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# Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States

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**JUSTICE FOR AMERICA'S HOMELESS CHILDREN:  
CULTIVATING A CHILD'S RIGHT TO SHELTER IN THE  
UNITED STATES**

Katherine Barrett Wiik<sup>†</sup>

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Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me.  
I lift my lamp beside the golden door!<sup>1</sup>  
—Emma Lazarus (1883)

This is the true nature of home—it is the place of Peace;  
the shelter, not only from all injury, but from all terror,  
doubt, and division.<sup>2</sup>  
—John Ruskin (1865)

Bricks and mortar make a house, but the laughter of  
children makes a home.  
—Irish Proverb

## I. INTRODUCTION

Vast numbers of American children suffer from homelessness. Homeless advocacy groups estimate that every year more than one million American children are homeless.<sup>3</sup> The United States

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1. Emma Lazarus, *The New Colossus*, in EMMA LAZARUS, SELECTION FROM HER POETRY AND PROSE 40–41 (Morris U. Schappes, ed.) (1944). This sonnet is inscribed on a plaque at the pedestal of the Statue of Liberty, and is also engraved on the wall of the reception hall in the John F. Kennedy International Airport in New York City. DAN VOGEL, EMMA LAZARUS, 157, 159 (1980).

2. JOHN RUSKIN, SESAME AND LILIES 73 (Gertrude Buck ed., Longmans, Green, and Co., 1905).

3. THE NAT’L CTR. ON FAMILY HOMELESSNESS (“NCFH”), HOMELESS CHILDREN: AMERICA’S NEW OUTCASTS, 1, <http://www.cudenver.edu/Academics/Colleges/ArchitecturePlanning/discover/centers/CYE/Publications/Documents/outcasts.pdf> [hereinafter NCFH, AMERICA’S NEW OUTCASTS]. The NCFH explains that

government acknowledges similarly staggering numbers. The United States Department of Education reported that the number of homeless children and youth (defined as pre-kindergarten through twelfth grade) increased from approximately 841,700 children in 1997 to 930,200 children in the year 2000.<sup>4</sup> Young children—those in preschool and elementary school—comprise the largest number of homeless American children.<sup>5</sup> In the 2003–2004 academic year, more than 600,000 schoolchildren in the United States were homeless.<sup>6</sup> The United States Conference of Mayors reports that of the homeless population in the twenty-three cities it surveyed, households with children constituted 30% of those homeless in 2006 and 23% of those homeless in 2007.<sup>7</sup>

As shocking as these numbers are, they are probably conservative estimates. Many of the states included in the Department of Education's report to Congress capture only the number of homeless children living in shelters.<sup>8</sup> This tendency to focus on shelters to count the homeless often results in an underestimation of the total number of homeless people because it excludes people living in rural areas who may not have access to shelters, those living in vehicles<sup>9</sup> or makeshift housing, those "doubling up" with family or friends, and those living in unstable housing arrangements who could soon find themselves homeless.<sup>10</sup>

To better grasp the scope of homelessness in the United States, some researchers have instead sought to discover how many

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although counting the exact number of homeless children is difficult, a consensus is emerging among researchers that the number is in excess of one million children. *Id.*

4. U.S. DEP'T OF EDUC., REPORT TO CONGRESS: EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM 9 (2000), <http://www.ed.gov/programs/homeless/rpt2000.doc> [hereinafter REPORT TO CONGRESS 2000].

5. *Id.* at 5.

6. U.S. DEP'T OF EDUC., REPORT TO THE PRESIDENT AND CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM 19 (2006), <http://www.ed.gov/programs/homeless/rpt2006.doc>.

7. U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 23-CITY SURVEY 18 (2007), <http://usmayors.org/HHSurvey2007/hhsurvey07.pdf>.

8. REPORT TO CONGRESS 2000, *supra* note 4, at 6.

9. Ian Urbina, *Keeping It Secret as the Family Car Becomes a Home*, N.Y. TIMES, Apr. 2, 2006, at 1–11 (reporting increase of "mobile homelessness" as housing costs rise).

10. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN THE UNITED STATES AND THE HUMAN RIGHT TO HOUSING 7 (2004), <http://www.nlchp.org/content/pubs/HomelessnessintheUSandRightstoHousing.pdf> [hereinafter NLCHP, HUMAN RIGHT TO HOUSING].

people have experienced homelessness.<sup>11</sup> One study estimates that 13.5 million adult residents of the United States have been homeless at some time, and 5.7 million had been homeless in the five years prior to being surveyed.<sup>12</sup> When “doubling up” is included in the definition of homelessness, the numbers jump to 26 million and 8.5 million respectively.<sup>13</sup>

The current economic crisis—and its attendant skyrocketing foreclosure rates—has resulted in many more Americans experiencing homelessness. A survey of local and state homeless coalitions revealed that almost 61% reported an increase in homelessness since the start of the foreclosure crisis in 2007.<sup>14</sup> Many cities, including Reno, Nevada and Seattle, Washington, are reporting increases in homeless encampments or “tent cities” as a result of the foreclosure crisis.<sup>15</sup>

In the McKinney-Vento Homeless Assistance Act, Congress stated that a person is considered to be homeless when she or he:

[L]acks a fixed, regular, and adequate nighttime residence . . . and has a primary nighttime residence that is – (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations . . . ; (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.<sup>16</sup>

Congress expanded upon this definition in the revised McKinney-Vento Homeless Education Assistance Improvements Act of 2001, stating that the term “homeless” includes:

(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship,

11. *Id.*

12. Bruce G. Link et al., *Lifetime and Five-Year Prevalence of Homelessness in the United States*, 84 AMER. J. PUB. HEALTH 1907, 1910 (1994).

13. *Id.*

14. NAT’L COAL. FOR THE HOMELESS, FORECLOSURE TO HOMELESSNESS: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 5 (2008), [http://www.nationalhomeless.org/housing/foreclosure\\_report.pdf](http://www.nationalhomeless.org/housing/foreclosure_report.pdf).

15. Evelyn Nieves, *Coast to Coast, Tent Cities Rising*, THE PHILA. INQUIRER, Sept. 19, 2008, available at [http://www.philly.com/inquirer/world\\_us/20080919\\_Coast\\_to\\_coast\\_tent\\_cities\\_rising.html](http://www.philly.com/inquirer/world_us/20080919_Coast_to_coast_tent_cities_rising.html).

16. 42 U.S.C. § 11302(a) (2000). The McKinney-Vento Education for Homeless Children and Youth Act grew out of the McKinney Homeless Assistance Act (Public Law 100-77) that became law in 1987 and was revised and reauthorized in 2001 as part of the No Child Left Behind Act.

or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings . . . ;

(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) migratory children . . . who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).<sup>17</sup>

What a homeless person “looks like” in our society is quite different than a few decades ago. The predominance of white men among the homeless has decreased and America’s homeless are now “diverse by employment status, age, gender, family situation, ethnicity, addiction and mental health.”<sup>18</sup> In 2003, the United States Conference of Mayors estimated that 41% of America’s homeless population were single men, 40% were families with children, 14% were single women, and 5% were unaccompanied minors.<sup>19</sup> Violence is both a contributing and ongoing factor in the lives of many homeless women and their children.<sup>20</sup>

17. 42 U.S.C. § 11434a(2) (2002); *see also* U.S. DEP’T OF EDUC., EDUCATION FOR HOMELESS CHILDREN AND YOUTH, TITLE VII-B OF THE MCKINNEY-VENTO HOMELESS ASSISTANCE ACT, AS AMENDED BY THE NO CHILD LEFT BEHIND ACT 2001, NON-REGULATORY GUIDANCE 2-3 (2004), *available at* <http://www.ed.gov/programs/homeless/guidance.pdf> (interpreting the McKinney-Vento Homeless Education Assistance Improvements Act of 2001, 42 U.S.C. § 11431, *et seq.*).

18. NLCHP, HUMAN RIGHT TO HOUSING, *supra* note 10, at 8.

19. U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES: A 25-CITY SURVEY ii (2003).

20. *See* Symposium, *A Leadership Summit: The Link Between Violence and Poverty in the Lives of Women and Their Children*, 3 GEO. J. ON FIGHTING POVERTY 5 (1995); THE Nat’l Ctr. on Family Homelessness, *Violence in the Lives of Homeless Women*, *available at* [http://www.councilofcollaboratives.org/files/fact\\_violence.pdf](http://www.councilofcollaboratives.org/files/fact_violence.pdf) (last visited Mar. 26, 2009) (reporting that 92% of homeless mothers surveyed had “experienced severe physical and/or sexual assault at some point in the lives,” and that 60% had been abused by age twelve); Nat’l Coal. for the Homeless (NCH),

The negative impacts of homelessness are particularly severe for children and youth, both physically and developmentally. Homeless children get sick more frequently than children in middle-class families, and have “higher rates of asthma, ear infections, stomach problems, and speech problems.”<sup>21</sup> Homeless children also go hungry twice as often as other children and are more likely to have mental health problems than housed children, frequently experiencing anxiety, depression, and emotional withdrawal.<sup>22</sup> According to the National Center on Family Homelessness, 74% of homeless children “worry they will have no place to live”; 58% “worry they will have no place to sleep”; and 87% “worry that something bad will happen to their family.”<sup>23</sup>

The constant stresses, physical ailments, and traumatic experiences that result from being homeless have deep effects on the cognitive and emotional development of homeless children.<sup>24</sup> Children who are homeless experience significant developmental and education challenges. School-age homeless children often change schools, are frequently absent, and as a result have higher rates of grade repetition compared with their non-homeless classmates.<sup>25</sup> They also face barriers to enrolling and attending school, including transportation problems, difficulties providing the necessary paperwork for enrollment such as medical documentation and prior school records, and inadequate clothing and school supplies.<sup>26</sup> Confronted with these alarming realities of the high rates of child homelessness, Congress passed an amended version of the McKinney-Vento Homeless Education Assistance Improvements Act, 42 U.S.C. § 11434(a), as part of the No Child

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*NCH Fact Sheet #12 – Homeless Families with Children* (June 2008), <http://www.nationalhomeless.org/publications/facts/families.html> [hereinafter *NCH, Homeless Families with Children*] (reporting that 22% of homeless parents surveyed “said they had left their last place of residence because of domestic violence,” and that 50% of cities surveyed “identified domestic violence as a primary cause of homelessness”).

21. *NCH, Homeless Families with Children*, *supra* note 20.

22. *Id.*

23. NCFH, AMERICA’S NEW OUTCASTS, *supra* note 3, at 2.

24. *Id.*

25. *Id.* at 4.

26. *NCH, Homeless Families with Children*, *supra* note 20; David H. Rubin et al., *Cognitive and Academic Functioning of Homeless Children Compared with Housed Children*, 97(3) PEDIATRICS 289, 293 (1996) (finding no difference in cognitive functioning between homeless and housed children but finding that homeless children performed significantly worse than housed children in tests of academic performance).

Left Behind Act of 2001. The revised Act seeks to remove these barriers by placing new requirements on local educational agencies to provide transportation,<sup>27</sup> and allows school districts to enroll children immediately even if they lack the required documents.<sup>28</sup> The Act also prohibits states that receive funds under the Act from maintaining segregated schools designated especially for homeless children.<sup>29</sup>

In passing the revised Homeless Education Assistance Act, Congress made a very public commitment to the educational rights of homeless children. The Act was not accompanied by additional legislation to address the *homeless* aspect of these children's lives but in fact came at a time when the housing needs of so many Americans were going unmet by federal funding.<sup>30</sup> These circumstances suggest that policymakers are unwilling to address the underlying issues that result in educational inequities. If we take the educational rights of children seriously, we are compelled to confront child homelessness.

As these statistics demonstrate, our society is failing to ensure the basic needs of its most vulnerable members. Federal funding for low-income housing has been drastically reduced over the past several decades.<sup>31</sup> The National Law Center on Homelessness & Poverty reports that appropriations for housing totaled \$36.78 billion for fiscal year 2004, compared to the fiscal year 1976 budget of \$83.6 billion in constant dollars.<sup>32</sup> This has had dramatic results, much to the detriment of those needing subsidized housing. More

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27. 42 U.S.C. § 11432(g)(1)(J)(iii) (2002).

28. *Id.* § 11432(g)(3)(C)(i).

29. *Id.* § 11432(e)(3)(A) (citations omitted). The 2001 Act also contains a grandfather clause that allows separate schools that were operational in the fiscal year 2000, in a covered county, to be eligible to receive funds. *See id.* § 11432(e)(3)(B). For an argument that separate schools provide essential services to homeless children and that the 2001 Act was wrong to prohibit these schools, *see* Andrea B. Berkowitz, *Homeless Children Dream of College Too: The Struggle to Provide America's Homeless Youth with a Viable Education*, 31 HOFSTRA L. REV. 515, 517 (2002) (arguing that these schools are "separate but equal" and that "[w]ithout these schools, homeless children will not be able to attend school at all, and will thus be deprived of their constitutional right to a free and appropriate education.").

30. *See infra* notes 31–35 and accompanying text.

31. "Federal subsidies for homeownership among middle- and upper-income households via homeownership-related tax deductions greatly exceed those for public and subsidized housing, and the funding gap is widening." NAT'L LOW INCOME HOUS. COAL. ET AL., *THE CRISIS IN AMERICA'S HOUSING: CONFRONTING MYTHS AND PROMOTING A BALANCED HOUSING POLICY* 1, 3 (2005), <http://nlihc.org/doc/housingmyths.pdf>.

32. NLCHP, *HUMAN RIGHT TO HOUSING*, *supra* note 10, at v.



than 435,362 additional low-income units were built or subsidized in fiscal year 1976.<sup>33</sup> By fiscal year 1996, this number had dropped to 8,493 units, increasing to 135,000 units in fiscal year 2000.<sup>34</sup> Presently “[o]nly 34% of the nation’s 9.9 million most needy renter households—those in the bottom fifth of the income distribution—receive housing assistance.”<sup>35</sup>

Millions of people in the United States are living on the brink of homelessness, deeply vulnerable to finding themselves without a home. According to the United States government, the shortage of supportive housing and permanent affordable housing has resulted in 4.89% of American families or 5.18 million households having “worst case housing needs,” meaning that they are very low-income households that spend more than half of their income on housing or live in substandard housing.<sup>36</sup> More than one-third of these “worst case housing needs” households—numbering 1.85 million—are families with children.<sup>37</sup> Because of these significant unmet housing needs, the Geneva-based Centre on Housing Rights and Evictions named (and shamed) the United States as one of the recipients of the 2004 Housing Rights Violators of the Year “Award.”<sup>38</sup>

The United States lags behind other wealthy nations in terms of the amount of resources dedicated to caring for the needs of its poor people. In a recent comparison with the nineteen other wealthy, industrialized nations that belong to the Organization for Economic Cooperation and Development (“OECD”), the United States is a noticeable outlier. At the same time that the United States ranks second highest in per capita income,<sup>39</sup> it ranks last in

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33. *Id.*

34. *Id.*

35. *Id.* at iii.

36. U.S. DEP’T OF HOUS. AND URBAN DEV., AFFORDABLE HOUSING NEEDS: A REPORT TO CONGRESS ON THE SIGNIFICANT NEED FOR HOUSING 1, 11 (2005), <http://www.huduser.org/Publications/pdf/AffHsgNeedsRpt2003.pdf>.

37. *Id.* at 2, 19.

38. Centre on Housing Rights and Evictions (COHRE), Housing Rights Awards 2004, [http://www.cohre.org/view\\_page.php?page\\_id=247](http://www.cohre.org/view_page.php?page_id=247) (last visited Mar. 9, 2009) (arguing that the United States systematically violates the right to housing by allowing such a high homelessness rate, criminalizing homelessness, and destroying thousands of homes in Iraq with “indiscriminate” bombing).

39. Economic Policy Institute, *International Comparisons: How Does the United States Stack Up Against Its Global Peers?*, in THE STATE OF WORKING AMERICA 2008/2009 357, 384–85 (2008), available at <http://www.stateofworkingamerica.org/swa08-ch08-international.pdf>. The United States was compared with Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland,

social expenditures as a proportion of gross domestic product and has the highest rates of poverty by a variety of measures.<sup>40</sup> The United States has the highest overall poverty rate (17.0%), the highest child poverty rate (21.9%), and the highest elderly poverty rate (24.7%).<sup>41</sup>

In this article, I suggest that housing needs and homelessness should be reframed<sup>42</sup> as a rights issue. More specifically, I argue for a rights-based approach to reducing child homelessness. International human rights law is perhaps the single richest source of law that protects the right to housing.<sup>43</sup> Within human rights law, the right to shelter is one of the many rights often grouped within the category or family of rights known as “economic and social rights.”<sup>44</sup> I therefore advance a rights-based approach that is informed by the human rights concepts of basic economic and social rights, and more specifically, the right to housing as developed within human rights law. International and comparative law materials will prove to be especially helpful for those looking to cultivate a right to housing in the United States. I encourage legislators, advocates, and judges to draw from international human rights materials as well as the decisions of constitutional courts in other countries as persuasive authority when giving substance to this right.

I am not the first commentator to argue for a right to shelter in the United States,<sup>45</sup> nor am I the first to advocate for the

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Italy, Japan, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. *Id.*

40. *Id.* at 2.

41. *Id.* at 1–2.

42. See GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004) (encouraging progressives to regain semantic equity with conservatives by reframing their arguments to better resonate with the electorate).

43. This article uses the phrases “right to shelter” and “right to housing” interchangeably. See NLCHP, HUMAN RIGHT TO HOUSING, *supra* note 10, at 24 (explaining that several international declarations use the term “shelter” and “housing” interchangeably). For a complete list of the legal sources of the right to housing under international human rights law, see Office of the U.N. High Comm'r for Human Rights, *The Human Right to Adequate Housing*, Fact Sheet No. 21, at Appendix I, available at <http://www.ohchr.org/Documents/Publications/FactSheet21en.pdf>.

44. This article uses several terms synonymously with “economic and social rights,” including “welfare rights,” “social welfare rights,” and “subsistence rights.”

45. Several United States-based NGOs, including the National Law Center on Homelessness & Poverty and the Center for Economic and Social Rights, advocate for a right to housing in the United States based upon human rights principles.

recognition of economic and social rights in the domestic context.<sup>46</sup> Over the past several decades, many American legal scholars have advocated for greater legal protections and entitlements for the poor,<sup>47</sup> with some explicitly calling for the recognition of social welfare rights in the United States.<sup>48</sup> By

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*See* NLCHP, HUMAN RIGHT TO HOUSING, *supra* note 10; Ctr. for Econ. and Social Rights (“CESR”), *About This Right?* (describing basic components of the right to housing), available at <http://cesr.org/article.php?id=131>; *see also* Adam S. Cohen, Symposium, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 618–19 (1989) (arguing that state courts should take a “different, and more receptive, approach to the question of a right to shelter” than federal courts have); Dennis D. Hirsch, *Making Shelter Work: Placing Conditions on an Employable Person’s Right to Shelter*, 100 YALE L.J. 491 (1990); Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970); Frank I. Michelman, *The Right to Housing*, in THE RIGHTS OF AMERICANS: WHAT THEY ARE – WHAT THEY SHOULD BE 43 (Norman Dorsen, ed.) (1970). *But see* Martha R. Burt, *Chronic Homelessness: Emergence of a Public Policy*, 30 FORDHAM URB. L.J. 1267 (2003) (arguing for more attention to be paid to chronic homelessness without employing a rights-based perspective).

46. *See, e.g.*, Martha Minow, Symposium, *Just Education: An Essay for Frank Michelman*, 39 TULSA L. REV. 547, 556 (2004) (stating that “perhaps no issue so joins political and civil rights with social and economic rights so clearly as does education.”); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L.J. 79, 88 (1992) (proposing that the United States ratify the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and delegate its implementation to the states).

47. *See* Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL’Y 89 (2002); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). Other prominent scholars have accepted the notion of positive welfare rights as consistent with their theories of rights and justice. *See, e.g.*, ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 92 (2003) (advancing a theory of positive and relational rights that includes “welfare rights and rights to work”) [hereinafter WEST, RE-IMAGINING JUSTICE]. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 35 (1994) (arguing that an abolitionist understanding of the Fourteenth Amendment provides “at least some support for the claim that the equal protection clause guarantees minimal welfare rights, not only to shelter, food, and clothing, but also to a livable minimum income or job”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 367 (1978) (stating that a right to a minimum level of welfare understood as “the claim that it is wrong for government to maintain an economic system under which certain individuals or families or groups fall below minimum welfare even if that economic system produces higher average utility (greater overall collective welfare) than any other system” is not excluded by his account of rights).

48. Frank Michelman has been one of the most longstanding proponents of welfare rights within the American legal academy, advocating a rights-based approach to economic and social justice for nearly four decades. In the 1960s and 1970s, Michelman argued that equal protection under the United States Constitution requires the states to guarantee a minimal level of welfare to its

focusing on a right to shelter for children, however, this article makes a new contribution to an ongoing discussion of how economic and social rights concepts could be usefully employed in the United States. This article is also timely because of the increasing tendency of United States-based lawyers and advocates to utilize human rights principles in their domestic advocacy and activism.<sup>49</sup> A report released by the Ford Foundation highlights the work of thirteen domestic organizations that are using traditional human rights tools to reduce poverty, promote workers' rights and environmental justice, abolish the death penalty, and end discrimination.<sup>50</sup>

The staggering statistics about homeless children demonstrate that a right to shelter for all American children remains largely unfulfilled. Constructing and articulating the idea of a fundamental human right to shelter for all children is an important advancement in the effort to eliminate child homelessness. Human rights are a powerful moral language, and one that

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inhabitants. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9, 13 (1969) (arguing that the Supreme Court should address deprivation suffered by the poor); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawl's Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979). More recently, Michelman has been advancing a comparative constitutional law approach to social rights. See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003); Frank I. Michelman, *The Constitution, Social Rights, and Reason*, 14 S. AFR. J. HUM. RTS. 499 (1998). See also Erwin Chemerinsky, Symposium, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 33 (2003) (arguing that the Supreme Court "should interpret the Constitution as creating a right to minimum entitlements for all Americans to the necessities of life: food, shelter, and medical care"); Frank E.L. Deale, *The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal*, 43 HOW. L.J. 281 (2000); William E. Forbath, Symposium, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); William E. Forbath, Symposium, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001).

49. See, e.g., NLCHP, HUMAN RIGHT TO HOUSING, *supra* note 10 (arguing that the scope of homelessness and substandard housing in the United States violates the right to housing under international law, and suggesting ways of strengthening the right to housing domestically); The Ctr. for Econ. and Social Rights ("CESR"), About Us, <http://www.cesr.org/about> (last visited Mar. 15, 2009) (describing CESR's mission as advocating for social justice using human rights tools and strategies).

50. Press Release, Ford Foundation, Ford Foundation Report Examines Human Rights Work in the United States (Feb. 17, 2004), available at <http://www.fordfound.org/newsroom/humanrights/86>. The full report is available at the Foundation's website at [http://www.fordfound.org/pdfs/impact/close\\_to\\_home.pdf](http://www.fordfound.org/pdfs/impact/close_to_home.pdf).

resonates favorably with most Americans. In a 1997 Hart Research poll, 76% of respondents said that universal human rights are intrinsic, rather than granted by governments.<sup>51</sup> My hope is that reframing homelessness as a rights-based issue will change the climate around the issue in positive ways, raising the profile and spurring greater legislative attention to the problem. Similarly, encouraging human rights education and grassroots action that teaches homeless people and their advocates about the right to housing under international law will enable them to make stronger claims for housing assistance in their lobbying and activist efforts.

Conceiving of housing as a right transforms a request for the exercise of discretion into a demand for the satisfaction of an entitlement. A right to housing provides children who attempt to obtain shelter or keep their existing home with a “political trump.”<sup>52</sup> Applying Ronald Dworkin’s understanding of a right to the issue of shelter for children suggests that such a right would mean that a collective goal (e.g., lowering taxes) is not a sufficient justification for denying children a right to shelter or imposing some loss or injury upon them.<sup>53</sup> In his classic essay on American rights consciousness, Hendrik Hartog suggests two ways of describing the demand that lies behind the assertion of a claimed right in addition to the “right as a trump.”<sup>54</sup> A right is “a duty on a public authority to undo—to destroy—the structures that maintain hierarchy and oppression.”<sup>55</sup> Finally, a right is “a duty on public

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51. World Public Opinion, *Human Rights in General*, available at [http://www.americans-world.org/digest/global\\_issues/human\\_rights/HRinGen.cfm](http://www.americans-world.org/digest/global_issues/human_rights/HRinGen.cfm). Respondents were asked whether they believed that every person has basic rights that are common to all human beings, regardless of whether their government recognizes those rights or not; or whether they believed that rights are *given* to an individual by his or her government. *Id.* Seventy-six percent said that every person has basic rights, 17% said rights are given by the government, 4% said some of both, and 3% said they were not sure. *Id.* Few of the Americans surveyed (8%), however, knew about the Universal Declaration of Human Rights (“UDHR”). *Id.* The complete data from the 1997 Hart survey can be found at the website of the Human Rights Resource Center at <http://www1.umn.edu/humanrts/edumat/adultsur.htm>.

52. Dworkin, *supra* note 47, at xi. See also Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74(3) J. AMER. HIST. 1013, 1020 (1987) (stating that the most familiar characterization of a right is “as a ‘trump,’ a claim that, once established, triumphs over competing values and claims”).

53. Dworkin, *supra* note 47, at xi.

54. Hartog, *supra* note 52, at 1020.

55. *Id.* Although Hartog is speaking specifically about federal constitutional rights consciousness, his insights about the meanings of rights claims are generalizable to rights claims in the United States.

authority to reconstruct itself or its relations to its citizens, or lose legitimacy.”<sup>56</sup> The first “right as a ‘trump’” claim says, “Mine!”<sup>57</sup> The second claim says, “Not theirs!”<sup>58</sup> The third claim says, “Do what is necessary, or I will never again trust you!”<sup>59</sup> A child’s claim that she has a fundamental right to shelter could encompass all three aspects of rights claims.

In advocating for the development of a right to shelter for children, I am aiming to cultivate such a right both culturally and legally. By developing the right culturally, I mean developing a philosophical and moral understanding of fundamental rights that addresses children’s needs for adequate and stable shelter. To borrow a term from Hartog, I am arguing that American “rights consciousness” should include a child’s right to shelter.<sup>60</sup> While support for human rights in the United States appears to be high, specific knowledge about human rights law is low,<sup>61</sup> and thus human rights education<sup>62</sup> will be an essential aspect of entrenching a child’s right to shelter and other basic human rights within a domestic culture of rights.

By developing a child’s right to shelter legally, I mean building the capacity of our domestic legal system, both under state and federal law, to recognize and promote children’s housing needs through positive law. As I discuss in more detail in Part V, I believe that state constitutional law provides a uniquely fertile ground for the substantive development of this right. Over the long term, advocates can also seek the recognition of a substantive right to housing under federal law, which would require revisiting *Lindsey v. Normet*.<sup>63</sup> In the short term, however, it appears that invoking

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See generally id.* at 1019.

61. *See supra* note 51 and accompanying text.

62. Many NGOs are working on human rights education and most have detailed websites that provide free access to materials for use in human rights education. *See, e.g.*, The Global Human Rights Education Network, <http://www.hrea.org> (last visited Feb. 10, 2009); The Human Rights Resource Center, <http://www.hrusa.org> (last visited Feb. 10, 2009); The International Network for Economic, Social & Cultural Rights, <http://www.escr-net.org> (last visited Feb. 10, 2009); The People’s Movement for Human Rights Learning, <http://www.pdhre.org> (last visited Feb. 10, 2009).

63. 405 U.S. 56 (1972). In *Lindsey v. Normet*, the Court upheld an Oregon eviction statute requiring early trial and limiting the litigable issues in an eviction trial against due process and equal protection challenges. *Id.* Justice White,

federal procedural and statutory rights is a far more realistic endeavor. Developing this right legally might also include promoting the passage of new federal and state legislation that recognizes and provides the right of all children to adequate housing. United States ratification of the remaining human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),<sup>64</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”),<sup>65</sup> and the Convention on the Rights of the Child (“CRC”)<sup>66</sup> might be another positive outcome of culturally and legally developing human rights in the United States.

This article is organized in the following manner. In Part II, I clear the theoretical ground for the cultivation of a child’s right to shelter. I consider and rebut arguments that economic and social rights like the right to shelter are theoretically distinct from civil and political rights and therefore cannot and should not function in the same way in domestic and international legal systems as do civil and political rights. I argue that economic and social rights are justiciable rights, that they can (and should) contain both positive and negative rights dimensions, and that they are of the same generation as civil and political rights in the realm of international human rights law.

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writing for the majority, stated:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

*Id.* at 74.

64. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 993 UNTS 3, entered into force Jan. 3, 1976, *available at* <http://www1.umn.edu/humanrts/instree/b2esc.htm> [hereinafter ICESCR].

65. Convention on the Elimination of All Forms of Discrimination Against Women, *available at* <http://www1.umn.edu/humanrts/instree/e1cedaw.htm> [hereinafter CEDAW].

66. United Nations Convention of the Rights of the Child, *available at* <http://www1.umn.edu/humanrts/instree/k2crc.htm> [hereinafter CRC].

Both American legal history and the development of international law norms provide rich foundations from which a contemporary domestic social rights movement could emerge. In Part III, I briefly review some of the moments in American political history where welfare rights movements gained considerable momentum, in order to demonstrate that a revitalized American welfare rights movement in the twenty-first century would not be historically anomalous. In Part IV, I briefly survey the development of the international human rights movement, exploring sources of international human rights law that provide protection for a human right to housing and other basic social rights that can be employed in a domestic context in the development of a right to shelter for children. Finally, in Part V, I suggest several ways that a right to shelter, informed by these international human rights norms, could both inspire new legal recognitions of and protections for a child's right to shelter within the United States.

My primary focus in Part V is the potential to strengthen the concept of a child's right to shelter under state constitutional law. I argue that state constitutional law is a promising avenue through which to develop the concept of a child's right to shelter for a number of reasons. First, it would allow for greater flexibility and contextualization than creating a federal substantive right to shelter. Second, many state constitutions provide a helpful foundation for a right to housing because they already contain provisions that address social welfare issues. For example, Article 17 of the New York Constitution, which mandates that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state," has been interpreted to create a right to emergency shelter for the homeless.<sup>67</sup> To conclude, I draw from the lessons in Parts II through V to suggest several strategies for working towards the recognition of a child's right to housing in the United States.

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67. N.Y. CONST. art. XVII; *see* *Wilkins v. Perales*, 487 N.Y.S.2d 961, 964 (N.Y. Sup. Ct. 1985).



## II. CREATING SPACE FOR A RIGHT TO SHELTER: RETHINKING RIGHTS NORMS

How can one argue that the right to vote is more important than the right to a roof over one's head? And yet, without the right to vote, and all that entails in terms of democratic choice, how will people ever secure the policies which will provide roofs over their heads?<sup>68</sup>

—Mary Robinson (1998)

Before moving to an analysis of international human rights law as a foundation for a child's right to shelter in the United States, I must first clear some doctrinal ground for the cultivation of a child's right to housing. This requires rebutting several normative assumptions about distinctions that can or should be drawn between political and civil rights on the one hand, and economic and social rights on the other, which is my task in the first half of this section. In place of these rejected distinctions, I seek to reconstruct notions of rights by looking to recent developments in understandings of citizenship and how this has impacted the maturity of domestic bills of rights and the unfolding of international human rights law. In the second half of this section, I discuss the evolving notions of citizenship as reflected in domestic constitutions, which in the last century have widely protected positive rights, including basic economic and social rights. Finally, I conclude this section with an analysis of the principle of the interdependence of basic human rights—civil, political, economic, and social—as affirmed by international human rights law.

### A. *Confronting Rights Norms*

One of the major arguments that proponents of a rights-based approach to poverty issues are likely to encounter is that economic and social rights like the right to shelter are theoretically distinct from civil and political rights. These allegedly intrinsic differences between different kinds of rights mean that it is inappropriate and normatively wrong to promote or protect economic and social rights through the same means and institutions through which civil

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68. Mary Robinson, Then-U.N. High Comm'r for Human Rights, Belfast (Dec. 1998), *excerpt available at* Northern Ireland Human Rights Consortium, *Frequently Asked Questions, Question 14*, <http://www.billofrightsnri.org/faq>.

and political rights are protected.<sup>69</sup>

An initial response to such essentialized claims about categories of rights is that understandings of rights are not fixed, but fluid and historically contingent.<sup>70</sup> This constitutional moment is not the only one in which legal thinkers and policymakers believed in drawing strong distinctions between different kinds of rights, but the distinctions have shifted over time. Mark Tushnet explains that after the Civil War, when the Reconstruction amendments were being drafted, scholars believed that the distinctions among civil, political, and social rights “were immutable and almost inherent in the nature of society.”<sup>71</sup> Despite these strong convictions, what these different categories of rights refer to has evolved significantly, undermining the claims of immutability. For example, in the Reconstruction era, civil rights and political rights were seen to be distinct, whereas most of what was then considered to be political rights now fall under our modern definition of civil rights.<sup>72</sup> Tushnet argues that from the outset, however, these Reconstruction-era distinctions were unstable and difficult to sustain.<sup>73</sup>

One distinction often made is that, as opposed to civil and

69. See, e.g., Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (1979); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857, 866–67 (2001) (proposing that negative rights are theoretically distinguishable from positive rights because even if there was no government in existence, negative rights would be “automatically fulfilled”); Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don’t Belong in the New Constitutions of Post-Communist Europe*, 2 E. EUROPEAN CONST. L. REV. 35 (1993) (cautioning against the inclusion of constitutionally protected social and economic rights in the new constitutions of former Soviet-bloc countries) [hereinafter Sunstein, *Against Positive Rights*]. But see Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights*, in GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 39 (Isfahan Merali & Valerie Oosterveld, eds.) (2001) (refuting the argument that economic and social rights are fundamentally different from civil and political rights).

70. See Hartog, *supra* note 5252, at 1034 (stating that the meanings of American constitutional rights “have changed dramatically and frequently over time”).

71. Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1208 (1992) (arguing that contemporary distinctions between civil and social rights are no less contingent than those drawn in the Reconstruction era) [hereinafter Tushnet, *Civil Rights and Social Rights*]. See *id.* for an elaboration of the Reconstruction-era understandings of political, civil, and social rights.

72. *Id.* at 1208–10.

73. *Id.* at 1209–10.

political rights, economic and social rights should not be justiciable.<sup>74</sup> A second distinction is framed in substantive terms based upon the nature of state action involved, arguing that civil and political rights are “negative rights” whereas economic and social rights are “positive rights.”<sup>75</sup> This distinction is often made in discussions about how to protect economic and social rights within domestic legal systems,<sup>76</sup> and thus is interconnected to the justiciability debate. A third distinction is usually made within the human rights discourse and is framed in temporal terms. Civil and political rights are categorized as “first generation rights” while economic and social rights are called “second generation rights.”<sup>77</sup> These theoretical distinctions, which too often go unchallenged even within progressive circles, often result in the marginalization of economic and social rights from political and legal discourse.

Like the distinctions existing at the time of the Reconstruction amendments, these contemporary distinctions purport to “captur[e] something essential about the social and legal order.”<sup>78</sup> And like the earlier distinctions Tushnet describes, the contemporary ones ultimately prove to be unstable.<sup>79</sup> None of these distinctions provide a satisfactory means of classification because all three convey misleading and overly simplistic notions of these basic human rights.

### 1. *The Justiciability Debate*

The primary arguments made against the justiciability of economic and social rights are that judges lack both the legitimacy and the competence needed to adjudicate issues relating to economic and social policy.<sup>80</sup> The former is usually framed as a

74. See Bork, *supra* note 69; Cross, *supra* note 69; Dennis M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. ON HUM. RTS. 475 (1992); Sunstein, *Against Positive Rights*, *supra* note 69.

75. See, e.g., Cross, *supra* note 69.

76. *Id.*

77. Karel Vasak, *Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER 30:11, Nov. 1977 at 28, 29.

78. Tushnet, *Civil Rights and Social Rights*, *supra* note 71, at 1219.

79. *Id.* at 1210–11 (claiming that “distinctions among rights have always been unstable in fact, though participants in any particular legal culture tend to believe that their culture’s definitions of the categories are embedded in the nature of society.”).

80. See Bork, *supra* note 69; Cross, *supra* note 69; Davis, *supra* note 74;

separation of powers argument—that judges speaking on issues of economic and social policy would be inherently legislative and therefore beyond the legitimate bounds of their judicial duties.

The legitimacy objection claims that judicial intervention in issues of policymaking and budgetary decisions would inevitably entail a breach of the separation of powers doctrine.<sup>81</sup> According to this interpretation of the separation of powers doctrine, social and budgetary policy should be in the exclusive domain of the legislature, which is directly accountable to the electorate.<sup>82</sup> Justiciable economic and social rights would grant the courts the power to order the state to take extensive positive action and make resource commitments, thus challenging the supremacy of the legislature in the realm of budgetary and social policy. Also, given that judges are not elected and are often unaccountable to the public, it raises concerns about the democratic legitimacy of such a system.

Sandra Liebenberg argues that the above “legitimacy” arguments assume a rigid, formalist concept of the separation of powers doctrine.<sup>83</sup> The importance of a court’s role in considering the constitutionality of legislative decisions relating to civil and political rights has long been appreciated. This need for protection against the tyranny of the majority is just as essential in relation to economic and social rights as any other area. There is a parallel need to have a constitutional check over legislation or executive action relating to economic and social issues. Arguments against the entrenchment of economic and social rights tend to assume a system of benevolent majority rule in which the legislature always considers the basic human rights of minority groups and marginalized constituencies when making budgetary decisions. Unfortunately this is rarely the case, as most societies have minority groups that have faced direct and indirect discrimination at the hands of the majority.

The legitimacy argument also overlooks the fact that courts frequently make decisions within areas of law that impact budgetary and economic policy. In the United States, courts are seen to be

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Sunstein, *Against Positive Rights*, *supra* note 69.

81. Sandra Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 55, 58 (Asbjørn Eide, Catarina Krause & Allan Rosas, eds., 2d ed. 2001).

82. *Id.*

83. *Id.*

competent to adjudicate tax issues, bankruptcy issues, campaign financing issues, and even issues relating to the adequacy of educational funding. In the 1996 case of the *Certification of the Constitution of the Republic of South Africa*, the South African Constitutional Court also disputed the idea that only economic and social rights interact with budgetary matters.<sup>84</sup> The court held that economic and social rights should be justiciable, stating:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.<sup>85</sup>

Although early on in its jurisprudential development, the South African Constitution of 1996 presents a helpful case study for understanding the possibilities for justiciable economic and social rights.<sup>86</sup> The economic and social rights included in South Africa's Constitution can be categorized into three main types. The first category (sections 28(1), 29(1), and 35(2)) entrenches a set of basic rights that consists of children's economic and social rights, everyone's right to a basic education, and the economic and social rights of detained persons.<sup>87</sup> The state obligations are highest in relation to this first category of rights and are not subject to "progressive realization" or resource constraints.<sup>88</sup> The second category of constitutional economic and social rights (sections 26(1) and 27(1)) establishes the right of everyone to *have access to*

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84. *Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC), at 49 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1996/26.html>.

85. *Id.* at 49-50.

86. See S. AFR. CONST. 1996, available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

87. *Id.* §§ 28(1), 29(1), 35(2).

88. *Id.*

adequate housing, health care, food, water, and social security.<sup>89</sup> The state obligation in relation to these rights is less absolute, but establishes that the state must take “reasonable legislative and other measures” within its available resources to achieve the progressive realization of these rights.<sup>90</sup> The third category of constitutional economic and social rights (sections 26(3) and 27(3)) imposes certain prohibitions on state action, as well as the action of other private parties, to prevent actions that have a devastating effect on people’s economic and social wellbeing, such as unfair and arbitrary evictions or refusal of emergency medical treatment.<sup>91</sup> In addition to these three categories, the South African Constitution also includes rights relating to labor, the environment, land, and culture.<sup>92</sup>

The Constitution of Finland, revised in 1999 and entered into force in 2000, presents another possible model for entrenching economic and social rights.<sup>93</sup> Section 19 of the “Basic Rights and Liberties” portion of the Constitution guarantees a right to social security and opens with, “[t]hose who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.”<sup>94</sup> In addition to providing a general constitutional right to social security, section 19 also includes specific references to other basic economic and social rights, such as the right to housing and the right to health, thereby creating some positive state obligations in relation to these component rights.<sup>95</sup> This approach creates flexibility for both legislators and the judiciary to decide to what extent and what level of specificity they will create legally enforceable economic and social rights over time. The approach, however, *immediately* codifies the underlying basic principle that economic and social rights must be attended to within domestic law.

If those amending a constitution are unwilling to entrench judicially enforceable social and economic rights, there are other ways of including economic and social rights within a constitution. One such option is to include economic and social rights within a

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89. *Id.* §§ 26(1), 27(1).

90. *Id.* §§ 26(2), 27(2).

91. *Id.* §§ 26(3), 27(3).

92. *Id.* §§ 22–25, 30.

93. SUOMEN PERUSTUSLAKI [Constitution] (Fin.), *available at* <http://www.om.fi/en/Etusivu/Perussaannoksia/Perustuslaki>.

94. *Id.* § 19.

95. *Id.*

state's constitution in the form of "Directive Principles of State Policy," as is the case with the constitutions of India,<sup>96</sup> the Republic of Ireland,<sup>97</sup> Nigeria,<sup>98</sup> and Namibia.<sup>99</sup> "Directive Principles" consist of a set of social and economic goals that the state must apply in making laws but are usually not directly enforceable through the courts. Even so, over time, these directive principles tend to be indirectly enforced; they often seep into the jurisprudence of constitutional courts.<sup>100</sup> This can result in the courts giving the principles a more substantive nature as they are used to shape the contours of justiciable rights.

All of the above models demonstrate that justiciable social and economic rights are possible. These constitutional safeguards can perform a necessary check upon the policy decisions of the legislative branch and ensure a truly just system by guaranteeing that some fundamental freedoms are not left solely to the discretion of the legislature. In its Ninth General Comment, the United Nations Committee on Economic, Social and Cultural Rights<sup>101</sup> also recommended that such judicial review protections extend to basic economic and social rights. The Committee maintains:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond

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96. INDIA CONST. pt. IV, available at <http://indiacode.nic.in/coiweb/welcome.html>.

97. Ir. CONST., 1937, art. 45, available at [http://www.taoiseach.gov.ie/attached\\_files/html%20files/Constitution%20of%20Ireland%20\(Eng\)Nov2004.htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng)Nov2004.htm).

98. CONSTITUTION, Art. 13–24 (1999) (Nigeria), available at [http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter\\_2](http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_2).

99. CONSTITUTION, PmbL., Ch. XI (Namibia), available at <http://www.orusovo.com/namcon>.

100. See, e.g., the decision of the Indian Supreme Court in *State of Tamil Nadu v. Abu Kavier Bar*, A.I.R. 1984 S.C. 725, in which the Court held that it has a duty to harmonize the fundamental rights of the Constitution with the Directive Principles. Another example is the case of *Unni Krishnan v. State of Andhra Pradesh*, A.I.R. 1993 S.C. 2178, in which the Indian Supreme Court relied upon the Directive Principles to elevate the right to education, the mandate of Article 45, to the level of a fundamental right under Article 21, and directed the Executive to ensure its implementation. For more on the Indian Supreme Court's usage of the Directive Principles to broaden substantive protections, see JUSTICE B. N. SRIKRISHNA, INNOVATIONS BY THE SUPREME COURT OF INDIA TO IMPROVE ACCESS TO JUSTICE 6–7 (2003), [http://www.humanrightsinitiative.org/jc/papers/jc\\_2003/judges\\_papers/srikrishna.pdf](http://www.humanrightsinitiative.org/jc/papers/jc_2003/judges_papers/srikrishna.pdf).

101. See *infra* notes 237–46 and accompanying text (providing a more detailed discussion of the role of the Committee on Economic, Social and Cultural Rights).

the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.<sup>102</sup>

Rather than weakening the separation of powers doctrine, I would instead argue that allowing judicial checks on budgetary decisions when they pertain to basic economic and social rights actually *strengthens* the separation of powers doctrine. As with core civil and political rights, there should be certain economic and social needs that are not vulnerable to the whims of majority rule. Exposing legislative decisions related to economic and social rights to judicial review, along with decisions about civil and political rights, actually broadens the separation of powers doctrine by applying the same protective check on policies relating to all fundamental freedoms.

In advocating for justiciable constitutional economic and social rights, I do not envision activist courts that usurp the legislature's role as the primary budgetary decision-makers. Judicial intervention should be measured and leave the specific implementation decisions within the legislative realm. For example, the courts may urge the legislature into action to realize basic economic and social rights while at the same time respecting the legislature's choice of means as to the most appropriate methods to advance the rights.<sup>103</sup> Cécile Fabre suggests a similar formulation for creating modest constitutional constraints on the government in relation to social rights:

The government of the day must take all steps to ensure that it satisfies social rights to minimum income, housing, education and health care, as far as it can, within the constraints of resources reasonably available to pursue them. The judiciary would be able, I think, to make sure that the government does indeed take those steps.<sup>104</sup>

Like the arguments challenging the legitimacy of courts to involve themselves with economic and social rights, the arguments

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102. U.N. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, ¶ 10, U.N. Doc. E/C.12/1998/24 (1998), available at <http://www1.umn.edu/humanrts/gencomm/escgencom9.htm>.

103. Liebenberg, *supra* note 81, at 59–60.

104. Cécile Fabre, *Constitutionalizing Social Rights*, 6 J. POL. PHIL. 263, 283 (1998) (footnote omitted).



questioning the competence of the courts to engage with these issues appear overstated after closer consideration. The competency objection that is frequently raised against the inclusion of economic and social rights as justiciable rights is that judges are not economists or public policy experts and thus do not have the knowledge and experience necessary to assess the most effective policy measures for realizing these basic rights.<sup>105</sup> This would be a fair point to make if what was being proposed by the pro-justiciability camp was creating a judicial power to draft budgetary policy. Again, however, this assumes more than the desired outcome of those wanting legally enforceable economic and social rights, which is simply that budgetary decisions could be *subject* to judicial scrutiny when they pertain to the fulfillment of people's most basic of needs.

Judges are widely recognized as competent to consider a variety of technical and scientific information and are deemed competent to rely upon expert testimony and evidence when necessary. It seems that only when it comes to matters close to the market economy that judges are suddenly presumed incompetent to rely and depend upon the expertise of others in their decisions. Again, my proposal for the judiciary's role is modest. The courts can place a burden on the executive and legislature to justify the reasonableness of their policy choices in light of any constitutional commitments to economic and social rights.<sup>106</sup> Here, I envision something similar to Mark Tushnet's model of "weak judicial remedies."<sup>107</sup> In this model, courts identify the violation of a right but then provide only light oversight of a remedial plan's implementation.<sup>108</sup> Tushnet explains that this might mean requiring that "government officials develop plans that hold out some promise of eliminating the constitutional violation within a reasonably short, but unspecified time period."<sup>109</sup> Parties will stay in contact with the court throughout the remedial phase as needed. Tushnet suggests:

The implementing officials may respond to such complaints or may come to the courts themselves to ask

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105. See Bork, *supra* note 69, at 695–96; Cross, *supra* note 69, at 923–24; Davis, *supra* note 74, at 483–84; Sunstein, *Against Positive Rights*, *supra* note 69, at 37.

106. Liebenberg, *supra* note 81, at 60.

107. Mark Tushnet, Symposium, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1910–11 (2004) [hereinafter Tushnet, *Social Welfare*].

108. *Id.* at 1910.

109. *Id.*

for a modification of the plan in light of the experience they have had in attempting to implement it. Sometimes the courts will agree with the plaintiffs and ratchet up the requirements, setting more precise timetables or identifying specific benchmarks the officials must reach. Sometimes the courts will agree with the officials and loosen the requirements to accord with the realities as they have developed.<sup>110</sup>

In contrast, “strong judicial remedies” are “mandatory injunctions that spell out in detail what government officials are to do by identifying goals, the achievement of which can be measured easily, for example, through obvious numerical measures.”<sup>111</sup>

Tushnet argues that *Government of the Republic of South Africa v. Grootboom*<sup>112</sup> is a successful example of a weak remedies approach.<sup>113</sup> In *Grootboom*, the South African Constitutional Court held that the Constitution’s right of access to housing was justiciable,<sup>114</sup> and found that government policies that resulted in the eviction of the desperately poor plaintiffs violated this constitutionally guaranteed right.<sup>115</sup> The Court entered an order declaring that “the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing”<sup>116</sup> but refused to find or define a minimum core right to shelter under the constitution.<sup>117</sup> The *Grootboom* order did, however, require that the government adjust its existing housing plan in order to ensure that it contained an element that would provide housing opportunities for the “people in desperate need.”<sup>118</sup>

The *Grootboom* model is promising for courts at the early stages of adjudicating social and economic rights. It strikes a balance between the concerns of legitimacy and competence of courts in the area, but at the same time names and defends the right to housing. *Grootboom* rejects any categorical distinction based upon justiciability but is simultaneously sensitive to judicial overreach. This is the vision of justiciability that I will advance in Part IV when

110. *Id.* at 1910–11.

111. *Id.* at 1911.

112. 2000 (11) BCLR 1169 (CC) (S. Afr.).

113. Tushnet, *Social Welfare*, *supra* note 107, at 1903.

114. *Grootboom*, 2000 (11) BCLR ¶ 20.

115. *Id.* ¶ 99.

116. *Id.*

117. Tushnet, *Social Welfare*, *supra* note 107, at 1904.

118. *Id.* at 1905.

I advocate for the cultivation of a right to shelter for children within United States domestic law.

2. *Beyond Negative Rights*

In addition to the distinction that is often made between justiciable and non-justiciable rights, a second contemporary distinction frequently drawn between economic and social rights on the one hand, and civil and political rights on the other hand, purports to stem from the substantive nature of the rights. Economic and social rights are sometimes also referred to as “positive rights” because they often establish obligations for the state to take positive action towards some end.<sup>119</sup> For example, the right to education requires a state to establish schools that meet a minimum standard in order to fulfill this requirement. Civil and political rights, on the other hand, are often referred to as “negative rights” in that they create a right to be left alone—they carve out a realm of liberties in which a person is protected from state intrusion, such as with the right to freedom of speech and the right to religious exercise.<sup>120</sup>

This substantive distinction perceiving economic and social rights as positive, and civil and political rights as negative, is more misleading than it is useful.<sup>121</sup> Civil and political rights can both constrain and require state action, and the same is true for economic and social rights. Many civil and political rights do require positive state action as integral to that right.<sup>122</sup> For instance, voting rights require the government to create the infrastructure and means to facilitate an election; the right to a fair trial similarly places obligations on states. Conversely, the substance of basic economic and social rights could be negative in nature and still be robust, such as protecting individuals from state-sponsored evictions from private lands and providing heightened protections for tenants facing eviction from public housing.

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119. See, e.g., Cross, *supra* note 69.

120. See, e.g., *id.*

121. See WEST, RE-IMAGINING JUSTICE, *supra* note 47, at 83 (arguing that the connection between the classical, liberal idea of rights and the constraint of negativity is contingent and illogical).

122. See Tushnet, *Civil Rights and Social Rights*, *supra* note 71, at 1214 (stating that “[c]ivil rights implicate positive governmental action no less than social rights do”).

Robin West's work is particularly helpful in eroding the positive/negative rights binary. In her recent book *Re-Imagining Justice*, West challenges progressive and egalitarian legal theorists to disassociate the regressive, conservative, and libertarian notions of justice and the law from the potential of the law itself, and instead become invested in the work of understanding law's progressive promise.<sup>123</sup> West suggests the need to reconstruct the three ideals of justice—the Rule of Law, the content of our rights, and the idea of formal equal—in order to advance a progressive legalism that promotes moral goodness.<sup>124</sup> Rejecting our current liberal state's assumption that only negative rights must be promoted and protected is central to reconstructing our understanding of the content of rights. West diagnoses our existing liberal state as being “structured by negative and atomistic rights” and “committed to securing the minimal preconditions of participation not in a good society, but in a free society.”<sup>125</sup> At its core, a free society has “rights of autonomy, contract and property,” which are interpreted in ways that “ward off the danger of an overly zealous state.”<sup>126</sup>

Inspired by the fundamental human capabilities approach advanced by Amartya Sen<sup>127</sup> and Martha Nussbaum,<sup>128</sup> West argues for a revitalized understanding of rights that goes beyond negative and atomistic rights.<sup>129</sup> West contends:

[A] liberal state similarly structured by rights, but committed to securing the minimal preconditions of capabilities as well as autonomy, would, I think, explicitly recognize additional fundamental rights, currently unrecognized or underrecognized by liberal states overly committed to the atomism and negativity of rights, including welfare rights and rights to work.<sup>130</sup>

West also notes that a specific right can include both positive and negative expectations. A right can “be defined as including *both* the individual entitlement that follows from the moral *obligations* of liberal states, as well as the entitlements that follow from the

123. See WEST, RE-IMAGINING JUSTICE, *supra* note 47, at 3–4, 9.

124. *Id.* at 3–4, 173.

125. *Id.* at 92.

126. *Id.*

127. AMARTYA KUMAR SEN, DEVELOPMENT AS FREEDOM 54–86 (2000) (viewing poverty as capability deprivation).

128. MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 4–15 (2001).

129. See WEST, RE-IMAGINING JUSTICE, *supra* note 47, at 92–93.

130. *Id.* at 92.

constraints upon them.”<sup>131</sup> In order to accord all individuals dignity, concern, and respect, West argues that sometimes the state must refrain from acting, yet sometimes must be required to act.<sup>132</sup>

A robust understanding of a child’s right to housing must contain both positive and negative dimensions. Sometimes the right to housing might require the state to refrain from acting, either to advance a state interest like excluding individuals with drug-related offenses from public housing<sup>133</sup> or to advance the interests of other individuals, like landlords, who turn to the state to recognize and enforce property and contract rights. The most obvious example is broadening the doctrine of mitigation in an eviction circumstance when children are living in the residence in question. In this scenario, a broad understanding of a child’s right to housing as necessary to ensure her human dignity and subsistence needs could act as a shield against state action in a variety of ways, perhaps providing her household with the opportunity to rebut the claims of criminality imputed to a household member, to disassociate from any criminal actions of household members if they are occurring, or to obtain the funds necessary to become current on rent.

Additionally, a right to housing could sometimes require the state to take action by, for example, requiring the state to reconsider a budgetary decision or to provide more beds in an emergency shelter. A right to shelter as developed within either state or federal law could have both positive and negative components. The balance between the two components can be flexible—it is likely to vary between forums, both between state and federal law and between different states, as well as over time, depending upon the needs and norms of society.

### 3. *Rethinking “Generations” of Rights*

A final distinction often made between economic and social rights, and civil and political rights, is framed in terms of

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131. *Id.* at 83.

132. *Id.*

133. A child’s right to shelter seems to require rethinking the zero-tolerance crime policy upheld in *HUD v. Rucker*, which did not consider the interests of children to maintain housing when tenants are subject to eviction due to a violation of the zero-tolerance criminal activity lease terms required by the public housing agency under the Anti-Drug Abuse Act of 1988. 535 U.S. 125, 127–32 (2002).

generations of rights. Economic and social rights, which include, *inter alia*, concepts like the right to work, the right to education, and the right to shelter, are referred to as “second generation” rights.<sup>134</sup> These rights are then distinguished from and portrayed as coming after what are called “first generation” rights, which are civil and political rights like the right to speech, the right to religious freedom, and the right to be free from torture.<sup>135</sup> This distinction relies upon the flawed “positive/negative rights” distinction and results in an imprecise historical impression that privileges civil and political rights. The generational syllogism flows like this: negative rights constraining state action predated positive rights obliging state action; civil and political rights are inherently negative in nature whereas economic and social rights are inherently positive in nature; therefore, civil and political rights came a generation before economic and social rights. This line of reasoning creates the misconception that all rights now considered civil and political predated all rights now considered economic and social, which is simply not the case.

It is true that the earliest written constitutions like the English Bill of Rights of 1688, the French Declaration of the Rights of Man and Citizen of 1789, and the United States Constitution of 1789 primarily recognized negative rights.<sup>136</sup> Even so, the second statement in the above syllogism fails because the positive/negative distinction does not directly map onto the landscape of political and civil rights versus economic and social rights. If the generational language should be used at all, it should be negative rights (or to incorporate West’s conception of rights as able to include negative and position dimensions, the negative component of rights) that are termed first generation and positive rights that are termed second generation. If we look to the substantive realization of political and civil rights and how long it took for marginalized groups like racial minorities and women to be

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134. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 32–47 (1982); Tushnet, *Social Welfare*, *supra* note 107, at 1895–96; JEREMY WALDRON, LIBERAL RIGHTS 4–5 (1993).

135. WALDRON, *supra* note 134, at 5. See *infra* notes 142–55 and accompanying text (discussing further the changing substance of rights included in domestic bills of rights as notions of citizenship have evolved).

136. In the words of Sandra Liebenberg, a South African human rights expert, “the traditional liberal conception of a bill of rights is to act as a *shield* designed to protect individual liberties from arbitrary and excessive applications of state power.” See Liebenberg, *supra* note 81, at 57.

granted basic civil and political rights, the existing generational framework becomes even more tenuous.

Unfortunately, this generational language has had some traction within the human rights movement. Even though economic and social rights have been entrenched within key human rights documents as interdependent and indivisible with civil and political rights since the birth of the movement,<sup>137</sup> they have not received equal attention to civil and political rights within the human rights community. Groups like Amnesty International and Human Rights Watch have only recently begun paying attention to violations of economic and social rights. In a strong critique of the neglect of economic and social rights within the human rights movement, Professor Philip Alston, former Chair of the United Nations Economic, Social and Cultural Rights Committee, claims that of the modest resources that the international community devotes to human rights, 95% goes “entirely to civil and political rights.”<sup>138</sup> Furthermore, Alston claims that the United Nations Commission on Human Rights, the precursor to the United Nations Human Rights Council, “devote[d] about 90% of its energies to civil and political rights.”<sup>139</sup> The remaining 10%, he argues, was mostly devoted to “unproductive discussions” about the right to development, “which actually contains very few elements genuinely concerned with realizing economic, social, or cultural rights.”<sup>140</sup> Recent developments within the human rights framework have helped to increase attention to economic and social rights. For instance, the Economic, Social and Cultural Rights Committee and the jurisprudential work they have been doing developing the substance of rights through their issuance of General Comments, as well as the work of United Nations Special Rapporteurs on housing issues,<sup>141</sup> has helped undo the “second class status” of these rights as implied by the generational language.

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137. See WALDRON, *supra* note 134, at 4–5.

138. Philip Alston, *Making Economic and Social Rights Count: A Strategy for the Future*, 68 POL. Q. 188, 188 (1997).

139. *Id.*

140. *Id.*

141. See *infra* Part IV.

*B. Social Citizenship and the Expanding Constitutionalization of Rights*

In the past century, evolving notions of citizenship and the nature of the social contract between individuals and the state has resulted in states adopting more positive obligations towards their citizens. T.H. Marshall's work on the evolution of Western conceptions of citizenship reveals the expanding definition of domestically protected rights and provides a more nuanced description of their evolution than does the generational language critiqued above.<sup>142</sup> Marshall identifies three stages in the evolution of Western conceptions of citizenship.<sup>143</sup> First, civil rights were the great achievement of the eighteenth century, establishing the notion of the equality of most members of society before the law.<sup>144</sup> Next, the nineteenth century brought significant advances in political rights, allowing for the increasing political participation in the realm of public decision-making.<sup>145</sup> Finally, social rights were the defining rights concept of the twentieth century.<sup>146</sup> In order to make it possible for more members of society to enjoy a satisfactory life than ever before, the protective function of the state to promote the welfare of its citizens emerged. As Tushnet explains, "[w]orking-class movements in Western Europe gained political power and with it began to show that governments could take on the task of guaranteeing social rights."<sup>147</sup>

At the same time that many countries began incorporating these rights in their constitutions, the number of countries with bills of rights also increased exponentially. The end of the Second World War, decolonization, and the end of the Cold War produced "waves of new constitution-making" around the world.<sup>148</sup> These

142. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (Cambridge Univ. Press 1950).

143. *Id.* at 10.

144. *Id.* at 10–11, 14–17. I purposely use the term "most" instead of "all" here because in much of the Western world, civil and political rights were much later in coming for large classes of people, including women and persons of color, who often did not enjoy these basic human rights until the late nineteenth or early twentieth century.

145. *Id.* at 19–21.

146. *Id.* at 21.

147. Tushnet, *Civil Rights and Social Rights*, *supra* note 71, at 1210; *see also* Tushnet, *Social Welfare*, *supra* note 107, at 1913 (stating that it is a "fixed point after 1945" that constitutions must contain guarantees of social and economic rights).

148. Philip Alston, *Preface*, in *PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES* (1999) [hereinafter *PROMOTING HUMAN RIGHTS*].



twentieth century geopolitical changes created the political space in which numerous ethnic and national groups achieved self-determination, began the process of state building or rebuilding, and established or revised domestic legal systems. In Central and Eastern Europe, more than twenty-five national constitutions have been revised or were drafted for the first time in the years since the Cold War ended.<sup>149</sup> The African continent has also seen many new and revised constitutions in the past few decades; in French-speaking African states alone, twenty new constitutions have come into force since 1990.<sup>150</sup> Modern constitutions often expand upon the negative rights protected and frequently impose positive obligations upon states to take certain actions. Many twentieth century bills of rights move beyond protecting only negative rights to also setting positive requirements upon the state to protect and fulfill certain basic rights.<sup>151</sup>

Most commonly, these types of positive legal guarantees in domestic constitutions relate to ensuring equality for all under the law, protecting citizens from discrimination, and providing a right to social security. The Canadian Charter of Rights and Freedoms (1982)<sup>152</sup> and South African Bill of Rights (1996)<sup>153</sup> are examples of contemporary constitutions that create positive rights by codifying duties upon the state to take positive action.

Philip Alston argues that bills of rights at the turn of the twenty-first century are more expansive than at any time previously.<sup>154</sup> Alston suggests that now:

Bills of rights are taken more seriously, their enforcement provisions are significantly more elaborate, far-reaching and potentially effective than ever before, and their relationship with the international normative regime that has been constructed in the human rights field gives them a coherence and a momentum which they have not had in

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149. Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in PROMOTING HUMAN RIGHTS, *supra* note 148, at 1 [hereinafter Alston, *Comparative Analysis*].

150. *Id.* at 1–2. See also *id.* at 1–2 nn.2 and 4 for a complete listing of the new constitutions in Central and Eastern Europe and Africa.

151. See *supra* notes 84–100 and accompanying text.

152. See Constitution Act, 1982, Schedule B to the Canada Act 1982, Ch. 11 (U.K.), available at <http://laws.justice.gc.ca/en/charter>.

153. See S. AFR. CONST. 1996, Ch. 2 – Bill of Rights, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm>.

154. See Alston, *Comparative Analysis*, *supra* note 149.

previous eras.<sup>155</sup>

As notions of citizenship and the substance of basic human rights have broadened, so too have understandings about the relationships between basic rights. By including social rights like the right to education and social security alongside civil and political rights, modern constitutions recognize the interdependent nature of basic human rights, a principle that is explored in more detail in the following section.

*C. Promoting the Interdependence of Basic Human Rights*

Perhaps the most problematic byproduct of the essentialized distinctions between the categories of rights critiqued above is that the classifications are usually employed in a hierarchy of rights, to the detriment of economic and social rights like the right to shelter.<sup>156</sup> Yet civil and political rights are no more essential or fundamental to human dignity than are economic and social rights. On the contrary, the fulfillment of basic economic and social rights is essential in order to enjoy basic civil and political rights. Unfulfilled economic and social rights can result in such stress and social exclusion that it becomes impossible to participate meaningfully in political and civic life. As former United Nations High Commissioner for Human Rights and President of Ireland Mary Robinson posits, how can a person meaningfully realize her right to vote, or participate in other basic aspects of a democracy, when she does not have a roof over her head or her other subsistence needs met?<sup>157</sup>

The principles of the indivisibility and interdependence of all human rights have been repeatedly affirmed within international human rights law. Human rights instruments like the Universal Declaration of Human Rights and the Convention on the Rights of the Child, which are discussed in more detail in the following

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155. *See id.* According to Alston, a surprising 82% of the national constitutions that were drafted between 1788 and 1948 contained some form of protection for rights now considered human rights, although admittedly these were mostly civil and political rights. *See id.* at 3. This trend continued and 93% of the constitutions drafted between 1949 and 1975 included human rights provisions. *Id.* Although no such statistics are available for the new constitutions post-1975, this rate has undoubtedly continued to increase.

156. Some of the salience of this bifurcation can be attributed to the ideological divide between the East and West during the Cold War. *See infra* notes 224–27 and accompanying text.

157. Robinson, *supra* note 68.

section, exemplify the idea that all basic human rights are interdependent and interrelated. The Vienna Declaration, issued at the World Conference on Human Rights in 1993, powerfully proclaimed these principles:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>158</sup>

The indivisibility and interdependency of fundamental human rights is even more intuitive when children are the primary rights bearers being considered. For a child, having her basic economic and social rights realized may even be more important to her growth and human dignity than are her civil and political rights. Many basic political rights are often significantly restrained until the age of majority, and until then, children are considered virtually represented by their adult caregivers.<sup>159</sup> In contrast, food, shelter, and education—all interests protected by basic economic and social rights—are critical for her physical, psychological, and intellectual development.

Before moving to a discussion of the international human rights sources of a right to shelter in Part IV, I first consider the historical support for welfare rights within the United States.

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158. Vienna Declaration and Programme of Action, World Conference on Human Rights, Part 1, ¶ 5, July 12, 1993, *available at* [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

159. *But see* Harry Brighouse, Symposium, *How Should Children Be Heard?*, 45 ARIZ. L. REV. 691, 705–11 (2003) (arguing that children should be consulted in several decision-making arenas including custody arrangements and government “child policy”—policies affecting and of interest to children).

### III. SUPPORT FOR SOCIAL WELFARE RIGHTS IN AMERICAN POLITICAL HISTORY

Poor America, of what avail is all her wealth, if the individuals comprising the nation are wretchedly poor? If they live in squalor, in filth, in crime, with hope and joy gone, a homeless, soilless army of human prey.<sup>160</sup>

–Emma Goldman (1917)

In the past several decades, the United States government has signed but failed to ratify several international human rights treaties that protect economic and social rights.<sup>161</sup> The United States is a notorious outlier in its failure to ratify the Convention on the Rights of the Child (“CRC”); at this point, Somalia is the only other state who has not ratified the CRC.<sup>162</sup> On the international stage, the United States stands virtually alone in denying the validity of economic, social, and cultural rights. At a 2005 meeting of the United Nations Commission on Human Rights, the United States was the lone dissenter in separate votes of fifty-two to one on resolutions on the right to food and the right to the highest attainable standard of physical and mental health.<sup>163</sup> This suggests a level of skepticism and perhaps even hostility among recent American leaders about economic and social rights, and human rights more generally,<sup>164</sup> that is as disturbing as it is internationally

160. EMMA GOLDMAN, ANARCHISM AND OTHER ESSAYS 54 (Dover Publications ed., 1969) (1917).

161. The United States government has signed but not yet ratified the ICESCR, CRC, or CEDAW. OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL HUMAN RIGHTS TREATIES 11 (2004), <http://www.unhchr.ch/pdf/report.pdf> [hereinafter STATUS OF RATIFICATIONS]. See generally Office of the U.N. Comm’r for Human Rights, Convention on the Rights of the Child, *available at* <http://www.unhchr.ch/html/menu3/b/k2crc.htm>; Office of the U.N. High Comm’r for Human Rights, Committee on the Elimination of Discrimination Against Women, *available at* <http://www2.ohchr.org/english/bodies/cedaw/index.htm>; ICESCR, *supra* note 64. Like the UDHR, both the CRC and CEDAW portray economic and social rights as interdependent with civil and political rights, and protect all basic human rights.

162. STATUS OF RATIFICATIONS, *supra* note 161.

163. See Ian Seiderman, *Letter to the Editor: F.D.R.’s Bill of Rights*, N.Y. TIMES, Apr. 21, 2005 (late edition), at A22. Mr. Seiderman is legal adviser to the International Commission of Jurists. *Id.*

164. At the recent Beijing +10 conference of the United Nations Commission on the Status of Women, the United States appeared opposed to recognizing any additional human rights. The United States delegation created significant

anomalous.

In this section, I argue that a respect and commitment to social welfare rights and the redistributive values behind it has played an influential role in American political and legal discourse at various points in our history. While social welfare rights have occupied a contested terrain in political discourse throughout American history, many American political leaders and organized movements have advocated for social welfare rights at various points throughout United States history. Furthermore, the United States was a crucial player in the framing of the founding institutions and documents of the international human rights system, as well as the principle of human dignity and the interdependence of rights that are enshrined in the system.

As Elizabeth Bussiere explains, the argument that welfare rights are fundamentally at odds with the American political tradition “assumes a unidimensional and an ahistorical view of American political thought.”<sup>165</sup> There have been many moments in American history when business and government have been confronted with populist movements advocating for social protections in ways that challenged the individualistic, market-oriented notions of freedom associated with John Locke and Adam Smith.<sup>166</sup> Bussiere points to two longstanding traditions in American political thought that could be used to establish “the government’s obligation to satisfy the subsistence needs of society’s most vulnerable members.”<sup>167</sup>

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controversy when it refused to sign a statement supporting the original Beijing platform of action unless it was amended to say that the platform does not create any new human rights or the right to abortion. See Warren Hoge, *Panel Backs Women’s Rights After U.S. Drops Abortion Issue*, N.Y. TIMES, Mar. 5, 2005, at A5. After dominating the conference dialogue for several days, the United States delegation finally agreed to drop its proposed amendment, saying it had accomplished its goal by receiving reassurances from other delegations on its points of concern. See *id.*; Mary-Ann Stephenson, *It Will Take All Our Energy to Stand Still: Bush’s America Is Waging a Global Battle Against Women’s Rights*, GUARDIAN, Mar. 8, 2005, at 24.

165. See ELIZABETH BUSSIÈRE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 6 (1997). Bussiere argues that the failure of the Warren Court to constitutionalize welfare rights did not stem from a “fatal flaw” in America’s liberal political tradition, but rather from the intellectual and institutional dynamics of legal doctrines and decision-making operating within the Supreme Court at that time. *Id.* at 21.

166. *Id.* at 6.

167. *Id.* at 21.

One was a natural-law tradition that found powerful expression in Revolutionary thought and that was revived by the radical artisan movements of the 1830s, when Workingmen created a powerful proto-welfare-rights philosophy out of deeply rooted natural-law and civic-republication principles. The second, “maternalism,” dated back to the Jacksonian era and found its most potent political expression in the Progressive-era movement for mothers’ pensions. The former grounded civic responsibilities toward the poor as a whole in the natural right to self-preservation. The latter stressed the civic obligation toward mothers, especially impoverished mothers, on account of the fundamental role they play in the moral development of children—the nation’s future citizens.<sup>168</sup>

In the late 1930s and early 1940s, under the leadership of President Franklin Delano Roosevelt and in the wake of the economic depression around the world, many American policymakers supported efforts to strengthen and promote economic and social rights, although they did not always use that language.<sup>169</sup> During this period between the two World Wars, there was a realization among Western leaders that widespread unemployment and poverty had fostered political upheaval and a rise in oppressive totalitarian regimes.<sup>170</sup> According to Asbjørn Eide, a Norwegian human rights scholar, this “led to a genuine interest [within the West] in securing economic and social rights, not only for their own sake but also for the preservation of individual freedom and democracy.”<sup>171</sup> At the same time that the American New Dealers were increasing their political influence, British social reformers were similarly encouraging the United Kingdom’s government to be more sympathetic to economic and social rights. The arguments put forth by social reformers and progressive political leaders resonated around the world with people struggling against “the devastating effects of extremist

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168. *Id.* at 6–7.

169. *See infra* notes 173–88 and accompanying text.

170. Asbjørn Eide, *Promoting Economic, Social and Cultural Rights: Obligations of States and Accountability of Non-State Actors*, Paper presented at the United Nations Development Programme (UNDP), Second Global Forum on Human Development, Rio de Janeiro, Brazil, 10 Oct. 2000, 4, available at [http://hdr.undp.org/docs/events/global\\_forum/2000/eide.pdf](http://hdr.undp.org/docs/events/global_forum/2000/eide.pdf) [hereinafter Eide, *Promoting Rights*].

171. *Id.*

nationalism and totalitarianism, while simultaneously fighting against the effects of callous economic *laissez-faire*, which ushered in the Great Depression and in turn fueled the emergence and appeal of authoritarian nationalism.”<sup>172</sup>

President Roosevelt’s 1941 State of the Union Address to the United States Congress articulated the importance of economic and social rights to peace and democracy.<sup>173</sup> In the address, which is known as his “Four Freedoms Address,” Roosevelt spelled out “four essential human freedoms,” which he argued were the essentials of any healthy and strong democracy—the freedom of expression, freedom of religion, freedom from fear, and freedom from want.<sup>174</sup> Roosevelt defined the last, freedom from want, as “economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.”<sup>175</sup>

Later in 1941, President Roosevelt and British Prime Minister Winston Churchill adopted the Atlantic Charter, agreeing to eight “common principles in the national policies” of the United States and United Kingdom.<sup>176</sup> The Charter voiced their desire to bring about the fullest collaboration between all nations in the economic field with the goal of “securing, for all, improved labor standards, economic advancement and social security.”<sup>177</sup> Shortly after the signing of the Atlantic Charter, lawyers and scholars in the Western world initiated serious efforts to plan and prepare for what would become the United Nations. As Eide explains, the initial planning stages of the United Nations were mainly carried out within the United States administration, influenced “to a large extent” by the goals articulated in the Four Freedoms Address.<sup>178</sup> In 1942, the American Law Institute, comprised mostly of American and Canadian scholars but also involving other international experts,

172. Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 15 (Asbjørn Eide, Catarina Krause & Allan Rosas, eds., 2d ed. 2001) [hereinafter Eide, *Economic and Social Rights*].

173. Franklin Delano Roosevelt, U.S. President, State of the Union Address to the United States Congress (Jan. 6, 1941), *available at* <http://www.fdrlibrary.marist.edu/4free.html>.

174. *Id.*

175. *Id.*

176. The Atlantic Charter, ¶ 1, U.S.-U.K., Aug. 14, 1941, *available at* <http://avalon.law.yale.edu/wwii/atlantic.asp>.

177. *Id.* ¶ 5.

178. Eide, *Economic and Social Rights*, *supra* note 172, at 14.

undertook to draft and advise those developing the United Nations on essential human rights.<sup>179</sup> The Law Institute established a working group that prepared one of the first drafts of what would become the Universal Declaration of Human Rights (“UDHR”); this draft contained most of the social and economic rights that were subsequently included in the UDHR.<sup>180</sup>

A few years later, in his 1944 State of the Union Address, President Roosevelt argued even more strongly for economic and social rights, calling on Congress to consider implementing a second Bill of Rights known as the “Economic Bill of Rights.”<sup>181</sup> In that speech, delivered in the darkest days of the Second World War, Roosevelt not only argued for the importance of the physical security of nations but also the need for economic security, social security, and moral security.<sup>182</sup> The President argued that a “basic essential to peace . . . is a decent standard of living for all individual men and women and children in all nations” and “[f]reedom from fear is eternally linked with freedom from want.”<sup>183</sup> He suggested that political rights were no longer adequate to assure equality in the pursuit of happiness.<sup>184</sup> Instead, Roosevelt argued:

We have come to a clear realization of the fact . . . that true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ People who are hungry [and] out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be

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179. *Id.* at 15.

180. *Id.* For more information on the American Law Institute’s role in drafting the UDHR, see American Law Institute, *Statement of Essential Human Rights, by a Committee Appointed by the American Law Institute*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18 (1946).

181. For a recent analysis of President Roosevelt’s Second Bill of Rights speech and the argument that its principles should be revitalized, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION & WHY WE NEED IT MORE THAN EVER* (2004). See also Bob Herbert, *A Radical in the White House*, N.Y. TIMES, Apr. 18, 2005, at A19 (commemorating the sixtieth anniversary of President Roosevelt’s death and applauding the progressive vision he set forth in the Second Bill of Rights).

182. Franklin Delano Roosevelt, U.S. President, State of the Union Address to the United States Congress (Jan. 11, 1944), available at <http://www.fdrlibrary.marist.edu/011144.html>.

183. *Id.*

184. See *id.*



established for all—regardless of station, or race or creed.<sup>185</sup>

Roosevelt advocated that several specific economic rights, including a right to housing, should be protected in a second American Bill of Rights:

- The right to a useful and remunerative job in the industries, or shops or farms or mines of the nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of (every) farmers to raise and sell their (his) products at a return which will give them (him) and their (his) families (family) a decent living;
- The right of every business man, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- *The right of every family to a decent home;*
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, and sickness, and accident and unemployment;
- And finally, the right to a good education.<sup>186</sup>

In Roosevelt's eyes, "[a]ll of these rights spell security" for the United States.<sup>187</sup> Looking forward, he advocated the following for after the United States won the Second World War:

[America] must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being. America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for all our citizens. For unless there is security here at home there cannot be lasting peace in the world.<sup>188</sup>

In the next section, I discuss the sources of protection for the right to housing and other basic economic and social rights within the realm of international human rights law.

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185. *Id.*

186. *Id.* (emphasis added).

187. *Id.*

188. *Id.*

#### IV. A CHILD'S RIGHT TO SHELTER IN INTERNATIONAL HUMAN RIGHTS LAW

Article 25 of the Universal Declaration of Human Rights states: Everyone has the right to a standard of living adequate for the health and well-being of himself [or herself] and of his [or her] 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 [or her] control.

[Children] are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.<sup>189</sup>

The right to adequate housing has been recognized in a wide range of international instruments, including the UDHR,<sup>190</sup> the ICESCR,<sup>191</sup> and the CRC.<sup>192</sup> This section discusses the development of the right to housing as part of the development of economic and social rights, and argues that there are heightened standards on State Parties to protect and fulfill these rights as applied to a child.

Economic and social rights have been an organic and central part of the body of international human rights since the origins of the formalized international human rights movement in the early twentieth century. Eide argues that economic rights found acceptance at the international level even before civil and political rights did.<sup>193</sup> In the late nineteenth century, workers' rights advocates began to organize internationally and held a conference in Germany in 1890 to adopt an international agreement aimed at improving labor conditions.<sup>194</sup> Based on that group's groundwork,

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189. Universal Declaration of Human Rights, G.A. Res. 217A, Art. 25 U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) *available at* <http://www.un.org/Overview/rights.html> [hereinafter UDHR]. Article 25(2) reads, in full, "[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." *Id.*

190. *Id.*

191. ICESCR, *supra* note 64.

192. CRC, *supra* note 66. *See infra* notes 250–66 and accompanying text (analyzing the economic and social rights included in the Convention on the Rights of the Child).

193. Eide, *Economic and Social Rights*, *supra* note 172, at 27.

194. *Id.*

the Swiss Government convened conferences in Berne in 1905 and 1906 to discuss working conditions.<sup>195</sup> As a result, some of the first international conventions in the field of economic and social rights were adopted.<sup>196</sup> After the turmoil of World War I had receded, these early efforts to protect economic rights were renewed with the establishment of the International Labor Organization (“ILO”) in 1919.<sup>197</sup>

The body of international law known as international human rights law was born in the dark days after the Second World War. The United Nations Charter was adopted in June of 1945 as the War waned and reconstruction efforts began around the world.<sup>198</sup> The Charter was entered into force in October of that year and places the economic and social wellbeing of humans resolutely within the purpose and remit of the United Nations.<sup>199</sup> The Preamble of the United Nations Charter aims to “promote social progress and better standards of life in larger freedom” and “to employ international machinery for the promotion of the economic and social advancement of all peoples.”<sup>200</sup> Additionally, the Charter states that one of the explicit purposes of the United Nations is “to achieve international co-operation 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.”<sup>201</sup> It pledges that the United Nations will become “a cent[er] for harmonizing the actions of nations in the attainment of these common ends.”<sup>202</sup>

This next section explores the major human rights treaties that protect economic and social rights, including the right to housing. I provide a brief survey of the development of the treaties and the provisions that pertain to the right to housing and children’s economic and social rights.

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195. *Id.*

196. *Id.*

197. For more information about the ILO’s history and work, see its website at [http://www.ilo.org/global/About\\_the\\_ILO/lang-en/index.htm](http://www.ilo.org/global/About_the_ILO/lang-en/index.htm) (last visited Nov. 2, 2008).

198. U.N. Charter Preamble, *available at* <http://www.un.org/aboutun/charter/preamble.shtml>.

199. *Id.*

200. *Id.*

201. *Id.* at art. 1, ¶ 3.

202. *Id.* at art. 1, ¶ 4.

A. *Economic and Social Rights in the Universal Declaration of Human Rights (“UDHR”)*

In December of 1948, the United Nations General Assembly adopted the UDHR,<sup>203</sup> which was the first significant international statement of human rights principles. The UDHR is not a treaty, and therefore does not create obligations that are legally binding on State Parties. But because the UDHR is widely used as the primary statement of what are considered human rights, it is regarded as having legal significance and has been considered customary international law by American courts<sup>204</sup> and commentators.<sup>205</sup>

The UDHR embodies a holistic vision of human rights and speaks about the centrality of economic, social, cultural, civil, and political rights to the preservation of human dignity and freedom.<sup>206</sup> Mary Ann Glendon explains that although overall there was strong agreement within the fledgling United Nations about the rights to be included within the UDHR, economic and social rights were the most controversial rights in the process.<sup>207</sup> The economic and social rights provisions within the UDHR were strongly encouraged by Latin American countries and supported by the United States but balked at by many of the socialist Eastern European countries for not being strong enough.<sup>208</sup>

The UDHR also emphasizes the inalienable nature of all fundamental human rights.<sup>209</sup> In the words of Eide, the declaration represents a “package of interrelated and interdependent rights,” which are indivisible.<sup>210</sup> Since the adoption of the UDHR, the

203. UDHR, *supra* note 189.

204. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (stating that “several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law”) (citing Kuldip Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813, 816–17 (1978); Humphrey Waldlock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, INT’L & COMP. L.Q., Supp. Publ. No. 11 at 15 (1965)).

205. DAVID SHIMAN, ECONOMIC AND SOCIAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE, PART I: ECONOMIC AND SOCIAL JUSTICE, QUESTIONS AND ANSWERS (1999), <http://www1.umn.edu/humanrts/edumat/hreduseries/tb1b/index.html>.

206. UDHR, *supra* note 189.

207. Mary Ann Glendon, Professor of Law, Harvard University, Caritas Helder Camara Lecture Series: Human Rights for All, Melbourne, Australia, (June 2002) *available at* [http://www.catholiceducation.org/articles/social\\_justice/sj0006.html](http://www.catholiceducation.org/articles/social_justice/sj0006.html).

208. *Id.*

209. UDHR, *supra* note 189.

210. Eide, *Promoting Rights*, *supra* note 170, at 2.

interdependence and indivisibility of all human rights have been regularly reaffirmed within human rights documents, including in more recent United Nations treaties like the CEDAW and the CRC.

References to human dignity and social progress permeated the UDHR, but the most explicit proclamations of economic and social rights can be found in Articles 22 through 26.<sup>211</sup> Article 22 of the UDHR states that everyone has the right to social security and is entitled to the realization of the economic, social, and cultural rights indispensable for one's dignity and the free development of one's personality.<sup>212</sup> Article 23 protects economic rights related to work, including the right to work, just and favorable work conditions, equal pay for equal work, and the right to form and join trade unions.<sup>213</sup> Article 23(3) contains a right to a living wage, stating that everyone who works has the right to just and favorable remuneration "ensuring for himself [or herself] and his [or her] family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."<sup>214</sup> Article 24 protects the right to rest and leisure.<sup>215</sup> The section of the UDHR most directly relevant to a child's right to adequate housing is Article 25's right to an adequate standard of living, including "food, clothing, housing and medical care, and necessary social services."<sup>216</sup> This is followed by the right to education enshrined in Article 26, which is a right of particular interest to—although not exclusive to—children.<sup>217</sup>

*B. The International Bill of Rights: The ICESCR and the ICCPR*

In order to strengthen the legal standing of these basic human rights, the United Nations decided to integrate the rights protected in the UDHR into legally binding treaties. An initial United

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211. Property rights, another important subclass of economic and social rights, are also enshrined in the UDHR. Article 17 states that everyone has a right to own property, and that no one shall be arbitrarily deprived of his [or her] property. UDHR, *supra* note 189, at art. 17. Article 27(2) protects intellectual property rights, and reads "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." *Id.* at art. 27(2).

212. *Id.* at art. 22.

213. *Id.* at art. 23.

214. *Id.* at art. 23(2).

215. *Id.* at art. 24.

216. *Id.* at art. 25.

217. *Id.* at art. 26.

Nations General Assembly Resolution on the subject, passed in December of 1950, pledged to adopt a single convention that recognized the interdependence of all categories of human rights—civil, political, economic, social, and cultural.<sup>218</sup> Many Western states, particularly the United States and United Kingdom, advocated that two separate treaties should be drafted—one for civil and political rights and another for economic, social, and cultural rights.<sup>219</sup> Eastern states, which were more likely to hold socialist values, were also comfortable with this division, in part because of a fear that a Western “veto” of a single covenant might result in no international protections for economic and social rights.<sup>220</sup> Eventually, campaigners arguing to split the drafting process between the two categories of rights were successful in persuading the General Assembly to reverse its first decision, and a 1952 General Assembly Resolution resulted in a bifurcated drafting process.<sup>221</sup> The result was the creation of the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), known collectively as the International Bill of Rights.<sup>222</sup> The United States has signed and ratified the ICCPR but at the present time has only signed the ICESCR.<sup>223</sup>

Chisanga Puta-Chekwe and Nora Flood argue that the decision

218. G.A. Res. 421(V), U.N. GAOR, 5th sess., Supp. No. 20, at 42, U.N. Doc. A/1775 (1950). For more detailed discussion of this shift, see Asbjørn Eide and Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 3 (Asbjørn Eide, Catarina Krause & Allan Rosas, eds., 2d ed. 2001).

219. *Id.*

220. *Id.*

221. G.A. Res. 543 (VI), U.N. GAOR, 6th Sess., Supp. No. 20, at 36, U.N. Doc. A/2119 (1952).

222. ICESCR, *supra* note 64; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 UNTS 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]. Both the ICESCR and the ICCPR are available at the University of Minnesota Human Rights Library, at <http://www1.umn.edu/humanrts/instree/ainstls1.htm>.

223. University of Minnesota Human Rights Library, *Ratification of International Human Rights Treaties – USA*, available at <http://www1.umn.edu/humanrts/research/ratification-USA.html>; Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principle International Human Rights Treaties*, (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf>. For an argument that the debate about the United States’ ratification of the ICESCR should be more internally focused, and the benefits of ratification for Americans emphasized, see Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 392–93 (1990).

to separate the basic human rights in the UDHR into the two covenants largely stemmed from conflicting political ideologies between East and West and misconceptions about human rights, rather than from fundamental differences between these types of rights.<sup>224</sup> Unfortunately, the twin covenants rigidified the perceptions that economic, social, and cultural rights are different “both in value and in kind” from civil and political rights.<sup>225</sup> The Cold War years further entrenched this division, as economic and social rights fell out of favor with Western countries because they were increasingly seen as the province of communist Eastern bloc states.<sup>226</sup> Glendon argues that the Cold War wrought havoc with the principle of the interdependence of fundamental rights—while the United States and its Cold War allies emphasized the political and civil rights, the Soviet bloc championed the social and economic provisions.<sup>227</sup> She writes, “[w]hat the framers [of the UDHR] had joined together the two super-powers drove asunder.”<sup>228</sup>

#### 1. *Economic and Social Rights in the ICCPR and ICESCR*

While the right to shelter is most strongly supported by the provisions of the ICESCR, the ICCPR contains several negative housing-related rights, including that everyone shall have the freedom to choose their residence<sup>229</sup> and that no one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, *home*, or correspondence.<sup>230</sup> The ICESCR, on the other hand, includes several positive social welfare rights, and some are specific to housing and children.<sup>231</sup> Article 10 of the Covenant states that “special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.”<sup>232</sup> Article 11 of the ICESCR obliges State Parties to recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to

224. Puta-Chekwe & Flood, *supra* note 69, at 39.

225. *Id.*

226. Glendon, *supra* note 207.

227. *Id.*

228. *Id.*

229. ICCPR, *supra* note 64, at art. 12(1).

230. *Id.* at art. 17(1).

231. ICESCR, *supra* note 64.

232. *Id.* at art. 10(3).

the continuous improvement of living conditions,” and requires State Parties to take appropriate steps to ensure the realization of this right.<sup>233</sup> Under the ICESCR, then, the human right to adequate housing is a component or derivative right of the broader right to an adequate standard of living. Finally, Article 12 of the ICESCR recognizes the right to the enjoyment of the highest attainable standard of physical and mental health, and orders State Parties to take steps necessary for the healthy development of children.<sup>234</sup>

## 2. *The Committee on Economic, Social and Cultural Rights*

Although the ICESCR was proposed in 1952, it took more than twenty years to finalize the text of the Covenant and it did not enter into force until January of 1976.<sup>235</sup> In its first decade of existence, there was no enforcement body, and thus the ICESCR was merely “a textual reference point subject to the speculative claims of both its proponents and detractors.”<sup>236</sup> Finally, in 1985, the Economic and Social Council created the United Nations Committee on Economic, Social and Cultural Rights to monitor the Covenant.<sup>237</sup> The creation of the Committee as an oversight body was a major achievement in the protection and development of economic, social, and cultural rights. As Matthew Craven explains, since its inception, “the Committee has begun to reinvigorate the Covenant by developing a meaningful system of supervision [over the ICESCR] and generating a clearer understanding” of its terms.<sup>238</sup> The Committee is comprised of eighteen independent experts in

233. *Id.* at art. 11(1) (emphasis added).

234. *Id.* at art. 12(1)–(2)(a).

235. U.N. Treaty Collection, Human Rights, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=321&chapter=4&lang=en> (last visited Feb. 20, 2009) (verifying the date the ICESCR came into force). *See also*, MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 16–22 (1995) (discussing the lengthy process from when the decision was first made to draft a bill of human rights in 1947 to when the ICESCR was finally ratified in 1974).

236. CRAVEN, *supra* note 235, at 1.

237. Office of the U.N. High Comm’r for Human Rights, *The Committee on Economic, Social and Cultural Rights*, Fact Sheet No. 16 (Rev. 1) (June 25, 1993), <http://www.unhchr.ch/html/menu6/2/fs16.htm> (examining many of the key issues relating to the ICESCR and the work of the Committee on Economic, Social and Cultural Rights in monitoring the treaty).

238. CRAVEN, *supra* note 235, at 6.



human rights who are elected by State Parties to four-year terms.<sup>239</sup> The Committee regularly reviews reports submitted by State Parties and issues concluding comments on their progress.

The Committee has also begun a process of contributing to the normative and substantive development provisions of the ICESCR through its issuance of General Comments on various issues pertaining to economic, social, and cultural rights. To date, the Committee has issued nineteen General Comments on subjects ranging from the nature of State Parties' obligations under the ICESCR, to the right to education, to the right to food.<sup>240</sup> Two of the nineteen General Comments address housing issues: General Comment 4 entitled "The Right to Adequate Housing" and General Comment 7 entitled "Forced Evictions, and the Right to Adequate Housing."<sup>241</sup>

General Comment 4, which the Committee issued in 1991,<sup>242</sup> is particularly helpful for formulating what a right to adequate housing means. In Comment 4, the Committee identifies seven aspects of the right that should be considered when determining whether particular forms of shelter constitute "adequate housing" for the purposes of the ICESCR.<sup>243</sup> These seven aspects of the right to housing are:

- 1) *Legal security of tenure* – "a degree of security of tenure which guarantees legal protection against forced eviction, harassment, and other threats;"
- 2) *Availability of services, materials, facilities, and infrastructure* – "essential for health, security, comfort, and nutrition;"
- 3) *Affordability* – so that "personal or household financial costs associating with housing [is at] a level that the attainment

239. For a list of the current Committee members and more information about the selection process, see Office of the U.N. High Comm'r for Human Rights, *Committee on Economic, Social and Cultural Rights – Members*, <http://www2.ohchr.org/english/bodies/cescr/members.htm> (last visited Feb. 20, 2009). The Committee's official website is <http://www.unhchr.ch/html/menu2/6/cescr.htm>.

240. Office of the U.N. High Comm'r for Human Rights, *Committee on Economic, Social and Cultural Rights – General Comments*, available at <http://www1.umn.edu/humanrts/gencomm/econ.htm>.

241. *Id.*

242. *Id.*

243. U.N. Committee on Econ., Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, U.N. Doc. E/C.12/1991/4 (Dec. 13, 1991), available at <http://www.unhcr.org/refworld/category,LEGAL,,GENERAL,,47a7079a1,0.html> [hereinafter General Comment No. 4].

and satisfaction of other basic needs are not threatened or compromised;”

- 4) *Habitability* – requires that inhabitants have adequate space and are protected “from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors;”
- 5) *Accessibility* – requires that disadvantaged groups such as the elderly, *children*, the physically disabled, and mentally ill are accorded full and sustainable access to housing resources. Housing law and policy should “take fully into account the special housing needs of these groups;”
- 6) *Location* – of adequate housing must “[allow] access to employment options, health-care services, schools, child-care centers, and other social facilities;” and
- 7) *Cultural adequacy* – which means that “the way that housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.”<sup>244</sup>

The Committee’s work in developing the substance of the ICESCR is especially welcome because an argument often made against creating legally enforceable economic and social rights is that these rights are simply too vague, nebulous, and unclear to be enforced by any domestic courts. Some claim that the international instruments that deal with economic and social rights are ambiguously worded and aspirational, and thus it would be inappropriate, if not impossible, to make them justiciable. This is also a misconception. Economic and social rights are no more inherently vague than civil and political rights. The less developed jurisprudence of economic and social rights is due to the lack of attention paid to this effort rather than the nature of these rights. While international, regional, and domestic legal systems have focused their efforts on developing the specific content of civil and political rights, they spent much less interest and energy on economic and social rights. The work of the Committee on Economic, Social and Cultural Rights has demonstrated, however, that it is possible to tease out concrete standards relating to these kinds of rights.<sup>245</sup> The detailed “factors” analysis in General

244. *Id.* at ¶ 8(a)–(g).

245. Thanks to the efforts of many scholars and jurists, the Maastricht Guidelines on Violations of Economic and Social Rights (1997) and the Limburg Principles on the Implementation of the ICESCR (1986) also present precise,

Comment 4 make it a promising source of assistance to domestic constitutional courts looking for judicially manageable standards to use in adjudicating economic and social rights, whether statutory or constitutional.<sup>246</sup> For example, domestic courts looking to interpret the word “adequate” within the McKinney-Vento Act’s definition of homelessness should look to General Comment 4 as a source of persuasive authority.

### 3. *Social and Economic Rights in the Convention on the Rights of the Child (“CRC”)*

The primary international instrument relating to children’s rights generally is the CRC, which was adopted by the United Nations General Assembly in November of 1989 and entered into force in September of the following year.<sup>247</sup> The CRC is one of the most holistic and comprehensive human rights instruments in existence; it protects the civil, political, economic, social, and cultural rights of children.<sup>248</sup> The CRC is also the most widely ratified human rights treaty; only the United States and Somalia have failed to ratify the Children’s Convention. In her treatise on the CRC, Geraldine Van Bueren argues that the Children’s Convention is “a major stepping stone in international law” that can be a powerful source of momentum for the improvement of children’s welfare around the globe.<sup>249</sup> The economic and social rights contained in the CRC are the most relevant to the issue of child poverty. These will therefore be highlighted in this section’s overview of the Children’s Convention.

One of the central principles of the CRC is that “*the best interests of the child shall be a primary consideration*” in all actions concerning

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specific, and attainable measures for the economic and social rights sphere. *See* The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 1997, Maastricht, Netherlands, [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html); The Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights, June 1986, University of Limburg, Maastricht, Netherlands, <http://shr.aaas.org/thesaurus/instrument.php?insid=94>.

246. *See generally* General Comment No. 4, *supra* note 243.

247. *See* CRC, *supra* note 66.

248. Thomas Hammarberg, *Children, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 353, 358 (Asbjørn Eide, Catarina Krause & Allan Rosas, eds., 2d ed. 2001).

249. GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 321 (1995).

them, whether undertaken by public or private bodies.<sup>250</sup> When drafting government policies, this principle seems to require the eradication of poverty among children to the extent feasible. Article 4 of the CRC requires as much, obliging that “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”<sup>251</sup> Article 6.2 of the right to life provision of the CRC adds that “States Parties shall ensure to the maximum extent possible the survival and development of the child.”<sup>252</sup> The CRC thus places a high burden upon states with the economic potential to alleviate poverty completely among its children.

The next Article that states obligations with respect to child welfare issues is Article 18, which requires State Parties to provide “appropriate assistance” to parents and guardians in fulfilling their child-rearing responsibilities.<sup>253</sup> Article 18.2 says that states “shall ensure the development of institutions, facilities and services for the care of children.”<sup>254</sup> The article concludes with a duty for State Parties to take appropriate measures to ensure that children of working parents have the right to benefit from childcare services and facilities “for which they are eligible,” with the terms of eligibility being left to the discretion of the state.<sup>255</sup>

Articles 24 through 32 also focus on children’s economic, social, and cultural rights. Article 24 relates to the right to health.<sup>256</sup> State Parties must “recognize the right of the child to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”<sup>257</sup> State Parties must also “strive to ensure that no child is deprived of his or her right of access to such healthcare services.”<sup>258</sup> It requires

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250. See CRC, *supra* note 66, at art. 3.1 (emphasis added). Like most of the international human rights instruments, the CRC is relatively weak in terms of its enforcement powers. There is a Children’s Committee though, to which State Parties submit reports every five years and appear before to discuss the progress of implementation of the CRC in their domestic jurisdiction. *Id.* at art. 44.

251. *Id.* at art. 4.

252. *Id.* at art. 6.2.

253. *Id.* at art. 18.2.

254. *Id.*

255. *Id.* at art. 18.3.

256. See *id.* at art. 24.

257. *Id.* at art. 24.1.

258. *Id.*

State Parties to ensure the provision of necessary medical assistance and healthcare and obliges them to combat disease and malnutrition.<sup>259</sup>

The CRC recognizes that every child has “the right to benefit from social security, including social insurance,”<sup>260</sup> and obliges State Parties to “take the necessary measures to achieve the full realization of this right in accordance with their national law.”<sup>261</sup> The Convention also enshrines a right of every child to a standard of living adequate not only for the child’s basic survival, but also “for the child’s physical, mental, spiritual, moral and social development.”<sup>262</sup> Within their means, the CRC dictates that State Parties shall take measures to assist parents in realizing this right for their children and shall “in case of need provide material assistance and support program[s], particularly with regard to nutrition, clothing and housing.”<sup>263</sup> A child’s right to education is also strongly emphasized within the Convention,<sup>264</sup> as is the right to enjoy one’s own culture, religion, and language.<sup>265</sup> The importance of play and leisure to children’s quality of life and development is also stressed, as is the right to be protected against economic exploitation and hazardous work.<sup>266</sup>

Domestic social justice work on issues like education, poverty, and juvenile justice in the United States would benefit from integrating the norms enshrined in the CRC into a rights-based approach to organizing. Given the immense physical, psychological, and developmental consequences that result from homelessness, it is clear that even under a narrow reading of the CRC, a State Party with incidence of child poverty and homelessness as high as that in the United States and with the available resources of the United States, would be in violation of the CRC. Given the resonance of the language of human rights with the American public,<sup>267</sup> reframing these problems as human rights violations might be helpful in domestic lobbying and mobilizing. Human rights and child welfare groups should also

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259. *Id.* at art. 24.2(b)–(c).

260. *Id.* at art. 26.1.

261. *Id.*

262. *Id.* at art. 27.1.

263. *Id.* at art. 27.3.

264. *Id.* at arts. 28–29.

265. *Id.* at art. 30.

266. *Id.* at arts. 31–32.

267. *See supra* note 51 and accompanying text.

increase efforts to persuade the United States Senate to ratify the CRC. In the meantime, lawyers and advocates should rely upon its norms,<sup>268</sup> arguing that the CRC is customary international law and strong persuasive authority on the minimum standards of dignity and welfare that all children deserve.<sup>269</sup>

#### V. PROMOTING A CHILD'S RIGHT TO SHELTER WITHIN THE UNITED STATES

The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.<sup>270</sup>

—Franklin Delano Roosevelt (1937)

In this final section, I suggest several avenues for cultivating a child's right to shelter within United States domestic law. In the short term, pursuing a right to shelter under state law is a more promising route, but a concurrent long-term approach under federal law is also crucial. My preference for state courts in the short term is based upon several factors. First, it is in part motivated by the relative hostility of federal courts towards progressive understandings of rights under federal law. It has been nearly forty years since the Supreme Court's decision in *Dandridge v. Williams*, which declined to find a right to welfare in the United States Constitution,<sup>271</sup> and *Lindsey v. Normet*, which declined to uphold a federal constitutional right to housing.<sup>272</sup> Unfortunately, contemporary federal constitutional doctrine does not appear to present any better of a climate for revisiting the issue under the Federal Constitution. Justice Brennan, undoubtedly distressed by the many dissenting opinions he participated in during that decade, advocated in a 1977 law review article for protecting

268. Many American scholars are advocating for United States ratification and for the use of the CRC's norms in domestic work. See, e.g., Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L L. 237, 243 (1994) (arguing that the United Nations Convention on the Rights of the Child can provide a basis for transforming adolescents' rights in the United States).

269. Sarah Ramsey & Daan Braveman, "Let Them Starve": *Government's Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1639–40 (1995).

270. Franklin Delano Roosevelt, U.S. President, Second Inaugural Address (Jan. 20, 1937), available at [http://avalon.law.yale.edu/20th\\_century/froos2.asp](http://avalon.law.yale.edu/20th_century/froos2.asp).

271. 397 U.S. 471, 485, 487 (1970).

272. 405 U.S. 56, 74 (1972).

individual rights through state constitutions.<sup>273</sup> Brennan wrote:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>274</sup>

While Brennan advocated for the use of state law to protect personal liberties generally, several other scholars have suggested state constitutional law as a promising avenue for pursuing positive social welfare rights specifically,<sup>275</sup> including the right to shelter.<sup>276</sup> Helen Hershkoff has argued that both state courts and state legislatures<sup>277</sup> have important roles to play in advancing norms of social welfare rights.<sup>278</sup> Hershkoff asserts that state courts need not rely upon federal rationality review when considering state laws in this area because that standard is based on a number of institutional concerns that do not apply in the same way in the state context.<sup>279</sup> Arguing that reliance upon the federal rationality test is “misplaced,” Hershkoff suggests a different standard of review:

Federal rationality review rests on doubts concerning democratic legitimacy, federalism, and separation of powers that are inapposite to how state common law courts should function under state constitutions that guarantee public assistance to the poor. When a state constitution creates a right to a government-provided

273. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

274. *Id.* at 491.

275. Daan Braveman, Symposium, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 614 (1989); James K. Langdon & Mark A. Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305 (1985).

276. 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 GONZ. L. REV. 421 (2004); Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL'Y SYMP. 111, 123–24 (1996) (arguing that state constitutions should contain a provision explicitly addressing the needs of the poor and homeless).

277. See *infra* note 296 and accompanying text.

278. See generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

279. *Id.* at 1137.

social service, the relevant judicial question should be whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power.<sup>280</sup>

Strengthening the concept of a child's right to shelter within state constitutional law may be one of the most promising methods because of the expertise of state institutions that stems from the fact that child welfare and housing issues primarily fall within the domain of state law. This speaks to the concern about judicial competence, as well as federalism concerns about encroachment into areas that are traditionally occupied by the state. Next, as Sarah Ramsey and Daan Braveman point out, the common law tradition of state court judges means they are more accustomed to relying upon public policy arguments than are federal judges.<sup>281</sup> This may be of assistance to those advancing public policy arguments based on the persuasive interests in housed, healthy, and educated children.

State law is also a more promising venue for the development of a child's right to shelter because many state constitutions already demonstrate elements of a social citizenship model. Many already have healthy constitutional norms relating to social welfare rights; at least twenty-five state constitutions contain provisions that address aid to the poor or the protection of the public's health or welfare.<sup>282</sup>

280. *Id.*

281. Ramsey & Braveman, *supra* note 269, at 1631–32.

282. NLCHP, HUMAN RIGHT TO HOUSING, *supra* note 10, at 44 n.247. The National Law Center on Homelessness & Poverty's *Report on Homeless in the United States and the Human Right to Housing* lists the following twenty-five states with such constitutional provisions:

- Alabama – stating that “[i]t [is] the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.” ALA. CONST. art. IV, § 88;
- Alaska – enumerating that “the legislature shall provide for public welfare.” ALASKA CONST. art. VII, § 5;
- California – authorizing the legislature to enact laws relating to relief administration. CAL. CONST. art. XVI, § 11;
- Colorado – requiring the provision of a pension to Colorado residents—and United States citizens—over the age of sixty, subject to other requirements determined by the legislature. COLO. CONST. art. XXIV, § 3;
- Delaware – stating that “[t]he General Assembly shall provide for the establishment and maintenance of a State Board of Health which shall have supervision of all matters relating to public health.” DEL. CONST. art. XII, § 1 (repealed 1995);



- Georgia – authorizing local governments to contract with public entities for the care of its indigent sick. GA. CONST. art. IV, § 3, ¶ 1;
- Hawaii – reaffirming a belief in government with “an understanding and compassionate heart toward all the peoples of the earth.” HAW. CONST. pmb.;
- Idaho – providing that the State must establish and support “education, reformatory, and penal institutions,” to provide for the “public good” of the “insane, deaf and dumb.” IDAHO CONST. art. X, § 1;
- Illinois – stating that the State Constitution is ordained and established among other reasons to “eliminate poverty and inequality; assure legal, social and economic justice; [and] provide opportunity for the fullest development of the individual.” ILL. CONST. pmb.;
- Indiana – authorizing county boards to establish farms to house those who “have claims upon the . . . aid of society.” IND. CONST. art. IX, § 3;
- Kansas – establishing that “[t]he . . . counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society.” KAN. CONST. art. VII, § 4;
- Louisiana – authorizing the legislature to establish welfare and unemployment compensation as well as public health measures. LA. CONST. art. XII, § 8;
- Michigan – stating that “[t]he legislature shall pass suitable laws for the protection and promotion of public health.” MICH. CONST. art. IV, § 51;
- Mississippi – authorizing the legislature to provide homes to those who have claims upon the aid of society. MISS. CONST. art. XIV, § 262;
- Missouri – stating that the general assembly shall establish a department of public health and welfare. MO. CONST. art. IV, § 37;
- Nevada – stating that “[i]nstitutions for the benefit of the Insane, Blind and Deaf and Dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the State, subject to such regulations as may be prescribed by law.” N.V. CONST. art. 13, § 1;
- New Mexico – authorizing state and local governments to make provisions relating to the care of sick and indigent persons. N.M. CONST. art. IX, § 14;
- New York – stating that “[t]he aid, care and support of the needy . . . shall be provided by the State . . .” N.Y. CONST. art. XVII, § 1;
- North Carolina – establishing that a “[b]eneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.” N.C. CONST. art. XI, § 4;
- Oklahoma – stating that “[t]he several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.” OKLA. CONST. art. XVII, § 3;
- Rhode Island – providing that “[a]ll free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens.” R.I. CONST. art. I, § 2;
- South Carolina – stating that “[t]he health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern.” S.C. CONST. art. XII, § 1;
- Texas – authorizing payment of assistance to needy. TEX. CONST. art. III, § 51a;

Ramsey and Braveman classify state constitutional law language relating to the care of the needy or the protection of the health of its residents into three categories: 1) those that make a statement of principle about social welfare; 2) those that authorize the state or a local entity to provide for the poor; and 3) those that “do not explicitly authorize assistance, but instead make reference to a governmental duty to care for the [poor].”<sup>283</sup> The first approach involves state constitutional language and makes a statement of principle about the care of the less fortunate, most frequently found in a constitution’s preamble.<sup>284</sup>

New York, whose constitution falls into the first category, is a pioneer in the area of state constitutional protections for the right to shelter. Article 17 of the New York Constitution, which mandates that “the aid, care and support of the needy are public concerns and shall be provided by the state,” has been read to create a right to housing, which at the minimum, requires the provision of emergency shelter for the homeless.<sup>285</sup> In 1981, New York City and the state of New York entered into a consent decree in the case of *Callahan v. Carey*.<sup>286</sup> The decree guaranteed a right to shelter for all homeless men in New York City and established minimum health and safety standards for homeless shelters.<sup>287</sup> In 1983, *Eldredge v. Koch* extended this right to shelter and for equal shelter standards to homeless women in New York City.<sup>288</sup> In 1986, *McCain v. Koch* extended the right to shelter to families with

- West Virginia – stating that “[c]oroners, overseers of the poor and surveyors of roads shall be appointed by the county court.” W.V. CONST. art. IX, § 2; and
- Wyoming – setting forth a duty of the legislature to provide for “the health and morality of the people.” WYO. CONST. art. VII, § 20.

Until 1988, Montana also had such a provision. MONT. CONST. art. XII, § 3(3) (establishing that “[t]he legislature *shall* provide such economic assistance and social and rehabilitative services . . . for those . . . who . . . may have need for the aid of society”) (emphasis added). Montana now authorizes but does not require aid to the poor. See MONT. CONST. art. XII, § 3(3) (“The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need.”).

283. Ramsey & Braveman, *supra* note 269, at 1623–24.

284. See *id.* at 1623.

285. N.Y. CONST. art. XVII, § 1.

286. No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981) (final judgment by consent), available at <http://www.coalitionforthehomeless.org/FileLib/PDFs/callahanconsentdecree.pdf>.

287. *Id.*

288. 469 N.Y.S.2d 744, 745 (N.Y. App. Div. 1983).

children.<sup>289</sup> Both Hawaii and Illinois are also examples of this model.<sup>290</sup> Advocates in states whose constitutions contain statements of principle about care may benefit from looking to the jurisprudence not only of New York but also of countries like India and Ireland, whose constitutions are discussed in Part II of this article.<sup>291</sup>

Oklahoma's constitution takes the second approach—authorizing the state or a local entity to provide for the poor or the health of the state citizens.<sup>292</sup> North Carolina and Alabama are examples of the third approach since both constitutions affirm a governmental duty to care for the poor.<sup>293</sup>

No pattern has yet emerged between the ways in which constitutions recognize social welfare issues and state constitutional jurisprudence on social welfare rights. This suggests that a particularized approach will be the most fruitful, whereby creative lawyers tailor their arguments to state courts based upon any constitutional provisions and any relevant state traditions and customs.<sup>294</sup> Even though no other state appears to have articulated a right to shelter under state constitutional law at this time, the New York case is a reason for optimism<sup>295</sup> and provides an example that demonstrates the workability of a right to shelter within state law.

State legislatures should also be educated and lobbied on the topic so that they might also recognize a state right to shelter for children. Hershkoff argues that state constitutional amendments, which are much easier to accomplish and therefore happen much more frequently than do amendments to the Federal Constitution, “create important occasions for public dialogue, value formation, and social reform.”<sup>296</sup> It may be time for progressives to seriously

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289. 502 N.Y.S.2d 720 (N.Y. App. Div. 1986). For a detailed timeline of the right to housing under the New York Constitution, see COAL. FOR THE HOMELESS, THE RIGHT TO SHELTER FOR HOMELESS NEW YORKERS: TWENTY YEARS AND COUNTING (2002), <http://www.coalitionforthehomeless.org/FileLib/PDFs/righttosshelter/timeline.pdf>.

290. See HAW. CONST. pmbl.; ILL. CONST. pmbl.

291. See *supra* notes 96–97 (referencing the Constitutions of India and Ireland).

292. OKLA. CONST. art. XXV, § 1.

293. ALA. CONST. art. IV, § 88; N.C. CONST. art. XI, § 4.

294. Ramsey & Braveman, *supra* note 269, at 1629–31.

295. See *supra* notes 285–89 and accompanying text.

296. Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 803–05 (2002).

consider using constitutional amendments to bolster the basic welfare rights of children.

Relying primarily upon state law, however, may leave behind poor and homeless children in states where legislators are unwilling to pass new laws and courts are unwilling to entertain new legal theories. It is therefore also important for progressive lawyers and advocates of a right to housing to pay some attention to creating respect for a right to shelter under federal law. Ratification and implementation of the norms enshrined in the ICESCR is one possible project within the federal system. Barbara Stark has proposed an integrated state and federal model for the protection of the economic and social rights enshrined in the Covenant.<sup>297</sup> Upon ratification of the ICESCR, the “Covenant would become directly binding upon the states” as well as the federal government.<sup>298</sup> Stark proposes that federal law could create a floor to welfare rights, whereby federal courts would articulate a minimal standard below which a state could not fall without jeopardizing national compliance with the ICESCR, as well as handling federal constitutional claims as necessary.<sup>299</sup> As Stark notes, state courts would have the option to articulate higher standards, reflecting local needs and resources, in the same way that states are free to interpret the “equal protection” provisions of their own constitutions to require more than the same language in the Equal Protection Clause of the Federal Constitution.<sup>300</sup> Stark argues that the leeway built into the ICESCR to accommodate the demands of cultural relativism in an international context would serve equally well in the United States in creating flexibility for state-specific tailoring.<sup>301</sup>

Enforcement and implementation of the McKinney-Vento Homeless Education Assistance Improvements Act of 2001<sup>302</sup> is another realm of federal law in which conversations about a right to shelter should be developed. Even though the statute is framed entirely around the educational rights of homeless children and does not appear to question or address the fact that they are homeless, it is a public recognition both of the crisis that exists with

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297. Stark, *supra* note 46, at 103–28.

298. *Id.* at 106–07.

299. *Id.* at 107–09.

300. *Id.* at 109.

301. *Id.* at 109–10.

302. 42 U.S.C. § 11431–35 (Supp. V 2005).

unsheltered children as well as the strong correlations between homelessness and educational underachievement. This creates a crucial window for discourse about these interconnections and the need to eliminate not only educational hurdles, but also the experience of homelessness in these children's lives. Advocates must strive to ensure that a rights-based approach is utilized with activism around the McKinney-Vento Act. The holistic approach of the CRC provides a helpful model for conceptualizing the ways that the right to housing and the right to education intersect.

## VI. CONCLUSION

In August of 2004, the first National Homeless Kids Convention was held at the City University of New York Graduate Center in New York City.<sup>303</sup> Homeless children and their families from across the country attended the convention to address “the growing social problem of homelessness.”<sup>304</sup>

As these young delegates know all too well, the needs of children who are homeless or at risk of becoming homeless are tremendous. And as the young convention delegates identified, homelessness and poverty are complicated problems that intersect with economic, social, political, legal, and cultural realities and norms. There is no easy or quick fix for transforming our society into one that meets the basic needs of all its inhabitants. Reframing these unmet needs, however, as unfulfilled rights and in extreme cases, human rights violations, is an important step toward this end. Cultivating a rights-based approach to child homelessness in the United States will be a gradual process, one that requires openness to international and comparative law—not as something that coerces and constrains—but that informs and inspires.

There is much work to be done in cultivating a child's right to shelter. State-by-state analyses should be developed in order to inform strategies for expanding state constitutional rights. Networks of lawyers and policymakers should be expanded and new connections built. We must challenge many misconceptions

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303. See COAL. FOR THE HOMELESS, SAFETY NET 6 (Summer 2005), <http://www.coalitionforthehomeless.org/FileLib/PDFs/safetynetsummer2005.pdf> (referencing how on June 18, 2005 and “for the “second year in a row,” “the youth advocacy project of Coalition for the Homeless, hosted the *Homeless Youth Summit*”).

304. *Id.*

about a variety of rights, reconstructing and imagining anew the content of such rights. Forgotten histories of our Second Bill of Rights and grassroots welfare rights organizing must be retold. Human rights education will also play a critical role, and accessible materials that address the international human right to shelter and welfare rights traditions in the United States need to be developed to that end. As challenging and multifaceted as the project will be, there are many reasons to be optimistic. Those who desire to advance social welfare can draw support from a significant body of legal tradition, both domestic and international, to inform their efforts. Protecting the dignity and humanity of children by ensuring their right to shelter will bring invaluable rewards, both to those young people who are finally able to secure a safe and stable home and to society as a whole.