RESTORE INDIGENT HEALTH CARE IN NEW ORLEANS NOW: A FUNDAMENTAL RIGHT TO HEALTH CARE IN LOUISIANA FOLLOWING THE CONSTITUTIONAL ASPIRATIONS OF SOUTH AFRICA AND INDIA

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I. INTRODUCTION

"Hurricane Katrina drowned most of the New Orleans health care system."[1] This included the city's facilities within the Charity Hospital System, "the core health care provider to poor and underinsured, primarily African-American residents."[2] The inadequate recovery of accessible health care services for indigent residents of New Orleans adversely impacts those in need of primary care, treatment for chronic illnesses, and critical specialty care.[3] To ensure equity and access to health care for all New Orleanians, the state of Louisiana should adopt a fundamental right to health care by following the constitutional aspirations of South Africa and India.

Since 1736, Louisiana has provided indigent and uninsured health care primarily through the Charity Hospital System, currently coordinated through Louisiana State University ("LSU").[4] On August 29,

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1 William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 978 (2007).

2 *Id.* (citing Robin Rudowitz et al., *Health Care in New Orleans Before and After Hurricane Katrina*, 25 HEALTH AFF. w393 (2006) *available at* http://content.healthaffairs.org/cgi/reprint/25/5/w393). New Orleans' main health care facilities within the statewide Charity Hospital System were "Big Charity" Hospital and University Hospital, together forming the Medical Center of Louisiana at New Orleans ("MCLNO"). LSU Health Care Services Division, Historical Timeline, http://www.lsuhospitals.org/Hospitals/MCLNO/ MCLNO-History.htm (last visited Jan. 24, 2009). University Hospital reopened as Interim Hospital in November, 2006. LSU Health Care Services Division, Interim LSU Public Hospital, http://www.mclno.org/mclno//menu/default.aspx (last visited Jan. 24, 2009).

3 Complaint at ¶ 5, Leblanc v. Thomas, No. 08-548 (Civ. Dist. Ct. Parish of Orleans LA, Jan. 17, 2008), http://communitycatalyst.org/doc_store/publications/new_orleans_petition_part1_jan08.pdf (last visited Aug. 2, 2010) [hereinafter Leblanc]. "[T]he lack of mental health treatment facilities has forced more of these crises towards law enforcement." *See* Quigley, *supra* note 1, at 980.

4 Quigley, *supra* note 1, at 978. *See* Medical Center of Louisiana at New Orleans, The Beginnings of Charity Hospital, www.mclno.org/MCLNO/Menu/hospital/History/CharitysBeginnings.aspx (last visited Nov. 30, 2008). The Louisiana State University Health Sciences Center – New Orleans ("LSU HSC-NO"), of which MCLNO is a part, must "provid[e] access to high quality medical care" to the medically indigent. "Medically indigent" is defined as any uninsured

2005, Hurricane Katrina ("Katrina") decimated the health care infrastructure of New Orleans by closing the only two public hospitals in the city, Charity Hospital and University Hospital.[5] As a result, patients with disabilities and chronic illnesses lacked access to routine treatment, critical medical records were destroyed,[6] and mental illness rates doubled.[7] In fact, the loss of adult psychiatric beds in Charity Hospital's Crisis Intervention Unit forced the New Orleans Police Department to either incarcerate mentally ill people committing crimes or take them to ill-equipped emergency rooms.[8]

To address the future health care needs in New Orleans, LSU and the U.S. Department of Veterans Affairs ("VA") announced plans to build a new medical campus in downtown New Orleans with an expected joint investment greater than $2 billion.[9] While the VA hospital is slated to open by 2013, the LSU teaching hospital still does not have a target date for opening.[10] In addition, serious concerns exist regarding LSU's ability to raise $1.2 billion, their share of the funding.[11] LSU officials

persons whose incomes are below 200% of the federal poverty limit. LA. REV. STAT. ANN. § 17:1519.1(10, 12), .4(B)(1) (Supp. 2010).

5 Elizabeth A. Weeks, *Lessons from Katrina: Response, Recovery and the Public Health Infrastructure*, 10 DEPAUL J. HEALTH CARE L. 251, 276 (2007).

6 *Id.* (citing DANIEL A. FARBER & JIM CHEN, DISASTERS AND THE LAW: KATRINA AND BEYOND 5 (2006)). By contrast, Oschner Medical Center, a private hospital with ample resources, provided immediate attention. *See* NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 514 (Picador 2007).

7 *See* Quigley, *supra* note 1, at 980 (citing Ronald C. Kessler et al., Hurricane Katrina Community Advisory Group, *Mental Illness and Suicidality After Hurricane Katrina*, 84 BULL. WORLD HEALTH ORG. 930, 930 (2006), *available at* http://www.who.int/bulletin/volumes/84/12/06-033019.pdf).

8 *See* Quigley, *supra* note 1, at 980; Richard A. Webster, *Loss of Charity Hospital's Crisis Intervention Unit Limits Options*, NEW ORLEANS CITYBUSINESS, Aug. 21, 2006, http://findarticles.com/p/articles/mi_qn4200/is_20060821/ai_n16689326/?tag=content;col1 (last visited Nov. 1, 2009).

9 Kate Moran, *VA, LSU Choose Site for Hospital Complex*, TIMES-PICAYUNE, Nov. 25, 2008, at A1; Kate Moran, *7 Patients Sue to Reopen Charity*, TIMES-PICAYUNE, Jan. 18, 2008, at B1 [hereinafter Moran, *7 Patients*]; Jan Moller, *Larger LSU-VA Hospital May Be Needed, New Report Says*, TIMES-PICAYUNE, May 29, 2008, at A1 (the proposed hospital center is a joint venture of LSU HSC-NO and the VA). This plan ignores the continuing interrelated problems of grossly inadequate emergency care, primary care, and mental health services.

10 Bill Barrow, *VA Hospital Meeting Heated*, TIMES-PICAYUNE, Apr. 17, 2009, at B4.

11 The construction budget assumes $492 million FEMA reimbursement for Charity Hospital, contrary to FEMA's last offer of $150 million, and $400 million from a future bond sale in a shaky credit market. *See* Bill Barrow, *Hospital Land Tied to "Financing Plan"*, TIMES-PICAYUNE, May 28, 2009, at A3; Bill Barrow, *Jindal: LSU Needs More Details*, TIMES-PICAYUNE, June 2, 2009, at A2. A federal arbitration panel will determine how much FEMA should be required to pay Louisiana. Jonathan Tilove, *Hearing Starts in Charity Hospital, FEMA Dispute*, TIMES-PICAYUNE, Jan. 11, 2010, at A1, *available at* http://www.nola.com/hurricane/index.ssf/2010/01/post_23.html. *See* Save Charity Hospital, State Will Go for Secret

believe the building that housed Charity Hospital is ill suited for a modern teaching hospital.[12] Also, LSU claims that the damage and mold from Katrina preclude its reopening.[13] According to an LSU-sponsored assessment, it is not economically feasible to repair the indigent care hospital to restore health care services to pre-Katrina levels.[14]

However, renovating Charity Hospital would efficiently address the health care needs of indigent residents still unmet by the reopening of Interim Hospital in November 2006. An independent assessment conducted at the request of the Louisiana Legislature concluded that renovating the dormant hospital could be accomplished with savings of at least 22 percent compared to building a functionally similar building on a new site.[15] Allowing this historic landmark to resume its role as a

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Arbitration with FEMA on Charity Hospital, http://www.savecharityhospital.com/content/state-will-go-secret-special-arbitration-fema-charity-hospital (Oct. 5, 2009, 19:00 CST) (characterizing the arbitration process as secret, rather than public). La. House Bill 780 passed 94-2, but died in the Senate Education Committee. H.B. 780 requires legislative approval of LSU's financing plan before allowing land acquisition and expropriation to begin. H.B. 780, 1st Reg. Ses. (La. 2009), *available at* http://www.legis.state.la.us/billdata/History.asp?sessionid=09RS&billid=HB780 (last visited June 13, 2009); Bill Barrow, *Proposal to Delay Hospital is Halted*, TIMES-PICAYUNE, June 12, 2009, at A2. *See also* Bruce Nolan, *Jindal, LSU, Tulane Sign Hospital Agreement*, TIMES-PICAYUNE, Aug. 29, 2009, at B1 (lifting a halt to land acquisition when LSU, Tulane University, and other stakeholders agreed to the composition of a new board of directors for the new hospital).

[12] *See* LSU HOSPITALS, FORTY-FIVE YEARS OF STUDIES: CONSTRUCTION OF A NEW PUBLIC HOSPITAL IN NEW ORLEANS 6-7 (2007), http://www.lsuhospitals.org/Documents/Charity Studies-Forty-five years of Studies.pdf.

[13] LSU HEALTH CARE SERVICES DIVISION, EXECUTIVE SUMMARY - EMERGENCY FACILITIES ASSESSMENT: UNIVERSITY AND CHARITY HOSPITALS 5.1 (2005) [hereinafter ADAMS REPORT EXECUTIVE SUMMARY], http://www.lsuhospitals.org/Documents/Adams Report LSU Executive Summary_November 2005.pdf. According to Fred Cerise, vice president for health affairs and medical education at LSU, Katrina decided [to close Charity], not the State. Moran, *7 Patients*, *supra* note 9.

[14] ADAMS REPORT EXECUTIVE SUMMARY, *supra* note 13, at 4.1. *See also* GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANE KATRINA: STATUS OF HOSPITAL INPATIENT AND EMERGENCY DEPARTMENTS IN THE GREATER NEW ORLEANS AREA, GAO-06-1003, 18-20 (2006) [hereinafter GAO HURRICANE KATRINA REPORT], *available at* www.gao.gov/cgi-bin/getrpt?GAO-06-1003 (ADAMS Management Services Corporation determined that the repair costs exceeded 65% of the replacements cost of Big Charity). Curiously, LSU reopened University Hospital as Interim Hospital a mere 14 months after Katrina struck, despite the same report finding that University Hospital suffered more damage than Big Charity (68%). Interview with S. Stephen Rosenfeld, Partner, Rosenfeld & Rafik (Jan. 14, 2009).

[15] RMJM HILLIER, FEASIBILITY STUDY: MEDICAL CENTER OF NEW ORLEANS - CHARITY HOSPITAL 9 (2008), http://www.fhl.org/images/PDFs/09-15_Charity_Feasibility.pdf (Louisiana House Concurrent Resolution No. 89 charged the Foundation for Historical Louisiana ("FHL") to perform this assessment). Under this unfunded directive, the FHL raised more than $600 thousand to hire RMJM Hillier to prepare the study. Press Release, Foundation for Historical Louisiana, House Appropriations Committee to Hear Charity Hospital Feasibility Study Thursday, January 22, 9:30 a.m. at State Capitol (Jan. 22, 2009), http://www.fhl.org/FHL/News/PresvAlerts/CharityHospital.shtm#InTheNewsJan.

provider of indigent health care would save both time and money.[16] Multiple hearings in different venues have been held to discuss the Big Charity gut-rehab option presented by RMJM Hillier, an international architectural firm.[17]

A Louisiana court should interpret the state constitution to provide a fundamental right to health care. In addition to the constitutional protections of life and liberty, Louisiana law requires LSU to provide access to high quality medical care to all residents, including the medically indigent.[18] Poor and uninsured New Orleanians have relied on Charity Hospital for their medical needs for the greater part of three centuries.[19] While the United States Supreme Court declines to impose affirmative economic and social rights, internationally some states' high courts have found such rights to exist within their constitutions.[20] To guide the development of a state right to health care, Louisiana could examine the constitutions and case law of South Africa and India. South Africa's Constitutional Court affirmed the judiciary's authority to require the government to meet the minimum core obligation to progressively realize the fundamental right to health care under section 27 of the 1996 constitution.[21] India's Supreme Court interpreted their constitution's symbolic Directive Principles and the right to life under Article 21 to include an affirmative State duty to provide adequate medical care.[22] Finding a fundamental right to health care in Louisiana would require LSU to meet the immediate needs of all New Orleanians as currently prescribed by law.

This note argues that the adoption of a fundamental right to health care in Louisiana requires LSU to restore as soon as possible, and at a minimum, the pre-Katrina levels of indigent care that Charity Hospital provided to New Orleanians. Part II compares the health care

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[16] RMJM HILLIER, *supra* note 15, at 21.

[17] *See, e.g.*, Committee Hearing Notice, La. House Committee on Appropriations, Options Concerning the Remodeling of the Medical Center of Louisiana at New Orleans (Big Charity) (Jan. 22, 2009), http://house.louisiana.gov/Agendas_2009/Jan_09/0122_09_AP.pdf; Bruce Eggler, *Foes of Hospital Proposal Fill Forum*, TIMES-PICAYUNE, May 29, 2009, at B4.

[18] LA. CONST. art. I, § 2; LA. REV. STAT. ANN. § 17:1519.4(B) (Supp. 2010). Uninsured persons earning less than 200% of the federal poverty level qualify as medically indigent. § 17:1519.1(12).

[19] NATIONAL ECONOMIC & SOCIAL RIGHTS INITIATIVE, HUMAN RIGHTS OF HURRICANE SURVIVORS, BETRAYING AN AMERICAN TRADITION: THE KILLING OF CHARITY HOSPITAL 1 (2008) [hereinafter NESRI], http://www.nesri.org/Killing_Charity_Hospital.pdf.

[20] *See* Jeanne M. Woods, *Emerging Paradigms of Protection for "Second-Generation" Human Rights*, 6 LOY. J. PUB. INT. L. 103, 126 (2005).

[21] *See infra* Part III.

[22] *See infra* Part IV.

services available to indigent residents of New Orleans before and after Katrina. Part II also describes a Louisiana class action lawsuit that seeks to force state officials to restore access to pre-Katrina standards of health care. Parts III and IV discuss the fundamental right to health care as inspired by the constitutional interpretations of India and South Africa. Part V examines the federal adoption of negative fundamental rights and compares the findings of positive fundamental rights in federal and state courts. Part VI advocates an explicit finding of a fundamental right to health care in Louisiana, similar to the constitutional aspirations of India and South Africa. This affirmative fundamental right would define a minimum core obligation as providing access to high quality medical care to the medically indigent residents of New Orleans, a vulnerable population that depended on Louisiana to provide free health care through Charity Hospital. Specifically, Louisiana and LSU should follow RMJM Hillier's recommendations to gut and rehabilitate the dormant building that housed Big Charity and abandon the uncertain plans to build a new LSU hospital. Regardless of the route, LSU must replace the care lost by the unlawful closure of Charity Hospital sooner, rather than later.

II. CHARITY HOSPITAL AND THE STATE OF INDIGENT HEALTH CARE SERVICES IN NEW ORLEANS

A. PRE-KATRINA

From its inception in 1736, Charity Hospital served as the medical safety net dedicated to the impoverished residents of New Orleans.[23] Through LSU, Louisiana fulfilled a state mandate ensuring health care services to all residents by funding and operating a network of ten public-inpatient hospitals and more than 350 clinics that primarily served the uninsured.[24] LSU must provide free medical care to the medically indigent and uninsured.[25] The medical schools of LSU and

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[23] NESRI, *supra* note 19, at 1-2. In 2003, Charity Hospital provided indigent health care accounting for 83% of all inpatient and 88% of all outpatient uncompensated care costs in the New Orleans area. Rudowitz *supra* note 2, at w396 (2006) (citing data provided to the authors by the Louisiana Hospital Association). The historical mission of Louisiana's public hospitals is to provide medical care to any state resident. LA. REV. STAT. ANN. § 17:1519.4(A) (Supp. 2010).

[24] Rudowitz, *supra* note 2, at w396.

[25] This requirement logically arises from the State institution's statutory duties to (1) provide access to high quality health care to the medically indigent and uninsured and (2) reasonably charge others for treatment or service. § 17:1519.4(B)(1), (C).

Tulane University shared the primary clinical responsibilities for Charity Hospital and University Hospital, and trained many members of the New Orleans health care community.[26] These two public hospitals provided the bulk of the city's substance abuse, psychiatric, and HIV/AIDS care.[27] Prior to Hurricane Katrina, the greater New Orleans area staffed 4,083 inpatient beds and 462 inpatient psychiatric beds.[28]

Charity Hospital served the predominantly poor, minority population.[29] Despite its distinguished history of indigent care, annual assessments of the nation's health indicators routinely placed Louisiana at the bottom of the fifty states.[30] African-American residents of New Orleans, like their counterparts living elsewhere, disproportionately suffered from heart disease, diabetes, and asthma.[31] Poor and uninsured New Orleanians sought health care through Charity Hospital's extremely busy emergency department, outpatient clinics, and inpatient care.[32] High rates of emergency room visits indicate limited access to primary care and preventative services.[33] Charity Hospital and University Hospital provided the bulk of outpatient health services to low income residents because few private providers chose to treat the uninsured with uncompensated care, and Medicaid Disproportionate Share Hospital ("DSH") funds financed indigent care at these public hospitals.[34]

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[26] NESRI, *supra* note 19, at 2. Pre-Katrina, Big Charity and University Hospital trained 2000 health care professionals each year. Telephone Interview with Dr. Charles Zewe, Vice President for Communications and External Affairs, LSU System (Jan. 6, 2009). In addition to providing free indigent health care services, the State charges LSU with the task of developing medical and clinical resources through health education programs. § 17:1519.4(B)(2).

[27] Rudowitz, *supra* note 2, at w396.

[28] *Id.* at w395 (Exhibit 1) (includes public and private hospitals).

[29] While the national rate of nonelderly uninsured Americans is 18%, those in Orleans Parish and Jefferson Parish constituted 26% and 21% of the population, respectively. Two-thirds of all New Orleanians were African American. *Id.* at w394, w395 (Exhibit 1). *See* NESRI, *supra* note 19, at 1-2.

[30] In 2005, Louisiana improved its ranking to 49th place after placing last in 2004 and 1990. The 2005 report cited high rates of obesity, cancer deaths, infant mortality, and premature death. On a brighter note, the report noted strengths related to ready access to prenatal care and public health spending. UNITED HEALTH FOUND., AMERICA'S HEALTH RANKINGS: A CALL TO ACTION FOR PEOPLE & THEIR COMMUNITIES 50 (2005), http://www.unitedhealthfoundation.org/shr2005/ahr05_email.pdf. Since 1736, Charity Hospital has served the residents of New Orleans in six different locations. Medical Center of Louisiana at New Orleans, *supra* note 4.

[31] Rudowitz, *supra* note 2, at w394.

[32] *Id.* at w396.

[33] *Id.*

[34] *Id.* More than 150 primary and specialty care clinics provided 150,000 outpatient visits. But, these two hospitals faced "shrinking public resources, a high burden of uncompensated care, and a lack of capital to make much needed infrastructure improvements even before Katrina hit." *Id.* Nearly all hospitals, public or private, are required to provide emergency and stabilizing services

B. THE AFTERMATH OF HURRICANE KATRINA

On August 29, 2005, Hurricane Katrina struck the Louisiana coast as a Category 3 storm and lashed New Orleans with sustained surface winds of Category 1 or Category 2 strength.[35] The storm surge in New Orleans and the surrounding parishes approached nineteen feet.[36] Levee failures caused 80 percent of New Orleans to flood.[37] More than 1,500 deaths were directly attributable to Katrina across the Gulf Coast,[38] and nearly 300,000 homes were destroyed or rendered uninhabitable.[39] One month after Katrina, nearly half a million people still lived in temporary housing: hotels, shelters, or with family.[40]

As expected, the most vulnerable residents of New Orleans faced great challenges post-Katrina. A survey of evacuees in the Houston shelters described these internally displaced persons ("IDPs") as: (1) mostly African-American, (2) extremely poor with no bank accounts or available credit cards, (3) having low education levels, and (4) lacking

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regardless of a patient's ability to pay. Centers for Medicare and Medicaid Services, EMTALA Overview, http://www.cms.hhs.gov/EMTALA/01_overview.asp (last visited Jan. 24, 2009). DSH funds support hospitals that serve a "significantly disproportionate number of low-income patients." United States Department of Health and Human Services, Disproportionate Share Hospital (DSH), http://www.hhs.gov/recovery/cms/dsh.html (last visited Nov. 1, 2009). Staff at private hospitals, like Oschner Medical Center, did not view uninsured, predominantly African American New Orleanians as potential patients. *See* KLEIN, *supra* note 6, at 515.

35 RICHARD D. KNABB ET AL., NAT'L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE KATRINA 23-30 AUGUST 2005 3, at 8 (2005) (updated 2006), http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf. The Saffir-Simpson Scale describes hurricanes with maximum sustained wind speeds as follows: Category 5 (156+ mph), Category 4 (131-155 mph), Category 3 (111-130 mph), Category 2 (96-110 mph), and Category 1 (74-95 mph). Hurricane Research Division – Frequently Asked Questions, Atlantic Oceanographic and Meteorological Laboratory, http://www.aoml.noaa.gov/hrd/tcfaq/D1.html (last visited Nov. 2, 2008).

36 KNABB, *supra* note 35, at 9.

37 Quigley, *supra* note 1, at 957 (citing Molly Garber et al., *Hurricane Katrina's Effects on Industry Employment and Wages*, MONTHLY LAB. REV., Aug. 2006, at 22). Although the Army Corps of Engineers designed New Orleans' levee system to withstand a Category 3 storm, many people believe that faulty design and construction of the levee system caused the flooding of the city. *See*, *e.g.*, Ian L. Taylor, *Charity Hospital: A Former Tulane Dean's Perspective*, 99(5) J. NAT'L MED. ASS'N 581, 581 (2007).

38 KNABB, *supra* note 35, at 11.

39 Quigley, *supra* note 1, at 957 (citing Garber, *supra* note 37, at 22-23).

40 BRUCE KATZ ET AL., BROOKINGS INST., HOUSING FAMILIES DISPLACED BY KATRINA: A REVIEW OF THE FEDERAL RESPONSE TO DATE 1 (2005), http://www3.brookings.edu/metro/pubs/20051114_CostofHousing.pdf.

the resources to facilitate evacuation.[41] These IDPs often lacked food, fresh water, prescriptions, and medical care.[42]

Hurricane Katrina dramatically decreased the rate of health insurance coverage of people still traumatized by the storm. Initial estimates from Blue Cross Blue Shield of Louisiana indicate that employers shed 200,000 people from their insurance rolls.[43] More than one third of all applicants for Louisiana Medicaid were denied coverage due to categorical eligibility requirements that remained unchanged after the storm.[44] People with health care needs could no longer count on Charity Hospital for help.

The storm devastated New Orleans' health care infrastructure. Only three hospitals located in neighboring parishes operated throughout the storm.[45] The city's bed capacity dropped by more than 50 percent within one year.[46] The city also lost 45 percent of its nursing home beds and 83 percent of its long-term acute care beds.[47] The uncompensated care previously provided by Charity Hospital and University Hospital shifted to private hospitals and other hospitals within the Charity Hospital System, some as far away as Baton Rouge.[48] The loss of Charity Hospital's inpatient mental health beds forced mentally ill people into

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41 Rudowitz, *supra* note 2, at w397-98 (citing M. Brodie et al., *Experiences of Hurricane Katrina Evacuees in Houston Shelters: Implications for Future Planning*, 96(8) AM. J. PUB. HEALTH 1402, 1402-08 (2006)).

42 *Id.*

43 *Id.* at w398. (citing Judith Graham, *Storm Sweeps Away Health Insurance*, CHI. TRIB., Dec. 29, 2005, at 13); Personal Communication with Kristy Nichols, Director of the Bureau of Primary Care and Rural Health, Department of Health and Hospitals (May 16, 2006) (due to difficult surveying conditions, only estimates of uninsurance rates were available). Despite unknown work related health hazards inherent in reconstructing a disaster zone, only 43% of documented workers had health insurance. LAUREL E. FLETCHER ET AL., REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY OF LABOR AND HUMAN RIGHTS IN NEW ORLEANS 3 (2006), http://hrc.berkeley.edu/pdfs/report_katrina.pdf.

44 In addition to narrow restrictions, the five broad categories for Medicaid eligibility are: (1) children up to age 19; (2) pregnant women; (3) parents and other caretakers of dependent children; (4) individuals with serious disabilities; and (5) the elderly. DONNA COHEN ROSS & VICTORIA WACHINO, CTR. BUDGET POL'Y PRIORITIES, MEDICAID CATEGORICAL ELIGIBILITY RULES ARE PROVING A MAJOR OBSTACLE TO GETTING HEALTH COVERAGE TO IMPOVERISHED KATRINA VICTIMS IN LOUISIANA 3 (Sept. 26, 2005), http://www.cbpp.org/9-26-05health.pdf.

45 Rudowitz, *supra* note 2, at w399.

46 *Id.* at w395 (Exhibit 1).

47 *Id.*

48 *See id.* at w399-w400. Three such private hospitals in nearby Jefferson Parish include East Jefferson General Hospital, West Jefferson Medical Center, and Oschner Medical Center. *See* Paul Rioux, *Hospitals Hurting, JEDCO Study Says*, TIMES-PICAYUNE, Dec. 8, 2008, at B1.

either the criminal justice system or overcrowded emergency rooms that are "ill-equipped to handle psychotics."[49]

C. THE HEALTH CARE INFRASTRUCTURE IN NEW ORLEANS TODAY

Nearly four years after Hurricane Katrina, the public health care infrastructure has improved in some ways, but still fails to meet the needs of the medically indigent residents of New Orleans suffering from chronic illnesses and disabilities. Reopened by LSU on November 17, 2006 as "Interim Hospital," University Hospital currently has 249 staffed inpatient beds.[50] Dr. Charles Zewe, LSU System Vice President for Communications and External Affairs, said that Katrina dispersed personnel and resources.[51] LSU plans to open more beds with the hiring of more staff.[52] This temporary facility does not perform a function similar to Charity Hospital's Crisis Intervention Unit, which evaluated people in "psychiatric crisis" in a secure environment.[53] Interim Hospital, through the Mental Health Emergency Room Extension, does provide short-term acute behavior health emergency care.[54] Other agencies, like the Metropolitan Human Services District ("MHSD") and the LSU Healthcare Network, facilitate outpatient treatment.[55] In addition, Interim Hospital received verification for a Level 1 Trauma Center, previously housed at Charity Hospital.[56]

LSU Health Care Services Division has opened seven community and school based clinics with an emphasis on prevention.[57]

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[49] Rudowitz, *supra* note 2, at w395 (Exhibit 1); Quigley, *supra* note 1, at 980.

[50] LSU temporarily leased space at the Behavioral Health Unit at DePaul to staff 38 of these inpatient beds. LSU HEALTH CARE SERVICES DIVISION, INTERIM LSU PUBLIC HOSPITAL INPATIENT BEDS CURRENTLY IN OPERATION (Oct. 1, 2008) (on file with author).

[51] Telephone Interview with Dr. Charles Zewe, *supra* note 26.

[52] LSU HEALTH CARE SERVICES DIVISION, *supra* note 50.

[53] LSU HEALTH CARE SERVICES DIVISION, INTERIM LSU PUBLIC HOSPITAL BEHAVIORAL HEALTH (Oct. 1, 2008) (on file with author); *Post-Catastrophe Crisis: Addressing the Dramatic Need and Scant Availability of Mental Health Care in the Gulf Coast: Hearing Before the S. Comm. on Homeland Security and Gov't Aff.*, 110th Cong. 2 (2007) (statement of Kevin U. Stephens, Sr., Director, New Orleans Health Department), http://hsgac.senate.gov/public/_files/TestimonyStephens.pdf.

[54] LSU HEALTH CARE SERVICES DIVISION, *supra* note 53.

[55] *Id.*

[56] Press Release, LSU Health Care Services Division, LSU Trauma Center Receives Level 1 Verification (Dec. 16, 2008), http://www.lsuhospitals.org/Media-Relations/PressReleases/2008/LSU%20Trauma%20Center%20Receives%20Level%201%20Verification.pdf; NESRI, *supra* note 19, at 2.

[57] LSU HEALTH CARE SERVICES DIVISION, LSU HCSD CLINICS - NEW ORLEANS, LOUISIANA, http://www.lsuhospitals.org/Documents/community-clinics.final.v7-copy.pdf.

These clinics provide primary care, non-emergency acute care, and preventative treatment programs.[58] They extend access to specialty care at two sites and collaborate with other providers for mental health needs.[59] Treatment and management of chronic diseases are limited to high blood pressure, obesity, diabetes, high cholesterol, and asthma.[60]

Today, Tulane Medical Center, a private hospital located across the street from Charity Hospital, provides much needed health care services. Unlike Louisiana's public hospitals, private hospitals are not required to provide free high quality health care.[61] While treating Canadian journalist and author, Naomi Klein, immediately after Katrina, a medical intern employed by Oschner Medical Center hoped that Charity Hospital would reopen to treat "those people," referring to the medically indigent patients who comprise a minority of those treated at his private hospital.[62]

D. *LEBLANC V. THOMAS* - A CHALLENGE TO THE LSU-VA HOSPITAL PLAN

On January 17, 2008, seven residents of New Orleans filed a class action lawsuit to force Louisiana and LSU to restore pre-Katrina levels of indigent health care under state law.[63] The lead plaintiffs were statutorily entitled to receive medical care at Charity Hospital because they were medically indigent.[64] They relied upon the public hospital for

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[58] *Id.* at 3-10.

[59] *Id.*

[60] *Id.*

[61] Private hospitals are only required to provide emergency and stabilizing medical services under EMTALA. EMTALA Overview, *supra* note 34. In 1995, Hospital Corporation of America, a private for-profit owner and operator of hospitals, acquired 80% of Tulane Medical Center. Tulane Medical Center, History, http://www.tuhc.com/CustomPage.asp?guidCustomContentID={89CBC617-41 73-427A-B39A-A2F51E45A876} (last visited Jan. 27, 2010); Hospital Corporation of America, Corporate Profile, http://phx.corporate-ir.net/phoenix.zhtml?c=63489 &p=irol-homeprofile (last visited Jan. 27, 2010).

[62] KLEIN, *supra* note 6, at 515.

[63] The lead plaintiffs are Melvin LeBlanc, Naomi Faulkin, Lucille Moore, Ronald Newman, Delilah Hall, Marlene Dumas, and Betty Washington. Leblanc, *supra* note 3. *See also* Plaintiff's Exhibit 1-7, Leblanc v. Thomas No. 08-548 (Civ. Dist. Ct. Parish of Orleans LA, 2008) *available at* http://communitycatalyst.org/doc_store/publications/new_orleans_petition_part2_exhibits_jan 08. pdf.

[64] *See* LA. REV. STAT. ANN. § 17:1519.4(B) (2003). Uninsured persons earning less than 200% of the federal poverty level qualify as medically indigent. LA. REV. STAT. ANN. § 17:1519.1(A)(12) (2003).

ongoing care of chronic medical conditions.[65] Despite their inability to pay, they received quality health care in an accessible location, their hometown.[66] Due to the unlawful closure of Charity Hospital, they faced obstacles to their statutory right to free health care, including: prohibitive costs, extensive wait times for necessary services, and lack of transportation to alternate locations for those services.[67] The plaintiff class represents low-income residents of New Orleans and the surrounding parishes who do not have the capacity, either financially or medically, to travel long distances to access high quality medical care.

According to the plaintiff class, the state and LSU violated section 17:1519.3 of the Louisiana Revised Statute by closing a hospital within the Charity Hospital System without legislative approval.[68] The legislature prohibited such closures to ensure access to health care for its low-income residents without regard to their ability to pay.[69] The class action lawsuit seeks (1) a declaratory judgment that the unilateral closure violated state law and (2) an injunction requiring the defendants to replace the pre-Katrina level of care, whether through reopening of the historic landmark or equivalent means.[70] The lead plaintiffs' medical conditions continue to deteriorate as a direct and proximate result of Charity Hospital's closure.[71]

While state courts rule on procedural matters, the substantive issue of whether LSU unlawfully closed Charity Hospital remains unresolved.[72] Dr. James Moises, a former Charity Hospital physician,

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[65] Leblanc, *supra* note 3, ¶¶ 13, 25, 38, 60, 66, 76, 58. These chronically ill and disabled New Orleanians bore a special dependence on the Charity Hospital system because their conditions required regular interaction with medical specialists and more frequent treatment as inpatients. The increased availability of primary care clinics in New Orleans and surrounding parishes fails to address the health care needs of the plaintiff class. Interview with S. Stephen Rosenfeld, *supra* note 14.

[66] Leblanc, *supra* note 3, ¶¶ 13, 26-27, 39, 60, 66-67, 73, 84.

[67] *Id.* ¶¶ 14-17, 19, 31-35, 41-44, 62, 68, 74-79, 88-89.

[68] *Id.* ¶ 3. In 2007, the Louisiana Attorney General issued an opinion affirming that statutory provision. 1 Op. La. Att'y Gen. No. 07-0169 (2007).

[69] Leblanc, *supra* note 3, ¶ 2.

[70] *Id.* ¶ 7.

[71] *See, e.g., id.* ¶¶ 23, 24, 37, 64. On January 6, 2009, Cayne Miceli, an asthmatic, died at LSU Interim Hospital after leaving the custody of Orleans Parish Prison. On January 12, 2009, John Sanchez was discovered dead at the same prison. Bill Barrow, *Tempers Flare Over Hospital Dispute*, TIMES-PICAYUNE, Feb. 2, 2009, at A1.

[72] On October 20, 2009, the state Supreme Court determined that the proper venue should be East Baton Rouge Parish, home of the state agency in charge of Charity Hospital. Leblanc v. Thomas, 08-CC-2869 (La. 10/20/10). On February 20, 2009, Judge Jolien held a hearing on the plaintiffs' Motion for Partial Summary Judgment to determine whether LSU unlawfully closed Charity

stated that the first three floors were ready to reopen weeks after the storm to provide critical emergency, specialty, and psychiatric services.[73] Contrary to LSU's assertion that the building was beyond repair, the plaintiffs claim that LSU chose to close Big Charity.[74] Before Katrina struck the Gulf Coast, Louisiana and LSU planned to close the public hospital.[75] Even LSU's own Adams assessment found that University Hospital, later reopened as Interim Hospital, suffered more damage than Charity Hospital.[76]

III. FUNDAMENTAL RIGHT TO HEALTH CARE IN SOUTH AFRICA

To effectively address *Leblanc*'s allegations of LSU's failure to meet the post-Katrina indigent health care needs of patients with chronic medical conditions, Louisiana could examine foreign constitutional responses to similar barriers to health care. As provided by the 1996 South African Constitution, the Constitutional Court of South Africa has construed the right to health care to empower courts to require the State to affirmatively act towards fulfilling the fundamental rights of its most vulnerable populations while acknowledging the limited resources available for the task.[77] In *Soobramoney v. Minister of Health, Kwa-Zulu-Natal*, the Constitutional Court found that the new constitutional order requires a commitment to achieving human dignity, freedom, and equality, but the State's obligations under section 27 of the South African Constitution are limited by the resources allocated for those purposes.[78] Later, *Government of the Republic of South Africa v. Grootboom* defined a "minimum core obligation" as determined by the needs of the most vulnerable population and required the "progressive realization" of the right to housing, a fundamental right like the right to health.[79] The

Hospital without explicit legislative approval in the weeks following Hurricane Katrina. Interview with S. Stephen Rosenfeld, *supra* note 14.

73 Affidavit of James P. Moises, Leblanc v. Thomas No. 08-548 (Civ. Dist. Ct. Parish of Orleans LA, 2008), http://www.louisianajusticeinstitute.org/files/all/docs/Exhibit_B2_-_Affidavit_of__Dr _James_MOISES.pdf. *See also* NESRI, *supra* note 19, at 2.

74 Interview with S. Stephen Rosenfeld, *supra* note 14.

75 Telephone Interview with Dr. Charles Zewe, *supra* note 26.

76 Interview with S. Stephen Rosenfeld, *supra* note 14.

77 S. AFR. CONST. 1996 § 27.

78 *Soobramoney v. Minister of Health, Kwa-Zulu-Natal* 1998 (1) SA 765 (CC) ¶¶ 8, 11 (S. Afr.), http://www.saflii.org/za/cases/ZACC/1997/17.pdf.

79 *Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) ¶¶ 31, 41, 45 (S. Afr.), http://www.saflii.org/za/cases/ZACC/2000/19.pdf.

following year, *Minister of Health v. Treatment Action Campaign* affirmed the use of judicial powers to require that government programs address the needs of society's most vulnerable groups.[80]

A. NOMINAL CONSTITUTIONAL COMMITMENT TO HEALTH CARE

Decided in 1997, *Soobramoney* was the first case under the new Constitution.[81] The Constitutional Court affirmed the constitutional commitment to address access to health services, but limited those rights to the existing public allocation of resources.[82] Mr. Soobramoney unsuccessfully challenged Addington Hospital's decision to deny him the regular renal dialysis that would have prolonged his life.[83] Due to a shortage of resources, both in terms of staff and dialysis machines, the state hospital implemented a policy that limited dialysis treatment to patients experiencing acute renal failure or certain patients with chronic renal failure.[84] Despite suffering from chronic renal failure, Mr. Soobramoney failed to qualify due to his ineligibility to receive a kidney transplant and his significant vascular and cardiac disease.[85] In addition to adopting a utilitarian approach to enforcing fundamental rights,[86] the Constitutional Court deferred to the "rational decisions taken in good faith" by public officials and medical professionals.[87]

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[80] *See Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) ¶ 135 (S. Afr.), http://www.saflii.org/za/cases/ZACC/2002/15.pdf.

[81] Woods, *supra* note 20, at 111.

[82] S. AFR. CONST. 1996 § 27; *Soobramoney* 1998 (1) SA 765 (CC) ¶ 9. The Court clarified the fundamental right to health care found in Section 27(2), "within its available resources," to state that the government's obligation to provide access to health care for all South Africans is "dependent upon the resources available for such purposes." *Id.* ¶ 11.

[83] *Soobramoney* 1998 (1) SA 765 (CC) ¶¶ 5-6, 36.

[84] *Id.* ¶ 3.

[85] *Id.* ¶ 4.

[86] Woods, *supra* note 20, at 113.

[87] *See Soobramoney* 1998 (1) SA 765 (CC) ¶ 29. The Court explicitly excluded any discussion of private sector resources or responsibilities. *Id.* ¶ 48.

B. MINIMUM CORE OBLIGATION TO PROGRESSIVELY REALIZE FUNDAMENTAL RIGHTS

Where *Soobramoney* affirmed South Africa's commitment to addressing fundamental rights in name, *Grootboom* imposed an obligation on the State to act on those rights in practice.[88] *Grootboom* ordered the State to implement a comprehensive program that progressively realizes the right of access to adequate housing by including the minimum core obligation to use reasonable measures to provide relief to homeless people living in "intolerable conditions or crisis situations."[89] Destitute homeless families sought adequate basic shelter until the municipality delivered the affordable housing for which there was a seven-year wait.[90] After the government flouted an order from the Cape of Good Hope High Court to offer this vulnerable group short term housing relief, the Constitutional Court issued a ruling based on the fundamental right to adequate housing and the rights of children.[91]

C. CONSTITUTIONAL COURT ESTABLISHES SUPERVISORY JURISDICTION OVER THE GOVERNMENT

After *Grootboom* imposed an affirmative duty on the State to effectively address concerns about fundamental rights, *Treatment Action Campaign* affirmed the right of courts to issue declaratory judgments and exercise supervisory jurisdiction over the government to ensure compliance with the Constitution, even if those orders affect policy

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88 *Grootboom* 2001 (1) SA 46 (CC) ¶¶ 24, 42.

89 *Id.* ¶ 99. A concept of the United Nations Committee on Economic, Social and Cultural Rights ("UNESCR"), "minimum core obligation" is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. *Id.* ¶ 31. The South African notion of the "progressive realization" of fundamental rights means that legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. *Id.* ¶ 45; S. AFR. CONST. 1996 § 26(2). The Court recognized the importance of the availability of resources in determining the reasonability of the steps that the State may take to progressively realize a fundamental right. *See Grootboom* 2001 (1) SA 46 (CC) ¶ 46. The fundamental rights under Sections 26 and 28 are not individual rights that entitle claimants to relief upon demand. *Id.* ¶ 95. Although the Court recognized the national Housing Act as a "program. . .aimed at achieving the progressive realisation of the right of access to adequate housing," it found the program to be unreasonable because the program fails to address the immediate needs of desperate people like the Respondents. *Id.* ¶¶ 53, 65-66 (citing *generally* Housing Act, 1997, Act 107 (GG)). "The poor are particularly vulnerable and their needs require special attention." *Id.* ¶ 36.

90 *Grootboom* 2001 (1) SA 46 (CC) ¶¶ 8, 11, 13.

91 *Id.* ¶¶ 4-5, 12.

and/or legislation.[92] Consistent with *Soobramoney* and *Grootboom*, *Treatment Action Campaign* ordered the State to implement a comprehensive program to progressively realize, within its available resources, the rights of pregnant women and their newborn children to access health services to combat mother-to-child transmission of HIV/AIDS.[93] Rather than arguing a pregnant woman's individual right to Nevirapine contrary to *Soobramoney* and *Grootboom*, the petitioners challenged the government's failure to design an effective national public health program.[94] The advocacy organization sought to enable health care providers to administer the anti-retroviral drug to mothers and their babies who lack access to private health care or the few designated research and training sites.[95] The Court extended *Grootboom* to order the government to create, not just improve, national programs that address the fundamental rights of society's most vulnerable people.[96]

IV. FUNDAMENTAL RIGHT TO HEALTH CARE IN INDIA

While South Africa adopted a Bill of Rights approach to providing a fundamental right to health care, India's Supreme Court invokes a set of symbolic guidelines to secure fundamental rights for its citizens.[97] The Constitution of India's Directive Principles of State Policy ("Directive Principles") frame the country's laws and policies to secure a social order that ensures "social, economic, and political justice, liberty,

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[92] *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) ¶ 106, 113-114 (S. Afr.). Respect for the separation of powers does not preclude judicial action where appropriate to protect socio-economic rights found in the Constitution. *See id.* ¶¶ 98-101. The Court also reaffirmed *Soobramoney* and *Grootboom*'s interpretation of the State's "minimum core obligation" of the fundamental right to health care as (1) limited by available resources, and (2) not an independent right available upon demand. *Id.* ¶ 39.

[93] In addition, the order required the government to remove restrictions that limit Nevirapine to research and training sites for the purpose of expanding access to the anti-retroviral drug that reduces the risk of mother-to-child transmission of HIV/AIDS. *Id.* ¶ 135.

[94] *See* Woods, *supra* note 20, at 117; *Grootboom* 2001 (1) SA 46 (CC) ¶ 2. The infants threatened with the transmission of HIV/AIDS from their mothers at birth constitute the unique vulnerable class requiring protection from the Court. Woods, *supra* note 20, at 118.

[95] In the initial limited pilot program, only a few public health clinics selected as test sites administered the drug to pregnant women with a goal of reaching 10% of the population. *Treatment Action Campaign* 2002 (5) SA 721 (CC) ¶¶ 11, 41, 119.

[96] During the course of the lawsuit, the State relaxed the Nevirapine policy to provide service at all major hospitals in every district and substantially increased funding for the treatment of HIV, including for the reduction of mother-child transmission. *Id.* ¶¶ 118-19.

[97] Woods, *supra* note 20, at 104-05, 111; *See generally* INDIA CONST. arts. 36-51.

fraternity, and equality" for all.[98] Article 32 of the Indian Constitution empowers the Court to protect the people's fundamental rights by issuing directions, orders, or writs to the executive.[99] Starting in the 1970s, the legal aid movement embraced Public Interest Litigation ("PIL") to provide legal access to those who were unable to seek relief through the courts, due to indigence, illiteracy, and lack of resources.[100] The Court has interpreted the fundamental right to life to include the right to good health.[101]

A. ARTICLE 21 RIGHT TO LIFE WITH HUMAN DIGNITY

In 1981, the Indian Supreme Court invoked the Directive Principles in *Frances Coralie Mullin v. Union Territory of Delhi* to expand the fundamental right to life under Article 21 of the Constitution to include the right to live with human dignity and the attendant bare necessities of life, similar to the minimum core obligation that South Africa adopted from the United Nations Committee on Economic, Social and Cultural Rights ("UNESCR").[102] Prison authorities unconstitutionally imposed restrictions that effectively denied the petitioner, a British national held in pretrial detention, the ability to meet with her attorney and five year old daughter.[103] Since pretrial detainees enjoy the constitutional protections afforded by Article 21 (Protection of Life and Liberty), State restrictions that deprive persons of life or personal liberty must be "reasonable, fair and just and not arbitrary, whimsical or fanciful."[104] Those that lead to "torture or cruel, inhuman or degrading

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[98] Sheetal B. Shah, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT'L L. 435, 454 (1999) (citing Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 25, 35 (1994)); INDIA CONST. art. 38; India Facts, Indian Directive Principles of State Policy, http://www.indiafacts.headlinesindia.com/directive-principles-state-policy.html (last visited Jan. 24, 2009). The Court affirmed the role of PIL to protect the basic human rights of the most deprived and vulnerable communities, and the broad power of the judiciary to enforce fundamental rights. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, 67-68.

[99] Shah, *supra* note 98, at 464 (citing INDIA CONST. art. 32). The Constitution contains a chapter on fundamental rights. *See generally* INDIA CONST. arts. 12-35.

[100] With the goal of solving a problem in the public interest, PIL proceedings are non-adversarial and have relaxed standing and procedural requirements. Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE - ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 161-62 (B.N. Kirpal et al. eds., 2000).

[101] Shah, *supra* note 98, at 437, 462.

[102] Frances Coralie Mullin v. Adm'r, Union Territory of Delhi (1981) 2 S.C.R. 516, 529; *Grootboom* 2001 (1) SA 46 (CC) ¶¶ 29-31. *See* Woods, *supra* note 20, at 106.

[103] Frances Coralie Mullin, (1981) 2 S.C.R. 516, 520-21, 530, 532.

[104] *Id.* at 516, 522-24; INDIA CONST. art. 21, 22.

treatment" fail any test of reasonableness or non-arbitrariness, offend human dignity, and violate Article 21.[105]

B. INCLUDING THE RIGHT TO GOOD HEALTH

The Court further extended the Article 21 right to life in *Bandhua Mukti Morcha v. Union of India* to include the right to good health within the right to live with human dignity.[106] A Court appointed commission found that bonded laborers in stone quarries endured dangerous air, forced labor, dirty drinking water, inadequate shelter, chronic diseases, no compensation for workplace accidents, and no facilities for medical treatment or education.[107] The Court invoked the symbolic Directive Principles to order the State to enforce the laws already enacted to fulfill its constitutional obligation.[108] Finding the fundamental rights of the laborers violated, the Court interpreted Article 21 to "include protection of the health and strength of workers men and women, and of the tender age of children against abuse."[109]

C. FUNDAMENTAL RIGHT TO HEALTH AND MEDICAL CARE FOR WORKERS

In *Consumer Education & Research Centre v. Union of India*, the Court interpreted Article 21 to include a fundamental right to health and medical care for workers.[110] The petitioner sought to protect workers employed in the mining and asbestos industries from the disease asbestosis.[111] By citing the goal of the Constitution of India and the

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[105] Frances Coralie Mullin, (1981) 2 S.C.R. 516, 518, 529.

[106] Shah, *supra* note 98, at 476 (citing Bandhua Mukti Morcha, (1984) 2 S.C.R. 67, 103).

[107] Bandhua Mukti Morcha, (1984) 2 S.C.R. at 68. The petitioner, a public interest organization seeking the release of bonded laborers, alleged the existence of many bonded laborers in stone quarries working under inhuman and intolerable conditions. *Id.* at 67-68.

[108] *Id.* at 69-70. The social welfare laws abolished bonded labor and regulated conditions of employment, minimum wages, workmen's compensation, and maternity benefits. *Id.* at 68.

[109] *Id.* at 103.

[110] The Court engaged in an intertextual reading of Article 21 (Right to Life) with other related articles and fundamental human rights. Consumer Educ. & Research Ctr. v. Union of India (1995) 1 J.T. 636, 660. In support, the Court said, "Lack of health denudes [the workman's] livelihood." *Id.* at 659.

[111] *Id.* at 640. The opinion examined international asbestos guidelines and discussed the diagnosis of asbestosis in great detail, in part to demonstrate the dangers faced by workers exposed to asbestos. *See Id.* at 646-48. The Court examined the Asbestos Convention, 1986; safety rules regarding asbestos promulgated by the International Labour Office, Geneva; and the

Directive Principles to promote social justice for all members of society, the Court: (1) affirmed its right to order an employer, whether public or private, to protect a worker's fundamental rights; (2) declared the employer vicariously liable for damages; and (3) required extensive employee health records, an effective workplace asbestos test, compulsory health coverage, compliance with international asbestos exposure standards, and examinations for asbestosis.[112]

D. AFFIRMATIVE DUTY TO ENSURE ADEQUATE AND AVAILABLE MEDICAL FACILITIES

In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, the Court imposed a duty on the State to ensure adequate and available medical facilities to provide treatment, despite financial constraints.[113] The Court found that the failure of a public hospital to provide necessary and timely medical treatment violates the Article 21 right to life.[114] Due to a lack of medical resources, seven public hospitals denied treatment to Hakim Seikh, an agricultural worker who suffered serious head and brain injuries.[115] The Court ordered (1) compensation for the breach of his fundamental right to life, and (2) State medical facilities to provide adequate emergency and specialty care without the use of financial constraints as an excuse for non-compliance with the constitutional obligation.[116]

"Encyclopaedia of Occupational Health and Safety", Vol-1, published by International Labour Office, Geneva. *Id.* at 640-55.

[112] *Id.* at 657-59, 661-63.

[113] Shah, *supra* note 98, at 477-78 (citing Paschim Banga Khet Mazdoor Samity, (1996) 3 S.C.J. 25).

[114] Paschim Banga Khet Mazdoor Samity, (1996) 3 S.C.J. 25, ¶9.

[115] The various governmental health facilities lacked adequate trauma care, specialty care, and inpatient beds. *Id*. ¶¶ 2, 5, 7. Hakim Seikh ultimately received treatment at a private hospital at great expense. Petitioner Paschim Banga Khet Mazdoor Samity is an organization of agricultural laborers. *Id*. ¶ 2. Parallel to the legal proceedings, the State Government adopted an Enquiry Committee report that fixed blame on several health officials who failed to admit Mr. Seikh and ordered new procedures for medical facilities. *Id*. ¶¶ 6-8, 10-14.

[116] While acknowledging financial resources as a factor, the Court said that the State must do "whatever is necessary" to "provide adequate medical services to the people." *Id*. ¶¶ 9, 15, 16. To reject financial resources as an excuse to non-compliance, the Court analogized the State's obligation to provide free legal aid to the poor. *Id*. ¶¶ 16 (citing Khatri (II) v. State of Bihar, 1981 (1) SCC 627 at p. 631).

V. FUNDAMENTAL RIGHTS IN THE UNITED STATES OF AMERICA

A. FUNDAMENTAL RIGHTS GENERALLY

Recognizing a domestic fundamental right to health care would require a court to find that the right to life under the Due Process Clause of the Fourteenth Amendment would not exist without including a fundamental right to health care. To warrant constitutional protection, a court must find that the absence of such a right would violate the nation's principles of "life, liberty, or property" by referring to our people's history, traditions, values, and conscience.[117] Mindful of our representative democracy and the separation of powers, the Court warned against extending the reach of the substantive due process clause by creating judge-made laws without roots in the Constitution.[118]

Hopefully, when a future court finds a fundamental right to health care, the appropriate standard of review for legislation that implicates that right is a strict scrutiny analysis, not the rational basis test.[119] Under strict scrutiny, legislation would be constitutional if it is narrowly tailored to achieve a compelling state interest.[120] Absent classification as a fundamental right, health care legislation would likely fall under a rational basis test, one that generally defers to legislative priorities.[121] Using a rational basis test, a lower burden than strict scrutiny, a court would determine whether the statute is rationally related to a legitimate governmental interest.[122] Judicial review of legislation or agency actions under a strict scrutiny analysis would force the government to address the immediate health care needs of indigent people, not merely supply a plausible rationale as cover for competing interests.

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[117] Roe II v. Butterworth, 958 F. Supp. 1569, 1575 (S.D. Fla. 1997) (citations omitted).

[118] *Id.* at 1576 (citing Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986) and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 100-01 (1980)).

[119] *Id*. at 1573.

[120] *Id.* Legislation that targets a suspect class would also trigger a strict scrutiny analysis. *See generally* AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 645-48 (Calvin Massey ed., 2005). Contrary to the traditional belief that strict scrutiny is "strict in theory, fatal in fact," one empirical study found that laws survive this analysis roughly thirty percent of the time. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795, 815 (2006).

[121] *See* Roe II, 958 F. Supp. at 1573. An intermediate level of judicial scrutiny is possible. *See generally* AMERICAN CONSTITUTIONAL LAW, *supra* note 120, at 429.

[122] AMERICAN CONSTITUTIONAL LAW, *supra* note 120, at 429.

B. FEDERAL FINDINGS OF FUNDAMENTAL RIGHTS

Applicants seeking constitutional protection from the State for implicit liberties, similar to the fundamental right to health care, sometimes find relief under the Due Process Clause of the Fourteenth Amendment, among other sources within the Constitution. For example, Courts have protected the right of parents to educate their children in the school of their choice and the freedom to associate with attendant privacy rights.[123] Substantive due process supported successful claims that marriage is a fundamental right essential to the pursuit of happiness.[124] From enumerated constitutional zones of privacy and the related freedoms of association and marriage, the Court has found a fundamental right to privacy implicit in the relations of married people.[125] The state's police powers cannot be construed to deny other rights, including unwritten fundamental rights, retained by the people.[126]

Pierce v. Society of Sisters struck down Oregon's Compulsory Education Act on the grounds of unreasonable interference with the fundamental liberty of parents and guardians to raise and educate their children as they deem fit.[127] The education law compelled parents to send their children to public schools upon penalty of a misdemeanor.[128] To protect private school corporations, the Court issued an injunction against State interference with the freedom of their customers to choose to send their children to private schools that were neither unfit nor harmful to the public.[129]

In a decision hailed by privacy advocates,[130] *NAACP v. Alabama ex rel. Patterson*, the Court found within the First Amendment the right of private group association to reject a civil contempt order entered against the civil rights organization upon its refusal to identify all of its Alabama members.[131] The Court recognized that effective advocacy of

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[123] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[124] Skinner v. Oklahoma, 316 U.S. 535 (1942); Loving v. Virginia, 388 U.S. 1 (1967).

[125] Griswold v. Connecticut, 381 U.S. 479 (1965).

[126] *See* U.S. CONST. amend. IX, X.

[127] Soc'y of Sisters, 268 U.S. at 530, 534-35 (citing 1922 Or. Laws § 5259).

[128] *Id.*

[129] *Id.* at 534, 536. Oregon's police power to regulate all schools was not challenged. *Id.* at 534.

[130] *See, e.g.,* Anita L. Allen, NAACP v. Alabama, Privacy and Data Protection, http://naacpvalabamaat50.org/ (last visited Feb. 2, 2009).

[131] *See* NAACP v. Alabama, 357 U.S. at 460-62, 466. When the Supreme Court of Alabama refused to honor the order on remand, the Court reasserted its authority by considering the matter settled. NAACP v. Alabama ex rel. Patterson, 360 U.S. 240, 244-45 (1959).

controversial points of view is "undeniably enhanced by group association" and the reasonable likelihood of compelled disclosure of membership rolls to adversely affect membership and financial support.[132] The Court synthesized the indispensable freedoms of speech, press, and association.[133]

In a different line of cases, the United States Supreme Court found the right to marry to be fundamental to the existence of the species. Under the guise of the Equal Protection Clause, *Skinner v. Oklahoma* invoked the spirit of the Due Process Clause of the Fourteenth Amendment to find unconstitutional a state law that unevenly forced vasectomies upon comparable classes of repeat felons.[134] The Court applied a strict scrutiny analysis due to the law's invidious discrimination based upon superficial distinctions between criminal offenses.[135] The Court incorporated a substantive due process analysis by noting that some multiple felons were irrevocably deprived of their fundamental rights to marriage and procreation while sparing others who were similarly situated.[136]

Where *Skinner* skirted the explicit use of substantive due process, *Loving v. Virginia* invoked both the Equal Protection Clause and the Due Process Clause under the Fourteenth Amendment to rule unconstitutional state statutes that prohibited interracial marriages.[137] An interracial couple challenged their 25-year exile from Virginia for violating the state law that criminalized marriages between white and "colored" people, whether the ceremony was performed in or out of state.[138] The denial of the fundamental right to marry, as described in

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[132] NAACP v. Alabama, 357 U.S. at 459-60.

[133] *See id.* at 461.

[134] *See* Skinner, 316 U.S. at 541-42; AMERICAN CONSTITUTIONAL LAW, *supra* note 120, at 474-75. The Habitual Criminal Sterilization Act ordered this permanent consequence for persons convicted of multiple felonies involving moral turpitude, but excluded a few classes of white collar offenses. *Id.* at 536-37 (citing OKLA. STAT. 57, §§ 171 et seq. (1935)). Violations of prohibitory laws, revenue acts, embezzlement, or political offenses were excluded from consideration in this act. OKLA. STAT. 57, § 195.

[135] *See* Skinner, 316 U.S. at 541-42.

[136] American Constitutional Law, *supra* note 120, at 474-75; *see* Skinner, 316 U.S. at 540-41 (other similarly situated felons were spared). The Court recognized the potential danger of using such laws to promote eugenics in substance, if not form. *See* Skinner, 316 U.S. at 541-42.

[137] Loving, 388 U.S. at 11-12.

[138] *Id*. at 4-6 (citing Va. Code Ann. §§ 20-59 (1960)). At the time, 16 States had banned interracial marriage. *Id*. at 6 n.5.

Skinner, under these invidious racial classifications deprived the state's citizens of their liberty without due process of law.[139]

Synthesizing judicial findings of fundamental rights with enumerated constitutional zones of privacy, *Griswold v. Connecticut* adopted a right to privacy by married couples to use contraceptives.[140] Based on professional relationships, the appellants successfully challenged their convictions for assisting their married clients' use of contraceptive devices by providing information, instruction, and medical advice.[141] The Court recognized protected zones of privacy in the First, Third, Fourth, and Fifth Amendments to find that the right of privacy in marriage relationships rejects such broad and intrusive state regulations.[142]

C. FEDERAL REJECTION OF ECONOMIC AND SOCIAL RIGHTS

Despite recognizing some negative rights, the United States Supreme Court has resisted attempts to interpret the Constitution to include economic, social, and many cultural rights.[143] A few examples include rejecting education as a fundamental right and poverty as a suspect classification, denying a right to have medically necessary abortions covered by Medicaid, and not finding a fundamental right to government sponsored welfare aid.[144] *San Antonio Independent School District v. Rodriguez* ignored the importance of a government service in its consideration of whether a service qualifies as a fundamental right.[145] While the Court found that a person with severe mental retardation in an involuntary custodial relationship possessed a liberty interest under the

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[139] The Court applied a strict scrutiny analysis to the anti-miscegenation law due to the racial classification, and likely, its impingement on the fundamental freedom to marry as a citizen's liberty interest. *Id*. at 11-12.

[140] Griswold v. Connecticut, 381 U.S. 479, 485-86.

[141] *Id.* at 480-81. Similar to *Society of Sisters*, the Court protected people based on their professional relationship with those who suffered an infringement of their fundamental rights. *See infra* p. 25 and note 136.

[142] The Court found constitutionally guaranteed zones of privacy in the First Amendment's fundamental right of private group associations, the Third Amendment's prohibition against compelled peacetime quartering of soldiers in private homes, the Fourth Amendment's protection against unreasonable searches and seizures, and the Fifth Amendment's Self-Incrimination Clause. *See* Griswold, 381 U.S. at 484.

[143] Woods, *supra* note 20, at 125. While negative rights protect people from intrusive State restrictions, positive rights impose an affirmative duty on the State to secure constitutional rights.

[144] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *see also* Harris v. McRae, 448 U.S. 297 (1980); *see also* Dandridge v. Williams, 397 U.S. 471 (1970).

[145] Rodriguez, 411 U.S. at 30.

Fourteenth Amendment, an earlier decision deferred to the legislature to determine the costs, benefits, and appropriate incremental steps necessary to achieve reform.[146]

In *Rodriguez*, the challenged state system of public school financing passed the rational basis test for constitutionality; the Court did not find the Texas Minimum Foundation School Program to implicate a fundamental right or a suspect classification.[147] The parents of school children, who were either minority or poor and living in school districts with a low property tax base, unsuccessfully claimed that the Texas system of apportioning education funds based on school districts' relative tax paying ability violated the Equal Protection Clause of the Fourteenth Amendment.[148] Considering federal, state, and local funding combined, the poorest district in the San Antonio area spent $356 per student on education compared with $594 per pupil in the richest district.[149]

Also rejecting indigence (or wealth) as a suspect classification, *Harris v. McRae* upheld the Hyde Amendment to the Medicaid Act, Title XIX of the Social Security Act, which withheld federal funds for medically necessary abortions.[150] A class of pregnant women, who qualified for Medicaid in New York and chose to have a first trimester abortion, failed to convince the Court that the funding restrictions violated the Due Process Clause under the Fifth Amendment through unwarranted governmental interference with their privacy rights regarding medical choice.[151] The negative privacy protections arising from *Griswold* and *Society of Sisters* do not impose an affirmative funding obligation on the federal government, nor on the states, to provide medically necessary abortions.[152]

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[146] Youngberg v. Romeo, 457 U.S. 307 (1982); *See also* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

[147] Rodriguez, 411 U.S. at 6, 9-10, 16, 55.

[148] *Id.* at 4-5, 9-10.

[149] *Id.* at 11-13.

[150] McRae, 448 U.S. at 326. *See also* Rodriguez, 411 U.S. 28-29.

[151] The Court also rejected the plaintiffs' challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment due to lack of standing. McRae, 448 U.S. at 304, 326-27. *See also id.* at 317-18. The named appellees fell into three categories: (1) indigent pregnant, and potentially pregnant, women, (2) the two officers of the Women's Division, and (3) the Women's Division itself. McRae, 448 U.S. at 320. Medicaid is a federal program that is administered by the states. Centers for Medicare and Medicaid Services - Medicaid Program Overview, http://www.cms.hhs.gov/MedicaidGenInfo/ (last visited Feb. 10, 2010).

[152] McRae, 448 U.S. at 326. *See generally* Griswold, 381 U.S. 479; Soc'y of Sisters, 268 U.S. 510 (providing for a fundamental right to privacy in marital relations, specifically, in the use of contraceptives; and the parents' right to school choice for their children, respectively).

Similar to *McRae*'s approval to withhold Medicaid funds, *Dandridge v. Williams* held constitutional Maryland's grant caps under the state's Aid to Families with Dependent Children ("AFDC") statute without regard to whether a family's specific financial needs, as determined by the AFDC program, exceeded the maximum aid allowable per family.[153] In order to provide some aid to every eligible family, Maryland's compliance with the Equal Protection Clause of the Fourteenth Amendment did not force a choice between addressing the total need and not helping at all.[154] The Court deferred to the state's expertise over economic and social issues, such as public welfare, by applying a rational basis test.[155]

While the importance of a public service may be ignored, the presence of a custodial relationship may require the state to meet a minimum core obligation under the Due Process Clause of the Fourteenth Amendment.[156] *Romeo* imposed an affirmative duty on Pennsylvania to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.[157] As her son's next friend, a mother claimed that his treatment during confinement violated his constitutionally protected liberty interests in safety, freedom of movement, and training.[158] Balancing the individual's substantive due process rights with the state's legitimate interests, the Court ordered the institutional administrators to meet those minimum standards of care, as a professional in that field would deem reasonable.[159]

In addition to trusting industry self-regulation, *Lee Optical* shifted challenges to the states' traditional police powers from the courts to the electoral process.[160] Using a rational basis test, the Court upheld an Oklahoma statute that effectively prohibited opticians from fitting or duplicating lenses without a prescription, despite the potential waste of economic resources.[161] The Court foreclosed the use of substantive due process to strike down state laws and regulations based on policy

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[153] Dandridge v. Williams, 397 U.S. 471, 472-73, 486-87.

[154] *Id.* at 480-81, 486-87.

[155] *Id.* at 487.

[156] Interview with S. Stephen Rosenfeld, *supra* note 14. *See* Rodriguez, 411 U.S. at 30.

[157] Youngberg v. Romeo, 457 U.S. 307, 319-20. The lawful commitment of Romeo did not strip him of his substantive liberty interests. *Id.* at 315.

[158] *Id.* at 309, 315. Romeo was an adult with the mental capacity of an 18 month old. Mental health professionals agreed that Romeo was severely retarded and could not care for himself. *Id.* at 309-10.

[159] *Id.* at 321-23.

[160] *See* Lee Optical, 348 U.S. 483, 487-88 (1955).

[161] *Id.* at 488-91

differences.[162] The Court also deferred to legislative priorities when identifying incremental steps to achieve desired reform, even to the neglect of certain aspects of the problem.[163]

D. STATE REFUGE FOR POSITIVE RIGHTS

While litigants stumble in their efforts for relief in the federal courts, they find more success in state courts.[164] The *Rodriguez* plaintiffs successfully challenged the public school financing system in the Texas Supreme Court.[165] In contrast to *McRae*, a New Jersey statute barring Medicaid coverage for medically necessary abortions failed under the state constitution.[166] Contrary to the *Williams* Court upholding AFDC caps, New York recognized an affirmative duty to provide benefits for the needy under the New York State Constitution.[167] Despite recognizing that positive right, a New York appeals court declined to impose "reasonable minimal standards" for emergency shelters.[168] Still, Professor Woods believes that these state court decisions "establish the possibility of recognizing 'minimum core obligations' to fulfill basic human needs in the United States," like adequate health care.[169]

In *Edgewood Independent School District v. Kirby*, the *Rodriguez* plaintiffs convinced the Supreme Court of Texas that the state failed its affirmative duty to provide an efficient system of public free schools under the state constitution.[170] The vast disparities in public school financing demonstrated an unconstitutionally inefficient system in which property rich school districts with low property tax rates enjoyed significantly greater resources than property poor districts with high property tax rates.[171] Professor Woods cites *Kirby* as a state example in

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[162] *Id*. at 488.

[163] *Id.* at 489.

[164] Woods, *supra* note 20, at 126.

[165] *See generally* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1991).

[166] *See* Right to Choose v. Byrne, 91 N.J. 287 (1982).

[167] *See generally* Tucker v. Toia, 43 N.Y.2d 1 (1977).

[168] *See* McCain v. Koch, 502 N.Y.S.2d 720 (N.Y.App. Div., 1986).

[169] Woods, *supra* note 20, at 128.

[170] Kirby, 777 S.W.2d at 394, 397-98 (citing TEX. CONST. art. VII, § 1). *See id.* at 126.

[171] *See* Kirby, 777 S.W.2d at 392, 397. The Court found unconstitutional the Texas Minimum Foundation School Program that apportioned education funds based on school districts' relative tax paying ability. Kirby, 777 S.W.2d at 397-98. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 9-10 (1973).

which "the principle of equal protection was given a substantive dimension."[172]

In *Right to Choose v. Byrne*, the New Jersey Supreme Court found unconstitutional a state statute that barred Medicaid funding for abortions, unless deemed medically necessary to preserve the woman's life, under the New Jersey Constitution.[173] While the court recognized *McRae*'s allowance for federal withholding of Medicaid funds, the state ban on abortion funding failed under the state constitution because the fundamental right of pregnant women to choose whether to have an abortion extended to those entitled to Medicaid reimbursement.[174] Withholding these state funds denied equal protection to pregnant women eligible for Medicaid due to the state's requirement to neutrally fund medically necessary care attendant upon pregnancy, including abortions.[175] Although the court explicitly avoids the fundamental right to health care question, this ruling holds promise for such a state right to exist in the future.[176]

By finding that the New York State Constitution imposed an affirmative duty to care for the needy, *Tucker v. Toia* declared unconstitutional a state statute that required independent persons under the age of twenty-one to obtain an order in a support proceeding before collecting benefits under the Home Relief Program.[177] The provision denied public assistance to needy persons, some of whom might not have been able to find their parents nor secure a disposition against them.[178] The legislature must provide home relief assistance to anyone classified as needy by the state.[179]

While acknowledging New York's positive right to care for the needy, in *McCain v. Koch*, a state appellate court declined to impose

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[172] Woods, *supra* note 20, at 126-27.

[173] Right to Choose v. Byrne, 91 N.J. 287, 292-93 (1982).

[174] *Id.* at 305 (citing Harris v. McRae, 448 U.S. 297, 316 (1980)).

[175] *See* Right to Choose, 91 N.J. at 305-07. The New Jersey Supreme Court also cited the State's constitutional right to privacy and its priority accorded to an individual's interest in health require these health care services to include medically necessary abortions. *Id*. at 312. The right to privacy is implicit in the New Jersey Constitution's declaration of the right to life, liberty, and the pursuit of happiness. *Id*. at 303. The right to privacy extends to sexual conduct between consenting adults, sterilization, the termination of one's own life, and abortion. *Id*. at 303-04.

[176] *Id.* at 304.

[177] Tucker v. Toia, 43 N.Y.2d 1, 4, 8 (1977) (citing N.Y. SOC. SERV. L. § 158 (1976); N.Y. CONST. art. XVII, § 1).

[178] Tucker, 43 N.Y.2d at 5-7 (or a legally responsible relative).

[179] *Id.* at 8. A needy individual under 21 residing with a parent or legally responsible relative is eligible for AFDC. *Id*. at 4-5. A needy individual under 21 who does not reside with a parent or legally responsible relative receives home relief benefits through the State. *Id*.

"reasonable minimal standards" for emergency shelters by deferring to the legislature's discretion to determine the adequacy of that care.[180] The court reversed an interim order that required shelters to meet "minimal standards of cleanliness, warmth, space and rudimentary conveniences" based on the state's custodial relationship with the homeless.[181] Later, the Court of Appeals of New York recognized the municipal agencies' concession that stricter state regulations apply to emergency housing and held that courts had the power to issue the preliminary injunction that imposed reasonable minimum standards.[182]

VI. THE CASE FOR FUNDAMENTAL RIGHT TO HEALTH CARE IN LOUISIANA

A. DOMESTIC JURISPRUDENCE

To find several negative fundamental rights, the Court cited the substantive due process protection of liberty, cited natural law, and synthesized existing constitutional rights. *Society of Sisters* struck down Oregon's Compulsory Education Act that impermissibly impinged on parents' freedom to raise and educate their children as they pleased.[183] *Loving* ended Virginia's criminalization of interracial marriage by invoking the Fourteenth Amendment's Equal Protection and Due Process clauses.[184] *Loving* also affirmed *Skinner*'s finding of a fundamental right to marriage.[185] The Court used an explicit equal protection argument and an implicit substantive due process argument to strike down the state law that unequally delivered this punishment.[186] In *NAACP v. Alabama*, the Court synthesized the First Amendment freedoms of speech, press, and association to find a right of private group association that protected a civil rights organization from the state's compelled disclosure of their

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[180] McCain v. Koch, 117 A.D.2d 198, 215-16 (N.Y. App. Div. 1986) (citing Tucker v. Toia, 43 N.Y.2d 1, 8 (1977)).

[181] McCain, 117 A.D.2d at 208-09 (N.Y. App. Div. 1986).

[182] McCain v. Koch, 70 N.Y.2d 109, 120-21 (N.Y. 1987). The Court of Appeals is the highest state court in New York.

[183] Pierce v. Soc'y of Sisters, 268 U.S. 510, 530, 534-35 (citing 1922 Or. Laws § 5259).

[184] Loving v. Virginia, 388 U.S. 1, 4, 11-12 (1967) (citing VA. CODE ANN. §§ 20-58, -59).

[185] *Id.* at 11-12 (citing Skinner v. Oklahoma, 316 U.S. 535, 536-37, 541 (1942)). Along with an explicit equal protection rationale, *Skinner* noted that Oklahoma's forced sterilization law irrevocably deprived some multiple felons of liberty rights "basic to the perpetuation" of a species, the fundamental rights of marriage and procreation. Skinner, 316 U.S. at 536-37, 541 (citing OKLA. STAT. 57, §§ 171 et seq.).

[186] *Id.* at 541; AMERICAN CONSTITUTIONAL LAW, *supra* note 120, at 474-75.

members' identities.[187] Incorporating that case, *Griswold* adopted a right of married couples to use contraception by recognizing protected zones of privacy in the First, Third, Fourth, and Fifth Amendments.[188] In all of these cases, the Court restricted the state's unreasonable interference in the people's fundamental rights.

Where the Court resisted calls to recognize positive fundamental rights, some state courts assumed the responsibility to provide relief to vulnerable populations. After *Rodriguez* rejected claims based on equal protection, poverty as a suspect classification, and education as a fundamental right,[189] in *Kirby*, the Texas Supreme Court found that the public school funding system failed to meet the state's affirmative duty to provide an efficient system of free public education under the Texas Constitution.[190] Where *McRae* rejected a funded entitlement to exercise the constitutional freedom of medical choice, *Right to Choose* opened the door to such an affirmative right in New Jersey.[191] With respect to state sponsored welfare assistance, Maryland families with dependent children lost their federal equal protection challenge to capped grants under the State's AFDC program, regardless of actual need.[192] By contrast, *Tucker* imposed an affirmative duty to care for the needy under the New York State Constitution.[193] Post-*Tucker*, the New York Court of Appeals affirmed the trial court's power to issue a preliminary injunction to set reasonable minimal standards for emergency shelters.[194]

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[187] *See* NAACP v. Alabama, 357 U.S. 449, 460-62, 466 (1958).

[188] The Court rejected Connecticut's ban on the use of contraceptives as unnecessarily broad and intrusive into the "sacred precincts of marital bedrooms." Griswold v. Connecticut, 381 U.S. 479, 480, 485-86 (1965).

[189] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6, 16, 55 (1973).

[190] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 388-89 (citing TEX. CONST. art. VII, § 1). A class of parents of poor and/or minority school age children, who live in school districts with a low property tax base, challenged an inequitable State system of public school financing that apportioned education funds based on the school districts' relative tax paying ability. Rodriguez, 411 U.S. at 4-5, 9-10.

[191] Harris v. McRae, 448 U.S. 297, 317-18 (1980). *See* discussion *supra* p. 381. *McRae* allowed the federal and State governments to withhold Medicaid funds under the Hyde Amendment. McRae, 448 U.S. at 326. *Right to Choose* forced New Jersey to continue their share of Medicaid funding for medically necessary abortions by building upon the State's constitutional right to privacy, and requiring the neutral funding of medically necessary care at the onset of pregnancy. *See* Right to Choose v. Byrne, 91 N.J. 287, 292-93, 306-07, 310 (1982).

[192] Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

[193] Tucker v. Toia, 43 N.Y.2d 1, 8 (1977) (the State determines if someone is needy) (citing N.Y. SOC. SERV. L. § 158 (1976); N.Y. CONST. art. XVII, § 1).

[194] *See* McCain v. Koch, 70 N.Y.2d 109, 120-21.

B. FOREIGN PERSPECTIVES

In addition to using domestic jurisprudence to find a positive fundamental right to health care in Louisiana, the Louisiana Supreme Court should follow the example set by Supreme Court Justice John Paul Stevens that demonstrates his willingness to consult foreign sources of law on the bases of mutual respect and shared values.[195] Justice Stevens' jurisprudence reflects receptiveness to the ideas of thoughtful jurists, foreign or domestic, with a commitment to fundamental rights.[196] Serving the Court with humility, he reaches beyond our physical borders by stating, "If we expect them to listen to us, we should at least be willing to listen to [them]."[197] Indeed, South African Constitutional Court Justice Sachs cited United States Supreme Court Justices William Brennan and Stevens in *Soobramoney*, the first socio-economic rights case heard by the Constitutional Court.[198] Also, in *Frances Coralie Mullen*, the Indian Supreme Court took notice of statements made by Justices of the United States Supreme Court that reserved constitutional rights to prisoners, including due process rights.[199] India and South Africa provide two foreign examples of positive fundamental rights to health that could guide Louisiana.

India's Supreme Court derived the fundamental right to health care from the Indian Constitution's symbolic Directive Principles, Article 21 right to life, and Article 32. Article 32 empowers the judiciary to force the executive to act upon its constitutional responsibilities.[200] *Frances Mullin* incorporated the concept of living with human dignity with the attendant bare necessities of life within the right to life.[201] *Bandhua Mukti Morcha* extended those rights to include the right to good health and affirmed the importance of the Directive Principles.[202]

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[195] *See generally* Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1603-05 (2006) (exploring Supreme Court Justice John Paul Stevens' engagement with international and foreign law and norms).

[196] *Id.* at 1605 (instead of "automatic acceptance of foreign practice").

[197] *Id.*

[198] *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) ¶¶ 56-57 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 303, 343 (1990)); HEALTH & DEMOCRACY: A GUIDE TO HUMAN RIGHTS, HEALTH LAW AND POLICY IN POST-APARTHEID SOUTH AFRICA 35 (Adila Hassim et al. eds., 2007).

[199] Francis Coralie Mullin v Adm'r, Union Territory of Delhi, (1981) 2 S.C.R. 516, 526.

[200] INDIA CONST. arts. 32, 36-51.

[201] Frances Coralie Mullin, (1981) 2 S.C.R. at 529. *See* Woods, *supra* note 20, at 106.

[202] Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, 69-70; Shah, *supra* note 98, at 476 (citing Bandhua Mukti Morcha, (1984) 2 S.C.R. at 103).

Consumer Education and Research Centre expanded Article 21 to include a fundamental right to health and medical care and recognized the goal of the Constitution and the Directive Principles to promote social justice for everyone.[203] The following year, *Paschim Banga Khet Mazdoor Samity* imposed an affirmative duty on the State to provide adequate medical care, regardless of financial constraints.[204]

Where India's Supreme Court invokes a set of symbolic guidelines, South Africa provides a fundamental right to health care under section 27 of the 1996 Constitution.[205] While *Soobramoney* affirmed the constitutional commitment of providing access to health services, the Constitutional Court limited those rights to the existing public allocation of resources.[206] Later, *Grootboom* required the State to progressively realize fundamental rights through governmental action.[207] *Grootboom* also based the State's minimum core obligation on the needs of the most vulnerable population.[208] *Treatment Action Campaign* asserted the use of judicial powers to require that government programs address the needs of the most vulnerable people, even if the orders affect policy and/or legislation.[209]

C. APPLYING LOUISIANA'S CONSTITUTION, STATUTES, AND HISTORY

Absent a constitutional amendment, the Louisiana Supreme Court should find a peripheral fundamental right to health care through the State Constitution and its similarities to the United States Constitution and India's Directive Principles. The Preamble of the Louisiana Constitution: (1) "protect[s] individual rights to life [and] liberty;" (2) "afford[s] the opportunity for the full development of the people;" and (3) "promote[s] the health" of the people.[210] The Declaration of Rights also contains a Due Process clause and a Right to Individual Dignity that prohibits arbitrary discrimination against people under the law.[211] The constitution ensures criminal defense for indigent

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[203] Consumer Educ. & Research Ctr. v. Union of India (1995) 1 J.T. 636, 657-63.

[204] Shah, *supra* note 98, at 477-78 (citing Paschim Banga Khet Mazdoor Samity, (1996) 3 S.C.J. 25).

[205] S. AFR. CONST. 1996 § 27.

[206] *Id.*; *Soobramoney v. Minister of Health* 1998 (1) SA 765 (CC) ¶¶ 9, 11.

[207] *Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) ¶ 99.

[208] *Id.* ¶ 31.

[209] *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) ¶¶ 106, 113-14.

[210] LA. CONST. pmbl.

[211] LA. CONST. art.1, §§ 2-3.

people.[212] Akin to the United States Supreme Court's protection of the substantive due process right to liberty,[213] a Louisiana court could construe the state constitution to provide for indigent health care, essential to the full development and liberty interests of people, within the protected right to life. In the alternative, a state court could invoke natural law to determine that a positive right to adequate health care for all, especially the uninsured indigent plaintiffs in *Leblanc*, is fundamental to the continued existence of our species.[214]

In addition to constitutional support, state statutes require free health care for the medically indigent, essentially codifying Charity Hospital's historical role as the health care safety net. To restore pre-Katrina levels of indigent health care services, *Leblanc* cites these statutes that required Charity Hospital and University Hospital to provide "access to high quality medical care for patients, including the medically indigent and uninsured."[215] While LSU officials claim Hurricane Katrina closed Charity Hospital, the plaintiff class asserts that the State and LSU unlawfully closed Big Charity, violating the prohibition on closing any hospital or emergency room without legislative approval.[216] *Right to Choose*'s *de facto* requirement to fund a woman's right to medical privacy and *Tucker*'s finding of an affirmative duty to provide welfare assistance may support a future positive right to health care in Louisiana.[217]

Following *Roe II*, the absence of a fundamental right to health care would violate Louisiana's principles of life and liberty based on the state's centuries long history of providing access to high quality health care to all residents, including the medically indigent plaintiffs in *Leblanc*.[218] Since May 10, 1736, New Orleans' poor and uninsured residents' reliance on Charity Hospital for their health care needs have

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[212] LA. CONST. art. 1, § 13.

[213] U.S. CONST. amend. XIV, § 1.

[214] *See infra* Part II.D. *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (describing marriage and procreation as fundamental to the existence of humans).

[215] Leblanc, *supra* note 3, ¶ 3 (citing LA. REV. STAT. ANN. § 17:1519.3 (2001)); LA. REV. STAT. ANN. § 17:1519.4(B) (2001). Uninsured persons earning less than 200% of the federal poverty level qualify as medically indigent. LA. REV. STAT. ANN. § 17:1519.1(12).

[216] Moran, *7 Patients*, *supra* note 9; Interview with S. Stephen Rosenfeld, *supra* note 14. In 2007, the La. Attorney General issued an opinion affirming that statutory provision. 1 Op. La. Att'y Gen. No. 07-0169 (July 18, 2007), *available at* http://www.ag.state.la.us/Shared/ViewDoc.aspx ?Type=4&Doc=18999. To date, the legislature has not granted such approval, either by concurrent resolution or within the General Appropriation Act.

[217] *See* Right to Choose v. Byrne, 91 N.J. 287, 312 (1982) (from the beginning of prenatal care); Tucker v. Toia, 43 N.Y.2d 1, 4, 8 (1977) (upon the State's determination of need).

[218] *See* Roe II v. Butterworth, 958 F. Supp. 1569, 1575 (S.D. Fla. 1997).

approached custodial status, similar to *Romeo*.[219] While city residents with financial resources can seek medical treatment at private hospitals, like Tulane Medical Center or Oschner Medical Center, the medically indigent turn to emergency rooms. Private hospitals are only required to provide stabilizing, emergency care under the Emergency Medical Treatment & Labor Act.[220] DSH funds support indigent care at public hospitals, like Big Charity.[221] Pre-Katrina, Big Charity and University Hospital provided a disproportionate share of the city's substance abuse, psychiatric, and HIV/AIDS care.[222] The need and love for Big Charity was so great that health care professionals and military personnel scrubbed the first three floors to prepare it for reopening within weeks.[223] But, LSU closed Big Charity without legislative approval.

Due to private hospitals' reluctance to treat the medically indigent without compensation, the reliance of *Leblanc*'s plaintiff class on Big Charity amounts to a custodial relationship that requires an affirmative duty on the State to meet a minimum core obligation to address the needs of that most vulnerable population.[224] *Romeo* imposed such a duty on Pennsylvania to provide minimally adequate conditions of lawful confinement that complied with the substantive due process right to liberty of the petitioner, a person with severe mental retardation.[225] Similar to *Romeo*, a *de facto* custodial relationship exists between the state of Louisiana, through LSU, and *Leblanc*'s plaintiff class that demands protection of medically indigent New Orleanians' substantive due process right to life. Accordingly, LSU must replace the care that Charity Hospital provided pre-Katrina pursuant to the minimum core obligation defined by the state's statutory duty to provide access to high quality medical care as soon as possible.[226]

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[219] Interview with S. Stephen Rosenfeld, *supra* note 14. *See* NESRI, *supra* note 19, at 1.

[220] Rudowitz, *supra* note 2, at w396. *See* EMTALA Overview, *supra* note 34. Pre-Katrina, Big Charity operated a Level 1 trauma center ready to address any type of medical emergency; the trauma center has since reopened in Interim Hospital. NESRI, *supra* note 19, at 1; Press Release, LSU Health Care Services Division, *supra* note 56.

[221] Rudowitz, *supra* note 2, at w396. Disproportionate Share Hospital, *supra* note 34.

[222] Rudowitz, *supra* note 2, at w396.

[223] Affidavit of James P. Moises, Leblanc v. Thomas, No.08-548 (Civ. Dist. Ct. Parish of New Orleans LA, 2008) http://www.louisianajusticeinstitute.org/files/all/docs/Exhibit_B2_-_Affidavit_of__Dr_James_MOISES.pdf. *See also* NESRI, *supra* note 19, at 2.

[224] *See* Interview with S. Stephen Rosenfeld, *supra* note 14.

[225] Youngberg v. Romeo, 457 U.S. 307, 309-10, 319-20 (1982).

[226] But, decisions like *Lee Optical* and *Williams* suggest judicial deference to the legislature, an acceptance of incremental steps to achieve desired policy goals to the neglect of others, and that a State's decision to provide some benefit to all does not confer an entitlement to individuals to

VII. CONCLUSION

Despite the federal reluctance to recognize positive fundamental rights, the Louisiana Supreme Court should find a fundamental right to health care to restore pre-Katrina levels of care afforded to poor and uninsured New Orleanians, at a minimum. High courts in Texas, New Jersey, and New York have imposed affirmative duties on state governments to meet the critical needs of their vulnerable residents. Following Justice Stevens' respect for thoughtful jurists, foreign or domestic, South African and Indian jurisprudence provides a framework for imposing an affirmative duty on states to provide a right to health within the right to life. Considering Louisiana's constitution, statutes, and distinguished history of Charity care, the absence of an affirmative right to indigent health care violates Louisiana's constitutional principles of life and liberty.

In addition to unlawfully closing Charity Hospital, on behalf of Louisiana, LSU continues to pursue plans to build a new hospital amid growing concerns regarding financing, timing, and dislocation of a historic neighborhood. Despite LSU's expansion of primary care facilities, access to health care by the chronically ill and disabled residents who rely on the state remains unanswered. Sooner rather than later, LSU must meet its duty under state law, and hopefully, a newfound fundamental right to health care, to provide access to high quality medical care for all New Orleanians, especially the medically indigent residents who cannot afford the private hospitals. Restoring indigent health care within Charity Hospital will meet the ongoing need more efficiently than building a new hospital with an uncertain future.

all of their health care needs. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955); Dandridge v. Williams, 397 U.S. 471, 480-81, 486-87 (1970).