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Introduction: framing economic, social, and cultural rights

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The Institute on Framing Economic, Social, and Cultural Rights for Mobilization and Advocacy: Towards a Strategic Agenda in the United States

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In many forms of art, transgression of the frame is a means of calling attention to and questioning boundaries. Actors leap off the stage and into the audience. Musicians improvise. Visual artists ignore the limits of the canvas or paint in forbidden places. Each of these acts invites the audience to abandon the physical and temporal limitations imposed by a frame, a score, or a stage and to re-envision the artistic project. However, as subversive as this artistic technique is, it also reinforces the role of frames as determinants of what is “in”—that which is accepted, controlled, and sanctioned—and what is “out”—that which is untamed, challenging, and impermissible.¹

On a practical level, the example of artistic frames appears far afield from the issues of framing that lawyers face in developing advocacy and litigation strategies. Lawyers frame ideas and arguments, not art. But on a conceptual level, thinking about the creative framing of legal arguments in ordered and tangible terms, like the painting in a picture frame or the notes on a musical score, can help illuminate some of the challenges and opportunities of the legal framing process.

Lawyers are framers by trade. Presented with raw facts, they work with clients to identify the relevant legal frame through which to apprehend the facts—perhaps tort, contract, criminal, constitutional, or human rights law. The frame influences the relative power of the parties and, importantly, determines the available remedies. Choosing the right frame or frames is a critical strategic decision that sets the future course of the advocacy, whether litigation or less formal policy advocacy.

Very often, the relevant legal frame is obvious and largely beyond dispute. However, facts are often messy and there may be sever-

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¹ On transgression in visual art, see Anthony Julius, Transgressions: The Offences of Art (2003), and Kieran Cashell, Aftershock: The Ethics of Contemporary Transgressive Art (2009).
al possible frames that must be considered and prioritized. In the hardest cases, the facts simply fall outside of an existing legal frame, and lawyers may develop sophisticated strategies to promote the incremental expansion of existing frames. For example, the 1970s campaign to recognize sexual harassment as a form of sex discrimination was built on existing civil rights law but moved beyond the limits of the longstanding frame for claiming employment discrimination. The phenomenon of “sexual harassment” was transformed from a troubling and recurring, but legally insignificant, fact of women’s employment to a federal civil rights violation. At the same time, the boundaries of the statutory term “sex discrimination” were shifted to encompass the phenomenon of sexual harassment.²

Professor Charles Reich’s reframing of social welfare programs as property provides another instructive example. In his article The New Property, Reich drew on existing law to expand the definition of constitutionally protected property rights to encompass government programs such as cash welfare benefits that had previously been viewed as purely discretionary charity or largesse.³ The jurisprudential shift that Reich’s work triggered drew on known facts and existing law, but reframed the understanding of those facts to argue, with some success, for a shift in boundaries and greater constitutional protection of welfare rights.

The status of economic, social, and cultural rights (ESC rights) under U.S. law qualifies as a hard case and presents a similar challenge. United States federal law recognizes few of these rights, and although state constitutions often specify rights to education or welfare, few state courts have connected those provisions with the larger international jurisprudence of ESC rights.⁴ Challenges to the justicia-

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² On the effort to attain legal recognition of sexual harassment, see Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979); Reva B. Siegel, Introduction: A Short History of Sexual Harassment, in Directions in Sexual Harassment Law 1 (Catharine MacKinnon & Reva Siegel eds., 2004).
bility of ESC rights and the acceptance of a bright line dividing ESC rights (out) from civil and political rights (in) raise additional framing issues.⁵

These challenges arise because ESC rights transgress the familiar frames of U.S. law. On the one hand, this transgression illuminates the significance of what is happening outside of the narrow legal frame that encompasses only civil and political rights. As with visual art, the transgression calls into question our familiar and accepted boundaries. In fact, it is this very act of underscoring the out-ness of ESC rights that generates and organizes community-based power to claim such rights. Economic and social rights have proven to be effective organizing constructs for communities precisely because they transgress the prevailing frame and challenge a status quo that has left many communities and individuals on the margins of society.

At the same time, as lawyers we are trained to expand the legal frame, not to abandon it. Economic and social rights, we are predisposed to argue, should be frame-able as rights within the U.S. legal system—perhaps as part of a constitutional right to live or an underlying natural law that predates and transcends the Constitution.⁶ We tend to proceed incrementally and strategically and to build out from existing, accepted frames. Because of the difficulty of finding a universal frame under domestic law that encompasses the full range of ESC rights, we may focus on specific issues such as housing or food, or on specific population sectors such as children or veterans or the disabled, to begin the reframing task. With these incremental

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moves, however, the question remains: is such reframing even possible within our domestic legal constructs, and if it is, does it run the risk of undermining the truly radical movement-building power of ESC rights in the United States? The articles in this symposium issue grapple fully with these tensions and their practical implications for lawyers and social movements.

Katharine G. Young begins, in an elegant and insightful article titled *Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States*, by noting that the ESC rights frame is “neither fixed nor uniform.” Implicit in her discussion is the fact that the legal frame against which ESC rights transgresses—in this case, the federal Constitution—is also neither fixed nor constant, but is subject to interpretation and even wholesale change. The widely various possibilities for such shifts are identified in the redemptive/rejectionist dichotomy of Young’s title. On the one hand, ESC rights movements may gain short-term momentum and perhaps some long-term gains from constitutional rejection. On the other hand, through integration, ESC rights also hold the potential to redeem and transform a U.S. constitutional jurisprudence that has largely resisted the incorporation and enforcement of substantive norms. Ultimately, Young posits that redemption is the more pertinent frame for the United States in the long term, but argues that the redemptive frame should draw on some of the power of the rejectionist frame by settling for nothing less than transformative changes in law, targeting “root causes and deep structures underlying poverty and inequality.”

Dorothy Thomas explores similar themes in her evocative essay *The 99% Solution: Human Rights and Economic Justice in the United States*. Drawing on her experiences as a human rights activist in the United States and the United Kingdom, Thomas probes (and lances) the notion of human rights exceptionalism in the United States. She catalogs examples of human rights rejection by government and individuals that are overt, repeated, and real. Yet in the shadow of Occupy Wall Street, Thomas embraces a redemptive frame, calling on activ-

8 Id. at 345.
ists to begin by acknowledging the universality of human rights and then work to realize such rights in the United States rather than simply to recognize them.

Two articles, one by Gillian MacNaughton and Mariah McGill and one by Risa Kaufman, also adopt a redemptive posture, chronicling the extensive and successful implementation of ESC rights in the United States even in the absence of formal ratification of relevant human rights treaties. In *Economic and Social Rights in the United States: Implementation Without Ratification*, McNaughton and McGill challenge the accepted wisdom that the United States has little to show in terms of ESC rights implementation. In doing so, they also critique the historic dichotomy between ESC rights and civil and political rights. As the authors note, ESC rights have been accepted, in some contexts and at some times, by governments at all levels in the United States. The U.S.-focused activities of the United Nation’s Special Procedures, U.S. participation in the Universal Periodic Review process, and U.S. statements in connection with the treaty monitoring processes all indicate a degree of formal national engagement with ESC rights. On the subnational level, evidence of ESC rights implementation is even more compelling, with concrete examples from Vermont to Eugene, Oregon—the latter, a self-proclaimed “human rights city.” In this account, it is the U.S. Senate that is sorely out of step, while many other government bodies at all levels move ahead to implement an ESC rights agenda.

Kaufman’s article, *Framing Economic, Social, and Cultural Rights at the U.N.*, also explores the extent to which activists have succeeded in expanding the United States’ ESC rights commitments in the absence of treaty ratification. Kaufman particularly stresses the ways in which U.N.-based advocacy has become a locus of activity for grassroots activists. For example, she observes that in 2008, four hundred grassroots and national social justice organizations participated in development of a U.S. shadow report to the U.N. Committee on the Elimination of Racial Discrimination, with 125 of the activists traveling to Geneva to deliver their concerns to the Committee and the U.S. government in person. Kaufman suggests that this strategic pressure from new and unexpected quarters, outside of established domestic

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boundaries—perhaps the legal equivalent of blowing in the wrong end of your oboe—has gotten the attention of the U.S. government in part because it stretches the traditional frameworks of domestic advocacy. The next step, she notes, is “to translate [ ] advocacy efforts and successes into a more robust understanding and precise articulation of the U.S. government’s obligations to protect and promote ESC rights domestically.” This integrative task is aided immensely by the organizing that occurred around the U.N. activities.

The final two articles in this collection continue to drill down on the questions of framing and strategic advocacy by examining specific sectors through a human rights lens. In The Champagne of Housing Rights: France’s Enforceable Right to Housing and Lessons for U.S. Advocates, authors Eric S. Tars, Julia Lum, and E. Kieran Paul provide a detailed comparative look at implementation of a right to housing in France. Interestingly, the policy changes that secured this shift were directly tied to a powerful and confrontational grassroots movement of “homeless individuals, housing advocacy organizations, celebrities, students, and other French residents.” Protests were combined with squatting takeovers and international legal pressure. The resulting policy framework provides for continuing participation of community organizations in nearly every aspect of the housing law’s implementation on the local level—a clear example of embedding mechanisms for review and revision directly into policy implementation, perhaps straddling the rejection/redemption divide. The authors conclude that France’s approach serves as a model, ensuring that U.S. “government officials cannot claim that creating an enforceable right to housing in the United States is impracticable.”

This symposium issue closes with an article on human rights and education by Alexandra Bonazoli titled Human Rights Frames in Grassroots Organizing: CADRE and the Effort to Stop School Pushout. In this piece, Bonazoli works through a detailed case study of CADRE’s grassroots work among parents and students in Los Angeles challenging school discipline procedures and the school-to-prison

12 Id. at 426.
14 Id. at 445.
15 Id. at 482.
pipeline on human rights grounds. Drawing on the sociological literature on framing theory, the article examines in concrete terms the work done by the human rights frame in CADRE’s grassroots mobilization work. Most important, the author concludes, are the ways in which procedural principles of human rights—transparency, inclusion, and participation—were incorporated both into processes and outcomes in CADRE’s work in ways that responded to and engaged the grassroots activists for the long term.

In conclusion, perhaps it is no accident that both of the legal framing examples noted at the beginning of this introduction—sexual harassment and the new property—are examples of legal shapeshifting spurred by a social movement. The articles in this symposium issue repeatedly note the role of ESC rights frames in movement building, as well as the role of movements in shaping ESC rights claims. This juxtaposition makes clear the fluidity of frames and their role in the movement as a way to impart solidarity, direction, and vision.

Lawyers will be comfortable with this fluidity. As Katherine Young observes, frames are not fixed. Because of this, strategic decisions must be made again and again, based on specific contexts and goals. Like artists, activists can choose to be bound by frames or can reject and transgress them. The nature of the ESC rights movement’s relationship to the prevailing frame, and even to the human rights frame itself, is a deliberate choice with consequences for movement building as well as advocacy.

Having said that, the essays in this collection reveal an unusual consistency in their choice of integrative, or redemptive, approaches to domestic implementation of ESC rights. To be sure, challenging the status quo is a critical component of the process, as the works of Dorothy Thomas and Eric Tars et al. particularly note. But as we choose among frames for ESC rights advocacy in the United States, the weight of the collective wisdom expressed in this collection argues for approaches designed to expand the domestic frame, to bend it toward real change, rather than to subvert it.