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Legal & Policy Analysis

Human Rights in State Courts

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An Overview and Recommendations for Legal Advocacy

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

Yet, despite that legacy, international human rights laws have not played a major role in legal efforts to pursue fundamental rights, justice, and equality in the United States. That trend has begun to change over the last decade, as more and more legal advocates have begun to incorporate human rights arguments into their work, and as the U.S. Supreme Court, in particular, has increasingly cited human rights law as persuasive authority for important constitutional decisions.[1]

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

Recognizing this important and underutilized opportunity, this report details the ways in which state courts have considered and interpreted international human rights law. It is intended for public interest lawyers and state court litigators, and also for state and municipal policy makers interested in integrating compliance with international human rights law into their domestic policies.[2]

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[1] *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (considering whether practices have "been accepted as an integral part of human freedom in many other countries" or "rejected elsewhere" in construing the constitutional concepts of privacy and due process); *Grutter v. Bollinger*, 539 U.S. 306, 342-43 (2003) (Ginsburg, J., concurring) (citing United Nations conventions and the "international understanding" as to affirmative action plans).

[2] A number of advocates have argued that state courts should look to international and comparative law as they explore the meaning of positive rights under state constitutions, statutes, and common law. *See, e.g.*, Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1628, n.300 (May 2006) (citing Martha F. Davis, *Realizing Domestic Social Justice Through International Human Rights: Part 1: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006); Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy Int'l Standards of Human Decency*, 39 GONZ. L. REV. 421 (2003); Bert B. Lockwood, et al., *Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor*, 2 WM. & MARY BILL RTS. J. 1 (1993); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001)). *See also* Catherine Albisa & Shara Sekaran, *Realizing Domestic Social Justice Through International Human Rights: Foreword*, 30 N.Y.U. REV. L. & SOC. CHANGE 351

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

- California courts citing the Universal Declaration to support their interpretation of the right to practice one's trade, the right to privacy, the meaning of "physical handicap," the right to freedom of movement, and the scope of welfare provisions;[3]
- A Missouri Supreme Court decision citing the Convention on the Rights of the Child in striking down the juvenile death penalty;[4]
- The New Hampshire Supreme Court relying on the International Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights in its interpretation of parental rights under the state constitution;[5]
- New York courts invoking the Universal Declaration in cases involving the rights to work and to strike, a transnational discovery dispute, and the Act of State doctrine;[6]
- The Oregon Supreme Court looking to the Universal Declaration, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights to interpret the meaning of the state constitution's provision on the treatment of prisoners;[7]
- A Pennsylvania trial court reviewing the state's failure to provide a 15-year-old defendant with schooling while in custody in light of the Universal Declaration;[8]
- The Utah Supreme Court using the International Covenant on Civil and Political Rights to help define constitutional standards for the treatment of prisoners;[9]
- The Washington Supreme Court looking to the Universal Declaration to reject Seattle's residency requirements for civil service position applicants;[10]
- The West Virginia Supreme Court invoking the Universal Declaration to review the financing scheme for public schools and to define the right to education;[11]
- A concurring opinion in a Connecticut Supreme Court case that looked to the Universal Declaration and the International Covenant on Economic Social and Cultural Rights to determine the scope of government's obligations to provide for the poor;[12]

(2006); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 824-36 (1990).

[3] *Bixby v. Pierno*, 4 Cal. 3d 130, 143 n.9, 145 n.12 (Cal. 1971); *Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 n.2 (Cal. 1980); *Am. Nat'l Life Ins. Co. v. Fair Employment & Housing Comm.*, 32 Cal. 3d 603, 608 n.4 (Cal. 1982); *In re White*, 97 Cal. App. 3d 141, 149 n.4 (Cal. Ct. App. 1979); *Boehm v. Superior Court*, 178 Cal. App. 3d 494 (Cal. Ct. App. 1986).

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

[5] *State v. Robert H.*, 118 N.H. 713 (N.H. 1978), *overruled in part by In re Craig T.*, 147 N.H. 739 (N.H. 2002).

[6] *Wilson v. Hacker*, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. Ct. 1950); *Jamur Prod. Corp. v. Quill*, 51 Misc. 2d 501, 509 (N.Y. Sup. Ct. 1966); *In re Estate of Vilensky*, 424 N.Y.S.2d 821 (N.Y. Surrog. Ct. 1979); *Beck v. Mfr. Hanover Trust Co.*, 125 Misc. 2d 771 (N.Y. Sup. Ct. 1984).

[7] *Sterling v. Cupp*, 290 Ore. 611 (Or. 1981).

[8] *Commonwealth v. Sadler*, 3 Phila. 316, 1979 Phila. Cty. Rptr LEXIS 92 (Comm. Pleas Ct. 1979).

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

[10] *Eggert v. Seattle*, 81 Wash. 2d 840, 841 (Wash. 1973).

[11] *Pauley v. Kelly*, 162 W. Va. 672, 679, 708-09 (W. Va. 1979).

[12] *Moore v. Ganim*, 233 Conn. 557 (Conn. 1995) (Peters, J., concurring).

- A concurring opinion in a Florida Supreme Court case that invoked the International Covenant on Civil and Political Rights and struck down the juvenile death penalty;[13]
- Dissenting Michigan Supreme Court opinions invoking the International Covenant on Civil and Political Rights to interpret the meaning of the Michigan constitution's Double Jeopardy Clause and citing the Universal Declaration to interpret the meaning of the Establishment Clause;[14] and
- Dissenting and concurring Nevada Supreme Court opinions arguing that customary international law prohibits the execution of minors and invoking the International Covenant on Civil and Political Rights to challenge the juvenile death penalty.[15]

These decisions—described in further detail below—use human rights law as persuasive authority in interpreting state constitutions, statutes, and common law.

Part I of this report identifies strategies for and hurdles to the development of a human rights jurisprudence at the state level, which advocates should consider in crafting their arguments. Part II summarizes state court experiences with human rights. Although the discussion does not identify every single decision in which a state court has discussed international human rights law, it is fairly comprehensive. Part III proposes a strategy for further development of a jurisprudence of human rights in state courts.

The following abbreviations are used in this report:

- American Convention: American Convention on Human Rights
- American Declaration: American Declaration on the Rights and Duties of Man
- CAT: Convention Against Torture
- CEDAW: Convention on the Elimination of Discrimination Against Women
- CERD: International Convention on the Elimination of All Forms of Racial Discrimination
- CRC: International Convention on the Rights of the Child
- European Convention: European Convention on Human Rights
- ICCPR: International Covenant on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social, and Cultural Rights
- UDHR: Universal Declaration of Human Rights

[13] *Brennan v. State*, 754 So. 2d 1, 14 n.18 (Fla. 1999) (Anstead, J., concurring).
[14] *State v. Davis*, 695 N.W.2d 45, 54-55 (Mich. 2005) (Kelly, J., dissenting); *Sheridan Road Baptist Church v. Michigan*, 426 Mich. 462, 516 (Mich. 1986) (Riley, J., dissenting).
[15] *Servin v. State*, 117 Nev. 775 (Nev. 2001) (Rose, J., concurring); *Domingues v. State*, 114 Nev. 783 (Nev. 1998) (Rose, J. & Springer, C.J., dissenting).

I. Strategies

For Using Human Rights in State Courts and Possible Complications

State courts can draw upon a number of arguments to support their use of international human rights principles in decision making. Under article VI, section 2 of the U.S. Constitution, treaties are the "Supreme Law of the Land," binding on the "Judges in every State."[16] The United States has signed and ratified the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination and is therefore bound by these treaties.

Implementation of these treaties and their principles is the responsibility of federal, state, and local government.[17] Under the federal system, states are responsible for regulating areas of substantive law, including criminal, family, and social welfare law. The reservations the U.S. Senate issued when it ratified the treaties make clear that states are responsible for implementing international human rights law in these areas.[18] State court incorporation of human rights principles is thus crucial to ensuring implementation at the state level.

Although the treaties are "non-self-executing"—meaning that they cannot be directly enforced in U.S. courts[19]—they impose concrete obligations on states. Ratified treaties "have a legal status

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

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

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

[19] U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, at S4784 (1992); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (1994); U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (1990). When treaties are non-self-executing, individuals cannot sue for violation of rights recognized under the treaties. *See* http://www.ushumanrightsonline.net/u.s.humanrightstreatyobli781.cfm.

equivalent to enacted federal statutes";[20] they prevail over previously enacted federal statutory law (when there is a conflict) and over any inconsistent state or local law.[21]

In ratifying the ICCPR, the Senate mandated that its protections go no further than corresponding protections in domestic law.[22] Advocates and scholars have argued that such a reservation frustrates the purpose of the treaty and may be invalid under international law and therefore unenforceable—although the rest of the treaty may be severable and continue to have legal effect.[23] But state courts routinely invoke Senate reservations to deny individuals' claims under treaties like the ICCPR.[24]

Despite such reservations, international and U.S. law requires courts to interpret both state and federal law so that it does not conflict with ratified treaties.[25] And as a signatory to convenants and conventions like the ICESCR and CRC, the United States must "refrain from acts which would defeat the object and purpose of a treaty."[26] Furthermore, when human rights principles rise to the level of customary international law, meaning they are "practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were

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[20] Davis, *supra* note 2, at 363 (quoting United States, Initial Report to Comm. on Elim. of Racial Discrim., Addendum, P 50, UN Doc. CERD/C/351/Add.1 (Sept. 21, 2000), available at http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/4c02eba071d735f4c1256a1700588ba0/$FILE/G0044926.pdf).

[21] United States, Initial Report to Comm. on Elim. of Racial Discrim., Addendum, P 50, U.N. Doc. CERD/C/351/Add.1 (Sept. 21, 2000).

[22] 138 Cong. Rec. S4781-01, S4783 (1992) (attaching a reservation to the ICCPR and stating "that the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States").

[23] *See, e.g.*, Penny White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (And Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937, 950-51, 967-69 (2003) (arguing that state judges have an independent authority to interpret the underlying treaties and reservations).

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

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

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

laws,"[27] they do not require implementing legislation to be binding in the United States.[28] Customary international law is part of federal common law, and as such, it displaces conflicting state laws.[29]

Most importantly, though, courts can look to international human rights treaties for interpretive guidance, whether or not the treaties are signed, ratified, or considered customary international law. Specifically, courts can turn to international human rights law to help clarify the meaning of vague or unsettled domestic law. Even if human rights principles are not directly binding, they can influence courts as they define and explain statutory provisions, and as they give meaning to domestic constitutional rights. Courts have looked to unratified, as well as ratified, treaties for this purpose.[30]

[27] BLACK'S LAW DICTIONARY 162 (17th ed. 1996).
[28] Foscarinis, *supra* note 25, at 478 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); Restatement (Third) of Foreign Relations Law of the United States 111 (1987)). *See also* Restatement (Third) of Foreign Relations Law 102(2) (1986).
[29] Restatement (Third) of Foreign Relations Law of the United States 111 at cmt.d; *see also The Paquete Habana*, 175 U.S. at 700. *C.f. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[30] *See, e.g.*, White, *supra* note 23, at 973 ("State appellate courts, in applying state law, are free to utilize international treaty provisions and customary international law in making" decisions as to the content of constitutional guarantees).

II. International Human Rights in State Courts

The following state by state discussion examines the role international human rights law has played in state court decisions. There are virtually no cases in which state courts have relied solely on international human rights law to reach a decision. Rather state courts most often turn to international human rights law when it is offered as an interpretive guide for the development of rights enumerated in state constitutions or statutes.

Alabama

State courts in Alabama have addressed international human rights law primarily in the criminal context. In a 2000 decision the Alabama Supreme Court upheld the juvenile death penalty, rejecting an international law argument made by the defendant.[31] The court held that the ICCPR was not self-executing and did not create a private right of action in U.S. courts. It dismissed the defendant's argument that the Senate reservation upon which the court based its decision was invalid.[32] And it rejected the defendant's arguments under CERD and CAT, noting that when the United States ratified those treaties it specifically stated that international law did not prohibit the juvenile death penalty.[33]

Following the 2005 decision in *Roper v. Simmons*,[34] in which the U.S. Supreme Court invoked international human rights law and invalidated the juvenile death penalty, however, Alabama courts have overturned at least two juvenile death penalty cases, finding the convictions in violation of international treaties.[35]

Finally, at least one defendant has tried (and failed) to invoke international human rights law in the context of a habeas petition in Alabama state court. In *Wood v. State* the Alabama Court of Criminal Appeals rejected as non-jurisdictional a defendant's argument that his attorneys rendered ineffective assistance of counsel in violation of the ICCPR and CERD.[36]

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[31] *Ex parte Pressley*, 770 So. 2d 143 (Ala. 2000); *see also Wynn v. State*, 804 So. 2d 1122 (Ala. Crim. App. 2000) (addressing the ICCPR and the death penalty by adopting the *Pressley* reasoning as its own); *Ex parte Carroll*, 852 So. 2d 821 (Ala. 2001) (same).

[32] *Pressley*, 770 So. 2d at 148-49.

[33] *Id*.

[34] 543 U.S. 551, 575-78 (2005).

[35] *Adams v. State*, Case No. CR-98-0496, 2003 Ala. Crim. App. LEXIS 212 (Ala. Crim. App. Aug. 29, 2003) (addressing the ICCPR and upholding the juvenile death penalty), *overturned on appeal*, 2005 Ala. LEXIS 217, 1030633 (Ala. Dec. 23, 2005) (citing *Roper v. Simmons*, 543 U.S. 551 (2005)). *See also Duncan v. State*, 925 So. 2d 245, 276-77 (Ala. Crim. App. Mar. 18, 2005) ("The appellant's third argument is that the sentence of death, which was imposed for a crime he committed when he was 17 years old, constitutes cruel and unusual punishment and violates several international treaties and covenants. Based on *Roper* . . . we are compelled to agree. . . .").

[36] *Wood v. State*, 891 So. 2d 398, 420 (Ala. Crim. App. 2004).

Arkansas

The Arkansas Supreme Court addressed the applicability of the ICCPR to the juvenile death penalty in *dicta* in *McFarland v. State*.[37] The court pronounced the defendant's reliance on the treaty "novel," but declared it "meritless," observing that "the treaty signed by the president provides that persons under age eighteen may be sentenced to death."[38] In any event, the court noted that the argument was moot, as McFarland had not been sentenced to death.

California

California state courts have significant experience with international human rights law in both civil and criminal contexts. In a few cases, courts have demonstrated willingness to use treaties and customary international law to develop state constitutional and statutory protections.

In a 1952 case, *Sei Fujii v. California*,[39] the California Supreme Court refused to apply the non-discrimination guarantees of the United Nations Charter to invalidate the California Alien Land Law, which denied immigrants the right to own land in the state. The court inquired into the "intent of the signatory parties" to determine whether the provisions of the Charter were self-executing.[40] It held that they were not; although the Charter's "humane and enlightened objectives" warranted "respectful consideration by the courts," its language "lack[ed] the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification."[41]

In its 1971 decision in *Bixby v. Pierno*, however, the California Supreme Court looked more favorably at international human rights law, citing the UDHR, among other authority, to support its statement that the California constitution protects the right to practice one's trade or profession.[42] Almost a decade later, in *Santa Barbara v. Adamson*, the California Supreme Court again invoked the UDHR, this time to interpret a state law protecting privacy.[43] And two years later, in *American National Life Insurance Company v. Fair Employment and Housing Commission*, the court relied on the UDHR to construe the definition of "physical handicap" in an anti-discrimination statute.[44]

Courts of appeal in California have also drawn extensively on international human rights law. The Fifth District Court of Appeal cited the UDHR in its 1979 decision in *In re White* to support its determination that the California constitution guaranteed freedom of movement within the state.[45] And in its 1986 decision in *Boehm v. Superior Court*, the Fifth District Court of Appeal relied heavily on international law for guidance in interpreting the state's welfare statute.[46] The plaintiffs here had challenged the county defendant's planned reduction of welfare assistance

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[37] 337 Ark. 386, 399-400 (Ark. 1999).
[38] *Id*. at 399 (emphasis in original).
[39] 38 Cal. 2d 718 (Cal. 1952).
[40] *Id*. at 721.
[41] *Id*. at 724.
[42] 4 Cal. 3d 130, 143 n.9, 145 n.12 (Cal. 1971).
[43] 27 Cal. 3d 123, 130 n.2 (Cal. 1980).
[44] 32 Cal. 3d 603, 608 n.4 (Cal. 1982); *see also Wong v. Tenneco*, 702 P.2d 570, 581 (Cal. 1985) (Mosk, J., dissenting) (citing UDHR); *Perez v. Sharp*, 198 P.2d 17, 29-30 (Cal. 1948) (Carter, J., concurring) (citing UN Charter).
[45] 97 Cal. App. 3d 141, 149 n.4 (Cal. Ct. App. 1979); *see also In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 868 n.4 (Cal. Ct. App. 2001) (citing law review article on CEDAW and Islamic law).
[46] 178 Cal. App. 3d 494 (Cal. Ct. App. 1986).

payments as a violation of the state's welfare statute.[47] The Court of Appeal held that the statute required the county to provide for minimum subsistence and relied on the UDHR to determine what that entailed.[48] The court concluded that "it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation, and medical care."[49] The court added that "to leave recipients without minimum medical assistance is inhumane and shocking to the conscience."[50]

In a 2004 case, *C & C Construction, Inc. v. Sacramento Municipal Utility District*, the Third District Court of Appeal contrasted the meaning of discrimination in CERD with the meaning of discrimination under the state constitution.[51] In *C & C Construction*, the plaintiff contractor sued the district, alleging that its race-based affirmative action program violated the state constitution. The California Supreme Court affirmed the trial court's ruling in favor of the plaintiff, finding that the definition of discrimination in the state constitution (as amended by Proposition 209) prohibited the state from classifying individuals by race or gender. The court noted that section 8315, enacted during the pendency of the appeal, attempted to change the definition of discrimination in the California constitution to be consistent with the definition in CERD. Section 8315 quoted CERD, which recognizes that "special measures" such as affirmative action "may be necessary in order to ensure . . . equal enjoyment or exercise of human rights and fundamental freedoms."[52] The court rejected the definition of discrimination in section 8315 as "ineffective" and criticized the state's legislature and governor for failing to comply with the proper procedures for amending the state constitution.

More recently, in 2007, the Third District Court of Appeal considered a similar case, *Connerly v. Schwarzenegger*, and cited *C & C Construction* in its discussion. In *Connerly*, the plaintiff sought a declaration that section 8315 was in conflict with the state constitution and therefore invalid.[53] The Court of Appeal dismissed the plaintiff's claim on the grounds that there was no justiciable controversy surrounding the statute, because section 8315 had been successfully challenged in *C & C Construction* and a final decision by an appellate court had rendered the statute null and void.[54]

Over the past twenty years, California courts have also repeatedly interpreted and applied international human rights law in criminal cases. In a 1987 case, *People v. Ghent*, the defendant relied on various UN resolutions in challenging the death penalty law as inconsistent with "principles of international human rights law."[55] The California Supreme Court rejected these arguments, finding that international resolutions and treaties have no domestic effect without implementing legislation from Congress.[56] Almost 15 years later, in *People v. Hillhouse*, the California Supreme Court denied that the ICCPR, American Declaration, and CERD prohibited the death penalty, ruling: "International law does not prohibit a sentence of death rendered in

[47] 178 Cal. App. 3d at 496.
[48] 178 Cal. App. 3d at 502.
[49] *Id*.
[50] *Id*.
[51] 122 Cal. App. 4th 284, 303 (Cal. Ct. App. 2004).
[52] *Id*. at 301 (citing CERD) (internal quotations omitted).
[53] 146 Cal. App. 4th 739 (Cal. Ct. App. 2007).
[54] *Id*.
[55] 43 Cal. 3d 739, 778 (Cal. 1987).
[56] *Id*. at 779 (citing *Sei Fujii*, 38 Cal. 2d at 724-25).

accordance with state and federal constitutional and statutory requirements."[57] In a 2004 case, *People v. Brown*, the California Supreme Court again upheld the California death penalty statute against the defendant's charge that it violated the ICCPR.[58] The court noted that the Senate had attached a reservation to the treaty expressly reserving states' rights to impose the death penalty.[59]

In 2006 the California Supreme Court reiterated its position that, given the U.S. government's reservation to the ICCPR, "international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements."[60] And in *People v. Boyer* the court found that the defendant was not denied his right to a fair trial under the UDHR, ICCPR, and American Declaration, where the court found no errors under state or federal law whose cumulative effect was prejudicial.[61] Similarly, in *People v. Perry* the California Supreme Court reasserted that the state's death penalty law did not violate the ICCPR, given the U.S. reservations to the treaty, and also held that the imposition of capital punishment in California did not violate international norms.[62] In *People v. Ramirez* the court cited its previous decisions and summarily rejected the defendant's claims that he was denied the right to a fair trial under the ICCPR, American Declaration, and UDHR and subjected to racial discrimination in violation of customary international law.[63]

Also in 2006, in *People v. Lewis & Oliver*, defendant Oliver claimed that the physical restraints he wore before and during his trial violated the UDHR.[64] The California Supreme Court found that Oliver's claim lacked merit, because the trial court's shackling orders did not violate applicable state or federal law and Oliver had failed to show how international law differed from domestic law on the issue.[65]

Furthermore, at least one concurring opinion and one dissent in criminal cases in California cited international human rights law. In *Cramer v. Tyars* California Supreme Court Justice Frank Newman dissented, finding that the trial court violated the state constitution by requiring a defendant who suffered from "severe and irreversible mental retardation" to respond to questioning that might incriminate him. Justice Newman cited the UDHR and found the treatment of the defendant "cruel and degrading."[66] In a concurrence in *People v. Levins* Justice Newman noted his agreement that the defendant had a right to a post-indictment preliminary examination, pointing to amicus briefs by the ACLU suggesting that the court consider the UDHR and the ICCPR, as well as to articles citing CERD.[67]

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[57] 27 Cal. 4th 469, 511 (Cal. 2002).
[58] 33 Cal. 4th 382, 403-04 (Cal. 2004); *see also People v. Turner*, 34 Cal. 4th 406, 439-40 (2004) (citing *Brown* to reject an attempt to use the ICCPR).
[59] *Id.* at 404 ("Given states' sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.").
[60] *People v. Cook*, 39 Cal. 4th 566, 620 (Cal. 2006).
[61] 38 Cal. 4th 412, 489-90 (Cal. 2006).
[62] 38 Cal. 4th 302, 322 (Cal. 2006).
[63] 39 Cal. 4th 398, 479 (Cal. 2006); *see also People v. Cornwell*, 37 Cal. 4th 50, 105-06 (Cal. 2005) (finding that defendant's claims under the ICCPR and UDHR lacked merit); *People v. Harris*, 37 Cal. 4th 310, 366 (Cal. 2005).
[64] 39 Cal. 4th 970, 1032 n.21 (Cal. 2006) (citing *People v. Blair*, 36 Cal. 4th 686, 755 (Cal. 2005) (finding that defendant had failed to establish a violation of international law where no federal or state laws were violated)).
[65] *Id.*
[66] 23 Cal. 3d 131, 151 n.1 (Cal. 1979) (Newman, J., dissenting).
[67] 22 Cal. 3d 620, 625 (Cal. 1978) (Newman, J., concurring).

Connecticut

Former Chief Justice Ellen Peters of the Connecticut Supreme Court has been a proponent of the important role that state courts can play, and have played to date, in safeguarding human rights.[68] In a 1995 concurrence in *Moore v. Ganim*[69] Justice Peters relied on the ICESCR and the UDHR to differ with the majority and interpret the Connecticut constitution to require a minimal social welfare safety net for the poor.[70] She looked to the UDHR and the ICESCR, among other sources, to support her contention that "contemporary considerations of law and policy" mandate governmental responsibility to provide for the poor.[71] Although the United States is not a party to the ICESCR, she noted that it represented "wide international agreement on at least the hortatory goals" contained within.[72] The majority opinion did not address international human rights law.

In other Connecticut cases, human rights law has received a mixed reception. In a 1972 Connecticut Supreme Court case, a plaintiff argued that a number of international affirmations of anti-discrimination, including the precursor to the CEDAW, prohibited the Connecticut state bar from refusing to admit her on the grounds that she was a foreign national.[73] The court eschewed a discussion of her international law arguments in its rejection of her claim.[74] In *Batista v. Batista*, an unreported decision, a superior court judge expressed "great concern and embarrassment" that the United States had not signed the CRC and nonetheless used the convention as a guide for her custody determination.[75] In *Belic v. Amtrak*, also an unreported decision, another superior court judge refused to allow claims under the UDHR to proceed on the grounds that there was no private right of action for violation of the UDHR and the United States was not a signatory to it.[76] The court did not address the fact that the United States helped craft the UDHR. In another unreported decision, *Wendt v. Wendt*, the plaintiff in a divorce proceeding cited the UDHR, articles by legal scholars, and laws in sister states in support of her argument that marriage is a partnership. The superior court considered and dismissed her arguments.[77]

Florida

A number of Florida courts have considered the ICCPR in their decisions, but in only one case has a judge given the covenant any weight. In a 2000 decision, *Booker v. State*,[78] the defendant argued that pursuant to the ICCPR and CAT, the state had forfeited its right to execute him due to the length of time he had spent on death row.[79] The Florida Supreme Court rejected the arguments, pointing to a recent decision in which it had found an identical claim "interesting" but without merit. The court dismissed the international law claim on the grounds that "no federal or state courts ha[d] accepted [defendant's] argument that a prolonged stay on death row constitute[d] cruel and unusual punishment, especially where both parties bear responsibility

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[68] *See* Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1072, 1084 (1998).
[69] 233 Conn. 557 (Conn. 1995) (Peters, J., concurring).
[70] *Id*. at 616.
[71] *Id*. at 635.
[72] *Id*. at 638.
[73] *In re Griffiths*, 162 Conn. 249, 266-67 (Conn. 1972), *rev'd*, 413 U.S. 717 (1973).
[74] *Id*. at 267-68.
[75] FA 92 0059661, 1992 Conn. Super. LEXIS 1808, at *18-20 (Conn. Super. Ct. June 18, 1992).
[76] CV010275697S, 2002 Conn. Super. LEXIS 795, at *5 (Conn. Super. Ct. Mar. 11, 2002).
[77] D.N. FA96 0149562 S, 1998 Conn. Super. LEXIS 1023 (Conn. Super. Ct. Mar. 31, 1998).
[78] 773 So. 2d 1079 (Fla. 2000).
[79] *Id*. at 1096.

for the long delay."[80] In the 1999 decision in *Brennan v. State* the Florida Supreme Court struck down the Florida juvenile death penalty.[81] A concurring justice invoked the ICCPR in support of an argument based on "evolving standards of decency."[82]

A Florida District Court of Appeal addressed international human rights law outside the death penalty context in a 2002 case, *Toca v. State*.[83] The *pro se* plaintiff refused to sign court papers on religious grounds, invoking the ICCPR in support of his argument. After observing that there is "scant case law nationally, and none . . . in Florida" interpreting the article of the treaty concerned with religious freedom, the court found the ICCPR inapplicable due to the Senate's reservation declaring it non-self-executing.[84] The court also noted that at least one court had interpreted article 18 of the ICCPR, the religious freedom provision, as "furnishing no greater rights or protections than those provided in the First Amendment."[85] As a result, the court concluded that even if the ICCPR were enforceable, the plaintiff's assertions under the ICCPR would fail on their merits, just as his constitutional claims had failed.[86]

Illinois

The Illinois Supreme Court has addressed international human rights law in its death penalty decisions. In *People v. Caballero* the court rejected the argument by the government of Mexico, appearing as an amicus, that the death penalty imposed on an 18-year-old Mexican national violated CERD and the ICCPR.[87] In response to the CERD argument—that the defendant, one of four perpetrators and the only noncitizen, was the only one given the death penalty—the court discussed the substance of CERD as if it were a binding source of law, but held that the defendant had failed to make out a prima facie case of discrimination.[88] In response to the ICCPR argument—that the defendant was unfairly sentenced to death while a co-perpetrator was given a much lighter sentence—the court invoked the Senate's reservation to the ICCPR, asserting that the ICCPR must be read consistently with the U.S. Constitution. Because the imposition of the death penalty was constitutional, the court found that the ICCPR offered no relief.[89]

The Illinois Supreme Court's decision in *People v. Madej* is notable for its discussion of the Vienna Convention on Consular Relations in the context of a death penalty case.[90] The defendant, a Polish citizen, contended that his sentence was void under international law due to the state's failure to inform him of his right to contact the Polish consulate to assist him with his defense.[91]

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[80] *Id*. (quoting *Knight v. State*, 746 So. 2d 423, 437 (Fla. 1998)) (internal quotations and citations omitted).
[81] 754 So. 2d 1 (Fla. 1999).
[82] *Id*. at 14 n.18 (Anstead, J., concurring). That same year the Florida Supreme Court reversed a death penalty conviction for failure to hold a timely competency hearing in violation of the Due Process Clause and a Florida rule of civil procedure, relying in part on a dissenting opinion by Justice Stephen Breyer invoking foreign decisions on delay in carrying out the death penalty, including a European Court of Human Rights decision. *Jones v. State*, 740 So. 2d 520, 524-25 (Fla. 1999) (citing *Elledge v. Florida*, 119 S. Ct. 366 (1998) (Breyer, J., dissenting from denial of certiorari)).
[83] 834 So. 2d 204 (Fla. Dist. Ct. App. 2002).
[84] *Id*. at 211.
[85] *Id*.
[86] *Id*.
[87] 206 Ill. 2d 65 (Ill. 2002).
[88] *Id*. at 99-102.
[89] *Id*. at 103.
[90] 193 Ill. 2d 395 (Ill. 2000).
[91] *Id*. at 398.

The court held that the international legal principle of *restitutio in integrum*, an equitable remedy recognized in international law that provides for the restoration of an injured party to his condition *ex ante*, did not invalidate a death sentence.[92] Moreover, the court opined, the defendant's rights were a matter of public record, and therefore the state did not fraudulently conceal his right to contact a consular official.[93] The decision provoked strong dissents, including one from a justice who cited a decision from the Inter-American Court of Human Rights that held that the execution of an individual deprived of his rights under the Vienna Convention violated the "right not to be deprived of life 'arbitrarily'" under the American Declaration and the ICCPR.[94]

Indiana

Only one Indiana court appears to have addressed international human rights. In *Baird v. State* the petitioner sought a subsequent challenge to his death penalty conviction on the grounds that he should not have been sentenced to death because he was mentally ill when he committed the murders.[95] The petitioner argued that international treaties and customary international law prohibited death sentences for the mentally ill, and he was therefore entitled to post-conviction relief. The court concluded that the petitioner had not shown a reasonable possibility of success as required for a successive post-conviction claim, noting that three of the documents cited by the petitioner—the ICCPR, UDHR, and CAT—did not specifically discuss the execution of mentally ill people. The court further noted that incarcerated individuals like the petitioner lack standing to claim relief under these documents, citing the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), which held that the UDHR did not impose obligations as a matter of international law and that, given the U.S. reservations, the ICCPR did not create obligations enforceable in American courts.[96]

Iowa

The Iowa Supreme Court has addressed international human rights once, in reviewing an appeal of a criminal conviction. To determine whether the defendant was properly convicted of first-degree kidnapping, the court in *State v. White* sought to determine whether torture could encompass mental as well as physical anguish.[97] The court looked to various definitions of torture in dictionaries, treaties, and case law from other jurisdictions, including a federal court case in Georgia which cited the definition of torture in CAT.[98] The court relied on the definition of torture in that case and others, and affirmed the defendant's conviction on the grounds that mental anguish alone was sufficient to constitute torture for first-degree kidnapping.[99]

Kansas

Kansas courts have addressed international human rights law in the context of both criminal and family law. In *Kansas v. Kleypas* the state's Supreme Court rejected the defendant's claim that customary international law and unspecified treaties invalidated the Kansas death penalty

[92] *Id*. at 400-01.
[93] *Id*. at 402-03.
[94] *Id*. at 407-08 (McMorrow, J., dissenting).
[95] 831 N.E.2d 109 (Ind. 2005).
[96] *Id*. at 115.
[97] 668 N.W.2d 850 (Iowa 2003).
[98] *Id*. at 856-88.
[99] *Id*.

statute.[100] The court rejected the argument in conclusory fashion, reasoning that "[t]he weight of federal and state authority dictates that no customary international law or international treaty prohibits the State of Kansas from invoking the death penalty as a punishment for certain crimes."[101] In *In re D.A.*, the Kansas Court of Appeals examined the UN Declaration on the Rights of the Child as part of its refusal to restore custody of a child to a Mexican national who had been accused of abuse.[102] The court quoted the Declaration as evidence of customary international law, but then held that it was consistent with Kansas law and thus did not require any further examination.[103]

Kentucky

Kentucky courts have also addressed international human rights law in both the criminal and family law context. The Supreme Court of Kentucky recently considered the ICCPR in reviewing a death sentence, rejecting the defendant's argument that the ICCPR was a properly ratified treaty and therefore part of the supreme law of the land. The court pointed to a Sixth Circuit decision that noted that the ICCPR was not binding on U.S. courts and did not require the United States to abolish the death penalty. The court noted that the United States had to abide by the covenant only "to the extent that the 5th, 8th, and 14th amendment ban cruel and unusual punishment."[104] The court found that the defendant had received a fundamentally fair trial and was not deprived of any legal right.

In 1999 a Kentucky Court of Appeals applied the ICCPR by way of the Hague Child Abduction Convention in a case involving a Greek father's efforts to retrieve his daughter from her mother.[105] The mother defended her actions by arguing, inter alia, that Greek police had subjected her daughter to physical and verbal abuse in violation of the ICCPR.[106] The court did not analyze the applicability of the covenant, holding that the mother had failed to allege anything other than vague, insufficient indictments of the Greek police system.[107]

Louisiana

At least one Louisiana court has considered international human rights law in its decision making. In *State v. Craig* the state's Court of Appeal affirmed the trial court's decision to change the sentence of a juvenile defendant under the age of 18 from a death sentence to life without parole.[108] The defendant challenged the trial court's decision, arguing that a sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence violated the ICCPR and the Supremacy Clause. The court rejected the defendant's argument, noting that although the U.S. Supreme Court discussed the ICCPR in *Roper v. Simmons*, 543 U.S. 551, 578 (2005), it was in the context of rejecting the death penalty for juvenile offenders, not life imprisonment for juvenile offenders. The Louisiana court emphasized that the U.S. Supreme Court in *Roper* had in fact affirmed the defendant's life without benefits sentence. The court

[100] 272 Kan. 894, 1056 (Kan. 2001), *overruled on other grounds by State v. Marsh*, 278 Kan. 520 (Kan. 2004).
[101] *Id*.
[102] 794 P.2d 1177, 1990 Kan. App. LEXIS 453, *6-10 (Kan. Ct. App. 1990) (unpublished).
[103] *Id*. at *9.
[104] *Simmons v. Commonwealth of Kentucky*, 191 S.W.3d 557, 567 (Ky. 2006) (citing *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001)).
[105] *Janakakis-Kostun v. In re Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999).
[106] *Id*. at 851.
[107] *Id*.
[108] 944 So. 2d 660, 662-64 (La. Ct. App. Oct. 25, 2006).

added that when the United States ratified the ICCPR, it reserved the right "to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws . . . including such punishment for crimes committed by persons below eighteen years of age."[109]

Maryland

The Maryland Supreme Court has considered international human rights law in the death penalty context. In a 1984 decision, the court refused to invalidate the state's juvenile death penalty statute on constitutional grounds.[110] Although the court noted that the ICCPR and the American Convention "have called for the abolition of capital punishment of juveniles," it contrasted their provisions with the practice of states and decided that it was "unable to conclude that society's contemporary standards of decency have rejected capital punishment of juveniles."[111]

Massachusetts

The Massachusetts Supreme Judicial Court in *Adoption of Peggy* held that the CRC did not prohibit the termination of a father's parental rights and the adoption of his child without his consent.[112] Although the court held that the convention did not apply to Massachusetts courts because the United States had not ratified it, the court nonetheless applied the CRC and held that the proceedings complied with the CRC provisions.[113]

Michigan

Two dissenting justices of the Michigan Supreme Court have relied on international human rights law to support their positions. In *State v. Davis*, a 2005 decision, a dissenting justice disagreed with the majority's decision that a prior conviction in Kentucky for a single offense did not bar a second prosecution in Michigan.[114] The justice took issue with the majority's reliance on what she deemed outdated U.S. Supreme Court case law on the Double Jeopardy Clause and invoked the ICCPR in support of her argument.[115]

In an earlier case, a dissenting justice disagreed with the majority's decision upholding a Michigan statute that required two religious schools to close for failure to comply with a teacher certification requirement.[116] To support her interpretation of the First Amendment's Establishment Clause, the justice cited the UDHR for the proposition that "parents should have the prior right, and primary role, in directing the education of their children[.]"[117]

Mississippi

Only after the U.S. Supreme Court decision in *Roper v. Simmons*, 543 U.S. 551 (2005) have Mississippi courts given any weight to international human rights law. In a 2003 habeas petition, *McGilberry v. State*, the Mississippi Supreme Court rejected the petitioner's arguments under the

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[109] *Id*. (internal quotations and citations omitted).
[110] *Trimble v. Maryland*, 300 Md. 387 (Md. 1984).
[111] *Id*. at 423.
[112] 436 Mass. 690 (2002).
[113] *Id*. at 699-700.
[114] 695 N.W.2d 45, 54-55 (Mich. 2005) (Kelly, J., dissenting).
[115] *Id*. (observing that "international law recognizes that multiple prosecutions by separate nations violate fundamental human rights" and citing the ICCPR).
[116] *Sheridan Road Baptist Church v. Michigan*, 426 Mich. 462, 516 (Mich. 1986) (Riley, J., dissenting).
[117] *Id*. at 537 n.30.

ICCPR, invoking Senate reservations and noting that the treaty did not bar the state from executing a juvenile offender.[118] After the U.S. Supreme Court's decision in *Roper*, however, the Mississippi Supreme Court remanded the case to the circuit court with instructions that it re-sentence the defendant to life imprisonment without parole.[119]

In a 2004 opinion in *Dycus v. State*[120] the Mississippi Supreme Court also rejected the defendant's argument that the ICCPR barred the juvenile death penalty. The court indicated no willingness to consider international law: "[T]his is an appeal concerning a crime committed in the State of Mississippi and heard by a Mississippi state court. [The defendant] has cited no applicable laws in the United States nor in Mississippi where international law has been applied to a death penalty case in a state court. The issue is without merit."[121]

The U.S. Supreme Court overturned and remanded *Dycus* on appeal[122] in light of the Court's decision in *Roper*. The Mississippi Supreme Court called for supplemental briefs from the parties, and both sides agreed that Dycus should be resentenced to life in prison without parole.[123] Justice Michael Randolph made clear that he concurred only because his "oath and loyalty to th[e] office and the law require[d] [him] to comply with the mandate of the U.S. Supreme Court in *Roper*."[124] His concurrence was joined by five other justices. Justice Randolph drew upon Justice Antonin Scalia's criticism of the majority opinion in *Roper* as "legally flawed, lack[ing] valid reasoning and def[ying] historic precedent," and he emphasized that "[i]f personal whims or beliefs are besetting the Constitution, and ignoring the rule of law, then those culpable of such conduct should either recuse themselves from such cases, or consider the honorable path chosen by former Justice Harry A. Blackmun . . . [who] when faced with such a dilemma declared, 'I no longer shall tinker with the machinery of death.'" Justice Randolph "respectfully urge[d] the Supreme Court to exercise judicial restraint, as the function of all courts is to adjudicate, not to legislate." He added that "[c]ourts are charged with the responsibility to interpret, not create law."[125]

In a 2005 case, *Jordan v. State*, the petitioner sought post-conviction relief, alleging that his attorneys were ineffective because they failed to raise various international treaties as defenses to imposition of the death penalty.[126] The petitioner cited the ICCPR, CAT, CERD, American Convention, and ICESCR, claiming that those treaties should be enforced under the Supremacy Clause.[127] The court "unhesitatingly acknowledged" the U.S. Supreme Court's decision in *Roper v. Simmons*, but noted that the petitioner was 18 years of age—"and only 81 days from his 19th birthday"—and therefore "decline[d] to rely on international law, covenants and treaties in determining whether the death penalty is appropriate."[128]

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[118] *McGilberry v. Mississippi*, 843 So. 2d 21, 32 (Miss. 2003).
[119] *McGilberry v. State*, 2005 Miss. LEXIS 598, 2000-DR-00343-SCT (Miss. Sept. 22, 2005).
[120] 875 So. 2d 140, 168-69 (Miss. 2004).
[121] *Id*. at 168-69.
[122] *Dycus v. Mississippi*, 544 U.S. 901 (2005).
[123] *Dycus v. State*, 910 So. 2d 1100 (Miss. 2005).
[124] *Id*. at 1102 (Randolph, J., specially concurring).
[125] *Id*. (internal citations and quotations omitted).
[126] 918 So. 2d 636, 656 (Miss. 2005).
[127] *Id*.
[128] *Id*.

Missouri

The Missouri Supreme Court in *Simmons v. Roper* found that juvenile executions were prohibited by the Eighth and Fourteenth Amendments.[129] The court found it "of note," "although by no means dispositive," "that the views of the international community have consistently grown in opposition to the death penalty for juveniles."[130] The court referred to the CRC and to "other international treaties and agreements" that "expressly prohibit the practice."[131]

Nevada

As with most state courts, the Nevada Supreme Court has addressed international human rights law in the context of its death penalty jurisprudence. Although the court as a whole has at times displayed little patience with international law,[132] at least one justice, Robert Rose, has proven willing to consider human rights claims.

In *Servin v. State*[133] the Nevada Supreme Court relied on the Senate's reservation to the ICCPR to hold that the treaty did not prohibit American jurisdictions from executing juveniles, although it found other reasons to invalidate the sentence as applied to the defendant.[134] In his concurring opinion, Justice Rose argued that customary international law prohibited the execution of minors and thus provided a second basis for the majority's decision.[135] He considered and rejected the argument that the Senate's reservation to the ICCPR is invalid,[136] but then examined the work of international law scholars to support his conclusion that customary international law required that the defendant's sentence be commuted.[137]

Similarly, in *Domingues v. State*[138] a majority of the Nevada Supreme Court relied on the reservation to the ICCPR to reject the defendant's argument that the treaty barred the execution of minors.[139] Justice Rose dissented, arguing that the case should be remanded to allow the district court to determine whether the Senate's reservation is valid and, if not, whether the treaty would continue to bind the United States.[140] Chief Justice Charles Springer also dissented, arguing that the ICCPR is a binding treaty, and that the United States should not "join[] hands with such countries as Iran, Iraq, Bangladesh, Nigeria and Pakistan in approving death sentences for children."[141]

New Hampshire

The New Hampshire Supreme Court has relied on international human rights law to support its interpretation of parental rights under the state constitution.[142] In *State v. Robert H.* a father

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[129] *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *aff'd*, 543 U.S. 551 (2005).
[130] *Id*. at 411.
[131] *Id*.
[132] *E.g*., *Colwell v. Nevada*, 118 Nev. 807, 815 (Nev. 2002) (holding that the argument that death by lethal injection violates the ICCPR is procedurally barred).
[133] 117 Nev. 775 (Nev. 2001).
[134] *Id*. at 787.
[135] *Id*. at 794 (Rose, J., concurring).
[136] *Id*.
[137] *Id*. at 795-96.
[138] 114 Nev. 783 (Nev. 1998).
[139] *Id*. at 785-86.
[140] *Id*. at 786-87 (Rose, J., dissenting).
[141] *Id*. at 786 (Springer, C.J., dissenting).
[142] 118 N.H. 713 (N.H. 1978), *overruled in part by In re Craig T.*, 147 N.H. 739 (N.H. 2002).

challenged termination of his parental rights on grounds of neglect.[143] After a discussion of the constitutional right of parents to assume the primary role in their children's upbringing, the court quoted from the ICCPR and the ICESCR in support of its conclusion that "[t]he family and the rights of parents over it are held to be natural, essential, and inherent rights within the meaning of [the] New Hampshire Constitution."[144]

New Jersey

New Jersey courts have had little occasion to consider human rights law. In *Sojourner A. v. New Jersey Department of Human Services*, the Supreme Court of New Jersey summarily rejected arguments by amici curiae that the New Jersey statute that established a "family cap" in New Jersey's welfare program violated international norms related to birth-status discrimination.[145] In *ACLU v. County of Hudson*, a suit to compel counties that held detainees for the Immigration and Naturalization Service in their jails to disclose information on detainees, the New Jersey Appellate Division found that "questions of whether and the extent to which international law guarantees have been denied to the INS detainees are not before us," but acknowledged that it must "construe State statutes and such federal laws as may come before [it] agreeably to any treaties to which the United States may be a party, for treaties are the supreme law of the land."[146] However, the international law issues had not been developed sufficiently in the trial court to be preserved for appeal.

In a 1998 decision, *State v. Nelson*, the Supreme Court of New Jersey noted that international law did not require invalidation of New Jersey's death penalty, given that the United States had not subscribed to any human rights accord that invalidated the death penalty.[147] The New Jersey Supreme Court echoed that reasoning in *State v. Timmendequas*, finding again that customary international law did not require invalidation of the New Jersey death penalty.[148]

New York

New York courts have significant experience addressing international human rights law in both civil and criminal contexts. In a 1950 case, a New York trial court considered the UDHR in its decision prohibiting a labor union that had exclusive negotiating rights with a tavern from forcing the establishment to fire its female barmaids who were ineligible to join the union. The court condemned discrimination on the grounds of gender "as a violation of the fundamental principles of American democracy" and noted that provisions of the UDHR were "[i]ndicative of the spirit of our times," quoting articles 2 and 23, which protect equal rights and the right to work, free choice in employment, favorable work conditions, and protection against unemployment.[149]

In *Jamur Productions Corp. v. Quill*, a 1966 case concerned with the right of workers to strike, a lower court pronounced the provisions of the UDHR "precepts of ethical behavior" and analogized them to "doctrinal codes and commands of religious bodies and orders."[150] The court noted, however, that these "precepts" did not "yet entail judicial authority" and were "not in the

[143] *Id*. at 714.
[144] *Id*. at 716.
[145] 177 N.J. 318, 336 n.9 (N.J. 2003).
[146] 799 A.2d 629, 640 (N.J. Super. Ct. App. Div. 2002).
[147] 715 A.2d 281, 294 (N.J. 1998).
[148] 737 A.2d 55 (N.J. 1999).
[149] *Wilson v. Hacker*, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. Ct. 1950).
[150] 51 Misc. 2d 501, 509 (N.Y. Sup. Ct. 1966).

texture of known categories of actions available here, despite the growth of regard and concern for redress of tortious wrongs."[151]

A 1972 decision by the New York Court of Appeals considered whether "children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life."[152] The court found that the state constitution "does not confer or require legal personality for the unborn" and affirmed the Appellate Division's order, remanding the case to the trial court to enter a declaratory judgment "sustaining the validity of the statute" that outlined "[j]ustifiable abortional act[s]."[153]

In his dissenting opinion, Judge Adrian Burke argued that "our laws should protect the unborn," pointing to the UN Convention against Genocide, "which forbids any Nation or State to classify any group of living human beings as fit subjects for annihilation."[154] He concluded that "the butchering of a foetus [sic] under the present law is inherently wrong, as it is an illegal interference with the life of a human being of nature."[155]

In a 1979 decision a lower court addressed international human rights law in a discovery dispute. The court considered whether to allow the issuance of letters rogatory to a court in the Soviet Union to take the testimony of a party.[156] The court noted that letters rogatory are the least favored method of disclosure and added that denying alleged inheritance distributees in the Soviet Union the right to pursue their inheritance by appearing in New York court violated the Helsinki Accords, an international human rights treaty signed by both countries.

The court quoted extensively from the Helsinki Accords, including the portion that guarantees U.S. and Soviet compliance with international human rights principles: "In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound."[157] The court denied the petitioner's motion to take testimony by means of letters rogatory.

In 1984 another lower court demonstrated its willingness to accept the UDHR as a source of legal obligation.[158] The court in *Beck v. Manufacturers Hanover Trust Company* recited the Act of State doctrine, which bars American courts from inquiring into the validity of the public acts of a foreign sovereign on its own soil, but opined in a footnote that the Act of State doctrine would not apply "for acts in gross violation of accepted standards of international law."[159] The court pointed to the Second Circuit's decision in *Filartiga v. Peña-Irala*, which drew upon "universally

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[151] *Id*.
[152] *Byrn v. New York City Health & Hospitals Corp*., 31 N.Y.2d 194, 199, 201 (N.Y. 1972).
[153] *Id*. at 199, 203.
[154] *Id*. at 206-08.
[155] *Id*. at 208.
[156] *In re Estate of Vilensky*, 424 N.Y.S.2d 821 (N.Y. Surrog. Ct. 1979).
[157] 424 N.Y.S.2d at 824-25 (internal quotations and citations omitted).
[158] *Beck v. Manufacturers Hanover Trust Co*., 125 Misc. 2d 771 (N.Y. Sup. Ct. 1984).
[159] *Id*. at 774 n.5.

accepted norms of the international law of human rights." The court in *Beck* suggested in *dicta* that violations of the UN Charter and the UDHR may be actionable in American courts.[160]

A few years later, in *State v. Scutari*, a lower court again considered the applicability of international human rights law. The defendants, accused of criminal trespass, argued that they were justified in remaining in a U.S. Congressman's office after closure to protest U.S. aid to El Salvador, given its human rights violations.[161] In their defense, defendants testified and called witnesses to testify that the law of the United States incorporates international law, as well as constitutional law and treaties. According to the defendant's expert in international law and human rights, continued U.S. aid to the government of El Salvador violated the Geneva Accords. The court "acknowledge[d] that international law is part of United States Law."[162] But the court concluded that the "defendants offered no proof that the Congressman's vote would have any immediate impact on the continued funding" of the government of El Salvador; therefore, the defendants' actions did not constitute "an emergency measure that could reasonably have been thought to accomplish the goal of changing United States policy."[163]

North Carolina

The North Carolina courts have expressed little patience with international human rights law in the criminal context. In *State v. Smith*, a 2002 death penalty case, the North Carolina Supreme Court admitted that "state law must yield when it is inconsistent with or impairs the policy" of treaties, but held, with little reasoning, that the ICCPR did not prohibit the defendant's execution.[164] The court summarily rejected the defendant's arguments that the long delay between sentencing and execution and the conditions of death row inmates constituted "cruel or degrading treatment or punishment" and "arbitrary deprivation of life" in violation of the ICCPR.[165] Subsequent North Carolina Supreme Court decisions reference *Smith* to dismiss in conclusory fashion international law arguments in death penalty cases.[166]

In *State v. Thompson*, a 2004 death penalty case, the North Carolina Supreme Court went a step further in explaining its reasoning in dismissing international human rights law arguments. The court refused to address the defendant's ICCPR argument on the grounds that it did not have the duty to apply international law even if state laws were in conflict.[167] That same year the Court of Appeals rejected an ICCPR-based argument on the grounds that the treaty is non-self-executing.[168] And a year later, in *State v. Duke*, the North Carolina Supreme Court again rejected a defendant's argument that the North Carolina capital sentencing statute violated international law. The court noted, without further explanation, that it had rejected this issue, among others, in the past and "decline[d] to depart from . . . prior precedent."[169]

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[160] *Id*. (citing 630 F.2d 876, 885 (2d Cir. 1980)).
[161] 560 N.Y.S.2d 943 (N.Y. Dist. Ct. 1990).
[162] *Id*. at 946.
[163] *Id*.
[164] 352 N.C. 531, 566 (N.C. 2002).
[165] *Id*.
[166] *State v. Williams*, 355 N.C. 501, 585-86 (N.C. 2002); *State v. Bell*, 359 N.C. 1, 43 (N.C. 2004).
[167] 359 N.C. 77, 126 (N.C. 2004) ("[W]e acknowledge that notions of international justice are not always consistent with our state and nation. We recognize that our foremost task is to uphold the Constitutions of the United States and the State of North Carolina . . . . To that end, we exercise judicial restraint and decline to consider the general principles of international law raised by defendant.").
[168] *State v. Bruton*, 600 S.E.2d 49, 55-56 (N.C. Ct. App. 2004).
[169] 360 N.C. 110, 143 (N.C. 2005).

In 2006, in *State v. Allen*, the North Carolina Supreme Court again cited *Smith* to reject the defendant's argument that the ICCPR prohibits the arbitrary deprivation of life. The court determined that, given the U.S. reservation, the ICCPR did not prohibit the defendant's execution.[170] The court also rejected the defendant's argument that the length of time and the conditions under which he expected to be detained while appealing his conviction and sentence violated article VII of the ICCPR. The court noted that article VII condemns torture and reasoned that allowing the defendant to appeal his conviction and sentence was not "torturous."[171] The court held that "[w]e simply cannot find a violation of defendant's rights merely because he chooses to subject himself to the rigors of judicial review."

The reluctance of North Carolina courts to confront international law has also manifested itself outside the criminal context. In *Gaspersohn v. Harnett County Board of Education*, the amicus curiae on behalf of the plaintiff urged the Court of Appeals to declare that the UN Charter prohibits corporal punishment. As the following conclusory statement suggests, the court was unwilling to consider international law: "The United States Supreme Court in *Ingraham* did not mention the United Nations Charter or the application of international law. We do not believe we should hold that international law made applicable to North Carolina by the United Nations Charter proscribes corporal punishment."[172]

North Dakota

In *Riemers v. Anderson*[173] the North Dakota Supreme Court refused to permit a plaintiff to prosecute a civil claim against law enforcement officials for violations of the ICCPR. The court adopted the Second Circuit's reasoning in *Flores v. Southern Peru Copper Corporation*,[174] explaining that the Senate's declaration that the ICCPR is not self-executing means that "this treaty does not create a private cause of action in United States courts."[175] The North Dakota Supreme Court also stressed the plaintiff's failure to draw its "attention to any decisions construing or applying the covenant" as a basis for the dismissal.[176]

Ohio

In several cases before Ohio courts, defendants have unsuccessfully attempted to invalidate the Ohio death penalty statute as inconsistent with various treaties and customary international law.[177]

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[170] 360 N.C. 297, 318 (N.C. 2006).
[171] *Id.*
[172] 75 N.C. App. 23, 35 (N.C. Ct. App. 1985). The United States Supreme Court in *Ingraham* held that the Eighth Amendment which forbids cruel and unusual punishment does not apply to corporal punishment in schools.
[173] 680 N.W.2d 280, 286 (N.D. 2004).
[174] 343 F. 3d 140 (2d Cir. 2003).
[175] 680 N.W.2d at 286 (quoting *Flores*, 343 F. 3d at 164 n.35).
[176] *Id.* at 287; *see also Riemers v. O'Halloran*, 678 N.W.2d 547, 550 (N.D. 2004) (holding that the plaintiff had failed to provide "any supportive reasoning or citations to relevant authorities showing that the [ICCPR] was either violated or applicable" to his argument that prosecution witnesses were not immune from suit).
[177] *State v. Keene*, Case No. 14375, 1996 Ohio App. LEXIS 4048, at *178-80 (Ohio Ct. App. Sept. 20, 1996) (discussing the ICCPR, OAS Charter and the UN Charter); *State v. Steffen*, App. No. C-930351, 1994 Ohio App. LEXIS 1973 (Ohio Ct. App. May 11, 1994) (discussing the American Declaration of the Rights and Duties of Man and customary international law); *State v. Greer*, Case No. 15217, 1992 Ohio App. LEXIS 5477, at *23-24 (Ohio Ct. App. Oct. 28, 1992) (discussing the American Declaration).

The Ohio Supreme Court's decision in *State v. Phillips* is representative of the reasoning in these cases. In *Phillips* the court observed that the American Declaration does not mention the death penalty, and the Senate ratified the OAS Charter with the reservation that none of its obligations would violate principles of federalism codified in the U.S. Constitution.[178] The Ohio Court of Appeals in *State v. Skatzes* ruled that Ohio's death penalty statutes, which do not violate due process and which are not imposed in a racially discriminatory manner, are consistent with customary international law.[179]

In *State v. Conway*, Conway brought a petition for post-conviction relief, challenging his death sentence.[180] Conway argued that the trial court erred in failing to appoint and fund an expert witness on international law to demonstrate that his convictions and sentence violated customary international law guaranteed by the UDHR, ICCPR, and the American Declaration. The Court of Appeals rejected Conway's arguments, noting that the state statute granting post-conviction relief only provided for appointment of counsel, not a right to expert witnesses.[181]

International human rights arguments had more success in one civil case. An Ohio Court of Common Pleas relied on the CRC in *In re Julie Anne* to prohibit a child's mother from smoking tobacco in her presence.[182] The court noted that the convention was "the most universally accepted human rights document in the history of the world," and "create[d] obligations for signatory governments to ensure children's right to the highest attainable standard of health."[183] The court also emphasized "that under the CRC, which has been ratified by the United States, courts of law**,** and state legislatures, administrative agencies have a duty as a matter of human rights to reduce children's compelled exposure to tobacco smoke."[184] The court's reasoning may be flawed, however, as the United States has not in fact ratified the CRC (but merely its optional protocols).

Oklahoma

Only one Oklahoma court has addressed international human rights law. In *Valdez v. State*[185] Valdez, a Mexican national, submitted a subsequent application for post-conviction relief on the grounds that he was not notified of his rights under article 36 of the Vienna Convention on Consular Relations, which provides foreign nationals detained in the United States a right to consular notification and assistance. Valdez cited the International Court of Justice's decision in *F. R. G. v. United States*, which found that the United States, through the state of Arizona, had violated the Vienna Convention when it failed to notify two German nationals convicted of a crime of their rights under article 36.[186]

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[178] *State v. Phillips*, 74 Ohio St. 3d 72, 103-04 (Ohio 1995) (discussing the American Declaration and the OAS Charter).
[179] *State v. Skatzes*, 2003 Ohio 516, 2003 Ohio App. LEXIS 865, at *182-84 (Ohio Ct. App. Jan. 31, 2003) (discussing the ICCPR, CERD, and CAT).
[180] 2006 Ohio 6219, 2006 Ohio App. LEXIS 6192, at *P14 (Ohio Ct. App. Nov. 28, 2006).
[181] *Id*. at *P15.
[182] 121 Ohio Misc. 2d 20 (2002). *But see Rodgers v. Ohio Dept. of Rehabilitation & Correction*, 91 Ohio App. 3d 565 (1993) (rejecting without discussion a *pro se* prisoner litigant's claims against the Ohio corrections department for alleged violations of the ICCPR, the UDHR, and the Helsinki Final Act).
[183] 121 Ohio Misc. 2d at 41.
[184] 121 Ohio Misc. 2d at 47.
[185] 46 P.3d 703 (Ct. Crim. App. Ok. 2002).
[186] *Id*. at 707-08.

Valdez argued that the Court of Criminal Appeals should grant him relief on the basis of *F. R. G. v. United States* and noted that the United States is bound by international treaties, had signed the UN Charter, and ratified the Optional Protocol to the Vienna Convention, requiring compliance with the decisions of the ICJ. In its amicus brief the government of Mexico echoed Valdez's arguments, claiming that courts in the United States cannot provide a remedy to German nationals that is not equally applicable to non-Germans without violating U.S. obligations under CERD.[187] Oklahoma countered these arguments, noting that the U.S. Constitution's Supremacy Clause "does not convert violations of treaty provisions into violations of constitutional rights."[188] The Court of Criminal Appeals rejected Valdez's international law arguments on the grounds that these claims were available to him from the time of his arrest and could have been raised in his first post-conviction application.[189]

Oregon

The Oregon Supreme Court has drawn upon international human rights law in deciding a number of cases. In a 1949 decision, *Namba v. McCourt*, the Supreme Court of Oregon referred to article 55 of the UN Charter to support its declaration that the Oregon Alien Land Law violated the Equal Protection Clause of the Fourteenth Amendment.[190]

The Oregon Supreme Court's 1981 decision in *Sterling v. Cupp* is often cited as an example of how a state court can use international human rights law to provide interpretive guidance for state constitutional protections.[191] In *Sterlin*g, the plaintiffs, male inmates of the Oregon State Penitentiary, sued to enjoin prison officials from assigning female guards to duties that involved frisking male prisoners or supervising them in showers.[192] The prisoners invoked a number of state and federal constitutional provisions in support of their claims, including article I, section 13 of the Oregon constitution, which prohibits the treatment of prisoners with "unnecessary rigor."[193] To determine the meaning of "unnecessary rigor," the court examined a variety of sources, including international legal standards for the treatment of detainees in the UDHR, the ICCPR, and the European Convention on Human Rights.[194] The court carefully explained that "[t]he various formulations in these different sources in themselves are not constitutional law" but rather "contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in article I, section 13."[195]

In *Humphers v. First Interstate Bank* the Supreme Court of Oregon considered whether the plaintiff had stated a claim for damages in alleging that her former physician revealed her identity to a daughter she had given up for adoption.[196] The plaintiff argued, inter alia, that her former doctor's disclosure of confidential information was an invasion of privacy and a breach of his contractual obligation to keep her identity secret. In considering the definition of privacy, the court looked, inter alia, to various law review articles, including an article that referred to the

[187] *Id*. at 708 n.21.
[188] *Id*. at 708.
[189] *Id*. at 709-10.
[190] 204 P.2d 569, 604 (Or. 1949).
[191] 290 Ore. 611 (Or. 1981).
[192] *Id*. at 613.
[193] *Id*. at 614 n.1; *see also* Oregon Constitution art. 1 § 13.
[194] *Sterling*, 290 Ore. at 622 n.21.
[195] *Id*. at 622.
[196] 298 Ore. 706 (Or. 1984).

right to privacy in international human rights documents and quoted the relevant provisions of the UDHR and the European Convention on Human Rights.[197]

Pennsylvania

Pennsylvania trial courts have considered human rights law in considering the right to education and the death penalty. In *Commonwealth v. Sadler* a trial court reviewed the conviction of a 15-year-old youth to determine, inter alia, whether the state had violated the Pennsylvania constitution by failing to provide the defendant schooling while in custody because he was certified to be tried in adult court.[198] The court noted that the right to education is established under the UDHR and is fundamental to American democracy and found that a "boy in custody, regardless of his status under the criminal law, is still a child and entitled to the education rights of all children."[199] The judge determined that the separate classification of youths certified to be tried in adult court was a violation of the Equal Protection Clause and Pennsylvania statutes.[200]
In *Pennsylvania v. Sattazahn* the petitioner sought post-conviction relief for his death sentence, arguing that the court's failure to instruct the jury that its life-sentencing option was statutorily defined as life without possibility of parole violated U.S. constitutional law, as well as "United States international human rights treaty obligations against arbitrary deprivation of life and cruel, inhuman, or degrading treatment or punishment."[201] The court dismissed the claim, finding that the petitioner failed to raise it on direct appeal and therefore waived it.

Tennessee

Tennessee courts have grappled with international human rights law in the context of criminal appeals, usually in death penalty cases. In *State v. Odom*[202] the defendant in a capital case invoked the ICCPR, CERD, and CAT to argue that "(1) customary international law and specific international treaties prohibit capital punishment; and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty once it has been abolished."[203] The Supreme Court of Tennessee began its analysis with the observation that "the defendant has cited no decision of any court accepting his arguments." It then signaled its willingness to follow federal pronouncements on international law by adopting the logic of the Sixth Circuit in *Buell v. Mitchell*,[204] where the Sixth Circuit rejected the argument that the American Declaration and the ICCPR invalidated death penalty statutes in the United States.[205] The *Odom* court stressed in particular that international human rights treaties were not self-executing, that Senate reservations to these treaties were valid, and that the treaties did not stand for a customary international legal prohibition on the death penalty.[206]

In *State v. Faulkner* the Tennessee Court of Criminal Appeals ruled nearly identically, disavowing any competence even to pronounce on the content of customary international law and citing with approval the following passage from *Buell*: "We hold that determination of whether customary international law prevents a State from carrying out the death penalty, when the State

[197] *Id*. at 713, n.7.
[198] 3 Phila. 316, 1979 Phila. Cty. Rptr LEXIS 92 (Comm. Pleas Ct. 1979).
[199] *Id*. at 330-31.
[200] *Id*.
[201] 2006 Pa. Dist. & Cnty. Dec. LEXIS 104, No. 2194-89, *68 (Comm. Pleas Ct. June 16, 2006).
[202] 137 S.W.3d 572 (Tenn. 2004).
[203] *Id*. at 597.
[204] 274 F. 3d 337 (6th Cir. 2001).
[205] *Odom*, 137 S.W.3d at 598-99.
[206] *Id*. at 599-600.

otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it is their constitutional role to determine the extent of this country's international obligations and how best to carry them out."[207]

In another case the Tennessee Supreme Court refused to stay an execution to allow an allegedly mentally ill defendant to pursue relief in the Inter-American Commission on Human Rights.[208] The court declared, "As a general rule, international agreements, even those benefiting private parties, do not create rights privately enforceable in domestic courts," and that only agreements "where such rights are contemplated in the" text itself do so.[209] It then denied that either the American Declaration or the American Convention created judicially cognizable private rights.[210] The court further observed that any decision by the Inter-American Commission, even if pursuant to a binding treaty, would constitute merely a "recommendation" and thus would not bind Tennessee courts.[211]

The Court of Criminal Appeals displayed more willingness to address the merits of an international human rights claim in its discussion of a defendant's double jeopardy defense based on the ICCPR in *State v. Carpenter*.[212] The court found that the plaintiff, who challenged a successive prosecution in Tennessee after a conviction in Ohio, "correctly point[ed] out that a properly ratified treaty is the supreme law of the land."[213] But the court held that the ICCPR does not prohibit prosecutions by different sovereigns, and "in ratifying the ICCPR . . . [t]he Senate wished to preserve the ability for the federal government and states to successively prosecute a person under the 'dual sovereignties' exception to the Fifth Amendment double jeopardy bar."[214] The court noted that the Senate's reservations invalidate any argument that international law does not recognize states in a federal system as different sovereigns.[215]
In a final case the Tennessee Court of Criminal Appeals refused to find that the defendant had been denied effective assistance of counsel for his counsel's failure to raise purported violations of the UDHR, CAT, ICCPR, ICESCR, CERD, CEDAW, American Convention, and American Declaration.[216]

Texas

Texas courts have addressed international human rights law in a variety of contexts. The Texas Court of Criminal Appeals in *Hinojosa v. Texas* refused to set aside a defendant's death sentence

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[207] *State v. Faulkner*, No. W2001-02614-CCA-R3-DD, 2003 Tenn. Crim. App. LEXIS 836, at *96-97 (Tenn. Crim. App. Sept. 26, 2003) (quoting *Buell v. Mitchell*, 274 F. 3d 337, 375-76 (6th Cir. 2001)) (internal quotations omitted).
[208] *Thompson v. State*, 134 S.W.3d 168, 174-76 (Tenn. 2004).
[209] *Id*. at 174.
[210] *Id*. at 175.
[211] *Id*.
[212] 69 S.W.3d 568, 578-79 (Tenn. Crim. App. 2001).
[213] *Id*. at 578.
[214] *Id*. at 579 n.4.
[215] *Id*. at 578-79. The Court took care to explain that the federal government could not enter into an agreement that inhibited states' ability to punish intrastate violence without overstepping Tenth Amendment bounds. *Id*. at 579 n.4. *See also State v. Thomas*, 158 S.W.3d 361, 391-93 (Tenn. 2005) (reaffirming its decision in *Carpenter* and dismissing defendant's claim that his state court trial violates the ICCPR because defendant's federal charges arise from the same criminal event).
[216] *Cauthern v. Tennessee*, 145 S.W.3d 571, 596 (Tenn. Crim. App. 2004).

pursuant to the UN Charter.[217] The court held that, generally speaking, "individuals do not have standing to bring suit based on an international treaty when sovereign nations are not involved in the dispute."[218] After an analysis of the Charter's "meaning and purpose," the court held that the document did not "establish individually enforceable rights."[219] Moreover, the court held that the Charter does not mandate the abolition of the death penalty.[220] In a recent case the Court of Criminal Appeals rejected a defendant's argument that his death sentence violated the CAT, ICCPR, or Supremacy Clause of the U.S. Constitution, reasoning that the Senate filed reservations to both treaties stating that they did not prohibit the United States from imposing capital punishment consistent with the Constitution.[221]

In an unpublished opinion in *Townsend v. Texas*, the defendant appealed his conviction for the misdemeanor offense of harassment for repeatedly calling a woman after she asked him to stop and after the police department sent him a letter requesting that he stop.[222] He argued that the statute under which he was convicted was unconstitutionally vague and overly broad, violated U.S. treaty obligations, and violated *jus cogens* international law under the ICCPR. The defendant also contended that the federal, state, and county governments violated his rights under the ICCPR and CAT by, inter alia, stealing his inheritance, bringing false charges, placing him under surveillance and in solitary confinement, torturing him while in jail, attempting to assassinate him, and "acting in reference to the Appellant as totalitarian states generally act."[223] The Court of Appeals declined to address these arguments, reasoning that "appellant's complaints [did] not attack the validity of the judgment" and were "inappropriate on appeal." The court rejected the defendant's claims relating to *jus cogens* international law pursuant to the ICCPR, because he presented no arguments on the issue.[224]

In *Dubai Petroleum Company v. Kazi*, the family of a citizen of India killed while working on an oil rig off the coast of the United Arab Emirates brought a wrongful death suit.[225] Under Texas law, suits for wrongful death are permissible if the decedent's country of citizenship has "equal treaty rights" with the United States. To determine whether India has equal rights with the United States, the Texas Supreme Court looked to the provisions of the ICCPR, on which the plaintiffs relied, to determine whether it conferred equal treaty rights between India and the United States. The court interpreted article 14(1) of the ICCPR as "requir[ing] all signatory countries to confer the right of equality before the courts to citizens of all other signatories."[226] The court quoted from a comment by the Human Rights Committee, explaining that the ICCPR "not only guarantees foreign citizens equal treatment in the signatories' courts, but also guarantees them

[217] 4 S.W.3d 240 (Tex. Crim. App. 1999).
[218] *Id*. at 252.
[219] *Id*.
[220] *Id*.
[221] *Sorto v. State*, 173 S.W.3d 469, 490 (Tex. Crim. App. 2005).
[222] 1999 Tex. App. LEXIS 9561, No. 14-96-01571-CR (Tex. App. Dec. 30, 1999).
[223] *Id*. at *10-11.
[224] *Id*. at *7-8, *12.
[225] 12 S.W.3d 71 (Tex. 2000); *see also Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 261-62 (Tex. App. 1999) (discussing the ICCPR in the context of equal treaty rights in a negligence suit where subject matter jurisdiction was at issue).
[226] *Id*. at 82.

equal access to these courts."[227] The court cited the Human Rights Committee's comment in rejecting the defendants' contention that article 14(1) does not confer "equal treaty rights."[228]

Utah

The Utah Supreme Court used the ICCPR to help define constitutional standards for treatment of prisoners in *Bott v. DeLand*.[229] The plaintiff, a prisoner, suffered severe health problems after prison physicians failed to diagnose him correctly. He argued that physicians had subjected him to "unnecessary rigor" in violation of the Utah constitution.[230] The plaintiff appealed the trial court's limitation on the damages he recovered. In upholding the damages limitation, the court drew on the UDHR and the ICCPR to determine what constituted abusive conditions in prisons and to decide whether the treatment the plaintiff had endured qualified as such under the constitution's "unnecessary rigor" provision.[231]

Washington

Washington courts have interpreted and applied human rights treaties in several decisions involving its penal statutes. In an unpublished opinion, *Washington v. Berry*, the defendant argued that a life sentence without parole violated his right under the ICCPR to a prison term with rehabilitation, not punishment, as its goal.[232] The Court of Appeals rejected the defendant's argument, stressing that the ICCPR "speaks of the goal of penitentiary systems in general and not what can or cannot be done with individual prisoners." It invoked the Senate's reservation to that provision of the ICCPR, which insists that the provision "does not diminish the goals of punishment, deterrence and incapacitation as additional legitimate purposes."[233] The Court of Appeals also rebuffed a defendant's efforts to use the ICCPR to procure a lighter sentence in *In re Haynes*.[234] The petitioner argued that the state imposed a heavier penalty on him than the penalty available at the time of the crime's commission, in violation of the covenant. The court disagreed on the facts, but also noted in *dicta* the possibility that the ICCPR is not self-executing "and therefore does not apply to the states."[235]

In a 1973 civil case the Washington Supreme Court relied in part on the freedom of movement guarantee in the UDHR to support its holding that the Washington constitution prohibited Seattle's one-year residency requirement on applicants for civil service positions.[236] The court mentioned the UDHR in a background discussion of the freedom of movement in Anglo-American law.[237]

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[227] *Id*.
[228] *Id*.
[229] 922 P.2d 732 (Utah 1996), *overruled in part by Spackman v. Board of Educ*., 16 P.3d 533 (Utah 2000).
[230] *Id*. at 735.
[231] *Id*. at 740.
[232] Case No. 40293-5-I, 1998 Wash. App. LEXIS 1525, at *17 (Wash. Ct. App. Oct. 26, 1998) (finding that the Persistent Offender Accountability Act, which mandated a sentence of life without the possibility of parole for certain offenders, did not violate the ICCPR).
[233] *Id*. at *18 (internal quotations omitted); *see also State v. Russ*, 969 P.2d 106 (Wash. Ct. App. 1998) (published in part).
[234] 100 Wn. App. 366 (Wash. Ct. App. 2000).
[235] *Id*. at 379-80, 380 n.31; *see also State v. Stone*, No. 30616-6-II, 2005 Wash. App. LEXIS 1734 (Wash. Ct. App. July 19, 2005) (unpublished) (pointing to the Senate reservations to reject defendant's argument under the ICCPR).
[236] *Eggert v. Seattle*, 81 Wash. 2d 840, 841 (Wash. 1973).
[237] *Id*.

West Virginia

In *Pauley v. Kelly* the West Virginia Supreme Court, addressing the constitutionality of a financing scheme for public schools, invoked the UDHR in support of its holding that "education is a fundamental right of every American."[238] The court cited the UDHR in its review of other state and federal courts' analyses of the right to education, pointing to the UDHR as part of the "embarrassing abundance of authority" on the topic.[239]

[238] 162 W. Va. 672, 679, 708-09 (W. Va. 1979).
[239] *Id*. at 679.

III. Conclusion

Recommendations for a State Court Human Rights Strategy

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

As one scholar noted, while courts have proven "reluctant to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms."[240] Scholars have repeatedly argued that "[t]his 'indirect incorporation' of international human rights law continues to be a promising approach warranting greater attention and increased use by human rights advocates."[241]

State court litigators should therefore consider using international human rights standards as interpretive guides for state constitutional and statutory rights whenever strategically possible. Invoking international human rights law as an interpretive guide, while relying on state law for the rule of decision, has several advantages. It insulates decisions from review by the U.S. Supreme Court and makes them more resistant to removal to federal court.[242] State courts can thus safely develop their own jurisprudence of international human rights without the possibility that federal courts will intervene and frustrate the project altogether. An "indirect incorporation" approach also allows state courts to circumnavigate around the self-execution doctrine and reservations to treaties that otherwise may limit treaties' impact. These limitations are less relevant when state courts are not asked to apply treaties as governing law.

Moreover, the development of a jurisprudence in which human rights law plays a subsidiary but important interpretive role may encourage state courts, which have limited familiarity with such law, to examine international sources of obligation more frequently. As state courts become more familiar with international human rights law, they may prove more willing to adjudicate a violation of international human rights law standing alone, without having to rely on analogous

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

[241] Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 19 (1993); *see also* Martha F. Davis, *Lecture: Int'l Hum. Rts. & U.S. Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 428-31 (2000).

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

standards in state law for the rules of decision. And over time, as international human rights principles become more integrated into state law, courts will define rights more broadly and will hold government accountable for enforcing those rights, expanding opportunity for all Americans.

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