

## Presentations: A Human Right to Health in the U.S.

*Presentation by Cathy Albisa at the American Bar Association Summit on Civil Rights, Civil Liberties, and Social Justice on April 17, 2007 in Washington, D.C.*

Thank you for this invitation to speak about the need for a human right to health care in the U.S. Today, Governor Blagojevich of Illinois announced in a press release that:

*“Access to affordable healthcare and high-quality education should not be a privilege for the very wealthy – these are basic human rights.”*

This is not news to those of you sitting in this room. You have dedicated years of your life to advocating for the right to health care. But what is news is that political leaders across the country are being forced to recognize this as well. This may be a harbinger of things to come. We must not fail to seize this opportunity; it is time to redouble our commitment to bring a human rights vision to the United States.

To date, the U.S. has been famously reticent to recognize economic, social and cultural rights, such as the right to health, both internationally and domestically. Given the socio-economic indicators in the U.S., there is pressing need for the legal community to develop stronger jurisprudence to buttress basic levels of protection for these rights against perpetual changes in the political winds.

There have been a myriad of obstacles in realizing this goal, and we have been fighting a defensive battle for several decades now. Our challenge at this point in time, however, is to “**see the possible.**” A quick look at our own history should be a wake up call that where we are today is not inevitable. Indeed, we came quite close to taking a different path not that long ago.

We must examine the obstacles that have diverged us from the path of human rights in order to get back on it more firmly and securely than ever, and move towards genuine universal freedom, dignity and equality. There was a golden moment after WWII when the U.S. demonstrated great leadership on the international stage as it successfully promoted a human rights vision that recognized the importance of protecting civil, political, economic, social and cultural rights as a unified whole. This vision was captured and powerfully articulated in the Universal Declaration on Human Rights, which contains at least six core economic and social rights – health, education, food, housing, decent work, and social security.

From the U.S. perspective, these six rights emerged out of a recognition in the 1930's and 1940's that resources are not distributed through some inevitable natural law, but as a result of human-made laws in a number of fields. All economic activity is mediated through our legal frameworks and government action at the sub-national, national and international level. Corporate law, labor law, tax law, industry regulation, trade agreements, securities law, disclosure requirements, anti-trust laws, consumer protection law, property law, patent law, bankruptcy law and government-set fiscal policy are among the many legal arenas that determine how wealth and resources will be distributed among the population.

Cass Sunstein's excellent analysis in his book the *Second Bill Of Rights* persuasively documents how awareness of the pervasiveness of law led to support for economic and social rights in this earlier era, and how the U.S. Supreme Court increasingly supported economic and social rights for several decades until President Nixon's appointees moved the court in a radically different direction from the rest of the world. Indeed, in *Goldberg v. Kelly* as you all well know, the Supreme Court recognized welfare benefits as a property interest – and we all know how important the concept of property is within our society. The election of President Nixon, and his subsequent appointments, is likely to be the reason we do not have economic and social rights today. Consequently human rights law is the only legal framework which we are not currently using to mediate economic activity, including the health financing field. This is a tragic irony considering the role of the U.S. in developing this body of law to do just that.

It is worth keeping in mind that President Nixon's election was one of the closest in U.S. history, and as such there was nothing inevitable about it. This is not to say that we do not face internal cultural barriers to creating protections for economic and social rights. We did not lose the battle on human rights on the international stage because of the Nixon Court, for example. No, this was due to a deep commitment among too many of our leaders to inequality based on race and class.

This institution, the American Bar Association (ABA), actually has much penance to pay for the undermining of human rights. It was Frank Holman — the head of the ABA at the time — that spearheaded the fight against human rights on the grounds that it might lead to racial equality. For example, Holman wrote that Article 16 of the Universal Declaration “means that mixed marriages between the races are allowable without regard to state or national law or policy forbidding such marriages.” Holman also stated that “it would have been better for this country, better for the world [and] better for civilization, if the South had won the civil war.” See C. Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights* (New York: Cambridge University Press, 2003). Other signs of trouble emerged when the NAACP filed a petition at the U.N., and had to withdraw it when, among other things, Eleanor Roosevelt threatened to resign from their Board of Directors as a result.

We lost the battle on the international stage much earlier than we did domestically, but these two arenas are intimately linked and the earlier loss was a serious warning for the domestic sphere. Nonetheless, as Professor Sunstein notes, we still came very close to developing jurisprudence on this set of rights.

Given how close we came, why shouldn't we place ourselves firmly back on that road towards securing economic and social rights, in particular a right to health care in the U.S. The benefits of a rights-based approach are important and significant. Once conferred, it is truly difficult to de-legitimize a right. Despite the likely persistent violations of the right to torture by the U.S., the basic concept that everyone should be free from torture has held. Similarly, despite attacks on Title VII, the basic notion that everyone should be free from workplace discrimination — which is statutorily and not constitutionally based — is strongly imbedded in the U.S cultural landscape. On the other hand, attacks on welfare lead to a dismantling of the notion of entitlement based on need.

But how do we start to build a right to health care? I would argue that despite national attention to the issue, we need to start at the state or even local level. This is not only an opportunity to ensure that more people have insurance coverage, or to do damage control and make sure that what is defined as adequate coverage is not narrowed in draconian ways; it is also an opportunity to re-examine the basic premises of our health care system.

A health care as a human right approach requires that our system be designed to meet public health needs, rather than to ensure profit. It requires re-examining the structure of insurance, the role of patents, the conflicts of interest between government and industry, the role of health-care professionals, and the distribution of health-care resources among populations and among preventive and curative treatments.

In order to maximize this opportunity, we need to build movement from the ground up. For the legal community, this means taking the state level work as seriously as the national work. Eight state constitutions make some reference to public health, and over half make reference to the general or public welfare. We need to give life to this language, and human rights is an important tool in this endeavor.

- Turning to human rights law as an **interpretive tool for state constitutions** can mitigate the decentralized nature of state work by offering a coherent conceptual basis to link efforts (although, resources and strategies must still be developed and tailored for multiples sites).
- The human rights framework offers a wide range of **jurisprudential precedents and models** to evaluate, and brings state court jurisprudence into the world community where state courts can learn from and participate in global debate.
- State court development of international principles provides fertile territory for **creating a dialogue** between the national and state level that enables more thoughtful legal development in this arena.

A human rights approach to state level legal work holds enormous promise in the long run. Early signs include judges, such as Justice Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, speaking out about the value of using comparative law to interpret state law and constitutions. She has said that:

*[I]n many ways, state judges are uniquely positioned to take advantage of the significant potential of comparative constitutional law ... As a state court judge, I have frequent occasion to look to the constitutional law of fifty other American jurisdictions, even though other states' interpretations of their constitutions have no precedential weight for Massachusetts. They do, however, provide guidance, perspective, inspiration, reassurance, or cautionary tales. How odd, then, when one stops to think of it: A novel issue of constitutional law will send us, our clerks, and counsel to the library to uncover any possible United States source of authority—including the note of a second-year law student. But in our search for a useful legal framework, we ignore the opinion of a prominent constitutional jurist abroad that may be directly on point.*

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Margaret H. Marshall, *Wise Parents Do Not Hesitate to Learn From Their Children: Interpreting State Constitutions In An Age of Global Jurisprudence*, *N.Y.U.L. Rev.* Vol. 79, No. 5 (Nov. 2004) (speech), p. 1,641.

Alternative models, such as the one developed by South Africa's premier Constitutional Court, demand that governments take reasonable steps to ensure access to health care that are tailored to human rights goals, without bringing courts into the legislative purview of specific resource allocations. We need jurisprudence that places similar demands on our government at the national and sub-national level.

Until we create a groundswell of support for health care as a human right, we cannot be confident that the opportunity for reform now presenting itself will lead to greater equity and security for most people in the U.S. This work is critical on the domestic level, but it is also critical for the world. The U.S. has been the strongest opponent to a right to health for peoples around the world, and we carry an additional responsibility to change the legal culture here in order to benefit and protect those being impacted by our current positions and policies.

Thank you for this opportunity to talk to all of you about this. I am excited to see where your work will take us in the future.