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NO PAPERS? YOU CAN'T HAVE WATER: A CRITIQUE OF LOCALITIES' DENIAL OF UTILITIES TO UNDOCUMENTED IMMIGRANTS

Azadeh Shahshahani*
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ABSTRACT

Access to utility services is a crucial part of a person's ability to live and make a home in a particular place. For those who are denied service by the local agency or company that provides public utilities—like electricity and water—there are very few ways to achieve a decent and dignified life in that locality. Even in the twenty-first century, some households in the United States face the risk of going without electricity or running water in their homes because of their national origin or immigration status. In Alabama, utility service providers have declined to provide service to applicants who cannot provide a Social Security Number (SSN) or specific identity documents that are not available to undocumented immigrants. At least two cities in Georgia have similar policies. The practice of denying utility services to individuals who cannot provide a SSN violates U.S. federal law and is contrary to international human rights norms and obligations. In this Article, we will discuss two approaches to this problem. First, we will discuss options for challenging these policies under U.S. law. The Privacy Act may be utilized to challenge state and local government policies that require SSN disclosure for utility service, while the Fair Housing Act (FHA) provides a basis to challenge any government or private utility provider based on the disparate impact of these policies on noncitizens and certain racial groups. Second, we will analyze how such utility service denials violate international human rights treaties and norms regarding security of the person, adequate standards of living, the right to water, and the right to equal treatment. Together, these domestic and

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international legal authorities provide a basis for immigrants' rights and human rights advocates to challenge these policies in court and lobby against the adoption of such policies.

INTRODUCTION

Access to utility services is a crucial part of a person's ability to live and make a home in a particular place. For those who are denied service by the local agency or company that provides public utilities—like electricity and water—there are very few ways to achieve a decent and dignified life in that locality. Some households might be fortunate enough to find a rental unit where the landlord provides the utility service. Otherwise, the individuals and families are forced to either move to a different place or go without utility service in their homes.

Even in the twenty-first century, some households in the United States face the risk of going without electricity or running water in their homes because of their national origin or immigration status. In Alabama, utility service providers have declined to provide service to applicants who cannot provide a Social Security Number (SSN) or specific identity documents that are not available to undocumented immigrants.¹ Human Rights Watch reports that some Alabama families lost utility service to their homes or were even forced to relocate to another state as a result of these policies.² At least two cities in Georgia, LaGrange and Calhoun, have similar policies.³

Families who are unable to comply with a city utility provider's SSN requirement have very few options to obtain housing within the city.⁴ When no adult member of the household is able to contract for utility services, the family must look for rental housing where the landlord provides the utility services or the utility account is in someone else's name. However, should that arrangement fall through, these families would be forced to leave the city or risk going without utility service to their homes.

¹ See, e.g., HUMAN RIGHTS WATCH, NO WAY TO LIVE: ALABAMA'S IMMIGRANT LAW 14–16 (2011), http://www.hrw.org/sites/default/files/reports/us1211ForUpload_2.pdf.

² *Id.*

³ *Georgia Utility Service Application*, LAGRANGE, <https://harris.lagrange-ga.org/utilitydocuments/Utility%20Application%20Form.pdf> (last visited Jan. 24, 2017); *Establish/Discontinue Service*, CITY OF CALHOUN, GA, <http://www.cityofcalhoun-ga.com/utilities/customer-service/establishing-service/> (last visited Jan. 24, 2017).

⁴ The observations in this paragraph are drawn generally from the authors' experience working with undocumented clients.

The practice of denying utility services to individuals who cannot provide a SSN violates U.S. federal law and is contrary to international human rights norms and obligations. In this Article, we will discuss two approaches to this problem. First, we will discuss options for challenging these policies under U.S. law. The Privacy Act may be utilized to challenge state and local government policies that require SSN disclosure for utility service, while the Fair Housing Act (FHA) provides a basis to challenge any government or private utility provider based on the disparate impact of these policies on noncitizens and certain racial groups. Second, we will analyze how such utility service denials violate international human rights treaties and norms regarding security of the person, adequate standards of living, the right to water, and the right to equal treatment. Together, these domestic and international legal authorities provide a basis for immigrants' rights and human rights advocates to challenge these policies in court and lobby against the adoption of such policies.

I. DOMESTIC LAW ARGUMENTS

This Part will discuss arguments against the SSN requirement based on U.S. law. First, we will analyze whether the Privacy Act of 1974 prohibits state utility agencies from denying services based on an applicant's refusal to disclose her SSN. Second, we will analyze how the SSN policy might be challenged under the Fair Housing Act using the disparate-impact theory recently upheld by the U.S. Supreme Court.⁵ Finally, we will discuss the comparative risks and benefits of each approach, along with other factors that should inform advocacy strategies.

A. *Privacy Act and Required Disclosure of SSNs*

The Privacy Act of 1974 includes a provision that severely restricts state and local governments' authority to require individuals to disclose their SSNs.⁶ The Privacy Act primarily prescribes detailed limitations on the solicitation and use of personal information by the federal government. However, § 7 of the Privacy Act makes it "unlawful for any federal, state, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security

⁵ *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

⁶ *Overview of the Privacy Act*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/opcl/social-security-number-usage> (last updated July 16, 2015).

number.”⁷ There are two exceptions: 1) if the disclosure is required by federal statute, or 2) if the agency’s records system required a SSN pursuant to a regulation or statute adopted before January 1, 1975.⁸

Although benefits may not be denied based on an applicant’s refusal to disclose, an agency may request that applicants voluntarily disclose their SSN. The Privacy Act requires any local government agency to provide applicants with certain information about a request for SSN disclosure.⁹ First, the agency must indicate whether the disclosure is voluntary or mandatory pursuant to one of the above exceptions.¹⁰ Second, the agency must indicate the statutory authority for the request, and inform the applicants about how their SSN will be used.¹¹

The following sections will discuss how each of the Privacy Act exceptions and requirements might apply to a local utility agency. First, it is important to note that § 3 of the Privacy Act defines an “individual” as a U.S. citizen or lawful permanent resident (LPR).¹² Local governments may attempt to use this provision to argue that the Privacy Act does not apply to undocumented persons, and the agency may deny benefits to an undocumented person for failure to provide a SSN. In order to distinguish between a citizen or LPR—whose refusal to disclose is protected by the Privacy Act—and an undocumented person who does not have a SSN, the agency would have to make an inquiry into every applicant’s immigration status. Except as permitted by federal law, local agencies have no authority to inquire about an individual’s immigration status, and are particularly barred from regulating a person’s residence in the jurisdiction based on immigration status.¹³ However,

⁷ Privacy Act of 1974 § 7(a)(1), Pub. L. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a).

⁸ *Id.* § 7(a)(2).

⁹ *Id.* § 7(b).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* § 3(a)(2) (codified as amended at 5 U.S.C. § 552a(a)(2)). The Trump administration has taken the position that individuals who are neither citizens nor LPRs should be excluded “from the protections of the Privacy Act regarding personally identifiable information.” Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). This executive order could affect the success of the pre-emption argument in Privacy Act-based challenges to the SSN requirement. *See infra* note 13.

¹³ The federal government has the sole authority to regulate immigration, and state governments may not attempt to punish or otherwise regulate undocumented immigration. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012). In fact, “every federal court that has considered a locality’s attempt to regulate immigration by limiting access to housing for individuals who cannot prove citizenship or lawful residence has been found preempted.” *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1179 (M.D. Ala. 2011), *vacated as moot sub nom. Cent. Ala. Fair Hous. Ctr. v. Comm’r, Ala. Dep’t of Revenue*, No. 11-16114-CC, 2013 WL 2372302 (11th Cir. May 17, 2013). *See also*

the definition of “individual” in the Privacy Act could affect an undocumented person’s standing to challenge the utility denial in federal court.

1. Applicability of Privacy Act § 7 to Local Utility Providers

Advocates must be prepared to rebut arguments that § 7 of the Privacy Act does not apply to local utility providers. First, in localities where the utility service is privately owned, advocates must show that the utility provider is a “government agency” for purposes of the Privacy Act. Case law interpreting § 7 is generally scarce. The only federal court to rule on this issue is in the District of New Jersey, which has repeatedly held that a private entity can be subject to the Privacy Act if the state or local government has “sufficient control over and involvement in” the entity’s operations.¹⁴ In many municipalities in Alabama and elsewhere, a department of the municipal government provides and regulates utilities.¹⁵ But even if a private company were involved, the requirement of sufficient control and involvement is unlikely to be a significant hurdle; because of the highly regulated nature of public utilities, state or local government arguably always has sufficient control and involvement over a public utility provider to satisfy this criterion.¹⁶

Challenged utility agencies might also question whether state and local government agencies can be sued under the Privacy Act at all. There is a significant split among federal district and circuit courts as to whether private individuals may sue a state or local agency under the Privacy Act.¹⁷ The discrepancy arises because the Privacy Act was codified as a note to 5 U.S.C. § 552a, in a section of the United States Code that primarily deals with administrative procedure; for example, the federal Freedom of Information Act

Villas at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524 (5th Cir. 2013); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013).

¹⁴ Ingerman v. Del. River Port Auth., 630 F. Supp. 2d 426 (D.N.J. 2009), *citing* Krebs v. Rutgers, 797 F. Supp. 1246, 1254 (1992).

¹⁵ See, e.g., ALABAMA LOCAL GOV'T RECORDS COMM'N, MUNICIPALITIES: RECORDS DISPOSITION AUTHORITY 1-4 (2013), <http://www.archives.alabama.gov/officials/rdas/local/munRDA.pdf> (“In return for fees, municipalities may provide power, water, sewage, garbage and trash collection, and landfill services to residents, either directly or by contracting . . . with private service vendors. They administer these operations through either a municipal department or an incorporated or unincorporated board.”).

¹⁶ See Ala. Code § 37-1-32 (LexisNexis 2017). The statute grants the Public Service Commission authority to “inquire into the management of the business and . . . the manner and method in which business is conducted” by utility providers. *Id.* See also Ga. Code Ann. § 46-2-20 (2012) (granting broad powers to the Georgia Public Service Commission to regulate and control the operations of utility companies).

¹⁷ See *infra* notes 19–22 and accompanying text.

is included in the same section.¹⁸ Section 552a(a)(1) incorporates a definition of “agency” that only includes federal government entities.¹⁹ However, § 7 of the Privacy Act itself explicitly includes state and local governments.²⁰ Some courts have refused to apply the Privacy Act to state and local governments because of the conflicting definition of “agency” in § 552a(a)(1),²¹ or because § 7 of the Privacy Act “was never codified [and] remains in the statute only as a historical note.”²²

The Eleventh Circuit and district courts in Ohio, Pennsylvania, and New Jersey have recognized a private right of action against a state or local agency that violates § 7 of the Privacy Act.²³ However, the First, Second, Sixth, Seventh, and Ninth Circuits have all held either that the Privacy Act does not apply to state and local governments at all, or that there is no private right of action against state and local governments under the Privacy Act.²⁴

Although there appears to be an overwhelming consensus among circuits that the Privacy Act does not allow private individuals to sue state and local governments, there is notable variation in the courts’ reasoning and outcome depending on the factual nature of the cases. Many of the cases interpreting § 7 of the Privacy Act merely involve vague accusations that a state entity violated a complainant’s privacy.²⁵ Other cases involve factual situations that are easily distinguished from the utility denials in Alabama and Georgia.²⁶

¹⁸ 5 U.S.C. § 552a (2012).

¹⁹ 5 U.S.C. § 552a(a)(1) (2012).

²⁰ Privacy Act of 1974 § 7(a)(1), Pub. L. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a note).

²¹ See, e.g., *Schmitt v. City of Detroit*, 395 F.3d 327, 331 (6th Cir. 2005); *Pennyfeather v. Tessler*, 431 F.3d 54, 56 (2d Cir. 2005).

²² *Stoianoff v. Comm’r of Motor Vehicles*, 107 F. Supp. 2d 439, 445 (S.D.N.Y. 2000) *aff’d sub nom. Stoianoff v. Comm’r of Dep’t of Motor Vehicles*, 12 F. App’x 33 (2d Cir. 2001).

²³ See *Schwier v. Cox*, 340 F.3d 1284, 1287–92 (11th Cir. 2003) (upholding a § 1983 challenge by individuals who refused to provide their SSN on state voter registration applications); *Ingerman v. Del. River Port Auth.*, 630 F. Supp. 2d 426, 440–41 (D.N.J. 2009); *Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F. Supp. 1313, 1319–20 (N.D. Ohio 1978); *Stollenwerk v. Miller*, No. Civ.A. 04-5510, 2006 WL 463393 (E.D. Penn. Feb. 24, 2006).

²⁴ See, e.g., *Perez-Santos v. Malave*, 23 F. App’x 11, 12 (1st Cir. 2001); *Pennyfeather*, 431 F.3d at 56; *Schmitt*, 395 F.3d at 329; *Polchowski v. Gorris*, 714 F.2d 749, 752 (7th Cir. 1983); *Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999).

²⁵ See, e.g., *Perez-Santos*, 23 F. App’x at 12 (“[pro se appellant] did not make any developed argument”); *Polchowski*, 714 F.2d at 752 (Seventh Circuit dismissing a case challenging disclosure of criminal history); *St. Michael’s Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (dismissing a challenge brought by hospitals, not individuals, alleging violation of a laundry list of statutes and constitutional right to privacy); *Huling v. City of Los Banos*, 869 F. Supp. 2d 1139, 1154 (E.D. Cal. 2012) (considering another laundry list of claims against city police by plaintiff who was involuntarily committed); *Logan v. Matveevskii*,

Other courts, particularly in cases involving fundamental rights or sympathetic plaintiffs, have applied Privacy Act § 7 to state and local governments and recognized a private right of action. The Eleventh Circuit, which includes Alabama and Georgia, held in *Schwier v. Cox* that the Privacy Act applies to states and confers a §1983 right of action.²⁷ *Schwier* invalidated Georgia's requirement of a SSN for voter registration, and the Eleventh Circuit has since recognized a private right of action under the Privacy Act to challenge the state's requirement of a SSN for a firearms license.²⁸ Similarly, a Pennsylvania district court enjoined state officials from denying a handgun permit to a U.S. Army soldier who refused to disclose his SSN.²⁹ Another successful Privacy Act challenge was brought against New Jersey by a senior citizen who applied for a discount on bridge tolls and was denied for failing to disclose his SSN.³⁰

In contrast to unsuccessful cases that only alleged vague objections to disclosure of personal information, successful cases specifically challenged the denial of a benefit for failure to disclose a SSN—exactly what the language of the Privacy Act proscribes.³¹ This suggests a higher likelihood of success in a suit against a state or local government for denying utility service to applicants who refuse to provide a SSN. Further, the known incidents of utility denial occurred within the Eleventh Circuit, which does apply the Privacy Act to state and local governments.³² The Privacy Act is therefore an important tool for advocates who are fighting against the denials of utility services. In the

57 F. Supp. 3d 234, 274 (S.D.N.Y. 2014) (“Plaintiff also makes various references throughout his submissions to the Privacy Act of 1974, 5 U.S.C. § 552a. It is not entirely clear on what basis and against whom Plaintiff is attempting to assert this cause of action.”); *McFarlane v. Roberta*, 891 F. Supp. 2d 275, 286 (D. Conn. 2012) (pro se plaintiff who vaguely referenced “breach of her rights to confidentiality ‘under the privacy act’”); *Pritzker v. City of Hudson*, 26 F. Supp. 2d 433, 441 (N.D.N.Y. 1998) (suit against police for requesting plaintiff’s military records).

²⁶ See, e.g., *Pennyfeather*, 431 F.3d at 56 (city employee whose SSN was disclosed during an employment hearing); *Schmitt*, 395 F.3d at 328 (city sent tax-related correspondence in which SSN was mistakenly printed on the outside of the envelope); *Ditman*, 191 F.3d at 1026 (upholding SSN requirement for acupuncture license, which is permitted by a section of the 1996 Welfare Reform Act specific to professional licenses, 42 U.S.C. § 666(a)(16)).

²⁷ *Schwier*, 340 F.3d at 1287–92.

²⁸ *Camp v. Cason*, 220 Fed. App’x 976, 981 (11th Cir. 2007).

²⁹ *Stollenwerk v. Miller*, No. Civ.A. 04-5510, 2006 WL 463393 (E.D. Penn. Feb. 24, 2006).

³⁰ *Ingerman v. Del. River Port Auth.*, 630 F. Supp. 2d 426 (D.N.J. 2009).

³¹ Cf. *Stollenwerk v. Miller*, 2006 WL 463393, at *4 (observing that the Eleventh Circuit’s reasoning in *Schwier* is persuasive in a case involving “the collection of Social Security numbers” rather than “dissemination” of the numbers or other information).

³² See *Schwier v. Cox*, 340 F.3d 1284, 1287–92 (11th Cir. 2003).

following sections, we will use the incidents in Alabama to illustrate how the Privacy Act applies to utility denials.

2. *Determining Whether Utility Denials Violate the Privacy Act*

If the Privacy Act applies to a utility provider, determining whether a SSN requirement violates § 7 of the Privacy Act is usually simple. There are only two exceptions to § 7: 1) the exception for disclosures required by federal statute, and 2) the “grandfather exception” for disclosures that have been required since before January 1, 1975.³³

Under the first exception, state and local governments may deny benefits to an individual for failure to disclose a SSN as “required by federal statute.”³⁴ There is currently no federal statute that permits state and local governments to require a SSN in order to provide utility service. Challenged utility providers may claim that requiring a SSN for identity verification is permitted or required by the Fair and Accurate Credit Transactions Act of 2003 (FACTA).³⁵ FACTA is aimed at preventing identity theft, and applies to various financial institutions and creditors including utility companies.³⁶ However, FACTA does not specifically mandate or permit creditors to require SSN disclosures. Rather, utility providers must only follow regulations issued by the Federal Trade Commission regarding “red flags” for identity theft.³⁷ These regulations do not include any requirement to collect SSNs, nor do they permit utility providers to require SSNs.³⁸

The “grandfather exception” permits state and local governments to continue requiring SSN disclosure if their system of records has been in place since before January 1, 1975, and the disclosure was required pursuant to

³³ Privacy Act of 1974 § 7(a)(2), Pub. L. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a note).

³⁴ *Id.* § 7(a)(2)(A).

³⁵ Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified at 15 U.S.C. §§ 1681–1681x); see *Establishing/Discontinue Service*, CITY OF CALHOUN, GA, <http://www.cityofcalhoun-ga.com/utilities/customer-service/establishing-service/> (last visited Jan. 24, 2017).

³⁶ See Red Flag Program Clarification Act of 2010 § 2, 15 U.S.C. 1681m(e)(4), Pub. L. 111-319, 124 Stat. 3457 (Dec. 18, 2010). The Act defines “creditor” as an entity that “obtains or uses consumer reports” and “furnishes information to consumer reporting agencies,” as most utility providers do. *Id.*

³⁷ See Fair and Accurate Credit Transactions Act of 2003 § 114.

³⁸ See Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63718-01 (2007). We are unaware of any other federal statute that would arguably permit state and local government agencies to require SSN disclosure for utility service.

regulation or statute enacted prior to that date.³⁹ This is a narrow exception, as the challenged agency must prove that a regulation or statute specifically required the disclosure of SSNs prior to 1975.⁴⁰ However, even if the utility agency is able to show that the grandfather exception applies, there still may be an avenue to challenge the SSN requirement under the Privacy Act. A utility agency whose SSN requirement is permitted by the grandfather exception must still comply with provisions of the Privacy Act, discussed in the next section, that require the agency to inform the applicant about the legal authority for the SSN requirement and how the SSN will be used.

3. *Privacy Act Requirements for Voluntary SSN Disclosure*

The provisions of the Privacy Act that we have discussed pertain to mandatory disclosures of a SSN. State and local governments are still free to request a SSN, as long as the disclosure is voluntary and rights and benefits are not denied for failure to disclose.⁴¹ However, requests for voluntary SSN disclosure must still conform to certain Privacy Act requirements. Section 7 of the Privacy Act provides that “any local government agency which requires an individual to disclose his SSN shall inform the individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.”⁴²

If a state or local government purports to require a SSN without complying with the requirements of the Privacy Act, it is likely that undocumented individuals and even some documented individuals will be effectively deprived of benefits. An undocumented immigrant who sees that the application for utility service seems to require a SSN might reasonably assume that the SSN is mandatory, and thus be deterred from applying. Immigrants are also adversely affected by an agency’s failure to comply with the requirement to inform applicants about how their SSN will be used. Even lawfully present immigrants with valid SSNs may be hesitant to disclose their SSNs because they may feel uneasy about why the government wants their information.⁴³

³⁹ See Privacy Act of 1974 § 7(a)(2)(B).

⁴⁰ See *id.*

⁴¹ *Schwier v. Cox*, 340 F.3d 1284, 1287–92 (11th Cir. 2003).

⁴² Privacy Act of 1974 § 7(b).

⁴³ On the tendency among Latino immigrant communities to be more reluctant to provide personal information to government, see, for example, J. Lester Feder, *Barriers to Health Care for Hispanics*, NEWSWEEK (June 7, 2010), <http://www.newsweek.com/barriers-health-care-hispanics-73467>; Brian Stelter, *U.S. Census Uses Telenovela to Reach Hispanics*, N.Y. TIMES (Sept. 22, 2009), <http://www.nytimes.com/2009/09/23/business/23telemundo.html?pagewanted=all&r=0>.

Therefore, advocates for immigrants' rights should ensure that the state or local agency complies with the Privacy Act requirement to inform applicants of the voluntary nature of and reasons for the disclosure.

B. Fair Housing Act and Disparate Impact

Because access to utility services significantly affects access to housing, utility denials can also be challenged under the Fair Housing Act. The Fair Housing Act makes it unlawful to "make unavailable or deny" a dwelling to someone based on national origin, or to discriminate based on national origin "in the provision of services or facilities in connection" with the sale or rental of a dwelling.⁴⁴ Requiring a SSN for utility service has the effect of making most dwellings unavailable to noncitizens who lack a SSN, and discriminating against them in the provision of services connected with their dwellings.

Since there is rarely a public expression of discriminatory intent behind this type of policy, advocates are most likely to succeed by showing that the SSN requirement has a discriminatory effect on persons of various national origins, who are a protected class under the FHA. The U.S. Supreme Court recently confirmed that disparate-impact claims are cognizable under the FHA.⁴⁵ This section will discuss the legal standards for a disparate-impact challenge under the Fair Housing Act.

1. Relevant FHA Provisions

There are two Fair Housing Act provisions that may apply to a denial of utility services: the section about provision of services in connection with a dwelling,⁴⁶ and the section about making unavailable or denying a dwelling.⁴⁷ According to 42 U.S.C. § 3604(b), it is unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services or facilities in connection therewith*, because of race, color, religion, sex, familial status, or national origin."⁴⁸

In a press release regarding a settlement of a utility-denial case in Alabama, Housing and Urban Development (HUD) officials acknowledged that utility

⁴⁴ 42 U.S.C. § 3604 (2012).

⁴⁵ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

⁴⁶ 42 U.S.C. § 3604(b).

⁴⁷ *Id.* § 3604(a).

⁴⁸ *Id.* § 3604(b) (emphasis added).

services are included in “the provision of services in connection with a dwelling.”⁴⁹ HUD’s Assistant Secretary for Fair Housing and Equal Opportunity emphasized: “Equal access to utility services is fundamental to fair housing.”⁵⁰ The settlement agreement, which arose out of allegations that the utility company discriminated against Latino applicants, included a requirement that the company “develop and publish a list of alternative eligibility or identification documents that do not rely solely on Social Security numbers and clarify which identity documents are required to qualify for service.”⁵¹ Advocates should point to this agreement to demonstrate that HUD interprets the FHA to prohibit SSN requirements for utility services.

Advocates may also argue that the utility denials are prohibited under § 3604(a), which makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁵² A utility provider’s refusal to provide services to an individual effectively makes most dwellings unavailable to that individual; the individual may not own a home, and may not rent most dwellings except dwellings whose landlord provides utilities. Therefore, the FHA’s “otherwise make unavailable” language arguably applies to utility denials.

There is only one reported case, which is from the District of Arizona, regarding the application of the “make unavailable” provision to utility denials. The court reasoned that, while the denial of utility services may make a home less habitable, this does not make the home “unavailable” or constitute a “denial of housing.”⁵³ However, that case arose from a quite unusual factual situation, in that a religious sect dominated the town government and the plaintiff was denied utility service as retaliation for leaving the church.⁵⁴ Also, after appealing, the plaintiff in that case ultimately won a multimillion-dollar

⁴⁹ Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD and Huntsville Utilities Reach Agreement Settling an Allegation of Discrimination Against Prospective Hispanic Residential Customers (Aug. 9, 2012), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-123A.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 42 U.S.C. § 3604(a) (2012) (emphasis added).

⁵³ *Cooke v. Colorado City*, 934 F. Supp. 2d 1097, 1112 (D. Ariz. 2013).

⁵⁴ *Id.* at 1100.

verdict.⁵⁵ This suggests that the “otherwise make unavailable” argument has a chance of succeeding, although advocates should be prepared to explain why the Arizona court’s “less habitable” reasoning does not apply.

2. *National Origin as a Protected Class*

A successful Fair Housing Act challenge requires the plaintiff to show not just that there was discrimination, but that the discrimination was directed against one of the protected classes enumerated in the FHA.⁵⁶ Because virtually everyone who lacks a SSN is a noncitizen, denial of utility services to people who lack a SSN constitutes discrimination based on national origin.⁵⁷ Further, if an area’s immigrant community is predominantly comprised of Latinos or members of another racial group, discrimination against people without SSNs may constitute discrimination based on race.

Proponents of the SSN requirement and other requirements for proof of immigration status will argue that discrimination based on immigration status is different from discrimination based on national origin.⁵⁸ Documented immigrants, these proponents might argue, have a SSN and thus will not be affected by the requirement. Proponents of the SSN requirement may argue that its only adverse effect is on undocumented immigrants specifically, who are not a protected class under the FHA.

To rebut these arguments, first it is important to note that not all immigrants are issued a SSN, even if they reside in the United States legally. SSNs are routinely issued only to noncitizens who are authorized to work in the United States (and thus required to pay into Social Security).⁵⁹ A noncitizen may lack a SSN if he is in the process of obtaining a work-authorized immigration status, or possesses lawful immigration status that does

⁵⁵ See Jim Dalrymple, *Family Wins Lawsuit Against Polygamous Towns, Gets Millions*, SALT LAKE TRIB. (Mar. 21, 2014, 11:11 AM), <http://www.sltrib.com/sltrib/news/57710092-78/cookes-family-thursday-walker.html.csp>.

⁵⁶ 42 U.S.C. § 3604(a)–(e).

⁵⁷ Cf. Press Release, U.S. Dep’t of Hous. & Urban Dev., *supra* note 49 (reporting allegations that utility company discriminated based on national origin by requiring SSN).

⁵⁸ See U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, *FAIR HOUSING – HOW TO DEAL WITH DISCRIMINATION* (2012), <http://www.acf.hhs.gov/orr/resource/fair-housing-how-to-deal-with-discrimination>.

⁵⁹ See SOC. SEC. ADMIN., PUB. NO. 05-10096, *SOCIAL SECURITY NUMBERS FOR NONCITIZENS* (2015), <http://www.ssa.gov/pubs/EN-05-10096.pdf>.

not include work authorization.⁶⁰ For example, an international student is lawfully present in the United States and may wish to obtain utility services for an apartment, but may not have a SSN. Depriving these noncitizens of utility service or other benefits constitutes discrimination based on their national origin.

Furthermore, a federal court has held that policies targeting undocumented immigrants may violate the FHA's ban on racial discrimination.⁶¹ Regardless of the intent behind the policy, excluding undocumented immigrants from housing has the effect of depriving those whose national origin is outside the United States, often Latinos, of "equal access to housing."⁶² The language of the FHA protects "'any person,' regardless of his immigration status."⁶³ Policies that have a disparate impact on a protected class, such as race or national origin, violate the FHA even if "the State was primarily discriminating against some other, non-protected group" like undocumented immigrants.⁶⁴

3. Discriminatory Effect

Before the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,⁶⁵ HUD regulations laid out the test for whether a housing-related policy has an impermissible disparate impact on a protected group.⁶⁶ Those regulations, however, were only promulgated as a response to the District Court's earlier decision in *Inclusive Communities* as a way to ensure that appropriate regulations regarding the evaluation of disparate-impact claims were in place; that is, those regulations did not precede the initial *Inclusive Communities* court challenge.⁶⁷ The impact of *Inclusive Communities*, as decided by the Supreme Court, on the validity of the regulations is thus unclear. The majority opinion mentions the disparate impact regulations only while reciting the procedural history of the case, while the dissent critiques both the regulations and the Court decision.⁶⁸ Until the

⁶⁰ SOC. SEC. ADMIN., PUB. NO. 05-10107, FOREIGN WORKERS AND SOCIAL SECURITY NUMBERS (2015), <https://www.ssa.gov/pubs/EN-05-10107.pdf>.

⁶¹ See *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1196 (M.D. Ala. 2011).

⁶² *Id.* at 1196.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

⁶⁶ 24 C.F.R. § 100.500(e)(1) (2014).

⁶⁷ *Inclusive Communities*, 135 S. Ct. at 2514.

⁶⁸ See *id.* at 2514, 2549.

legal status of the regulations is clarified, advocates should be prepared to demonstrate disparate impact under both the regulations and Supreme Court precedent.

a. Disparate Impact under the HUD Regulations

While *Inclusive Communities* was pending, HUD promulgated regulations that outline a three-part, burden-shifting test for the discriminatory effect of a housing policy.⁶⁹ The plaintiff must first make a prima facie case showing “that a challenged practice caused or predictably will cause a discriminatory effect.”⁷⁰ Then, the burden shifts to the defendant to prove that the policy “is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”⁷¹ Finally, the burden shifts back to the plaintiff, who may still prove discriminatory effect by showing that the defendant’s legitimate interests “could be served by another policy that has a less discriminatory effect.”⁷²

Initially, the burden is on the plaintiff to make out a prima facie case by showing that the challenged policy causes a discriminatory effect.⁷³ Under Eleventh Circuit precedent that would govern the SSN requirements in Alabama and Georgia, a plaintiff must show “that the decision has a segregative effect” or that “it makes housing options significantly more restrictive for members of a protected group than for persons outside that group.”⁷⁴ Utility denials based on SSN requirements make “housing options significantly more restrictive” for members of two protected groups—immigrants (national origin) and Latinos (race)—because a large percentage of those groups are effectively excluded from owning a home or renting most apartments. A showing of disparate impact requires empirical evidence of the segregative effect or disproportionate burden on members of a protected class.⁷⁵ For example, plaintiffs in Alabama challenged a policy banning undocumented immigrants from owning mobile homes by demonstrating both that most noncitizens in Alabama are Latino and that Latinos are

⁶⁹ 24 C.F.R. § 100.500(c).

⁷⁰ *Id.* § 100.500(c)(1).

⁷¹ *Id.* § 100.500(c)(2).

⁷² *Id.* § 100.500(c)(3).

⁷³ 24 C.F.R. § 100.500(c)(1) (2014); see DAVID H. CARPENTER, CONG. RESEARCH SERV., DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT (2015).

⁷⁴ *Bonasera v. Norcross*, 342 Fed. App’x 581, 585 (11th Cir. 2009) (citing *Hous. Investors, Inc. v. Clanton*, 68 F. Supp. 2d 1287, 1298 (M.D. Ala. 1999)).

⁷⁵ *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1197 (M.D. Ala. 2011), *vacated*, No. 11-16114-CC, 2013 WL 2372302 (2013); *Bonasera*, 342 Fed. App’x at 585.

overrepresented among mobile home owners in the state.⁷⁶ To show the discriminatory effect of utility denials, advocates should cite empirical evidence on the percentage of noncitizens in the jurisdiction who are Latino, and the percentage of dwellings in the area that are unavailable to them because of the utility denials.

Upon a prima facie showing of discriminatory effect, the burden shifts to the defendant to show that the policy furthers a “substantial, legitimate, nondiscriminatory interest.”⁷⁷ While some governments may follow Alabama’s lead in openly enacting policies that discriminate against immigrants,⁷⁸ most defendants’ stated justifications for their SSN requirements will likely have nothing to do with immigration.⁷⁹ Rather, a challenged agency may cite the need to run a background and credit check on the applicant or verify the applicant’s identity.⁸⁰

As long as the agency advances some kind of legitimate and nondiscriminatory interest, the burden shifts back to the plaintiff to show that this interest could be accomplished by a different means with a less discriminatory effect.⁸¹ Since all utility companies and agencies have a substantial interest in verifying applicants’ identity and creditworthiness, plaintiffs could point to other utility companies’ practices that do not require SSNs. Identity may be established by asking the applicant to show a passport from any country. Further, utility providers already have procedures in place for applicants with no credit history, such as requiring a guarantor or security deposit.⁸² If the lack of a SSN means that the agency is unable to check the applicant’s credit, the agency could address that interest in a less discriminatory way by requiring a security deposit.

The determination of disparate impact under the HUD regulations is highly fact-specific: the analysis and conclusion will vary significantly based on the

⁷⁶ *Magee*, 835 F. Supp. 2d at 1196.

⁷⁷ 24 C.F.R. § 100.500(c)(2) (2014).

⁷⁸ See HUMAN RIGHTS WATCH, *supra* note 1, at 33.

⁷⁹ See, e.g., Patricia Sullivan, *Undocumented Latinos and Their Families Sue After Evictions*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/local/virginia-politics/undocumented-latinos-and-their-families-sue-after-evictions/2016/05/23/f11a1a88-20e4-11e6-8690-f14ca9de2972_story.html.

⁸⁰ *Id.*

⁸¹ 24 C.F.R. § 100.500(c)(3).

⁸² See FED. TRADE COMM’N, CONSUMER INFORMATION: UTILITY SERVICES (2012), <http://www.consumer.ftc.gov/articles/0220-utility-services> (“If you are a new utility customer or if you have a poor payment history, the utility company may require you to pay a deposit or get a letter from someone who agrees to pay your bill if you don’t.”).

racial and ethnic makeup of the jurisdiction, the effect of each policy, and the agency's stated justification for the policy. Even though the policy intuitively has a disparate impact by limiting housing options for noncitizens and certain ethnic groups, plaintiffs must collect empirical evidence on the discriminatory effect. Assuming the challenged agency can advance some legitimate interest that the policy serves, plaintiffs must also research alternative ways to accomplish that interest.

b. Disparate Impact under Inclusive Communities

Although the Court mentioned the HUD regulations as part of the procedural history of the conflict, the decision in *Inclusive Communities* neither expressly approved nor disapproved of the regulatory three-part test discussed in the previous section.⁸³ Instead, the Court extensively discussed the analogy between disparate-impact claims under the FHA and under Title VII of the Civil Rights Act of 1964.⁸⁴ Under Title VII, which deals with employment discrimination, disparate-impact claims are cognizable but the employer may prevail by showing that there is a "business necessity" for the challenged policy.⁸⁵

Analogizing from its Title VII jurisprudence, the Court points out that disparate-impact liability should not be "imposed based solely on a showing of a statistical disparity," but rather should be targeted toward "removal of artificial, arbitrary, and unnecessary barriers."⁸⁶ Echoing the three-step process in the regulations, plaintiffs must first show not only a statistical disparity, but also "a defendant's policy or policies causing that disparity."⁸⁷ This "robust causality requirement" is aimed at shielding defendants from liability "for racial disparities that they did not create," but is a difficult hurdle for plaintiffs to clear.⁸⁸ Then, even if plaintiffs show that the defendant's policy caused a statistical disparity, the Court requires that defendants "be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest."⁸⁹

⁸³ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

⁸⁴ *Id.*

⁸⁵ *Id.* at 2512.

⁸⁶ *Id.* (internal quotation marks omitted).

⁸⁷ *Id.* at 2523.

⁸⁸ *Id.* at 2523–24.

⁸⁹ *Id.* at 2523.

Although the majority opinion echoes the first two steps of the regulatory burden-shifting test, it is silent on the third step: whether the plaintiff may still succeed by showing that the stated interest could be accomplished by less discriminatory means. Advocates may argue that the third step is implied by the analogy to Title VII and “business necessity.” If there is another way to accomplish the stated interest, then there is no “necessity” for the policy. Although the Fair Housing Act does not include a similar provision, advocates may also point to provisions in Title VII that create a burden-shifting test similar to that in the HUD regulations.⁹⁰ However, since the Court in *Inclusive Communities* relied heavily on the comparable language in the FHA and Title VII, it is less likely that courts will be willing to import Title VII law in the absence of a comparable FHA statutory provision.

Ultimately, the third step of the burden-shifting test is imperative to give effect to the FHA and to the recent Supreme Court decision upholding the possibility of disparate-impact claims. Utility providers and other challenged entities will rarely state a discriminatory intent, and will almost always be able to claim some nondiscriminatory purpose for the challenged policy.⁹¹ In order to protect the availability of disparate-impact liability, courts must permit plaintiffs to show that the challenged policy is not justified by “necessity” because there exists a less discriminatory alternative.

C. Strategies for Opposing the SSN Requirement

Deciding which of the above arguments to make or emphasize will depend primarily on whether the utility provider is a private company or public agency. Since the Privacy Act only applies to government agencies,⁹² the Privacy Act might not bar private utility providers from requiring SSNs. Advocates seeking to challenge a private utility company’s policy under the Privacy Act must convince the court to adopt the standard articulated by the District Court of New Jersey, which has repeatedly held that Privacy Act § 7 applies to private companies if the state or local government has “sufficient

⁹⁰ See 42 U.S.C. § 2000e-2(k) (2010) (permitting complainants to show availability of “an alternative employment practice” after a defendant demonstrates a business necessity).

⁹¹ Herb Weisbaum, *When Are Social Security Numbers Required?*, NBC NEWS (Apr. 17, 2006, 8:25 PM), http://www.nbcnews.com/id/12359845/ns/business-consumer_news/t/when-are-social-security-numbers-required/#.WBOTIzY0fiB.

⁹² 5 U.S.C. § 552.

control over and involvement in” the entity’s operations.⁹³ On the other hand, there is no question that the Fair Housing Act does apply to private utility companies.⁹⁴

Public utility agencies can be challenged under both the FHA and the Privacy Act. The Privacy Act argument has one major advantage: the policy can be challenged on its face, unlike the FHA challenge, which requires intensive factual development on the issue of disparate impact. Any federal court challenge should include both claims, but plaintiffs will be able to succeed more quickly and with much less effort if the case is decided on Privacy Act grounds. However, it is unclear whether the Privacy Act argument would succeed in court, especially outside the Eleventh Circuit, because of the shortage of developed case law regarding its application to state and local agencies. Moreover, although factually dependent, a respondent agency could quickly dispose of a Privacy Act challenge by showing that the SSN requirement is permitted by the Privacy Act’s grandfather exception.

For these reasons, plaintiffs should be prepared to develop evidence of disparate impact and present the more fact-intensive FHA claim in the event that their Privacy Act challenge fails. Plaintiffs may also seek the assistance of the federal Department of Housing and Urban Development, which may help them reach a quicker and more efficient resolution to a FHA claim. Unlike Privacy Act claims, which must be litigated in court, a FHA claim may be brought administratively to HUD’s office of Fair Housing and Equal Opportunity, which will conduct a preliminary investigation and make efforts at reconciliation between the parties.⁹⁵ Thus, if there are strong facts to support a FHA claim, plaintiffs may be able to resolve the issue entirely out of court. If a federal court challenge becomes necessary, though, advocates for the plaintiffs should be prepared to present arguments under both the Privacy Act and Fair Housing Act, bolstered by the significant international legal authorities discussed in the next Part.

⁹³ *Ingerman v. Del. River Port Auth.*, 630 F. Supp. 2d 426, 439 (D.N.J. 2009) *citing* *Krebs v. Rutgers*, 797 F. Supp. 1246, 1254 (1992). Due to the highly regulated nature of utility service provision, courts employing this standard would most likely hold that Privacy Act § 7 applies even to private utility companies.

⁹⁴ The FHA applies to all dwellings and bars private actors from discriminating, other than certain single-family homeowners and owners who reside in small multi-family dwellings. *See* 42 U.S.C. § 3603 (2012).

⁹⁵ *See* 24 C.F.R. § 103.1 (1997).

III. INTERNATIONAL LAW ARGUMENTS

Denying utility services to undocumented immigrants violates international human rights treaties and norms. We will begin this Part by examining interpretations of international legal standards that present a strong consensus that utility services, such as electricity and water, are either basic human rights or so intimately bound up in the exercise of basic human rights that they cannot be denied in any circumstance, much less on the basis of immigration status. Second, we will examine the fact that this international consensus has not affected U.S. government behavior so far. While doing so, we hope to provide practicing attorneys with not only an academic understanding of this issue, but also relevant case law and guidelines for presenting such claims in U.S. courts.

A. *International Human Rights Analysis of Utility Denials*

We will examine two rights in this section. The first is the “security of the person.” The second is “equal protection.” While both of these will be discussed more thoroughly below, we will provide working definitions here. Security of the person, broadly defined, is an umbrella term indicating that every person not only desires but deserves the ability to live a life that is more than “mere” existence, but is rather fundamentally fair, with the dignity befitting a human being.⁹⁶ This “dignity” concept is often used in the context of actions that deprive individuals of their health, such as government intrusion into women’s reproductive decisions⁹⁷ or cruel and unusual punishment in prisons.⁹⁸ Equal protection, more robustly, is the principle that every individual deserves similar, if not identical, access to and protection of the law.⁹⁹

1. *“Security of Person”*

Numerous international human rights documents have reiterated that “security of person” is a fundamental human right.¹⁰⁰ The first human rights document adopted internationally—which preceded the Universal Declaration

⁹⁶ Human Rights Committee on its One Hundred and Seventh Session, Organizational and other matters, Draft General Comment No. 35, art. 9, U.N. Doc. CCPR/C/107/R.3 (Jan. 28, 2013).

⁹⁷ *E.g.*, in *R. v Morgentaler*, [1988] 1 S.C.R. 30 (Can.), the Canadian Supreme Court held that § 251 of the Criminal Code, which had imposed penalties on performing abortions, violated a woman’s right to security of person under § 7 of the Canadian Charter of Rights and Freedoms.

⁹⁸ *Id.*

⁹⁹ *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 7 (Dec. 10, 1948).

¹⁰⁰ *See id.*

of Human Rights by about six months—was the Declaration of the Rights and Duties of Man.¹⁰¹ Article I of the Declaration of the Rights and Duties of Man reads that: “Every human being has the right to life, liberty, and the security of his person.”¹⁰² This language was adopted by Resolution 217 (III) of the U.N. General Assembly and thereafter made its way into Article 3 of the Universal Declaration of Human Rights (UDHR), which states that “[e]veryone has the right to life, liberty, and security of person.”¹⁰³ This fundamental right has reappeared several times in various human rights instruments. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states “[e]veryone has the right to liberty and security of person.”¹⁰⁴ Article 5(1) of the European Convention on Human Rights (ECHR) reiterates that point: “[e]veryone has the right to liberty and security of person.”¹⁰⁵ Finally, Article 6 of the African Charter on Human and Peoples’ Rights (the Banjul Charter) echoes this point: “[e]very individual shall have the right to liberty and to the security of his person.”¹⁰⁶

“Security of person” has proven to be a powerful legal tool in the opposition of inhumane, cruel, and degrading treatment. Jurists, while utilizing the UDHR as a whole, have seized upon the importance of “security of the person” to craft legal and policy arguments against all manner of inhumane, cruel, and degrading treatment.¹⁰⁷ They have done this by making the trio of rights to life, liberty, and the security of person as the entry through which all other rights are realized.¹⁰⁸ One of the best examples of this is the right to a

¹⁰¹ Inter-Am. Comm’n H. R. [IACHR], *American Declaration of the Rights and Duties of Man*, (May 2, 1948), <http://www.refworld.org/docid/3ae6b3710.html> [hereinafter *American Declaration of the Rights and Duties of Man*].

¹⁰² *Id.*

¹⁰³ Universal Declaration of Human Rights, *supra* note 99.

¹⁰⁴ International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

¹⁰⁵ Convention for the Protections of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

¹⁰⁶ Org. of African Unity [OAU], *African Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3/rev.5 (June 27, 1981), *reprinted in* 21 I.L.M. 58 (1982). The African Charter, also referred to as the Banjul Charter, was adopted in 1981 by the 18th Assembly of Heads of State and Government of the Organization of African Unity (OAU), the official body of African states. *Id.*

¹⁰⁷ *See* *Filártiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (finding that the UDHR is an authoritative statement of the international community); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (asserting that summary execution by a state is an international law violation which a judge uses to identify possible violations of the laws of nations).

¹⁰⁸ *See* U.N. HUMAN RIGHTS OFFICER OF THE HIGH COMM’R, FACT SHEET NO.2 (REV.1), THE INTERNATIONAL BILL OF HUMAN RIGHTS 3 (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

standard of living adequate for health, embodied in Article 25, because it is incomprehensible without first understanding Article 3's explicit prohibition against violations against the security of a person.¹⁰⁹

a. Standard of Living Adequate for Health and Well-Being

Utilities, and the resources that are made available to the people that use them, are seen internationally as a necessity for health.¹¹⁰ Fulfilling this right to health means that access to utilities cannot be denied. This concept was expressed directly in 2010 by the U.N. Human Rights Council (UNHRC).¹¹¹ Expanding upon UDHR Article 25(1), which states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services,”¹¹² the UNHRC concluded that the right to water was “inextricably related to . . . the right to life and human dignity.”¹¹³

The International Covenant on Economic, Social, and Cultural Rights¹¹⁴ (ICESCR) includes the most comprehensive article on the right to health in international human rights law. According to Article 12(1) of the ICESCR, State Parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” while Article 12(2) enumerates, by way of illustration, a number of “steps to be taken by the State Parties to achieve the full realization of this right,” including 12(2)(b) and the “improvement of all aspects of environmental . . . hygiene[.]”¹¹⁵ Additionally, the right to health is recognized, inter alia, in the U.N. Convention on the

¹⁰⁹ *Id.*

¹¹⁰ Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, para. 3, U.N. Doc. A/HRC/15/L.14 (Sept. 24, 2010), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G10/163/09/PDF/G1016309.pdf?OpenElement>.

¹¹¹ *Id.* The Human Rights Council is an inter-governmental body within the U.N. system made up of forty-seven States responsible for the promotion and protection of all human rights around the globe. *Id.*

¹¹² Universal Declaration of Human Rights, *supra* note 99, art. 25, ¶ 1.

¹¹³ Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9, at 3 (Oct. 6, 2010).

¹¹⁴ International Covenant on Economic, Social and Cultural Rights art. 11, ¶ 1, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. The International Covenant on Economic, Social and Cultural Rights is the main international treaty setting forth economic, social, and cultural rights. *Id.* Its sibling, the ICCPR, protects civil and political rights and freedoms. *Health and Human Rights, International Covenant on Economic, Social and Cultural Rights*, WORLD HEALTH ORG., http://www.who.int/hhr/Economic_social_cultural.pdf (last visited Feb. 20, 2017). The preambles of both covenants emphasize the indivisibility and interdependence of the two categories of rights. *See* ICESCR, *supra*, pmb1. Together, the UDHR and these two covenants constitute the International Bill of Human Rights. U.N. HUMAN RIGHTS OFFICER OF THE HIGH COMM’R, *supra* note 108.

¹¹⁵ *Id.* art. 12.

Elimination of All Forms of Racial Discrimination (CERD),¹¹⁶ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹¹⁷ and the Convention on the Rights of the Child (CRC).¹¹⁸ Article XI of the American Declaration on the Rights and Duties of Man further states that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”¹¹⁹ In the context of a developed nation, this requires access to utilities providing electricity for heat and light, as well as water for hygiene and sanitation.

International authorities have also recognized that access to adequate housing is crucial to a community’s health, and have called special attention to the housing situations of historically marginalized communities in developed countries. For example, the European Committee on Social Rights has repeatedly held that the European Social Charter is violated when Roma people, a historically marginalized community, are deprived of access to adequate housing, including water and electricity service.¹²⁰ While these opinions and the Revised European Social Charter are not binding on the United States, the opinions do establish that international legal principles of public health and equality require access to adequate housing.

b. Water

The right to water has been enunciated no less than nine times in various international instruments and declarations. The U.N. Millennium Declaration, adopted in 2000, identified the goal of “halv[ing] the proportion of people who

¹¹⁶ G.A. Res. 2106, International Convention on the Elimination of All Forms of Racial Discrimination (Mar. 7, 1966), art 5(c)(iv) guarantees “[t]he right to public health, medical care, social security and social services.”

¹¹⁷ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

¹¹⁸ U.N. Convention on the Right of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, (entered into force on Sept. 2, 1981) [hereinafter CRC]

¹¹⁹ *American Declaration of the Rights and Duties of Man*, *supra* note 101, art. 9.

¹²⁰ See, e.g., European Roma Rights Centre (ERRC) v. France, Complaint No. 51/2008, Eur. Comm. Soc. Rights, ¶ 46 (Oct. 10, 2009), <http://hudoc.esc.coe.int/eng/?i=cc-51-2008-dmerits-en> (“Article 31§1 guarantees access to adequate housing, which means a dwelling which . . . possesses all of the basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity”); European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No. 31/2005, Eur. Comm. Soc. Rights, ¶ 34 (Mar. 31, 2007), <http://hudoc.esc.coe.int/eng/?i=cc-51-2008-dmerits-en> (“The Committee recalls that Article 16 guarantees adequate housing for the family, which means a dwelling which . . . possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity; . . .”).

are unable to reach or to afford safe drinking water.”¹²¹ U.N. General Assembly Resolution 54/175, which dealt with the right of developing nations to become economically developed nations, affirms that all nations have a “right to clean water.”¹²² The United Nations took further steps in promoting the right to water in July 2010, when the U.N. General Assembly, in Resolution 64/292, recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”¹²³ The United Nations also called upon Member States to provide the resources, particularly to developing countries, necessary to secure this right for all.¹²⁴ In September 2010, Resolution 64/292 was affirmed by the Human Rights Council in Resolution 15/9.¹²⁵ Also noteworthy is the 1949 Geneva Convention relative to the Treatment of Prisoners of War, which includes the provision of adequate drinking water.¹²⁶

In General Comment 15, the U.N. Committee on Economic, Social and Cultural Rights maintains that a fair and humane interpretation of the Charter requires that all humans have a right to water.¹²⁷ The Special Rapporteur on the Promotion and Protection of Human Rights, El Hadji Guissé, agreed that “[r]ealization of the right to drinking water and sanitation” is required by the Charter.¹²⁸ The Charter guarantees a right to life, liberty and “security,” and these rights are not attainable without “access to safe water.”¹²⁹ The 2015 draft report of the Working Group on the Universal Periodic Review continues this theme by stating that the United States needs “to implement the human right to safe water and sanitation, ensuring this human right without discrimination for

¹²¹ U.N. Secretary-General, *Road Map Towards the Implementation of the United Nations Millennium Declaration*, ¶ 83, U.N. Doc. A/56/326 (Sept. 6, 2001).

¹²² The General Assembly “[r]eaffirms that, in the full realization of the right to development, inter alia: (a) The rights to food and clean water are fundamental human rights.” G.A. Res. 54/175, ¶ 12 (Feb. 15, 2000).

¹²³ G.A. Res. 64/292, ¶ 1 (Aug. 3, 2010).

¹²⁴ *Id.*

¹²⁵ *Id.*; Human Rights Council Res. 15/9, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010) [hereinafter H.R.C. Res. 15/9].

¹²⁶ Geneva Convention Relative to the Treatment of Prisoners of War arts. 20, 26, 29, 46, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135, <http://www.ohchr.org/english/law/prisonerwar.htm>.

¹²⁷ Comm. on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water, ¶ 1 E/C.12/2002/11 (Jan. 20, 2003) (“The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”).

¹²⁸ El Hadji Guissé (Special Rapporteur), *Realization of the Right to Drinking Water and Sanitation*, U.N., Econ. & Soc. Council, Comm. on Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/25 (July 11, 2005).

¹²⁹ U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006: BEYOND SCARCITY: POWER, POVERTY AND THE GLOBAL WATER CRISIS 4 (2006), <http://www.undp.org/content/dam/undp/library/corporate/HDR/2006%20Global%20HDR/HDR-2006-Beyond%20scarcity-Power-poverty-and-the-global-water-crisis.pdf> (quoting the U.N. Secretary General).

the poorest sectors of the population, including indigenous peoples and migrants.”¹³⁰ Citing public health concerns rather than a particular legal charter or agreement, organizations such as the World Health Organization have similarly recognized the importance of access to safe water and sanitation.¹³¹ Some scholars have also identified the 1997 U.N. Convention on Non-Navigational Uses of International Watercourses as containing an explicit right to water.¹³² Article 10 (2) states: “In the event of a conflict between uses of an international watercourse, it shall be resolved . . . with special regard being given to the requirements of vital human needs.”¹³³

These instruments describe what some scholars would categorize as “welfare” rights.¹³⁴ Other instruments, however, describe the right to water as a “liberty” right. The United States has signed two binding primary instruments under this “liberty” umbrella. The first is the 1979 CEDAW.¹³⁵ Among other provisions is Article 14, which states that “[all nations] shall ensure to . . . women the right . . . to enjoy adequate living conditions, particularly in relation to sanitation, electricity and water supply, transport and communications.”¹³⁶ Second, Article 24(2)(c) of the CRC states that “[p]arties shall pursue full implementation of [the right to the enjoyment of the highest attainable standard of health] and, in particular, shall take appropriate measures [to provide]. . . clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”¹³⁷ Even though the United States has not ratified these treaties, they provide in combination the grounds for a binding, customary international legal obligation for the United States.¹³⁸

¹³⁰ U.N. Human Rights Council, *Draft rep. of the Working Group on the Universal Periodic Review: United States of America*, UN Doc. A/HRC/WG.6/22/L.10 (May 21, 2015).

¹³¹ See WORLD HEALTH ORG., *THE RIGHT TO WATER* 6 (2003) (“Access to safe water is a fundamental human need and, therefore, a basic human right.”).

¹³² See Malgosia Fitzmaurice, *The Human Right to Water*, 18 *FORDHAM ENVTL. L. REV.* 537, 544 (2007). The author also notes that the Statement of Understanding attached to the Convention declares that in determining vital human needs in the event of a conflict between the uses of watercourses, “special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.” *Id.*

¹³³ G.A. Res. 51/229, at 7 (July 8, 1997).

¹³⁴ Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples’ Religious-Rights Claims to Water Resources*, 2 *ARIZ. J. ENVTL. L. & POL’Y* 81, 89–91 (2011).

¹³⁵ Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 *L. & INEQ.* 119, 120 (2010).

¹³⁶ CEDAW, *supra* note 117.

¹³⁷ CRC, *supra* note 118.

¹³⁸ Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties. See Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 1060 U.S.T.S. 993.

The right to water and other basic utilities is not restricted to these instruments, however, and numerous monitoring bodies have explained that the right to water, even when unmentioned, is implicit in various documents' intentions. The U.N. Human Rights Council, for instance, has concluded that the right to adequate standard of living, the right to health, and the right to life, among others, imply a right to sanitary drinking water.¹³⁹ The U.N. General Assembly, keeping in mind the Human Rights Council's conclusions,¹⁴⁰ acknowledged that its own goals were incomprehensible without first acknowledging that the right to water is an integral component of the realization of all human rights outlined by the United Nations.¹⁴¹ Following this show of support, the Human Rights Committee went further, saying that beyond mere protection, certain human rights, this among them, are accompanied by positive duties because, without ensuring all people certain basic necessities, the United Nations' political goals are meaningless.¹⁴² The Committee on Economic, Social, and Cultural Rights has relied on these determinations and gone still further, declaring that "[u]nder no circumstances shall an individual be deprived of the minimum essential level of water."¹⁴³ Even the Committee Against Torture, which monitors the implementation of the Convention Against Torture (CAT) prohibiting cruel, inhuman, and degrading treatment, has recognized instances of denials of access to water and sanitation as within the purview of CAT.¹⁴⁴

Many countries also individually recognize a fundamental human right to water, either through their domestic law or constitutions. The European Court of Human Rights has repeatedly and enthusiastically endorsed the right to water in its judicial proceedings.¹⁴⁵ And these are not simply unconnected

¹³⁹ Catarina de Albuquerque (Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/24 (2009).

¹⁴⁰ G.A. Res. 64/292, *supra* note 123.

¹⁴¹ *Id.*

¹⁴² Human Rights Comm., General Comment No. 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶¶ 1, 5, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

¹⁴³ Comm. on Economic, Social, and Cultural Rights, General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 56, U.N. Doc. E/C.12/2002/11 (2003).

¹⁴⁴ Comm. Against Torture, Conclusions and Recommendations of the Committee against Torture: Tajikistan, ¶ 20, U.N. Doc. CAT/C/TJK/CO/1 (2006).

¹⁴⁵ *See, e.g.*, Tadevosyan v Armenia, Eur. Ct. H.R. (App no 41698/04) (2008); Riad and Idiab v Belgium, Eur. Ct. H.R. (App nos 29787/03 and 29810/03) (2008); Eugen Gabriel Radu v Romania, Eur. Ct. H.R. (App

examples—more than thirty of the most recently adopted national constitutions specifically recognize the right to water, and nearly double that number of nations have adopted legislation to guarantee access to water.¹⁴⁶

Countries where this right already exists constitutionally have seen the greatest success in guaranteeing access to water. In Colombia, for instance, a woman who lived with her partner and their two children (aged eleven and five) in an area of extreme poverty, in a mid-size Colombian city, failed to pay her water bills.¹⁴⁷ The company stopped service, authorized by a regulation that considers lack of payment a breach of contract.¹⁴⁸ After a protracted battle, the Court found that disrupting the supply of water violated the explicit “constitutional right to water supply.”¹⁴⁹ Since cutting off service was a violation, the water company had a constitutional duty to reconnect.¹⁵⁰

Some countries have greatly expanded their citizens’ access to water even without constitutional enshrinement. India, for example, has recognized a right to water that is not found explicitly within its constitution’s text.¹⁵¹ While upholding the Indian government’s decision to construct over 3,000 dams on the river Narmada, the Indian Supreme Court stated in *Narmada Bachao Andolan v. Union of India*, that “[w]ater is the basic need for the survival of the human beings and is part of right to life and human rights as enshrined in Article 21 of the Constitution of India”¹⁵² In *A.P. Pollution Control Board v. Prof. M.V. Nayadu*, the Court held that the right to access to drinking water is fundamental to life and that the state has a duty under Article 21 to provide clean drinking water to its citizens.¹⁵³ In *M.C. Mehta v. Union of India*, the

no 3036/04) (2009); Marian Stoicescu v Romania, Eur. Ct. H.R. (App no 12934/02) (2009); Butan and Dragomir v Romania, Eur. Ct. H.R. (App no 40067/2006) (2008); Fedotov v Russia, Eur. Ct. H.R. (App no 5140/02) (2005); Dubetska and Others v Ukraine, Eur. Ct. H.R. (App no 30499/03) (2011); Melnik v Ukraine, Eur. Ct. H.R. (App no 72286/2001) (2006); Zander v Sweden, Eur. Ct. H.R. (App no 14282/88) (1993).

¹⁴⁶ See, e.g., S. AFR. CONST., 1996; Delhi Water Supply & Sewage Disposalundertaking & Anr. v. State of Haryana & Ors., (1996) 2 SCC 572 (India); Pilchen v. City of Auburn, No. 5:08-CV-1064, 2010 U.S. Dist. LEXIS 79379 (N.D.N.Y. Aug. 5, 2010).

¹⁴⁷ Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2009, D.C. Botogá, Sentencia T-546/09, Gaceta de la Corte Constitucional [G.C.C.] (p. 3) (Colom.).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 6–7.

¹⁵⁰ *Id.*

¹⁵¹ Philippe Cullet, *Right to Water in India Plugging Conceptual and Practical Gaps*, 17 INT’L J. HUM. RTS. 56, 61 (2013).

¹⁵² *Narmada Bachao Andolan v. Union of India*, (2000) AIR 2000 SCC 3751, ¶ 274 (India), <http://www.ielrc.org/content/c0001.pdf>.

¹⁵³ *A.P. Pollution Control Board II v. Prof. M.V. Nayudu and Ors.*, (2000) 3 SCALE 354, ¶¶ 3–4 (India), www.ielrc.org/content/e0010.pdf.

Supreme Court of India recognized that groundwater is a public asset, and that citizens have the right to the use of air, water, and earth as implicitly protected under Article 21 of the constitution.¹⁵⁴

Another successful defense of the right to water was another liberty-rights approach undertaken in the *Mosetlhanyane* case in Botswana.¹⁵⁵ There, Kalahari Bushmen secured the right to access wells traditionally used for drinking water based on their constitutionally protected right to be free from degrading or inhumane treatment and their religious rights laid out in the Botswana constitution.¹⁵⁶ Even though the national constitution of Botswana did not provide for an express right to water, the Kalahari Bushmen secured a right to water based on the connection between access to water resources and an express liberty right embodied in the constitution.¹⁵⁷

i. Equal Treatment

In addition to establishing a right to water, international human rights sources provide that this right cannot be disregarded merely because of undocumented immigration status.¹⁵⁸ Article 7 in the UDHR states, “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”¹⁵⁹ Specifically targeting undocumented immigrants to deprive them of utilities is forbidden discrimination.¹⁶⁰ Article 3 of ICESCR also affirms that State Parties to the treaty will “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”¹⁶¹ Under international law, all people are granted equal protection, not merely those with legal immigration status in the country where they reside.

¹⁵⁴ M.C. Mehta v. Union of India and Ors., (2004) 3 SCALE 396, ¶¶ 45–47, <http://www.ielrc.org/content/e0409.pdf>.

¹⁵⁵ *Mosetlhanyane et al. v. Attorney General of Botswana*, BLR 1, 15–16, 24 (July 24, 2010), http://www.escr-net.org/usr_doc/CKGR_judgment.pdf.

¹⁵⁶ *Id.* at 16.

¹⁵⁷ *Id.* at 29.

¹⁵⁸ Universal Declaration of Human Rights, *supra* note 99, art. 20(1).

¹⁵⁹ *Id.*

¹⁶⁰ See U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (OHCHR), THE HUMAN RIGHT TO ADEQUATE HOUSING, FACT SHEET NO. 21/REV.1 (2009), <http://www.refworld.org/docid/479477400.html>.

¹⁶¹ ICESCR, *supra* note 114.

The United States has ratified multiple treaties that ban discrimination in the provision of water and housing.¹⁶² The Committee on the Elimination of Racial Discrimination, the body of independent experts that monitors implementation of CERD, has emphasized the importance of the equal enjoyment of the right to housing without distinction as to race, color, or national or ethnic origin,¹⁶³ which should include access to water and sanitation. The Committee has also expressed concern about sub-standard housing conditions and services in impoverished African-American communities in the United States.¹⁶⁴

Arguments before the Human Rights Committee further bolster this point. The Global Initiative for Economic, Social, and Cultural Rights (GI-ESCR) came before the U.N. Human Rights Committee regarding the Israeli blockade of the Gaza Strip and its impact on housing, water, sanitation, and access to land in Palestine and Israel.¹⁶⁵ There, GI-ESCR supported a broad interpretation of the ICCPR to include the right to water and sanitation.¹⁶⁶ Following the presentation, the Human Rights Committee “reaffirmed that denial of access to food, water and sanitation in these contexts rose to violations of Articles 6, 7 and 26 of the Covenant” and “called on Israel to ensure and facilitate non-discriminatory access of Palestinians to land, natural resources, water and sanitation.”¹⁶⁷ This decision was built upon prior determinations that access to safe drinking water is a fundamental human right.¹⁶⁸

¹⁶² See generally Convention on the Rights of Persons with Disabilities art. 28, June 30, 2009, 2515 U.N.T.S. 3 (recognizing the right to clean water and housing without discrimination on the basis of disability).

¹⁶³ Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, Seventy-Second Session, Feb. 18–Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

¹⁶⁴ *Id.* ¶ 16.

¹⁶⁵ GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, PARALLEL REPORT SUBMITTED BY THE GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (GI-ESCR) TO THE HUMAN RIGHTS COMMITTEE ON THE OCCASION OF THE CONSIDERATION OF THE FOURTH PERIODIC REPORT OF ISRAEL: ISRAEL'S CONTINUED VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS WITH REGARD TO HOUSE DEMOLITIONS, FORCED EVICTIONS AND SAFE AND ACCESSIBLE WATER AND SANITATION IN OCCUPIED PALESTINE AND ISRAEL (2014), <http://globalinitiative-escr.org/wp-content/uploads/2014/10/140630-GI-ESCR-Parallel-Report-ICCPR-Israel-2014.pdf>.

¹⁶⁶ *Id.* at 16–18.

¹⁶⁷ *Human Rights Committee Addresses Housing, Water, Sanitation and Access to Land in Palestine and Israel*, GLOBAL INITIATIVE FOR ECON., SOC. & CULTURAL RTS. (Oct. 30, 2014), <http://globalinitiative-escr.org/human-rights-committee-addresses-housing-water-sanitation-and-access-to-land-in-palestine-and-israel/>.

¹⁶⁸ U.N. High Comm'r for Human Rights, *Rep. of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to*

The Inter-American Court of Human Rights has been equally vigorous in its defense of a right to water. In one example, *Vélez Loor v. Panama*, the State held Mr. Vélez Loor in a prison where drinking water was unavailable.¹⁶⁹ The Court held that “the absence of minimum conditions to guarantee the supply of drinking water within a prison constitutes a serious failure by the State.”¹⁷⁰ The decision was, again, unsurprising given the Inter-American Court of Human Rights’ jurisprudence.¹⁷¹

The African Commission on Human and Peoples Rights made a similar determination.¹⁷² In *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, the African Commission held that the Sudanese government’s efforts to force certain communities from their homes, which ranged from organized terror campaigns by local militia to shutting off or destroying utilities for designated population centers, directly conflicted with the Banjul Charter.¹⁷³

B. U.S. Response

Despite significant international pressure, the United States largely ignores or rejects international instruments as binding. The U.S. view on water and sanitation was succinctly expressed by the Deputy Representative to the

Safe Drinking Water and Sanitation Under International Human Rights Instruments, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007).

¹⁶⁹ *Vélez Loor v. Panama*, Preliminary objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 218 (Nov. 23, 2010).

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., *Vélez Loor v. Panama*, Preliminary objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 218 (Nov. 23, 2010); *Xakmok Kasek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 21 (Aug. 24, 2010); *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgement, Inter. Am. Ct. H.R. (ser. C) No. 146 (Mar. 29 2006); *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

¹⁷² African Commission on Human and Peoples’ Rights [ACHPR], *Sudan Human Rights Organization & Centre on Housing Rights and Evictions/Sudan*, at 23, 279/03–296/05 (May 13, 2009); see also *ACHPR, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS*, <http://www.achpr.org/about/> (last visited Mar. 19, 2017). The African Charter established the African Commission on Human and Peoples’ Rights. *Id.* The Commission was inaugurated on November 2, 1987 in Addis Ababa, Ethiopia and was tasked with analyzing and promoting progress in accordance with Article 62 of the African Charter on Human and Peoples’ Rights. *Id.* Primarily by evaluating State Parties’ reports on legislative or other measures taken within their countries to effectuate the rights and freedoms recognized and guaranteed by the Charter. *Id.*

¹⁷³ See *Inst. for Hum. Rts. & Dev. in Africa v. Angola*, Communication 292/04, African Comm’n on Hum. & Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 51 (May 22, 2008); *Sudan Hum. Rts. Organisation & Ctr. on Hous. Rts. & Evictions v. Sudan*, Communication 279/03-296/05, African Comm’n on Hum. & Peoples’ Rts. [Afr. Comm’n H.P.R.], ¶ 124 (May 27, 2009).

Economic and Social Council, John Sammis, in his note to President Obama explaining the U.S. vote against Resolution A/64/L.63/Rev.1, colloquially called “the Human Right to Water Resolution.”¹⁷⁴ While acknowledging the importance of water on both practical and political levels, Mr. Sammis stated that the United States opposed the Resolution’s vision of a broad right to water, arguing that there is “no ‘right to water and sanitation’ in an international legal sense as described by this resolution.”¹⁷⁵

By refusing to recognize an international right to water, Mr. Sammis simply restated the U.S. line on the topic of water security.¹⁷⁶ The primary document for U.S. diplomats on the topic of water security is the “Views of the United States of America on Human Rights and Access to Water.”¹⁷⁷ This document, submitted by the United States to the Office of the U.N. High Commissioner for Human Rights, states: “Neither the Universal Declaration of Human Rights (UDHR) nor the International Covenant on Economic, Social, and Cultural Rights (ICESCR) mentions water at all.”¹⁷⁸ The “Views of the United States of America” explicitly disagrees with the findings of GI-ICESCR. The document claims that water rights fall within the sole purview of the various nation states, or—in the case of the United States—within the individual state governments subsidiary to the federal government.¹⁷⁹ In direct opposition, GI-ICESCR, along with the U.N. Committee on Economic, Social and Cultural Rights, assert that the “legal bases of the right to water” is contained in Article 11(1) of the ICESCR.¹⁸⁰ In rebuttal, the United States maintains that “while it is apparent enough that this provision of the Covenant does not create an open-ended” list, any doubt at all is “dispelled by the following sentence which states: ‘[t]he States Parties will take appropriate

¹⁷⁴ Letter from John Sammis, U.S. Deputy Representative, Econ. and Soc. Council, to Barack Obama, U.S. President (July 28, 2010), <http://usun.state.gov/remarks/4749>.

¹⁷⁵ *Id.*

¹⁷⁶ See Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization*, 31 *BERKELEY J. INT’L L.* 89, 102–03 (2013); Letter from the U.S. to the Office of the United Nations High Comm’r for Human Rights on Views of the United States of America on Human Rights and Access to Water (June 2007), <http://www2.ohchr.org/english/issues/water/contributions/UnitedStatesofAmerica.pdf> [hereinafter U.S. Letter to OHCHR].

¹⁷⁷ U.S. Letter to OHCHR, *supra* note 176, at 1.

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.* at 6.

¹⁸⁰ ICESCR, *supra* note 114, art. 11 (“[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”); see also General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Committee on Economic, Social and Cultural Rights on Its Twenty-Second Session, ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

steps to ensure the realization of *this right . . .*”¹⁸¹ The United States also argues that “[t]he fact that the provision of a particular good or service may be essential to the realization of a Covenant right does not make that good or service itself the subject of a distinct international human right.”¹⁸² In other words, even though clean, safe water is necessary for the protection of many human rights, the United States fails to recognize the right to water because it is not a distinct and enunciated human right in itself.¹⁸³

Even when the United States does ratify a treaty, the U.S. Senate limits adherence by declaring reservations at the time of ratification.¹⁸⁴ Most countries follow this practice,¹⁸⁵ but U.S. reservations are particularly broad. The Senate’s ratification of CERD is representative of this practice. In that case, the Senate reiterated many of the reservations expressed during the debate over its ratification, writing:

[T]hat the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.¹⁸⁶

As the Supreme Court noted in *Sosa v. Álvarez-Machain*,¹⁸⁷ the presence of these provisions prevents the treaties from being reasonably interpreted as self-executing. Therefore, such treaties cannot be enforced by U.S. courts. Any remedy for a violation of the treaty would have to come from the legislative, or perhaps even the executive branch.

Multiple U.S. states have expressed unwillingness to enforce international treaties in the absence of implementing domestic legislation. In Connecticut,

¹⁸¹ U.S. Letter to OHCHR, *supra* note 176, at 4.

¹⁸² *Id.*

¹⁸³ *See id.*; *see also* Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT’L HUM. RTS. 331, 346–49 (2005).

¹⁸⁴ VALERIE HEITSHUSEN, CONG. RES. SERV., SENATE CONSIDERATION OF TREATIES 2 (Nov. 10, 2014).

¹⁸⁵ *See, e.g., Multilateral Treaties Deposited with the Secretary-General: Chapter IV. Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en (last visited Mar. 19, 2017); follow hyperlink entitled “3. International Covenant on Economic, Social and Cultural Rights. New York, 16 December 1966”; then scroll down for a list of all the reservations that other countries made before ratifying it.

¹⁸⁶ 140 CONG. REC. S7634-02 (daily ed. June 24, 1994).

¹⁸⁷ *Sosa v. Álvarez-Machain*, 542 U.S. 692, 728 (2004).

for example, both the Connecticut Supreme Court in 2000¹⁸⁸ and the Second Circuit Court of Appeals in 2001¹⁸⁹ provided clear guidance and thoughtful discussion of the Hague Convention on the Civil Aspects of International Child Abduction and its implementing state and federal statutes.¹⁹⁰ There, even though both courts acknowledged that they were sympathetic to the aim of the treaty and understood its persuasive value, the analysis began and ended with the implementing statutes passed by state and federal governments.¹⁹¹

There has been remarkably limited traction in applying international normative law in U.S. courts.¹⁹² This is well illustrated by the lack of a national constitutional right to water, which also usually does not exist at the state level.¹⁹³ But this has not stopped many advocates who have proceeded to attain recognition for the right to water in state constitutions through the legislative process. The Constitution of the Commonwealth of Massachusetts¹⁹⁴ and Constitution of the Commonwealth of Pennsylvania¹⁹⁵ outline a right to water, and California has adopted the right to water through a Senate Bill that clarified the stance of California's constitution on the subject of the right to water.¹⁹⁶ Although difficult to achieve, such advances based on international legal arguments are possible.

Interestingly, both the greatest possibilities and challenges exist on the day-to-day courtroom level. Indeed, one human rights scholar pointed out nearly a decade ago that principles of international human rights law “have been used to assist in the interpretation of state and federal laws. The law, with few exceptions, has been briefed by amici curiae or raised by the courts

¹⁸⁸ *Turner v. Frowein*, 752 A.2d 955, 957 (Conn. Sup. Ct. 2000).

¹⁸⁹ *Blondin v. Dubois*, 238 F.3d 153, 155 (2d Cir. 2001).

¹⁹⁰ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (entered into force for the United States Apr. 29, 1988, pursuant to 42 U.S.C. § 11601 2011)).

¹⁹¹ *Blondin*, 238 F.3d at 155–56; *Turner*, 752 A.2d at 957, 960, 963, 969; *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper*, Missouri, urging that there was not a national consensus against capital punishment for juveniles, noted that when the Senate ratified the International Covenant on Civil and Political Rights, “it did so subject to the President’s proposed reservation regarding” the prohibition of capital punishment for juveniles. *Id.* at 567. The fact that the State of Missouri eventually lost that case, in part because the Court did not find the argument persuasive, shows that this line of thinking has its limits. *Id.* at 578–79.

¹⁹² *See, e.g., Daugherty v. Wallace*, 621 N.E.2d 1374 (Ohio Ct. App. 1993) (failing to mention international norms at all when challenging the revisions to the state’s general assistance statute and focusing primarily on interpreting Article 1, § 1 of the Ohio Constitution).

¹⁹³ *See In re City of Detroit*, No. 13-53846, 2014 WL 6474081, at *2 (Bankr. E.D. Mich. Nov. 19, 2014).

¹⁹⁴ MASS. CONST. art. XCVII.

¹⁹⁵ PA. CONST. art. I, § 27.

¹⁹⁶ *See Assemb. B. 685*, 2011–2012 Leg. Sess. (Ca. 2012).

themselves.”¹⁹⁷ Small inroads along these lines are often made. For example, advocates have effectively used international law to create a “broader approach to proving discriminatory intent” at the trial court level.¹⁹⁸ International law has also been used to influence how courts determined custody battles utilizing the “best interest of the child” test.¹⁹⁹ In practice, this means that within the realm of water rights and utilities, international human rights arguments are as of yet underemployed tools. Although not conclusively deciding factors, international law arguments could lend weight to cases that would otherwise be significantly weaker, potentially tipping the scales in favor of change.

CONCLUSION

The problem of SSN requirements for public utility services can be approached in multiple ways, using both the domestic and international law frameworks. Particularly in jurisdictions that recognize the applicability of Privacy Act § 7 to state and local governments, plaintiffs have a relatively high chance of success by using a Privacy Act challenge against a publicly-run utility provider. In other jurisdictions, and particularly if the local utility provider is a private company, plaintiffs may be forced to bring a Fair Housing Act claim that requires intensive factual development on the statistical evidence and the cause of the disparate impact. This difficulty may be lessened somewhat by the availability of an administrative process for resolving FHA claims through the U.S. Department of Housing and Urban Development.

Particularly in a federal court challenge, advocates should consider employing international legal authorities and norms to frame their arguments and highlight the importance of the challenge. U.S. courts may be persuaded by the fundamental principles of security of person, equal protection, and human dignity. Immigrants’ rights advocates may also consider appealing to these principles while pursuing policy changes at the state and local levels that promote equal access to housing.

Utility denials like those in Alabama and Georgia can be viewed through many different lenses that dramatically alter the scope of the legal issue. These policies demonstrate how anti-immigrant discrimination has become subtler

¹⁹⁷ Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471, 488 (1994).

¹⁹⁸ Martha F. Davis, *Human Rights in the Trenches: Using International Human Rights Law in “Everyday” Legal Aid Cases*, 41 CLEARINGHOUSE REV. 414, 414 (2007).

¹⁹⁹ *Id.* at 422.

and couched in seemingly mundane, reasonable mechanisms, such as the SSN requirement. The utility provider's handling of one blank space on an application form—the space for a SSN—can have the effect of restricting noncitizens' access to housing in the area. More broadly, that one space on the application form can have the effect of denying undocumented people their basic human rights to security of person, equal protection, and the right to live with dignity. Correspondingly, advocates have the option of using the Privacy Act to specifically challenge the SSN requirement, the Fair Housing Act to challenge the disparate impact on immigrants, and international legal authorities to highlight the far-reaching effect on immigrants' human rights. Sometimes, advocates' sweeping goals of protecting immigrants' human rights and dignity may be better served by a narrow challenge on Privacy Act grounds. Given the pervasiveness and subtlety of some state and local efforts to create an inhospitable environment for immigrants, advocates should be prepared to use all of the tools at their disposal to challenge these policies.