"You Take Care of Your Own":
A Human Rights Analysis of HUD's 2019 "Mixed Status" Proposed Rule

MHR Professional Paper

In Partial Fulfillment of the Master of Human Rights Degree Requirements

The Hubert H. Humphrey School of Public Affairs

The University of Minnesota

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04/28/2020

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In May 2019, the United States Department of Housing and Urban Development (HUD) revealed a proposed rule that sparked outrage among housing advocates and immigrant rights activists across the country. The rule would bar mixed status families—that is, families whose members include people with different citizenship or immigration statuses—from access to government subsidized housing.[1] As a result, families with undocumented members would be forced to either split up to save their subsidy or to go out on the streets to find new housing. Much of the rule's controversy stems from the potential effect on U.S. citizens themselves; HUD's own analysis states it would more than likely force over 55,000 citizen children onto the streets, while the National Housing Law Project claims that it would provide undue burden on low income families to provide documentary proof of citizenship.[2]

Though the rule targets the undocumented, these analyses tend to focus on its negative effects for American citizens. Because housing resources are limited, state sovereignty norms suggest the United States has both the duty and right to allocate housing to its own citizens first. As HUD Secretary Ben Carson stated in his defense of the proposal, "It's common sense. You take care of your own."[3] Whether or not it really is common sense is to be debated, but what of

[1] United States Department of Housing and Urban Development. (10 May 2019). "Housing and Community Development Act of 1980, Verification of Eligible Status." 84 Fed. Reg 20589. *Federal Register: The Daily Journal of the United States*. Accessed online 18 Jan 2020.

[2] United States Department of Housing and Urban Development. (15 April 2019). "Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980." *National Low-Income Housing Coalition Archives.* Accessed online 18 Jan 2020. https://nlihc.org/sites/default/files/2019-05/Noncitizen-RIA-Final-April-15-2019.pdf;

National Housing Law Project. (July 10, 2019). "NHLP's Comments Opposing HUD's Mixed Status Rule." Accessed online 20 Jan 2020. https://www.nhlp.org/our-initiatives/nhlps-comments-opposing-huds-mixed status-rule/

[3] Ibid.

the rights noncitizens themselves? Does the United States have any duties toward the undocumented who will also be affected by the rule?

In the nation's politically charged atmosphere of border wall funding and public charge laws, many Americans may be inclined to say that undocumented migrants have no claim to rights. The real answer, however, is much more complicated. Under international human rights law, all individuals are afforded a certain number of rights by virtue of their common humanity. The United States is party to a number of treaties that recognize these rights—particularly those that outline the civil and political rights already guaranteed by its domestic law, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (CERD). While it recognizes the salience of some rights, however, the United States has strategically chosen to ignore others. The International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, which covers rights to housing, has been touted as "idealistic" by the United States government and has subsequently been signed but not ratified.[4] The U.S. government has made it clear throughout the years that it does not consider housing to be a human right and suggests it is a privilege hardly afforded to American citizens, let alone undocumented migrants.[5] Yet HUD's proposed rule has far greater implications on the rights of noncitizens than mere access to housing. It touches on a number of ICCPR and CERD rights, including protection of the family, unlawful interference with privacy,

[4] Foscarinis, Maria, et al. (2004). "The Human Right to Housing: Making the Case in U.S. Advocacy." *Clearinghouse Review*, 38 (3), pp. 97 -114.

[5] See Ibid; Argersinger, J. (2010). Contested Visions of American Democracy: Citizenship, Public Housing, and the International Arena. *Journal of Urban History, 36*(6), pp. 792-813;
Byrne, T. & Culhane, D. (2011). "The Right to Housing: An Effective Means of Addressing Homelessness?" *University of Pennsylvania Journal of Law and Social Change*, 14, pp. 379-389.
Every U.S. administration since Ronald Reagan has expressly denied housing as a human right. Barack Obama provides perhaps one exception; though never specifically describing housing as a right, he outwardly supported a United Nations recommendation to "continue [US] efforts in the domain of access to housing, vital for the realization of several other rights, in order to meet the needs for adequate housing at an affordable price for all segments of the American society." (See Thomas Byrne and Dennis P. Culhane).

and freedom from discrimination. This paper outlines HUD's tricky game: in framing its proposed rule as a matter of access to housing for American citizens, HUD ignores U.S. duties to noncitizens within its borders, appealing instead to its citizens' understanding of state sovereignty norms rather than acknowledging its treaty obligations toward undocumented migrants.

After a review of pertinent literature, this paper is broken up into four sections. Section one serves to place the United States within the context of the international human rights regime, outlining international human rights standards relating to noncitizens and U.S. obligations based on these standards. Section two discusses the interplay of state sovereignty on human rights obligations, arguing that sovereignty can be used to undermine the universality of rights. Section three will use HUD's proposed rule as a case study, examining the ways in which the United States frames domestic policy to mask and override its treaty obligations to noncitizens. Finally, section four will consider the usefulness of treaties in preventing anti-migrant domestic legislation—and what it might mean for opponents of HUD's rule.

Literature Review

The Federal Register describes HUD's proposed rule as follows: first, everyone in a household that receives government subsidized rent or housing assistance must prove that they are of eligible immigration status.[6] Second, individuals who are not of eligible immigration status will no longer be able to serve as a leaseholder—meaning citizen children will no longer be able to have an undocumented parent serve as head of household.[7] Third, no household can receive assistance unless every member living there is of eligible and legal immigration status.[8]

[6] United States Department of Housing and Urban Development, 2019, supra, footnote 1.
[7] Ibid.
[8] United States Department of Housing and Urban Development. (15 April 2019). "Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act

Each of these provisions seem clearly aimed at noncitizens—they remove their ability to reside in subsidized housing with their families and force the undocumented to declare their immigration status. HUD's own analysis clarifies this by focusing on the rule's potential effects for ineligible families. It clearly states that the rule's "outcome would be homelessness" for unsupported ineligible family members and that it would lead to a "justified fear" of family separation for noncitizens.[9] The rule as written in the Federal Register, however, makes no reference to immigration or noncitizen rights, stating only that it is an attempt to "reduce unnecessary regulatory burdens, enhance the effectiveness of…regulations, and promote principles underlying the rule of law."[10] As Ben Carson portrays it, the proposed rule is not immigration reform or a punishment for noncitizens, but is instead an increased opportunity for low-income citizens to have greater access to affordable housing.[11] By removing the undocumented who are allegedly using limited affordable housing resources, wait times for housing aid could theoretically be reduced for citizens.[12]

Unsurprisingly, HUD's announcement lead to a flurry of criticisms from civil service organizations all across the country—many of which used Carson's framing of the rule to form their arguments against it. For instance, a large majority of the condemnations came from national housing advocacy agencies, such as the National Housing Law Project, the National Center for Law and Economic Justice, and the National Low-Income Housing Coalition. Each of these organizations relied heavily on persuading readers of the rule's negative impact by

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of 1980." *National Low-Income Housing Coalition Archives.* Accessed online 18 Jan 2020. https://nlihc.org/sites/default/files/2019-05/Noncitizen-RIA-Final-April-15-2019.pdf

[9] Ibid, 16.

[10] United States, 84 Fed. Reg 20589, 2019.

[11] Fessler, Pam. (2019). "Proposed Rule Could Evict 55,000 Children From Subsidized Housing." *National Public Radio*. Accessed online 9 March 2020. https://www.npr.org/2019/05/10/722173775/proposed-rule-could evict-55-000-children-from-subsidized-housing

[12] Ibid.

emphasizing the ways it will affect citizens' housing rights. Though there are surprisingly few published responses from economic rights and immigration organizations, these, too, focus primarily on access to housing for Americans as opposed to its effects on noncitizens. The American Immigration Council characterizes the rule solely as a "mean-spirited attempt at addressing major issues with public housing…" while the Conference of Bishops' Justice for Immigrants focuses on the on the rules' failure to "treat housing as a fundamental right," for American children and "citizen families with undocumented members."[13] Although many immigrant-centered organizations contend that the rule will have devastating impacts on immigrant communities, most of these agencies tend to emphasize the effects on U.S. citizen children rather than their undocumented family members. Because of this focus, public debate around the rule tends to—like Ben Carson—veil its overarching effects on the undocumented by placing it within the realm of housing for citizens.

While some of the silence regarding noncitizen rights in this rule has to do with its framing by HUD, another reason may have to do with a general unfamiliarity with the rights that the undocumented do have. David Cole argues that although there is a common perception in the United States that citizens naturally have more rights than the noncitizens, the actual legal distinction between the two is fairly insignificant.[14] He states that because "the Constitution expressly limits to citizens only the rights to vote and to run for federal elective office, equality

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[13] Cruz, Erika. (2019). "HUD Proposes to Evict Citizens and Immigrants from Public Housing if They Have Undocumented Family Members." *Immigration Impact*. Accessed online 30 January 2020. https://immigrationimpact.com/2019/04/24/hud-propose-to-evict-citizens-and-immigrants-from-public housing-if-they-have-undocumented-family-members/ ;

Justice for Immigrants. 2019. "Mixed Status Familiies and Eligibility for Certain HUD Housing Programs: What you Need to Know about HUD's Proposed Rule." *United States Conference of Catholic Bishops*. Accessed online 11 March 2020. https://justiceforimmigrants.org/mixed-status-families-and-eligibility-for-certain hud-housing-programs-what-you-need-to-know-about-huds-proposed-rule/

[14] Cole, David. (2003). Are foreign nationals entitled to the same constitutional rights as citizens? *Thomas Jefferson Law Review, 25*(2), 368.

between non-nationals and citizens would appear to be the Constitutional rule."[15] Cole suggests that the public perception that citizens do not have rights stems from the fact that legislators have little reason to uphold the interests of a constituency that cannot vote.[16] In essence, the American approach to noncitizens is power- rather than rights-based. Politicians have no incentives to defend the rights of those who have no say in the American political system.

Because the U.S. government is unwilling or incapable of expressly clarifying the rights that noncitizens do have, Robert Ley claims that these rights are actually determined at the local level.[17] In the case of Hazelton, Pennsylvania, city officials developed the 2006 Illegal Immigration Relief Act, which required local landlords to check all tenants' immigration papers and prohibited them from renting property to tenants with unlawful status. After a lawsuit claimed that the local ordinance discriminated against Latinx citizens, the Third District Court struck down the law, stating it was an "impermissible state regulation of immigration under the guise of housing law."[18] Lawsuits such as these highlight the ambiguity of the rights of the undocumented once they have crossed the border: without explicit federal direction, local governments and agencies can and do use State police power to take immigration matters into their own hands.

In contrast to the ambiguity of U.S. law, however, international human rights norms have a much more explicit delineation of noncitizen rights. The ICCPR, ICESCR, and CERD all make it clear that rights "derive from the inherent dignity of the human person" and include very few exceptions in regards to making distinctions between citizens and noncitizens when

[15] Ibid, 368.
[16] Ibid, 375.
[17] Ley, Robert F. (2013) "Reviving Housing Rights of the Undocumented through Disparate Impact and the Fourteenth Amendment: the Problem with the FHA, s. 1981, & Preemption (Fair Housing Act of 1968)." *Berkeley La Raza Law Journal*. 23(1) pp. 35–76.
[18] Ibid, 42.

implementing rights.[19] This is further clarified by the Office of the United Nations High Commissioner for Human Rights (OHCHR)—the agency that explains international standards—in its statement that distinctions between citizens and noncitizens "can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective."[20] Despite this stark language, several scholars and United Nations officials have pointed out that there is a disconnect between the rights they prescribe and the rights noncitizens are able to actually access. David Weissbrodt makes this clear when he argues "institutional and endemic problems, like xenophobia and racism" leave noncitizens vulnerable to harassment at the hands of policy makers and officials.[21] Matthew Gibney expands on this, saying noncitizens become "precarious residents" of their new country, and are viewed as "trespassers with no right to be present in the state in the first place or as barely tolerated guests."[22] As such, while rights may be available to every noncitizen in theory, their ability to claim them is undermined by their social and political vulnerability.

This vulnerability is especially apparent when it comes to the United States. Philip Alston, Maria Foscarinis and Robert Goldman each contend that previous U.S. administrations have actively resisted adhering to international human rights treaties that provide housing and refugee rights.[23] Alston claims that conservative administrations fear recognition of housing and

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[19] United Nations, General Assembly. (1966). *International Covenant on Economic, Social and Cultural Rights*. G.A. res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 49, UN Doc. A/6316, 993 UNT.S. 3, entered into force Jan. 3, 1976. Retrieved from http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf

[20] UN Office of the High Commissioner for Human Rights (OHCHR). (2006). *The Rights of Noncitizens*. HR/PUB/06/11. Accessed online 16 January 2020. https://www.ohchr.org/Documents/Publications/noncitizensen.pdf

[21] Weissbrodt, D., & Meili, S. (2009). Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights? *Refugee Survey Quarterly, 28*(4), pp. 34-58.

[22] Gibney, M. (April 2009). "Precarious residents: migration control, membership and the rights of non-citizens." *United Nations Development Programme, Human Development Reports*. Accessed online 11 March 2020. https://mpra.ub.uni-muenchen.de/19190/1/MPRA_paper_19190.pdf

[23] Alston, P. (1990). U.S. ratification of the covenant on economic, social and cultural rights: The need for an entirely new strategy. *The American Journal of International Law*, 84(2), pp. 365–393.;

other social rights would fundamentally change the United States from a land of "responsible adults" who "obtain their own housing" to a welfare state for immigrants paid for through taxes.[24] These worries, coupled with deliberate efforts by conservative U.S. policy makers to push an anti-immigrant agenda, have transformed recognition of housing and refugee rights from economic threats to issues of national security. The Trump administration has characterized migrants coming up through Mexico as criminals and rapists and, as K. Moreno states, Trump's rhetoric has fashioned Mexican immigration into "a serious symbolic threat to American values, culture and identity."[25] In essence, extending the economic benefits reserved for citizenship to these types of immigrants—even on a state level—is seen by this administration as "incentivizing illegal immigration" and bringing Mexico's criminal underbelly to American cities.[26] For these reasons, noncitizens are often unwilling to ask for any formally extended rights for fear of attracting immigration authorities that may be working with housing or welfare organizations to root out the undocumented. To add insult to injury, Trump's administration has consistently disparaged the United Nations, which houses much of the international human rights framework and treaties regarding economic and social rights, as "useless" and disrespectful.[27] So while the undocumented have rights to adequate housing and economic life from an international human rights perspective, their ability to access those rights within the domestic law of the United States is severely limited by the policies and rhetoric of the current administration.

Goldman, Robert Kogod, and Scott M. Martin. (1983). "International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law." *Human Rights Quarterly*, 5(3), pp. 302–326;
Foscarinis, Maria. (2006). Advocating for the human right to housing: Notes from the United States.(Realizing Domestic Social Justice Through International Human Rights). *New York University Review of Law & Social Change*, 30(3), pp. 447-481

[24] Alston, supra, footnote 23 at 374

[25] Moreno, K., & Price, B. E. (2018). All in the Name of National Security: The Profiting from Xenophobia by Private Corporations in the Trump Era. In *Security Privatization* (pp. 143-172). Springer, Cham.

[26] Markowitz, Peter L. (2015). Undocumented no more: The power of state citizenship. *Stanford Law Review, 67*(4), 869-915.

[27] Alston, P. (2017). The populist challenge to human rights. *Journal of Human RightsPractice*, *9*(1), 1-15.

Scholars have brought up several additional hypotheses that explain the gap in standards and enforcement of noncitizen rights. Pia Oberoi, for one, claims that certain rights for noncitizens—mainly economic, social and cultural rights—have been neglected due to States' misconceptions about what the treaties actually require.[28] States often avoid their duties in regard to these rights assuming they are required to "always provide free goods and services" to those within their borders, though this is certainly not written into the ICESCR itself.[29] In this regard, international treaties are not as clear as they purport to be. J. Goldston backs this up. Because these human rights treaties allow States to make distinctions between noncitizens and citizens when it serves a "legitimate objective," it can be hard to find the dividing line between a legitimate State interest and illegitimate aspirations.[30] States can use this ambiguity to discriminate to their own ends.

Linda Bosniak, Catherine Dauvergne, and E. Larking take the argument a step further by asserting that international human rights treaties open themselves up for abuse by making concessions to state sovereignty.[31] Larking makes the bold claim that "the international system characterizes human rights and the sovereign rights of States as consistent and mutually supportive."[32] As such, human rights treaties recognize that States have the paradoxical tasks of exercising exclusive control over the State's physical domain while also serving as the primary

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[28] Oberoi, Pia. "Defending the Weakest: The Role of International Human Rights Mechanisms in Protectingthe Economic, Social and Cultural Rights of Migrants." *International Journal on Multicultural Studies*, 11(1), pp.19 – 35.

[29] Ibid, 22

[30] Goldston, J. (2006). Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens. *Ethics & International Affairs, 20*(3), 321-347,401.

[31] Bosniak, L. (1991). Human Rights, State Sovereignty and the Protection of the Undocumented Migrants Underthe International Migrant Workers Convention. The International Migration Review,25(4), 737-770;
Dauvergne, Catherine. (2000). The dilemma of rights discourses for refugees. University of New South Wales Law Journal,23(3), 56-74;
Larking, E. (2016). Irregular immigrants in Australia and the United States -Rights, realities, and political mobilization.Journal of Human Rights,15(2), 189-207.

[32] Larking, supra, footnote 31 at 193.

implementer of universal rights determined by the international community. States must constantly negotiate between their desire to exercise territorial sovereignty and their need to work within the international community to apply human rights protections. Such negotiation can be seen in the types of human rights treaties different states choose accept and reject. For example, States that have large numbers of people leaving their shores are more likely to accept and ratify treaties that protect the human rights of their migrants, while receiving states tend to reject these treaties in favor of protecting their sovereign oversight of immigration.[33]

Despite this selectivity, however, some treaties are actually approaching universal ratification. This is the case for the ICESCR and the ICCPR, which have 170 and 173 State parties respectively.[34] In effect, the universality of these treaties shows that the international community recognizes that the rights within are inherent to all, and that it is committed to developing domestic implementation mechanisms to meet the accepted standards. When the United States chooses not to ratify the ICESCR or to deny some individuals the rights in the ICCPR, it is signaling a clear break from this accepted international commitment. Though the U.S. government recognizes the standards set in these rights bodies, its lack of outward commitment indicates to both its own population and the international community that its negotiation processes prioritize sovereignty rather than international human rights norms.

Political historian Stewart Patrick claims that as a country founded on the idea of popular sovereignty through citizenship, conservative factions within the United States have long resisted the "entrapment" of "international institutions and foreign adventures."[35] Curtis Bradley explains

[33] UN Office of the High Commissioner for Human Rights (OHCHR). (2014). Status of Ratification Interactive Dashboard. Accessed online 11 March 2020. https://indicators.ohchr.org/

[34] Ibid.

[35] Patrick, S., & Council on Foreign Relations, issuing body. (2019).The sovereignty wars :Reconciling America with the world. Washington, D.C.: Brookings Institution Press.

this resistance as a fear by some that human rights treaties would lead to external involvement in America's internal affairs, "accelerate federal encroachments on …the states, and nullify existing state laws."[36] Treaties that protect noncitizen rights heighten such fears. If any person can claim the rights of citizenship in a country without even having been born or naturalized there, the sovereignty of a government over a specific territorial population becomes virtually meaningless.

Perhaps more worrisome to many conservative Americans is the idea that the federal government's acceptance of noncitizen rights could undermine the concept of federalism itself; enumeration of noncitizen rights on the federal level could potentially force States to take on obligations to protect the undocumented against their will. One of the prime tenants of territorial sovereignty is a nation's ability to distribute membership according to its own values. Noncitizen rights threaten this ability—and in America, these rights threaten the balance of power between state and federal powers.[37] Consequently, the U.S. has focused on ratifying treaties that reflect laws already existing in the nation's Constitution and accepted by the states, rather than taking on new obligations that may confront its notion of sovereignty.

The result of this approach for noncitizens is a reluctant acknowledgement of those rights that align with already-in-place domestic principles, and a staunch denial of any rights considered antithetical to the interests of American citizens—including access to government subsidized housing. As the works of Frey and Pardo, and MacNaughton and McGill point out, the implementation of rights not acknowledged by the U.S. government is left up to nongovernmental and charitable organizations.[38] Indeed, some noncitizens may be able to fulfill

[36] Bradley, C. A. (2010). The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism. *Chinese Journal of International Law*, *9*(2), 321-344.
[37] Bosniak, L. (2007). Being Here: Ethical Territoriality and the Rights of Immigrants. *Theoretical Inquiries in Law, 8*(2), 389-410.
[38] Frey, B., & Pardo, A. (2017). Filling the Migrant Rights Gap: Localized Protections of International Economic and Social Rights. *Public Integrity, 19*(2), 136-150;

their basic human needs through independent actors, but relying on nongovernmental organizations in this way allows the government to undermine the universality of human rights—seemingly without incurring political cost.

It is precisely at this juncture of international obligations, state sovereignty and political opinion where HUD's proposal lies. The purpose of this paper is to highlight the ways in which the United States uses domestic policy to shirk its human rights responsibilities and to continue oppression of noncitizens without arousing substantial ire from immigrant-rights advocates.

Citizens and Noncitizens in International Human Rights

Over 244 million people around the globe live in countries other than the one where they were born, 44.5 million of whom reside in the United States.[39] Broken down even further, 12 million of those migrants—approximately 5 percent of all migrants worldwide—are estimated to be undocumented.[40] Because these migrants have either entered the United States illegally or have overstayed a visa, they are removed from the guarantees afforded to legal residents. This translates into a number of rights violations, including substandard living conditions, barred access to health facilities or schools, and abuses of their rights to privacy or home by landlords or ICE agents.[41] In many cases, a lack of legal documentation for employment requires them to work "under the table" or in the informal sector. When coupled with the crime of illegal entry

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MacNaughton, Gillian, & McGill, Mariah. (2012). Economic and social rights in the United States: Implementation without ratification. *Northeastern University Law Journal, 4*(2), 406. Accessed online 20 Jan 2020. http://www.corteidh.or.cr/tablas/r30417.pdf

[39] United Nations, Department of Economic and Social Affairs. (2015). "Trends in International Migration." *Population Facts*. Accessed online 12 Feb 2020. https://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigratinPopFacts20154.pdf

Zong, J., & Batalova, J. (March 14, 2019). "Frequently Requested Statistics on Immigrants and Immigration in the United States." *Migration Policy Institute*. Accessed online 12 Feb 2020. https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration united-states

[40] Kamark, E. & Stenglein, C. (November 12, 2019). "How Many Undocumented Immigrants are in the United States and Who are They?" *Brookings Institute*. Accessed online 12 Feb 2020.

[41] Weissbrodt, supra, footnote 21 at 49.

and a lack of the necessary language skills, living undocumented leads to the constant threat of punishment or deportation by the local police and immigration authorities. Thus, many undocumented migrants are unable or unwilling to speak up about ongoing abuse or the inhumane conditions. Despite their vulnerability, however, these migrants are not entirely legally defenseless. As immigration has grown, immigrant rights advocates and families of the undocumented have pushed to expand the human rights framework to define, protect, and enforce the inherent rights of noncitizens.

This framework is made clear in the United Nations' Universal Declaration of Human Rights (UDHR), which clearly states that "All human beings are born free and equal in dignity and rights." This document lays out that it is individuals—and not just citizens—who are entitled to and responsible for the protection of human rights.[42] The universality of rights is clarified in Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[43] Although the UDHR is not a binding legal agreement upon States, this general principle of equality among all people is reinforced in the language provided by a number of subsequent human rights treaties—including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of Racial Discrimination (CERD), to name a few. As the Human Rights Committee made clear in their general comment on the ICCPR, "The general rule is that each one of the rights…must be

[42] Nash, Kate. (2009). Between Citizenship and Human Rights. *Sociology, 43*(6), 1067-1083;
United Nations, General Assembly. (10 December 1948). *Universal Declaration of Human Rights.* 217 A (III). Accessed online 10 February 2020. https://www.refworld.org/docid/3ae6b3712c.html.
[43] United Nations, *Universal Declaration of Human Rights*, Article II.

guaranteed without discrimination between citizens and aliens."[44] As such, this rule guarantees equal access to virtually all of the rights enumerated in human rights instruments for citizens and noncitizens.

The two Covenants provide the most legally binding and comprehensive list of the core rights available to all individuals within a State Party's territory—many of which are vital for the protection of undocumented immigrants. The ICCPR enumerates those rights necessary for civil and political life, including the right to life, freedom from arbitrary interference with family and home, the right to a nationality, and freedom from arbitrary detention and ill-treatment.[45] Civil and political rights are especially crucial for undocumented migrants, as both scholars and advocates have claimed this group is unusually susceptible to violations of privacy, illegal family separation and unjust detention.[46] The ICESCR, on the other hand, guarantees what might be considered more "positive" rights to noncitizens—the economic, social and cultural rights necessary for full engagement in civic life. The right to adequate housing is guaranteed by this treaty, as are the rights to social security, welfare assistance and protection of the family.[47]

Articles 2(1) and 5 of CERD further the protections of these two general Conventions by ensuring that all people remain free from racial discrimination and have access to equal treatment before the law.[48] The Committee on the Elimination of Racial Discrimination clarifies the

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[44] Human Rights Committee. (1986). "General Comment 15, 'The Position of Aliens under the Covenant.'" *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (1994), UN Doc HRI/GEN/1/Rev.1, at 18, para 1.

[45] United Nations, General Assembly. (1966). *International Covenant on Civil and Political Rights*. G.A. res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 49, UN Doc. A/6316, 993 UNT.S. 3, entered into force 23 March, 1976. Retrieved from http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf

[46] Weissbrodt, supra, footnote 21 at 49.

[47] United Nations, General Assembly. (1966). *International Covenant on Economic, Social and Cultural Rights*. G.A. res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 49, UN Doc. A/6316, 993 UNT.S. 3, entered into force Jan. 3, 1976. Retrieved from http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf

[48] United Nations, General Assembly. (1965). *International Convention on the Elimination of All Forms of Racial Discrimination*. G.A. res. 2106 (XX). Treaty Series vol 660. Accessed online 9 February 2020. https://www.refworld.org/docid/3ae6b3940.html

obligations that are written into CERD in regards to noncitizens: "States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights [to nondiscrimination] to the extent recognized under international law."[49] It goes on to clarify that while international law may allow for a few distinctions to be made between State nationals and non-nationals, all humans should enjoy the benefits of eliminating discrimination in the enjoyment of civil, political, economic, social and cultural rights.[50]

Though noncitizens should theoretically already have access to all of the same rights as their citizen counterparts because of the above general human rights treaties, there is an additional instrument that speaks to the special vulnerabilities of undocumented migrants. The drafting of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) was initiated in the 1980s in response to a need for more comprehensive and widely accepted protections for migrants than existed in other international bodies.[51] It provides the most detailed stance on the rights of the undocumented, affirming all migrant workers have access to a range of civil and social rights.[52] Interestingly, this treaty does not establish new rights for migrants. As Antoine Pecoud states, it offers "a more precise interpretation of human rights in the case of migrants" instead.[53] Most of the protected rights written in the treaty are already enumerated in previous conventions and Covenants—CMW

[49] UN Committee on the Elimination of Racial Discrimination (CERD). (1 October 2002). *CERD General Recommendation XXX on Discrimination Against Non Citizens.* Accessed online 11 March 2020. https://www.refworld.org/docid/45139e084.html

[50] Ibid, 2.

[51] Pecoud, A. & Guchteniere, Paul. (2010). "Obstacles to the ratification of the United Nations Convention on the Protection of the Rights of Migrant Workers." *Law and Society*. 75(2), 431 – 451.

[52] United Nations, General Assembly. (1990). *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. G.A. res. 45/158, annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49, entered into force 1 July 2003. Retrieved from http://www.ohchr.org/Documents/ProfessionalInterest/cmw.pdf

[53] Pecoud, Antoine, & De Guchteneire, Paul. (2006). Migration, human rights and the United Nations: An investigation into the obstacles to the UN Convention on Migrant Worker's Rights. *Windsor Yearbook of Access to Justice, 24*(2), 241-266.

simply goes further in defining these rights as available to noncitizens. While much of CMW is dedicated to the rights of "regular," or legal and documented immigrants, Part III of the treaty lists the rights that all migrants enjoy regardless of their status. Most notably for the arguments of this paper, rights for undocumented migrants in this treaty include equality of treatment with nationals of the State of employment (Article 43), access to social housing schemes (Article 43(d)), and protection of the family from arbitrary or unlawful interference (Article 14).[54]

Although created to set wide-spread accepted standards for the rights of migrants, the comprehensive nature of this treaty has made it unpopular with many States—owing in part to the incorrect assumption that the CMW encourages undocumented migration by granting rights equal to citizens.[55] Consequently, the treaty took ten years to draft and another 13 to gather enough States Parties to enter it into force. Only 55 States are party to the CMW to date—nearly all of which are from sending rather than receiving States.[56] Despite this, many of the reasons States give for not ratifying often point to a perceived tip in the balance between sovereignty and individual rights. Countries like Japan or South Korea, which define themselves through their ethnic and cultural homogeneity, have claimed that ratifying the convention would require them to recognize migrants as an integral part of a society to which they do not belong.[57] Germany, too, raised concerns about the treaty's potential indicators of permanence for migrants who have no access to citizenship, mostly in reference to those Turkish and Balkan migrants who overstayed their temporary employment visas in the aftermath of the Cold War.[58] Likewise, the United States argues the concept of "migrant workers" goes against its historical immigration

[54] United Nations, General Assembly, G.A. res. 45/158, supra footnote 52.
[55] Ibid., 255.
[56] UN Office of the High Commissioner for Human Rights, Status of Ratification Interactive Dashboard, 2014.
[57] Pecoud, A. & Guchteniere, Paul, (2010), supra, footnote 53 at 429.
[58] Ibid.

principles—foreigners who immigrate should theoretically become permanent residents and citizens. Migrant workers, then, have no place in this sort of scheme.[59] Because it enumerates very few new rights, however, States Parties to CERD and the two Covenants are already obligated to uphold many of the rights in CMW for undocumented migrants despite these reservations. Their objections bring to light the tension States feel in the face of accepting and ratifying treaties recognizing noncitizen rights.

The Obligations of the United States

When it comes to ratification of the treaties described above, the United States government has been relatively choosy. Many of the principles in both CERD and the ICCPR are already enshrined in the United States Constitution, making them relatively acceptable to most Americans and justiciable both domestically and internationally.[60] The ICESCR, on the other hand, does not have this sort of domestic support. As activist Phillis Schlafly put it in 1979, many conservative Americans believe that the Covenant's expansive recognition of economic rights would "constitute a giant step toward a socialist state" – a political system long considered by right-wing scholars and politicians as antithetical to the American way of life.[61] As such, the U.S. has embraced those treaties that reinforce its precise values of civil and political freedom while ignoring those that may force unpopular economic or social action.

Non-ratification does not mean, however, that the United States has no legal obligation to the rights listed in these unwanted instruments. Even as just as a signatory of several of these treaties, the United States is bound to "refrain from acts" which could defeat their "object and

[59] Ibid.
[60] MacNaughton, supra, footnote 38 at 374.
[61] Alston, P. (1990). U.S. ratification of the covenant on economic, social and cultural rights: The need for an entirely new strategy. The American Journal of International Law, 84(2), pp. 365–393.

purpose."[62] So while the United States may not believe in housing as a human right or that noncitizens should have access to government-funded welfare, it is obligated to make sure its domestic laws do not violate them as they are written in the ICESCR. The rights enshrined in the CMW, too, are elaborations on general rights already outlined in the ICCPR and CERD, which already fall within the United States' purview. The United States, then, has internationally recognized legal obligations to grant or protect a wide variety of human rights—including those important to HUD's rule, like housing and welfare—to all peoples, regardless of citizenship and regardless of which treaties it has formally ratified.

State Sovereignty and the Limitations of Noncitizen Rights

The ability of a State to choose which treaties to ratify and to choose how to—or not to—implement the obligations within them stems from the principle of territorial sovereignty, or a "state's power to exercise exclusive control over its physical domain."[63] According to this principle, States have the power to enact domestic policy as needed to "determine the character of the political community" within its borders, to refuse entry and expel aliens, and to confer nationality as they see fit.[64] On the other hand, human rights law contends that while fundamental rights must be given to all, States have the power—within reason—to determine how these rights are implemented to those within their borders. In fact, sovereignty is considered a bedrock of international law overall. Articles 2.4 and 2.7 of the United Nations Charter specifically prohibit both member states and the United Nations itself from intervening in the domestic matters and political independence of other member States.[65] In this sense, human

[62] Ibid., 318.
[63] Bosniak, 1991, supra, footnote 31 at 743.
[64] Ibid; Larking, supra, footnote 31 at 193.
[65] United Nations. (24 October 1945). *Charter of the United Nations*. 1 UNTS XVI. Accessed online 13 March 2020. https://www.un.org/en/sections/un-charter/chapter-i/index.html

rights and the sovereign rights of States are seen not in opposition within international law, but as consistent and mutually supportive. States willingly take on the legal obligations of human rights treaties, and the rights within them are enacted when States integrate treaty obligations into their own domestic frameworks.[66]

Like the UN Charter, human rights treaties make several explicit concessions to sovereignty, particularly in regards to noncitizen rights. The ICCPR clearly states that political rights are guaranteed only to citizens when expressly stated in domestic law, and freedom of movement is limited for noncitizens.[67] Article 25 clarifies this first distinction by laying out very precise instances of differentiation: "every citizen" shall have the right to participate in public affairs, to vote and hold office, and to have access to public service."[68] Only rights necessary for participation in political life within a country are limited to citizens. Article 12 likewise clarifies distinctions in freedom of movement: only persons who are "lawfully within the territory of a state" are granted freedom of movement.[69] States may not, however, prevent a noncitizen from returning to his or her place of origin. CERD expands on these distinctions by stating that differential treatment between the two groups can be permitted where it serves a "legitimate" State objective.[70] Unlike the principle of universality, though, the Human Rights Committee has made it clear that "no general rule can be drawn" when it comes to determining legitimacy of a State's action in limiting noncitizen rights.[71] In other words, States have the power to make

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[66] Ibid.
[67] UN Sub-Commission on the Promotion and Protection of Human Rights. (26 May 2003). *The rights of non citizens: final report of the Special Rapporteur, David Weissbrodt, submitted in accordance with Sub Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283*. E/CN.4/Sub.2/2003/23. Accessed online 22 January 2020. https://www.refworld.org/docid/3f46114c4.html
[68] United Nations, General Assembly, 1966, supra, footnote 45.
[69] Ibid.
[70] Weissbrodt, D. (2008). *The human rights of non-citizens*. Oxford ; New York: Oxford University Press.
[71] Ibid.

distinctions between the rights of citizens and noncitizens where they deem fit, so long as they do not interfere with other human rights principles.

There are several reasons a State might legitimately choose to make distinctions between citizens and noncitizens—not least of which are national security concerns associated with undocumented immigration. According to João Estevens, immigration as a whole poses a threat to the perceived security of nations by removing a State's sense of control over its own borders and the internal and external threats against it.[72] To mitigate these concerns, sovereignty principles and international law allow countries to adopt specific border control and immigration methods, including the development of screening procedures and cooperation with international governments to analyze information on travelers, cargo and vessels in real time.[73] Undocumented immigrants, however, render these processes virtually useless. By the very nature of their entry, they bypass the domestic checkpoints and processes that allow them to be vetted by border control agencies. National authorities of the receiving country therefore have no way of knowing who these migrants are, how many have crossed the border, what their intentions are for coming into the country, or how long they plan to stay. This lack of knowledge can translate into concerns for the safety of a nation's population, as well as fears—both real and unfounded—of increased instances of terrorism, human trafficking, and general criminality from those they are unable to track.

Unfortunately, fears relating to the perceived criminality of noncitizens often lead to the expansion of a State's legitimate interest into human rights abuses. In the aftermath of 9/11, for

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[72] Estevens, Joao. (October 2018). "Migration crisis in the EU: developing a framework for analysis of national security and defence strategies." *Comparative Migration Studies*, 6(1), 28.

[73] McElmurry, S., Kerr, J., Brown, T., Zamora, L. (October 2016). "Balancing Priorities: Immigration, National Security, and Public Safety." A joint report of the Chicago Council on Foreign Affairs and the Bipartisan Policy Center. Accessed online 17 March 2020. https://www.thechicagocouncil.org/sites/default/files/oct16_immigrationandnationalsecurty_report.pdf

instance, the United States rounded up 5,000 men of Middle Eastern descent who had entered the U.S. on non-immigrant visas for interviews, essentially violating their ICPPR right to privacy and CERD right to non-discrimination at the risk of detention or deportation.[74] Other noncitizens of Middle Eastern descent were detained and even tortured.[75] While the United States was criticized by the international community for its actions, Attorney General John Ashcroft defended the violations of human rights by citing domestic legislation (the U.S. PATRIOT Act) and a need to sacrifice the liberty of noncitizens for the security of the nation.[76]

Yet scholars and migrant-rights activists have increasingly pushed back against the perception that noncitizens and the undocumented are more likely to commit crimes or be disloyal to receiving countries. Studies have found that crime rates are actually lower in the neighborhoods where immigrants live, and incarceration rates for the undocumented in the United States were less than half of those for native-born Americans in 2017.[77] The numbers for undocumented-led terrorist attacks are even lower: of the 980 people who "planned, attempted or carried out" attacks in the United States between 1975 and 2017, only 192 of these were found to be foreign-born. A mere nine of these were undocumented or on an expired or "illegal" visa.[78]

Criminality among this group is rare, but it cannot be understated that the threat of terrorism from foreign nationals generates a substantial amount of fear among the American public. It is this fear that provides the context for the type of activity described above, which

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[74] Cohn, Marjorie. (2003). Human rights: Casualty of the war on terror. *Thomas Jefferson Law Review, 25*(2), 317 365.

[75] Cole, supra, footnote 14 at 367.

[76] Ibid, 348

[77] Wang, Xia. (2012). "Undocumented Immigrants as a Perceived Criminal Threat: A Test of the Minority Threat Perspective." *Criminology*, 50(3), 743-776;

Nowrastah, A. (March 4, 2019). "Illegal Immigrants and Crime – Assessing the Evidence." *Cato Institute*. Accessed online 17 March 2020. https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence.

[78] Nowrasteh, A. (May 7, 2019) "Terrorists by Immigration Status and Nationality: A Risk Analysis, 1975-2017." *Cato Institute*. Accessed online 10 April 2019. https://www.cato.org/publications/policy-analysis/terrorists immigration-status-nationality-risk-analysis-1975-2017

often overreaches international standards of necessity and proportionality. Despite the fact that the numbers do not often align with the severity of legislation enacted around undocumented immigrants, States around the world continue to implement criminalizing immigration controls—using national security and sovereign jurisdiction of border control as a means of legitimizing xenophobic legislation.

National security is not the only interest States might have for differentiating between citizens and noncitizens; many countries that encounter large numbers of undocumented immigrants also face substantial financial strain. Like their citizen counterparts, undocumented immigrants utilize educational and social systems—increasing costs to taxpayers and draining federal budgets.[79] To illustrate, many of the undocumented are ineligible for governmental or employer health care and must rely on emergency room assistance.[80] The lack of insurance for this group translates to an estimated $6 to $10 billion in additional health care costs per year for taxpayers in the United States.[81] Costs such as these lead to protest by conservative-leaning politicians around the world, including France's Marine le Pen's suggestion that "more and more [immigrants] are coming from the Third World, taking advantage of our benefits…" or former U.S. Attorney General Jeff Sessions' insistence that, "No great and prosperous nation can have both a generous welfare system and open borders."[82]

Both of these statements bely a legitimate interest in reducing the increased public tax burden caused by undocumented immigration. Still, research shows that policy makers often

[79] Becerra, D., Androff, D., & Ayon, Cecilia. (December 2012). "Fear vs. Facts: Examining the Economic Impact of Undocumented Immigrants in the United States." *Journal of Sociology and Social Welfare*, 39(4), 111-135.
[80] Terminski, B. (2013). "Realizing the right to health of undocumented immigrants in Europe: legal and social challenges." *In Proceedings of the 13th World Congress on Public Health*. Bologna: Monduzzi Ed, 1-12.
[81] Becerra et al., supra, footnote 78 at 116.
[82] Joseph, Yonette. (May 5, 2017). "In their own Words: Marine le Pen and Emmanuel Macron." *New York Times*. Accessed online 18 March 2020. https://www.nytimes.com/2017/05/05/world/europe/emmanuel-macron marine-le-pen-quotes.html;
National Housing Law Project, supra footnote 2 at 33.

over-emphasize these fears: many of the undocumented actually contribute more in tax payments than the costs of providing services at a federal level.[83] In fact, policies aimed at decreasing access for the undocumented to social and economic rights tend to cost countries more than an increase in welfare assistance for this same group. HUD's proposed rule exemplifies this; implementation and enforcement is estimated to cost American taxpayers an additional $227 million dollars annually, with another $13 million immediately in proposed up-front costs for evictions.[84] Although undocumented immigration does place a legitimate strain on States' financial resources, governments have pushed the boundary by understating both noncitizen tax contributions and the costs of anti-immigrant policies to taxpayers.

Sovereignty and Noncitizen Rights in the United States

The United States may be an active player in international organizations and human rights initiatives, but there is a prominent ideology promoted by conservative political scholars and think tanks that strongly favors domestic sovereignty. Stewart Patrick claims this prioritization stems "from the nation's origins as the first modern republic based on the consent of the governed."[85] "Consent" is key here; political recognition in the United States has historically been dependent upon a person's ability to approve of the laws that govern them—a right that only voting citizens can enact. Although citizenship is conferred by one's presence in the United States at the time of their birth, many of these politically conservative Americans do not consider citizenship to truly be a birthright. Rather, it is a moral and philosophical commitment to both shared ideals and a common identity. This commitment comes from the

[83] Becerra et al., supra, footnote 78 at 116.

[84] United States Department of Housing and Urban Development. (15 April 2019). "Regulatory Impact Analysis: Amendments to Further Implement Provisions of the Housing and Community Development Act of 1980." *National Low-Income Housing Coalition Archives.* Accessed online 18 Jan 2020. https://nlihc.org/sites/default/files/2019 05/Noncitizen-RIA-Final-April-15-2019.pdf

[85] Patrick, supra, footnote 36 at 253.

mutual agreement among residents to "recognize each other's rights and to share a justice system constituted on this basis."[86] Rights are not considered inherent in this American political landscape. Rather, they exist primarily when consented upon by the government—and not just any government, but one made up of mutually accepted peers.

From this conservative viewpoint, participation in international treaties and supranational bodies can fly in the face of the American conception of political legitimacy. Indeed, several Republican U.S. representatives have suggested that acquiescing to the rights in human rights treaties forces the country to accept a foreign agenda that is inherently antithetical to its own values.[87] In July of 2019, Secretary of State Mike Pompeo declared that the United States would develop its own commission on the exploration of "unalienable rights," claiming that the country must "be vigilant that human-rights discourse not be corrupted or hijacked or used for dubious or malignant purposes by external authorities"—in this case, the States making up the United Nations.[88] This statement becomes especially clear in light of the United States' parting from the United Nations Human Rights Committee. Former Ambassador to the United Nations Nikki Haley stated that U.S. commitment to human rights does not "allow [the U.S.] to remain a part of a hypocritical and self-serving organization that makes a mockery of human rights."[89] Ambassador Haley also responded to U.N. allegations of human rights abuses toward migrants at the southern border by saying, "Neither the United Nations nor anyone else can dictate how the United States upholds its borders." In each of these statements, conservative U.S. policy makers make reference to a long-held belief that international human rights bodies impose a "moral

[86] Ibid.
[87] Patrick, supra, footnote 36 at 222.
[88] U.S. Department of State. (8 July 2019). "Secretary of State Michael R. Pompeo Remarks to the Press." Accessed online 13 March 2020. https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/
[89] Dwyer, Colin. (June 2018). "U.S. Announces Its Withdrawal From U.N. Human Rights Council." *National Public Radio*. Accessed online 13 March 2020. https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council

authority" over America without regard to the country's sovereign jurisdiction over its own people and borders.[90]

This threat of an imposed foreign morality is exceptionally potent when treaties appear to force constraints on American immigration policies. According to current conservative discourse, "illegal immigrants" – the preferred description of the undocumented – present a profound rupture to the American social contract. By subverting legal means of entry, they display a lack of commitment to American legal and moral principles and are therefore unable to participate in the benefits of American citizenship. They have violated the American people's collective human right to self-determination by forcing their way into our society without submitting to the nation's right to choose who can have access to membership. As such, when human rights treaties insist that the undocumented deserve rights and benefits equal to that of law-abiding citizens, Americans with this political viewpoint tend to understand them as cheapening the value of American citizenship as a whole and taking away the sovereign right of citizens to have the sole say in governmental affairs.[91]

Conservative policy makers draw on this belief when they focus on the illegal entry of the undocumented, their (real and alleged) criminality, and the loss of financial resources for American citizens. In doing so, they make a concerted effort to bring border control to the interior of the country by developing policies that make it impossible for the undocumented to remain here. After all, both human rights and international law reinforce national security as a matter of U.S sovereignty, just as it reinforces the U.S.'s sovereignty over domestic law—including budget and resource allocation. If the United States can couch policies that affect the rights of the undocumented within matters of national jurisdiction, it can claim the supremacy of

[90] Patrick, supra, footnote 35 at 222.
[91] Cole, supra, footnote 14 at 383

sovereignty over its treaty obligations. As a result, citizenship access and welfare policy have been inextricably tethered since the onset of the Trump administration. This includes a 2020 public charge law that makes it harder for immigrants to access both citizenship and government benefits and a proposed bill that prohibits federal funding to cover the administrative costs of healthcare for the undocumented. These bills, as Ben Carson would say, are truly an attempt by the United States government to "take care of its own." HUD's 2019 proposed rule is a perfect point of analysis for this argument.

HUD's 2019 Proposed Rule on "Mixed Status Families"

Early in 2019, the Department of Housing and Urban Development made a proposal to amend Section 214 of the Housing and Community Development Act of 1987.[92] In its original form, this section of the act allows "mixed status" families—those families with members of different immigration and citizenship statuses—to live in public housing and receive federally subsidized housing assistance.[93] Because unauthorized immigrants are ineligible for housing funds, any financial aid is provided on a prorated basis. Financial assistance and total rent amount are based on the percentage of citizens and legal immigrants in the house. To be considered for assistance, a person must submit a declaration that states he or she is a U.S. citizen or a noncitizen with eligible immigration status.[94] Members of the household that know they are not eligible for funding due to undocumented status are not required to submit proof of authorized presence in the country—though they are counted as members of the household for the purposes of setting the rent.[95] In addition, the act's current regulations do not require that the head of household or spouse have eligible immigration status in order for a mixed family to

[92] National Housing Law Project, supra, footnote 2 at 2.
[93] United States Department of Housing and Urban Development, supra, footnote 1.
[94] Ibid.
[95] Ibid.

qualify for the assistance.[96] This is quite important. Around 70% of mixed status families receiving HUD assistance are made up of citizen children and at least one ineligible parent. As minors cannot currently sign their own leases, having undocumented parents be considered heads of household is important for remaining housed.

According to the Federal Register, HUD began considering changes to this act as a result of Trump's Executive Order 13828, which stated that "agencies should 'adopt policies to ensure that only eligible persons receive benefits and enforce all relevant laws providing that aliens who are not otherwise qualified and eligible may not receive benefits."[97] According to this directive, undocumented immigrants are considered to be illegally benefiting from resources marked only for citizens by virtue of residing within a house that receives financial assistance. Under the current law, they are already ineligible to personally receive any funds themselves.[98] To address this, HUD expanded the rule to say that any *household* with an undocumented immigrant—not just individuals—would be ineligible to receive public housing benefits. All persons within the home must submit the verification of eligible immigration status in order to be rendered eligible, even those who know they are ineligible.[99] Additionally, undocumented immigrants can no longer serve as the leaseholder or head of household, automatically disqualifying families with citizen children but undocumented parents from assistance.[100] Families have two choices: they can remove the undocumented member from their house to keep the subsidy, or they can leave the unit together and find similarly affordable housing on the market.

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[96] Ibid.
[97] Ibid.
[98] United States Executive Office of the President. (10 April 2018). "Reducing Poverty in America by Promoting Opportunity and Economic Mobility." 83 Fed. Reg. 15941. *Federal Register: The Daily Journal of the United States*. Accessed online 18 Jan 2020.
[99] United States Department of Housing and Urban Development, supra, footnote 1.
[100] Ibid.

The implications of this proposal for citizens and noncitizens alike are extreme. According to HUD's impact analysis, the rule would directly impact over 100,000 individuals in 25,000 mixed status families.[101] Because so many of the households involve minors with undocumented parents, HUD anticipates that most families will likely forgo the subsidies to avoid separation or detection by immigration authorities, forcing citizens and the undocumented onto the streets in search of affordable housing.[102] Additionally, HUD anticipates that families with full citizenship that will replace those of mixed status will likely have less income and require higher subsidies. This would actually require a reduction in the quantity and quality of assisted housing in response to the higher costs, making it harder for both mixed-status and full-status families to find housing they can afford.[103] For the undocumented, this new requirement to submit immigration verification makes public housing applications a new kind of border checkpoint—fear of punishment may force them to either become homeless or to commit a further crime by lying about his or her presence in a subsidized home.

Despite this negative impact, HUD explains that the proposed rule is not meant to address immigration, but rather to better align the department with President Trump's Executive Order—also titled "Reducing Poverty in America by Promoting Opportunity and Economic Mobility." President Trump states that government established programs like HUD's, which are designed to help Americans in poverty, "have instead delayed economic independence, perpetuated poverty, and weakened family bonds."[104] To ensure that all "Americans can realize the benefits of…the principles of freedom and equal opportunity for all," the government—in this case, HUD—

[101] National Low-Income Housing Coalition. (13 May 2019). "Trump Administration Publishes Proposed "Mixed Status" Rule that Would Lead to Family Separations and Evictions for Certain Immigrant Families." Accessed online 17 Feb 2020. https://nlihc.org/resource/trump-administration-publishes-proposed-mixed status-rule-would-lead-family-separations

[102] National Housing Law Project, supra, footnote 2 at 2.

[103] United States Department of Housing and Urban Development, supra, footnote 2 at 3.

[104] Ibid.

"owes it to Americans to use taxpayer dollars for their intended purposes" of serving purely American citizens.[105] HUD couches the rule not in terms of alleviating undocumented immigration or barring noncitizens from access to affordable housing, but as a reallocation of American dollars to American households.

Human Rights Violations

While focusing on citizen access to assistance might make sense in the context of domestic housing policy, it overlooks the impacts that this rule has on the human rights of the undocumented themselves. As both HUD and several housing agencies point out, the rule threatens to force family separations in order to retain housing stability. This policy change thus directly violates Article 23 of the ICCPR, which states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."[106] This protection was actually written into the original HUD act, which specified that financial assistance to mixed status families should be permitted "if necessary to avoid the division of a family."[107] In pursuing a rule change that removes essential protections for family unity, HUD is not only circumventing the U.S.'s international obligations to noncitizens, but is ignoring its own Congressional mandate.

In addition, forcing all within a household—regardless of whether or not they declare themselves eligible for financial assistance—to submit proof of eligibility violates several other ICCPR guarantees. Article 17 states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home…"[108] Some democratic lawmakers have expressed fear that HUD will release this information to Immigration and Customs Enforcement (ICE),

[105] Ibid.
[106] United Nations GA, 1966, supra, footnote 45.
[107] Restriction on Use of Assisted Housing By Non-Resident Aliens. 42 U.S. Code § 1436a. (2019).
[108] United Nations GA, 1966, supra, footnote 45.

which will use it to locate the undocumented for deportation or detention.[109] If this is the case, gathering this information would also impinge on ICCPR Article 9: "No one shall be subject to arbitrary arrest or detention."[110] The OHCHR supports this by stating information collected on the undocumented must only be used for the express reason for which it was obtained, as law enforcement can use it to arbitrarily root out undocumented immigrants who are leading otherwise lawful lives.[111] Requesting the status information of those not in contention for financial aid constitutes a clear interference with privacy, home and family, and has the effect of intimidating a vulnerable group of people with no clear ability to outwardly protest against it.

Furthermore, HUD's proposed rule also presents problems to United States compliance with CERD. The Center on Budget and Policy Priorities claims that the rule would disproportionately harm Latinx people. In fact, of the 109,500 people that would be affected by the rule, 95% are people of color, including 85% who are Latinx.[112] Even if the re-appropriation of federal housing assistance to citizens constituted a legitimate State objective under CERD, that objective loses legitimacy when it denies fundamental rights like family unity to primarily those of a specific nationality. While the rule itself does not state outright that only those mixed status families of Latinx background will be targeted, political narratives surrounding immigration in the United States give this change a racially-biased tone. The Trump

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[109] Wiltz, Teresa. (23 May 2018). "Housing Authorities Reel as HUD Singles Out Undocumented Immigrants." *Pew Stateline*. Accessed online 12 April 2020. https://www.pewtrusts.org/en/research-and analysis/blogs/stateline/2019/05/23/public-housing-authorities-reel-as-hud-singles-out-immigrants

[110] United Nations GA, 1966, supra, footnote 45.

[111] United Nations Office of the High Commissioner for Human Rights. (23 March 2012). *Human Rights at International Borders: Exploring Gaps in Policy and Practice.* Accessed online 12 April 2020. https://www.ohchr.org/Documents/Issues/Migration/Events/HumanRightsatInternationalBorders_backgroundpaper2012.pdf

[112] Mazzara, A. (1 July 2019). "Demographic Data Highlight Potential Harm of New Trump Proposal to Restrict Housing Assistance." Center on Budget and Policy Priorities. Accessed online 18 Feb 2020. https://www.cbpp.org/research/housing/demographic-data-highlight-potential-harm-of-new-trump proposal-to-restrict-housing

Administration, which has pushed many different departments to consider changes in policy to take away benefits from undocumented immigrants, has frequently referred to immigrants coming to the southern border as "animals," "tough, tough people," and "thugs" who come from "shithole countries."[113] The United States' approach to developing legislation that limits the rights of noncitizens directly contradicts its obligations under CERD to prevent and shut down arbitrary laws that discriminate disproportionately against people of color.

Although the prevailing narrative detailed in the previous section may make it seem otherwise, these violations show that HUD's rule is clearly not about housing. In addition to the fact that it disproportionally affects the undocumented, Ben Carson has told critics of the rule that once it comes into place, mixed status families will be given an 18-month deferral of assistance termination. His reasoning is that this period of time will be enough "for Congress to engage in comprehensive immigration reform."[114] With this phrasing, Carson affirms that this rule is intricately linked to immigration and is meant to be a placeholder for reform until the federal government takes greater action. Mixed status families, then, are allowed to keep their housing only so long as the government is still undecided about what to do once the undocumented have identified themselves through HUD's rule. Recognizing the hardship this might place on noncitizens and their families, Carson stated: "It's not that we're cruel, mean-hearted. It's that we are logical."[115]

The Value of Treaties

[113] National Housing Law Project, supra, footnote 2 at 30.
[114] Ibid, 26.
[115] Kwong, Jessica. (21 May 2019). "'You Take Care of your Own First': Ben Carson's HUD Prepares to Evict Undocumented Families, Including 55,000 Children." *Newsweek.* Accessed online 18 Feb 2020. https://www.newsweek.com/ben-carson-hud-evict-immigrant-take-care-your-own-1431925

Unfortunately, this type of logic will continue to be common so long as States continue to prioritize national interest over human rights obligations. Moreover, the U.S. government's success in controlling the narrative around the rule suggests that human rights treaties really have no ostensible power to prevent a government from stepping on the rights of the undocumented. Yet despite this deficiency in rights enforcement, treaties still have one important role: to set universal standards that remind States how they are *supposed* to act. A lack of short-term enforcement power may mean that States may be able to disregard treaties at the expense of migrants—but as discourse changes and human rights treaties become more universally accepted, civil society and the international community can use these standards to force offending States into compliance.

The "societal pressure" approach toward human rights compliance takes the long-term view but can nevertheless still be quite effective. When Donald Trump announced his "zero tolerance" immigration policy of separating children at the border, for instance, the U.S. received scathing denouncements from both allies and enemies alike. The U.K's Theresa May called the program "deeply disturbing" and "wrong," while Iran's Hassan Rouhani described it as "complete maliciousness."[116] These reprimands from world leaders, coupled with outrage from domestic NGOs and individual actors from around the globe, put a substantial amount of pressure on the U.S. to end the policy quickly. Trump did so by executive order just a few weeks after these comments in June of 2018.[117] It is certainly true that attempting to end human rights abuses in this way does not have any legal "teeth." What it can do, however, is prove that the minimum standard of conduct provided by human rights treaties actually does impose a political

[116] Ward, Alex. (20 June 2018). "How the World is Reacting to Trump's Family Separation Policy." Vox News. Accessed online 26 March 2020. https://www.vox.com/world/2018/6/20/17483738/trump-family separation-border-trudeau-may-reaction

[117] Executive Order 13841, 3 C.F.R, 29435 (2019).

cost on States—even those as powerful and seemingly impervious to treaty obligation as the U.S. Once visible to the necessary government officials, this cost has the potential to affect change in the long run.[118]

For the undocumented who need immediate assistance, this approach will a long time and a series of failures before there will be any signs of success. After all, to get State governments to enforce human rights, all of the actors involved need to both understand the standards written into international treaties and consider them valuable enough to set aside national interest and hold others accountable. This can be incredibly difficult, especially when governments like the United States are successful in hiding their commitments behind domestic jurisdiction. Such strategic narratives can render these human rights norms virtually invisible. Even when advocates are able to sift through the prevailing story and recognize the salience of a particular treaty, they often have to fight long and hard to convince both the general public and policy makers of its applicability before they can use it as a political tool. Subsequently, advocates may find it more expedient to use a different tactic when abusive legislation is in immediate danger of being passed.

Compounding these difficulties is the fact that State political interests regarding sovereignty are in constant contradiction. President Barack Obama, for instance, once expanded temporary deportation stays for a variety of undocumented migrants through the Deferred Action for Childhood Arrivals policy—but his scaling up of immigration enforcement funding and focus on formal removals for rather than softer returns still earned him the title "Deporter in Chief" by

[118] Hathaway, O. (2002). Do Human Rights Treaties Make a Difference? *The Yale Law Journal, 111*(8), 1935-2042.

immigrant rights activists.[119] The weight that governments place on the human rights standards, therefore, can change not only from one administration to the next, but from one policy to another. As a result, State compliance and acceptance of human rights is not a constant upward trend, but a series of slowly rising valleys and peaks. To be successful in their pursuits, advocates must understand that the effectiveness of using human rights treaties as a political tool will depend on the current political climate and the ruling administration's particular goals.

Advocacy Efforts and HUD's Rule

Family separation and child detention centers may have brought migrant rights to the forefront of international attention in the past, but opponents to HUD's rule will still face an uphill battle if they wish to overturn it. The current administration's continued insistence on increased border wall funding and immigration restrictions suggests President Trump's anti-immigrant agenda is not about to change any time soon. Opponents will have to convince conservative lawmakers to not only see through his "America first" rhetoric, but to upend decades of domestic political precedence denying housing as a fundamental right. When all is said and done, getting policy makers to honor U.S. obligations to the undocumented will require an amount of political leverage and voice that both housing and migrants-rights activists do not have in this national climate. Advocates may need to look for a means of preventing the rule's passing that is more politically palatable than international treaty obligation.

A human rights framework may not be immediately helpful against HUD's rule, but bolstering knowledge of human rights treaties can help migrant-rights advocates in the U.S. prevent similar legislation from arising in the future. The primacy of territorial sovereignty

[119] Chisti, M., Pierce, S. & Bolter, J. (26 January 2017). "The Obama Record on Deportations: Deporter in Chief or Not?" *Migration Policy Institute*. Accessed online 15 April 2020. https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not

means that the United States will always be negotiating between its national interests and human rights; mitigation, then, will depend on increasing the visibility of its treaty obligations overall so that the legislature and the general public can better understand the effects of controversial laws and rules. Like all political campaigns, this will take time, failure, and a lot of persistence. For now, however, these advocates will have to slowly chip away at HUD's prevailing rhetoric and address each oppressive rule as it comes.

Conclusion

This paper has attempted to explain how States can use strategic narrative to ignore or manipulate their international treaty obligations to the undocumented. In the case of HUD, the U.S. government took advantage of a housing rule to achieve anti-immigrant policy goals that prioritized sovereignty norms over the human rights of noncitizens. The undocumented are still waiting to hear of the rule's outcome—HUD must still comb through over 10,000 public comments condemning the proposal before it can begin a plan for implementation.[120] Unfortunately, the passage of similar legislation during President Trump's administration seems to suggest HUD's rule will likewise enjoy success in the coming year.

Regardless of the outcome, however, HUD's rule presents an important opportunity for domestic advocates to begin considering and separating legitimate national interest claims from the obligations of human rights treaties. Such action could bring the U.S. one step closer to universal rights enforcement by giving individuals, NGOs, and even pro-migrant rights legislators the tools to react and redirect national conversation in a more forceful way. The issue in this particular case, then, is not whether treaties can force the U.S. to stop HUD's proposal outright, but whether or not they can be used to promote and legitimize the progressive actions of

[120] United States Department of Housing and Urban Development, supra, footnote 1.

those already fighting for migrant rights. If civil society can uncover the rights hidden under the guise of national jurisdiction, activists and individuals may be able to use Ben Carson's words against him: "It's common sense, you take care of your own." When it comes to the obligations written in human rights treaties, the division between migrants and citizens simply does not exist—we are all America's "own."

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