

# The Right to Health as the Unheralded Narrative of Health Care Reform

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IN PASSING THE AFFORDABLE CARE ACT, THE UNITED States took a giant, if partial, step toward joining other nations wherein the right to health constitutes an inalienable moral and legal right. Although not widely appreciated, the right of every person to enjoy the highest attainable standard of physical and mental health<sup>1</sup> (the right to health for short) is not merely an abstract moral imperative. Rather, it is an established international legal precept still to be fully embraced in the United States. Even though the right to health was overshadowed during the health care debate by other narratives, such as insurance reform, cost control, and care delivery, this right remains a central if unheralded narrative of the Affordable Care Act and its legacy.

What is this right that engenders these bold claims? It is an assertion of the responsibility of governments to strive for “the highest attainable standard of physical and mental health.” It is an asseveration that governments will respect, protect, and fulfill the right to health by ensuring the availability, accessibility, acceptability, and quality of the care required. It is an averment that governments will honor the tenets of accurate information, nondiscrimination and equality, and participation. It is an avouchment that governments will address the “underlying determinants of health” such as sound housing, clean water, and adequate nutrition, especially as these determinants apply to the needs of poor and other marginalized populations.<sup>2</sup> As such, the right to health constitutes a concept broader than that represented by the right to health care, covering elements that the Affordable Care Act, with its focus on health care, addresses only in limited, although important, ways.

The right to health—or more precisely, to health care—as a moral dictum is associated with Senator Edward Kennedy’s impassioned expression of hope “that every American—north, south, east, west, young, old—will have decent, quality health care as a fundamental right and not a privilege.”<sup>3</sup> Others have echoed these sentiments, not least President Obama who framed last year’s health care debate as a core ethical and moral obligation. Americans appear to agree, evidenced by the very existence of and broad support for the

Medicare, Medicaid, and CHIP public safety net programs. Moreover, 72% of Americans strongly believe that health care should be considered a human right.<sup>4</sup>

The right to health is also a matter of international law, one drawing on the collective force of national constitutions, international and regional treaties, and other instruments. As such, the right to health is as established as the more familiar rights to freedom of expression and religion. Leading the way were British laws as early as 1802 triggered by the health threats of the Industrial Revolution, and the Mexican Constitution of 1843, which recognized the state’s role in public health.<sup>1</sup> In 1925, Chile became the first nation to incorporate the right to health into its constitution. Now more than 100 countries boast a commitment to the right to health or health care in their constitutions.<sup>5</sup>

Beyond these national efforts, several critical global pacts incorporate the right to health. First among them was the constitution of the World Health Organization (WHO), which in 1946 identified the “enjoyment of the highest attainable standard of health” as “one of the fundamental rights of every human being.”<sup>1</sup> Two years later, the United Nations (UN) General Assembly adopted the Universal Declaration of Human Rights (UDHR), article 25 of which guarantees the right to “a standard of living adequate for the health and well-being . . . including food, clothing, housing and medical care.”<sup>6</sup> Many international lawyers view the UDHR as creating a binding customary international law, including as an interpretation of the human rights commitments in the UN Charter, under which states have committed to the “universal observance of, and respect for, human rights.”<sup>7</sup> In 1966, the UDHR was expanded upon by the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which asserts that signatory states recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>1</sup> It was against this backdrop that the UN Commission for Human Rights created the mandate for a Special Rapporteur on the right of every person to enjoy the highest attainable standard of physical and mental health. The combined force of the

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UDHR, the WHO constitution, UN Charter, and other regional and international treaties, national constitutions and statutes, and widely endorsed declarations and resolutions has positioned the right to health as a binding obligation on most if not all countries.

The commitment of the United States to the right to health remains ambiguous. Constitutional right to health care amendments proposed during the past decade by representatives Jackson and McCollum garnered only a handful of cosponsors. United States law lacks a right to health statute, perhaps with the exception of the Emergency Medical Treatment and Active Labor Act. Moreover, although the United States is a signatory to ICESCR, unlike 160 other nations, the United States has yet to ratify this key treaty.<sup>8</sup> The same holds true for the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>8</sup> The United States also opposed the creation of the mandate for the Special Rapporteur on the right to health. There is no single reason for US reluctance to explicitly recognize the right to health. Possible reasons might include an overly optimistic belief in the power of individuals, outdated distinctions between socioeconomic and civil and political rights, a misunderstanding of what the right to health actually requires, and a general reluctance to ratify international treaties (seemingly emerging from a sense of American exceptionalism).

On a more approving note, the United States has ratified the Convention on the Elimination of All Forms of Racial Discrimination, which recognizes the right to public health and medical care.<sup>8</sup> The United States also joined 170 other nations in adopting the 1993 Vienna Declaration and Programme of Action, thereby affirming the duty of all states to “promote and protect all human rights and fundamental freedoms.”<sup>9</sup> More recently, with US support, the United Nations adopted the Political Declaration on HIV/AIDS, which recognizes access to medication as an inextricable ingredient of the right to health.

Taken together, particularly under obligations stemming from UN membership, a compelling if controversial case can be made that the right to health is not only morally but also legally binding on the United States. Ratifying the ICESCR, CEDAW, and CRC and codifying the right to

health in statutory law or as a constitutional amendment would further strengthen the case. In so doing, the United States would honor the vision and legacy of President Franklin D. Roosevelt, whose 1944 State of the Union address called for a “second Bill of Rights,” including the “right to adequate medical care and the opportunity to achieve and enjoy good health.”<sup>10</sup> The polio-stricken president certainly knew about adequate medical care and the opportunity to achieve and enjoy good health.

Health care reform ushered in a new day in the United States. The right to health has finally crossed the *posse ad esse* bar. The US legal code and treaty ratification record must be harmonized with that of the global community to unambiguously recognize the right to health, and the United States must build on the Affordable Care Act to more fully realize these moral—and legal—obligations.

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