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ISSUES AND CHALLENGES IN ADDRESSING POVERTY AND LEGAL RIGHTS: A COMPARATIVE UNITED STATES/ SOUTH AFRICAN ANALYSIS

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ABSTRACT

This article gives a comparative examination of poverty reduction strategies in the United States and South Africa. Three questions frame the discussion: 1) Are individual legally enforceable entitlements to the benefits of social and economic rights, particularly social assistance benefits, an important or even necessary tool in fighting poverty and realising social and economic rights? 2) Should anti-poverty policy privilege wage work and family contributions? 3) In light of economic globalisation, what problems are associated with viewing poverty-reduction strategies, particularly social welfare programmes, within a framework of nation-states and their subdivisions? Cast in the light of these questions, modern US poverty and social assistance policy reveal an abundance of misconceptions and biases which, over time, have reinforced opposition in the US to economic redistribution and the guarantee of minimally adequate living conditions for the poor. Regrettably, echoes of these failings in the US approach can be detected in the contemporary South African debate and in some recent South African anti-poverty initiatives.

I INTRODUCTION

Like most progressives in the US, I perceive South Africa’s incorporation of socio-economic rights in its Constitution as a significant achievement and a beacon of hope. Unfortunately, however, when it comes to utilising social welfare programmes to address poverty, South Africa has much too much in common with conservative trends in the US. Poverty and income inequality play out in racial and gender terms in both countries

* Professor of Law, Northeastern University School of Law. An earlier version of this paper was presented at the conference celebrating the twentieth year of the publication of the SAJHR, ‘Twenty Years of Human Rights Scholarship and Ten Years of Democracy’, at the University of the Witwatersrand in July 2004. I am deeply indebted to discussions with Beth Goldblatt, Sandy Liebenberg and Cathi Albertyn in drawing connections between my own understanding of US poverty law and their reflections on its implications for South African poverty law.
and their social security systems\(^1\) have exacerbated rather than ameliorated racial and gender disparities and continue to do so. In addition, some contemporary approaches to poverty reduction in South Africa echo arguments often made in US policy debate, which have been discredited by empirical research. Certain poverty initiatives within the new South Africa regrettably seem to be repeating US mistakes.

This article is limited in scope — it does not attempt to offer solutions for poverty. Indeed, I do not address many important issues central to poverty reduction, for instance the interrelationships of law and economic development. Rather, I focus on a few critical issues that I believe must be confronted in developing social welfare policies and concretising constitutional socio-economic rights. I discuss many of the errors of US poverty policy and set forth US-South African commonalities in the context of three questions:

(1) Is an individual legally enforceable entitlement to social and economic rights, particularly to social assistance benefits, an important or even a necessary tool in the process of realising social and economic rights?

(2) Should public policy prioritise wage work and family contributions as approaches to poverty reduction?

(3) In a globalising world, what problems are associated with viewing poverty-reduction, and particularly social welfare programmes, within the framework of nation-states and their subdivisions?

Each of these questions is complex, and I do not purport to provide definitive answers in this article. But for each, I set forth 1) a US context, 2) a critique of the US experience, and 3) actual or potential connections to contemporary South African experience. I hope to initiate a dialogue with South African social welfare scholars and advocates, prompting South African colleagues to reframe and sharpen my questions and push the discussion forward. I think it is particularly instructive to focus on the 2004 Constitutional Court decision in *Khosa v Minister of Social Development\(^2\) as it relates to each question, primarily the first and third. I argue that *Khosa* both moved the development of social and economic rights forward in South African jurisprudence and, at the same time, failed to understand or engage with how the new global economy and human mobility affect social welfare grants.

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1 This term usually includes, but distinguishes between, both social insurance, ie, programmes connected to waged work, and social assistance, ie, programmes that are means-tested or based on need. While this distinction, reflecting an assumption that social assistance programmes are residual to social insurance, may have validity in ‘developed countries’, it is largely inappropriate for so-called ‘developing countries’ with massive structural poverty and high levels of structural unemployment. B Goldblatt & S Liebenberg ‘Giving Money to Children: The Constitutional Obligations to Provide Child Support Grants to Child Headed Households’ (2004) 20 SAJHR 151, 156. In this article my primary focus is, therefore, on social assistance programmes.

2 2004 (6) SA 505 (CC).
I recognise that the debate in South Africa about socio-economic rights has been dominated by two concerns, one of which has also been central in the US poverty debate. First, both the US and South African governments, indeed all governments, albeit within their quite different economic and legal contexts, routinely highlight the tension between resource scarcity and the provision of socio-economic rights. While the arguments about resource scarcity are quite different in a highly ‘developed’ country such as the US from those in a so-called ‘developing’ country such as South Africa, in both contexts fiscal limitations are not simply facts of nature. They are at least in part constructed by past and current political choices. The fiscal constraints cited by all governments must be viewed through a lens that reflects corruption, misallocation of funds, colonialism, tax policies that favour the wealthy, and a host of other human-made conditions, historical and contemporary. Nevertheless, the perception of an inherent tension between resource scarcity and the realisation of socio-economic rights plays a central role in the interpretation and implementation of such rights. The second is a concern about separation of powers — in South Africa particularly, questions of parliamentary supremacy and judicial review of parliamentary action are intimately entwined in the debate about the constitutional incorporation of socio-economic rights. Quite aside from concerns about resource scarcity, the fear that democracy might be undermined by judicial fiat has formed the backdrop against which the Constitutional Court has begun to fashion its role in giving content to socio-economic rights. Although the problems of resource scarcity and separation of powers are never far from the discussion that follows, for the sake of brevity I do not directly address either issue here. I ask the reader to trust that I recognise the importance of these concerns and the fact that my arguments have implications for both.

II INDIVIDUAL LEGALLY ENFORCEABLE ENTITLEMENTS TO SOCIO-ECONOMIC RIGHTS

While the constitutional incorporation of social and economic rights is far more advanced in South Africa than it is in the US, policymakers in both countries continue struggling to understand the role of individual legally enforceable entitlements with respect to these rights. The concept of individual legally enforceable entitlements has played an important, although highly contested, role in the US. In South Africa it is too early to say what role such entitlements might play, but the approach is worthy of close scrutiny.

From the recent national debate conceiving entrenchment of socio-economic rights in the Constitution, South Africans are well aware that socio-economic rights can be, and have been, effected through numerous legal methods that do not involve individual legally enforceable entitlements. For example, constitutional incorporation of socio-
economic rights can serve as a guiding principle of state policy (that is, soft law to be taken into account in parliamentary and executive decision-making), directives to legislatures to take affirmative action subject only to minimalist judicial review (for example, a rationality test), or as the basis for group entitlements in which a class (for example, a village or a labour union) can compel governmental action on its behalf. In these situations, no individual has an enforceable legal claim to a benefit in his or her own right. That is, no particular result is guaranteed for any individual.

Here, however, I am raising the legal significance of concretising rights within a more robust notion of individual legally enforceable entitlements. I focus on two variations of individual entitlements; one that is primarily based on a legislative or parliamentary articulation of a substantive right, the other grounded in a constitutional substantive right:

- The establishment and implementation of an individual legally enforceable entitlement involves three dimensions. First, an individual substantive right, for instance, a property interest, must be legally articulated. Second, an articulated substantive legal right only becomes an 'entitlement' when there is an available legal mechanism through which the private individual can realise the entitlement if it is wrongly withheld. Third, even entitlements announced in law and tied to an enforcement procedure 'on the books', are not actual entitlements until they are experienced as such by the beneficiaries. That is, the 'law in practice' must deliver the 'law on the books'. This raises issues such as the problems of abusive discretionary implementation, ease of access to administrators and courts, the distribution of litigation resources and dissemination of information. An individual legally enforceable entitlement is established and implemented only through the confluence of all three dimensions — the legal articulation or designation of an entitlement, the process to enforce the entitlement, and the practical implementation.

- In addition to the three prongs above, a constitutional individual legally enforceable entitlement is established by adding a fourth prong — that the substantive entitlement (prong one) is rooted in a constitutional provision and therefore cannot be eliminated by legislative action.

3 In the US, for example, groups of poor people may proceed by class action to compel or bar governmental action with respect to certain social welfare benefits, although neither the group nor class members are permitted to demand financial benefits or reparations from the state. Edelman v Jordan 415 US 651 (1974). US collective bargaining law provides another version of the group rights concept. Except under rare circumstances, individual employees whose terms and conditions of employment are set by a collective bargaining contract cannot sue to enforce the contract in their own, individual names. Only the union can enforce the contract, and, in so doing, it has wide discretion to compromise individual entitlements for the good of the employee group as a whole. Vaca v Sipes 386 US 171 (1967); Ford Motor Co v Huffman 345 US 330 (1953).
In discussing either form of individual entitlement it is important to remember that while individual entitlements are often created by statutory or constitutional provisions, the concept of an individual legally enforceable entitlement is quite mundane in most areas of the law, including the common and customary law. For example, the background rules of property, contract, family and tort law create significant entitlements that often entrench the status quo scheme of wealth and poverty. Both the statutory and constitutional forms of entitlements I discuss have implications for understanding the broader range of individual legally enforceable entitlements throughout the law.

In the US, mainstream legal discourse does not consider socio-economic rights as such to be contained in the US constitutional framework. But, as discussed below, judicial interpretations of both legislative enactments and constitutional due process provisions have established certain individual legally enforceable entitlements, which have produced important, albeit limited, redistributive results.

However, in 1996 the US Republican-controlled Congress passed, and Democratic President Bill Clinton signed, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)—the so-called 'welfare reform' Bill. This statute abolished the Aid to Families with Dependant Children Programme (AFDC), a programme that provided small cash grants to single parents and their children. States now receive Temporary Assistance for Needy Families (TANF) in the form of fixed-funded block grants with limited federal individual eligibility requirements and guarantees. The new scheme pointedly eliminated the federal statutory language that had been interpreted (as discussed below) to provide the substantive right underlying an individual legally enforceable entitlement to cash assistance for poor single parent families.

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4 Note, however, that this is a contested viewpoint. F Michelman 'Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 Harvard L Rev 7 (seminal text finding socioeconomic rights in the US Constitution specifically in 'first generation' guarantees of due process and equality).


6 This statement should not be understood as eliminating all TANF individual legally enforceable entitlements. Prior to the passage of the PRWORA, all families that met the federal eligibility requirements were entitled to receive benefits regardless of state appropriation. Coalition for Basic Human Needs v King 654 F 2d 838 (1981). The PRWORA specifically rescinded the provision in 42 USC § 602 (a)(10) discussed below and added 'This Part shall not be interpreted to entitle any individual or family to assistance under any State programme funded under this part.' 42 USC § 601(b). This section has been interpreted to mean that families are not eligible for benefits after the fixed dollar appropriation, ie, block grant, has been expended or after a family has received benefits for a maximum of five years. Weston v Cassata 37 P 3d 469 (Colo App 2001) cert denied 536 US 923 (2002); State ex re KM v West Virginia Department of Health and Human Resources 575 SE 2d 393 (2002). However, eligible individuals who are not eliminated by those restrictions still have a statutorily established substantive right. In addition, this statutory change has not resulted in judicial determinations that there is no "property right" for purposes of procedural due process in the US constitutional structure.
In the debate surrounding this legislative rescission, the term 'entitlement' was given the demeaning connotation of a legal right for poor people, presumably undeserving, to receive governmental benefits. Anti-welfare politicians and commentators made it appear that, as a legal form, an 'entitlement' is an aberration or anomaly in US legal culture, only implicating the government's involvement in providing small subsistence grants to some, but not all, poor people. Of course, as noted above, 'entitlement' is an entirely prosaic legal form encompassing the virtually limitless range of enforceable legal claims.

In order to understand the US 'entitlement' debate and reflect on the importance and drawbacks of individual legally enforceable entitlements to social welfare, one must place the discussion in an historical context.

Public welfare programmes in the US originated as highly discretionary programmes for the 'worthy' poor, allowing first the localities and later the states (the equivalent of South African provinces) arbitrarily to exclude the 'unworthy', primarily African-Americans. Poverty was viewed as a local concern. This was a throwback to the Elizabethan-era Poor Laws, under which poor people were not allowed to move from town to town. If they tried, and had no independent means of support, they would be sent back to their town of origin to be dealt with through discretionary charity. In the US, towns and counties gradually developed disability, retirement, and 'widows' or 'mothers' pension programmes (still highly discretionary), which were later largely taken over by state governments.

Only in 1935 did the US Congress enact non-temporary national legislation relating to income transfers and social welfare. The original Social Security Act established three programmes. Two were connected to wage work in the formal sector — the Social Security and the Unemployment Insurance programmes were social insurance schemes based on employer/employee contributions that provided for retirement, disability and unemployment benefits for those with qualifying histories in certain categories of formal sector wage work. The third, Aid to Dependent Children, was a means-tested social assistance programme, funded through tax revenues, which provided a small benefit for children of lone parents, primarily mothers. In 1950, that programme was renamed Aid to Families with Dependent Children (AFDC) when eligibility was extended to include the parent as well as the children. One goal of the AFDC programme was to provide cash assistance to single mothers to enable them to fulfil the 'woman's role' of homemaker, rather than having to place their children in institutions while earning wages.

7 Social Security Act of 1935 Pub L No 74-271, 49 Stat 620. In light of the concern about resource scarcity it is interesting to note that this foundation of modern US social welfare policy was enacted at the height of the Great Depression.
All three programmes were quite racially exclusionary. Social Security and Unemployment Insurance disqualified most African-Americans based on the types of employment covered — for example, domestic and agricultural work, in which many African-Americans were employed, were excluded. AFDC excluded African-American women through numerous arbitrary, discretionary implementation policies, whether simply by denying applications, closing doors to administrative offices or terminating women from benefits at crop-picking time with no process for redress.\(^8\)

However, there was a significant and inclusive expansion of AFDC in the 1960s and early 1970s in response to heightened civil rights mobilisation and the emergence of poor people’s political movements and advocacy groups. Building on the concept of ‘welfare entitlement’ developed by social workers in the 1930s and 1940s and in the legal scholarship of Charles Reich and others which equated welfare benefits with private-law property rights,\(^9\) aggressive lawyering on behalf of poor people in the 1960s and 1970s removed many of the pervasive administrative barriers and subterfuges used to exclude African-American women from the welfare rolls.

Specifically, in 1968 in *King v Smith*\(^10\) the US Supreme Court interpreted the ambiguous language of the Social Security Act — ‘Aid ... shall be furnished with reasonable promptness to all eligible individuals’\(^11\) — as creating by statute a categorical entitlement to the receipt of cash assistance. To put it another way, as long as the federal statute was in place, families that met certain AFDC federal eligibility criteria possessed a substantive right to cash assistance (albeit in wholly inadequate amounts). *King* established the first of my three definitional prongs for an individual legally enforceable entitlement. While the plaintiffs in *King* also had a process for retrieval (the judicial system), the Court did not focus on process, but rather articulated the statutorily created substantive right. However, soon thereafter, the Supreme Court ruled in *Goldberg v Kelly*\(^12\) that the individual substantive legal entitlement recognised in *King v Smith* was a ‘property right’, rather than a ‘mere privilege’. Accordingly, termination of the benefit triggered administrative law protections for each recipient. For example, benefits could not be terminated without notice, the opportunity for a pre-termination hearing, findings of fact, and other safeguards. These

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protections, the Court said, were required by the US Constitution’s due process clause. Goldberg provided the second definitional prong by establishing a process through which a recipient could retrieve the entitlement prior to termination. The principle of Goldberg was later expanded to include applicants not yet in possession of the actual benefit. 13

These two cases together established an individual legally enforceable entitlement to AFDC, an important form of social assistance (subject, of course, to the third concern of access to enforcement resources and gaps between ‘law on the books’ and ‘law in practice’). But one case without the other would have been incomplete. Once welfare benefits were conceived of as a form of property, constitutional due process procedural protections were triggered. The other side of the coin is that insistence on the procedural guarantees gave enforceable content to the substantive rights established by Congressional action.

However, shortly after deciding Goldberg, the Supreme Court in Dandridge v Williams 14 refused to acknowledge social welfare as a fundamental substantive constitutional right ‘[f]or here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights’, 15 but rather as one grounded only in legislation. The plaintiffs challenged a state policy of providing a maximum benefit for families regardless of size: each additional member of a family up to six individuals increased the designated benefit amount, but in larger families, the presence of additional individuals did not result in any added benefit. Looking at exactly the same language of the statute that the court in King had relied on to mandate an individual entitlement, the Dandridge court interpreted ‘furnished to all eligible individuals’ to apply not to each individual, but to the family unit. Thus, some ‘individuals’ got far fewer benefits than others—a larger family (seven or more) received the same grant as was provided for a smaller family unit. 16

The Supreme Court looked at another section of the statute which set forth the purpose of the programme as ‘encouraging the care of dependent children in their own homes . . . by enabling each state to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such state’. 17 Although the Court did

13 Although the Supreme Court has not ruled on this issue, every circuit that has addressed the question has held that due process rights are not limited to those with a possessory interest in the benefit itself, i.e., current recipients whose benefits are being terminated, but also apply to applicants whose applications are denied or unreasonably delayed. See discussion of case law in Kapps v Wing 404 F. 3d 105, 115-116 (2nd Cir 2005).
15 Ibid 484.
16 The Court noted that rather than a younger child being denied individual benefits ‘a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments’. Ibid 477.
17 42 USC § 601 (emphasis added).
not provide an analysis of what was 'practicable', it relied on those words to reach the conclusion that Congress, aware of the limitations on state resources, intended to 'give each state great latitude in dispensing its available funds'. Thus individuals had an entitlement to social welfare as long as they met the statutory legal definition of an eligible recipient, but, to reduce costs, the states could give a capped entitlement to the family rather than providing a benefit for each individual.

While the Dandridge Court did not undermine the statutorily-based concept of an entitlement established in King and Goldberg, it limited the impact of the individual legally enforceable entitlement by leaving the determination of the substantive entitlement (prong one) entirely to Congress. In other words, 'all eligible individuals' were legally entitled to benefits, but what, if anything, the benefits amounted to in substance turned on the vagaries of parliamentary politics. Congress was not constitutionally obliged to guarantee to 'all eligible individuals' a minimum subsistence.

Two important developments occurred after this series of cases and the period of the US civil rights and welfare rights movements. First, as discussed in both King and Dandridge, many US social welfare programmes have been and continue to be jointly administered by states and the national government. Within that framework, each state must submit a 'state plan' to the federal government providing assurances that the state is complying with federal mandates. In recent years, conservatives have attacked individual rights, arguing that individual recipients have only a 'right' to a legally sufficient or reasonable state plan, not an individual entitlement to specified benefits.¹⁸

Second, the opening of the rolls to African-Americans contributed to a rhetorical shift affecting public support for the AFDC programme. Social assistance had never been politically popular in the US, but AFDC had been 'sold' based on an image of white widows of West Virginia coal miners. In the 1960s and 1970s it became viewed as a programme for African-Americans (and later Hispanics).¹⁹ In a society that was supposedly moving toward non-racialism, 'welfare' became a code word for 'race'. Right-wing politicians, commentators and think tanks spawned an increasingly vitriolic anti-welfare attack.²⁰ Various legislative cutbacks ensued, the most recent being the PRWORA.

¹⁸ See, eg, Suter v Artis M 503 US 347 (1992); Blessing v Freestone 520 US 329 (1997); see also Bene v Shalala 30 F 3d 1057 (9th Cir 1994); CK v Shalala 92 F 3d 171 (3rd Cir 1996) (discussing judicial review of states' requests to waive federal requirements). Particularly note the connection between this argument in the US and the Groothoom and TAC judgments (notes 32 & 30 below).
¹⁹ In fact, although poverty was more prevalent in black and Hispanic populations, many US whites, particularly in rural areas, were and are also poor.
Implicit in the US story is evidence that individual entitlement discourse has a conservative as well as a potentially radical side. A focus on individual entitlements can perpetuate the Washington-consensus ideology that privileges individual market oriented behaviour and ignores structural barriers to poverty reduction. Too often, individual entitlement discourse draws attention away from communal values and the importance of collective action. Analogueising welfare benefits to traditional property concepts might actually inhibit redistributive politics by grafting nineteenth-century individualistic values onto social change efforts. In other words, treating welfare as an entitlement might reinforce the image of rights as sanctuaries for independent individuals against the power of the state, thereby according a subtle but powerful normative priority to the private law status quo. Within the South African context of developing a transformative constitutionalism based on social solidarity, this by-product of arguing for individual entitlements might be problematic.

But there is also a strong case to be made that an individual legally enforceable entitlement to social welfare benefits is an important tool for reducing poverty and effecting socio-economic rights. First and foremost, individual legally enforceable entitlements can ‘put food on the table’ and contribute to a South African vision of substantive equality. By way of example, since the limitation of an AFDC statutorily based entitlement in the US, the number of recipients receiving TANF benefits has dropped from its peak of 14.4 million in March 1994 to 4.7 million in June 2004. This represents a 67 per cent decrease from March 1994 and a 62 per cent decrease since PWORA was enacted in 1996. Depending on location, up to 50 per cent of those no longer on the rolls are unemployed and ‘(m)ost employed leavers are in jobs with low earnings and limited or no access to employment benefits’.

Second, in the US, the civil rights and welfare rights movements used the individual entitlement concept embraced by King and Goldberg very effectively in developing organising strategies among the poor. Organisers saw the right to a pre-termination hearing as potentially creating many forums in which to mobilise and empower social assistance recipients. Poor people's lawyers used Goldberg to lessen recipients' fear of losing subsistence benefits in retaliation for taking collective action to advance anti-poverty agendas.

In addition to creating contexts for empowerment, legal enforcement of entitlements opened the courts as an alternative forum for the political struggle by disempowered members of society. Whatever the democratic virtues of parliamentary supremacy, the poor are often effectively excluded from the political process. The courts sometimes perform the democratic function of correcting distortions in the political process caused by its capture by unrepresentative elites (for instance the wealthy or ethnic factions) and manipulation in ways that corrupt or delegitimize representative democracy. Two important examples of judicial involvement in the US that re-opened and democratized the political process are the school desegregation cases culminating in Brown v Board of Education28 (at a time when most African-Americans were disenfranchised) and the Warren Court legislative redistricting process29 (in which the courts weakened the stranglehold of 'majorities' who maintained their power by diluting the force of minority votes). In South Africa, the Treatment Action Campaign30 decision provides a similar example of democracy enhancing corrective action by the judiciary.

Finally, the process of establishing individual legally enforceable entitlements to social welfare benefits is likely to be accompanied by a useful political and legal debate, one that might destabilise prevailing ideologies and thereby open political space for transformative politics. When welfare entitlements come to be understood as rights akin to classical property rights, for example, rights against trespassers or nuisances, or rights to inheritance, it becomes much easier to see that property rights do not have 'natural' or 'apopitical' content — a view encouraged by ideologies supportive of the status quo. Rather, all property rights are human artefacts or conventions designed to serve chosen social policies. It follows that property rights need not have any particular content — their substance can be altered and reconstituted in the name of preferred social policies, say the foundational commitment to equality and human thriving expressed in South Africa's Constitution. Neither is poverty a 'natural' state of affairs or solely a product of intrinsic human failings such as laziness or lack of initiative. The

30 Minister of Health v Treatment Action Campaign (2) 2002 (5) SA 721 (CC) (hereinafter TAC).
persistence of poverty under modern economic conditions is a product of legal and political institutions designed to serve chosen social policies. These policies, too, can be changed in the name of egalitarian values. Unfortunately, US social welfare activists and scholars did not fully recognise, or utilise to the optimal political advantage, the potentially radical destabilising effect of putting the words ‘welfare’ and ‘entitlement’ together.

South Africa’s 1996 Constitution explicitly guarantees socio-economic rights, and the Constitutional Court has definitively established that these rights are judicially enforceable, thereby providing South Africa with the opportunity not only to consider statutory individual legally enforceable entitlements,31 but indefeasible entitlements (constitutionally based) as well.32 Despite this remarkable development, poor South Africans continue to experience distressing barriers to realising these rights. Indeed, South Africa appears to mirror the US in some disturbing elements. Let me attempt to show this by discussing several examples well known to South African readers.

First, the evolving interpretation of the Constitutional Court regarding socio-economic rights33 within the structure of ‘progressive realisation’ set forth in the Constitution, provides no constitutional individual legally enforceable entitlement to even minimal socio-economic rights. Much as the US Supreme Court in Dandridge relied on the language of ‘as far as practicable under the conditions in such state’ to limit the individual rights to subsistence benefits established in King and Goldberg, the South African Constitutional Court has interpreted the ‘progressive realisation’ language of the Constitution as limiting the Court’s role to determining ‘whether the measures taken by the State are reasonable’,34 ‘reasonable’ being given little substantive meaning. Even more directly, the Court in TAC stated that ‘the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them’.35

The limitation of socio-economic rights through an interpretation such as that embraced by the Constitutional Court restricts basic enforceability. Thus, while the Grootboom decision has been widely discussed as an important victory for the vindication of socio-economic rights, the decision has had little impact on homeless people in general in South Africa or, indeed, on the actual plaintiffs, who continue to live in

31 Of course, Parliament has enacted social grants that might provide the same statutorily-based substantive entitlement as that established in King.
33 Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); Grootboom (note 32 above); TAC (note 30 above); but see discussion of Khosa (note 2 above) further below.
34 Grootboom (note 32 above) para 33.
35 TAC (note 30 above) para 34 (see full quotation in note 45 below).
squalor. Although the fact that the Grootboom plaintiffs have not received adequate housing results largely from an inadequate settlement agreement entered into before the Constitutional Court’s decision in the case, I question whether the Constitutional Court would have provided more robust relief for the plaintiffs even if the settlement had not been reached.

Some scholars have stated or assumed that the Constitutional Court has completely rejected the concept of individual legally enforceable entitlements to a minimum core obligation as set forth in international covenants. However, given the nuanced language in Grootboom and TAC and the fact that concepts of property and entitlement within South Africa are still evolving and being interrogated, this may be an overstatement.

In Grootboom, Yacoob J stated:

There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.40

However, in the context of the case presented, the Court noted that it did not have sufficient information before it to determine a minimum core obligation.41 Although stating that ‘[n]either section 26 nor section 28 [of the South African Constitution] entitles the respondents to claim shelter or housing immediately upon demand’,42 the Court does give at least a modest content to ‘reasonableness’:

A programme that excludes a significant segment of society cannot be said to be reasonable.43

and

The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognize that the state must provide for relief for those in desperate need.44

While the Court in TAC appeared more clearly to reject individual entitlements,45 the Court there again recognised that minimum core

37 Grootboom (note 32 above) para 91.
38 Ibid paras 68, 81.
40 Grootboom (note 32 above) para 33.
41 Ibid para 33.
42 Ibid para 95.
43 Ibid para 43 (emphasis added).
44 Ibid para 66 (emphasis added).
45 ‘Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2) and not as a self-standing right conferred on everyone under section 26(1).’ TAC (note 30 above) para 34.
rights might be relevant in determining reasonableness, and provided mandatory orders by way of relief rather than just a declaration of constitutional rights, as in Grootboom. Of course, the Court’s failure to incorporate the minimum core obligation concept and lack of supervisory oversight led to widespread non-compliance and criticism. Yet the mandatory orders within the context of an aroused civil society and the active intervention of the Treatment Action Campaign to seek contempt proceedings (reminiscent of the mobilisation of US welfare rights groups in the wake of King and Goldberg) provided a mechanism for translating the TAC decision into expanded distribution of Nevirapine.

Subsequent to Grootboom and TAC, several High Court and Constitutional Court cases have built on the concepts of the two cases, providing a framework to advance the idea of a minimum core obligation to socio-economic rights, albeit without using the term. First, lower courts have used the Grootboom decision to provide effective individual relief in certain settings. For example, the High Court in City of Cape Town v Rudolph denied an eviction order where the municipality had failed to develop a housing programme which complied with its constitutional obligations declared in Grootboom, thereby providing individual relief for the squatters. In addition, the Court issued a structural interdict requiring the city to report to the Court within four months ‘stating what steps it has taken to comply with its constitutional and statutory obligations as declared in this order, what future steps it will take in that regard, and when such future steps will be taken’.

More recently, the Constitutional Court in the Modderklip case, while finding that property owners’ interests had been violated, also ruled that ‘the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority’. Housing is easier for the Court to deal with than some other socio-economic rights because s 26(3) of the Constitution specifically prohibits unfair evictions, in addition to the general right to access to adequate housing contained in s 26(1). However, the Supreme Court of Appeal in Modderklip relied on s 26(1), and, although the Constitutional Court did not reach that issue, it upheld the relief ordered by the

46 M Heywood ‘Contempt or Compliance? The TAC Case After the Constitutional Court Judgment’ (2003) ESR Rev 4(1) 7-10; Pieterse (note 22 above) 415.
48 Rudolph (note 47 above) at 1281C.
49 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC).
50 Ibid para 68. For a more extensive discussion of Modderklip see AJ van der Walt ‘The State’s Duty to Protect Property Owners v The State’s Duty to Provide Housing: Thoughts on the Modderklip Case’ (2005) 21 SAJHR 1, 144.
51 Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the RSA v Modderklip Boerdery (Pty) Ltd 2004 (8) BCLR 821 (SCA) para 22.
Supreme Court of Appeal.\(^{52}\) Perhaps the Constitutional Court will move towards the provision of individual entitlements, at least in the housing context, by prohibiting evictions in specific situations rather than by reading a general minimum core obligation into the constitutional ‘right’ to housing.\(^{53}\)

Second, the Constitutional Court approached socio-economic rights by yet another path in *Khosa*, which also points toward a nascent concept of ‘minimum core’. *Khosa* is the first Constitutional Court case directly to address the constitutional provisions relating to the socio-economic right to social security (unlike the US Supreme Court decision in *King*, which was based solely on a statutory interpretation). *Khosa* differs significantly from the decisions in *Grootboom* and *TAC* for two reasons. First, it addressed the constitutionality of a statute enacted by Parliament, as opposed to an executive programme. Second, it dealt with a group of individuals who were not waiting in the queue for ‘progressive realisation’, but who had been entirely excluded by Parliament from specific social programmes. In *Khosa*, the Constitutional Court continued to apply a reasonableness standard,\(^{54}\) but shifted from a focus on ‘reasonable measures within progressive realisation’ to a focus on ‘the reasonableness of exclusion’ seen in light of the full Bill of Rights (particularly emphasising the rights to dignity, equality and life).\(^{55}\)

Within that context, *Khosa* moved the discussion beyond a ‘right to a reasonable plan’ (compare ‘progressive realisation’ in the South African context with the requirement of a ‘conforming state plan’ in the US) to an ‘individual right to benefits’. Without specifically stating that it was doing so, *Khosa* articulated at least one ‘minimum core obligation’, namely, that under the Constitution, permanent residents must be included in social security benefits in terms of the Social Assistance Act 59 of 1992. In *Khosa* the Constitutional Court finally provided an interpretation of one of the socio-economic rights that effectively granted certain individuals, that is, permanent residents, a constitutional individual legally enforceable entitlement.\(^{56}\)

Why was the Court willing to move in this direction in *Khosa*? Some evidence suggests that the Constitutional Court is more willing to skirt closer to a minimum core concept when a discrete, ‘outsider’ group is

\(^{52}\) *Modderklip* (CC) (note 49 above) paras 26, 66.

\(^{53}\) Ibid para 68. See also *Jaftha v Schoeman* 2005 (2) SA 140 (CC).

\(^{54}\) *Khosa* (note 2 above) paras 43-45.

\(^{55}\) Although the Court in *TAC* (note 30 above) rejected the argument that ss 26 and 27 contain two types of duties (minimum core obligations and progressive realisation), that is, they articulate one overarching right with two discrete obligations (S Liebenberg ‘The Interpretation of Socio-Economic Rights’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2004) Ch 33, 1-66), *Khosa* interestingly incorporates a version of that formulation.

\(^{56}\) But note problems with the Court’s analysis in *Khosa* vis-à-vis its recognition of the impact of the global economy and human mobility on temporary and undocumented immigrants’ eligibility for social welfare grants, see part IV below.
excluded than when the rights-demanding group is 'simply' the impoverished masses of South Africans?\textsuperscript{57} Is the Constitutional Court more willing to rule on the constitutionality of statutes enacted by Parliament than on executive branch programmes, which would be a curious inversion of the normal separation-of-powers explanation? These and other factors may be part of, but not the entire picture. In my view, an important, if veiled, significance of \textit{Khosa} and \textit{Modderklip} is that these cases show the Court to be very cautiously and indirectly moving towards endowing the Constitution's socio-economic rights with substantive, individually enforceable content within a framework grounded in the doctrine of 'progressive realisation'.

Like other broad terms in the Constitution, the phrases 'everyone has the right to have access to [that which is guaranteed by socio-economic rights]' and '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'\textsuperscript{58} are not self-defining and therefore require interpretation. In the standard analysis,\textsuperscript{59} enforcement of socio-economic rights poses a dichotomous choice between a 'minimum core obligations' approach and a 'progressive realisation' approach. The conventional wisdom has it that the Constitutional Court, faithful to the text, has opted for 'progressive realisation' and rejected 'minimum core obligations', thereby firmly staking out for South Africa a position of great judicial deference to the legislature. But the choice is not a dichotomy — there is a middle ground. For example, 'progressive realisation' can reasonably be understood in several different ways:

(1) Parliament must take measures towards realisation of the right, subject only to a generalised 'reasonableness' review by the courts; or

(2) a somewhat more robust form of judicial review in which the courts insist that Parliament's measures be not only reasonable in general but quite specifically conform to values and commands found elsewhere in the Constitution;\textsuperscript{60} or perhaps

\textsuperscript{57} This point is discussed in D Davis and K Klare 'Development of the Common and Customary Law in the Framework of Transformative Constitutionalism', forthcoming paper based on a presentation at the SAJHR conference 'Twenty Years of Human Rights Scholarship and Ten Years of Democracy' (July 2004).

\textsuperscript{58} Sec, eg, ss 26 and 27.

\textsuperscript{59} Note S Liebenberg (note 55 above) to the contrary.

\textsuperscript{60} Thus \textit{Khosa} requires Parliament not only to distribute social welfare benefits on some 'reasonable' basis, but specifically a reasonable basis that respects the Constitution's commitments to the dignity and equality of 'everyone'. By analogy, suppose the Constitutional Court had a case similar to the US \textit{Dandridge} case (note 14 above) in which Parliament had enacted family-size caps on social welfare benefits. Under version (1) of progressive realisation, the Court would simply inquire whether Parliament's action was reasonable. Under version (2), the Court might give specific content to the word 'everyone' in s 27(1) — that the right granted therein extends to every human being unqualified by the size of the family unit. If the Court took the latter path, it would probably have to decide the case differently from the way the US Supreme Court did in \textit{Dandridge}.
(3) Parliament must take reasonable measures to fulfil the right, but the qualification 'progressive' means that Parliament's steps must be improvements over time — the benefits it grants must be 'upwardly mobile' — unless it can be shown that the state's resources have diminished.

I am not advocating one or another of these interpretations of 'progressive realisation'. My point is two-fold: the courts must choose between these versions, or others that might be imagined, and, every time such a choice is made in the ordinary course of applying the 'progressive realisation' approach, debate is re-opened anew, if subtly, on whether there is some minimum standard Parliament must meet, how vigorous the courts' intervention should be, and other questions thought to have been resolved by the choice to reject 'minimum core obligations' in Grootboom and TAC.

Important as the analysis of statutory and constitutional individual legally enforceable entitlements is, it is worth recalling that legal declarations of individual entitlements, whether by the Constitution or Parliament, do not necessarily result in actual realisation of the entitlement by its intended beneficiaries unless the right is procedurally retrievable. As previously noted, Goldberg was considered a major victory for poor people in the US because it established rights to notice and the opportunity for a hearing (among other procedural safeguards) prior to benefit-termination, which empowered recipients to mobilise without fearing that unaccountable administrators would take away their grants. But Goldberg was politically vulnerable because the underlying property interest at stake had been established within a statutory, not a constitutional, framework. As a result, the interests that a Goldberg process protects from arbitrary termination must be created by positive law, and what positive law gives, it can take away. The procedure only retrieves the substantive right granted by Parliament.

Given the constitutional entrenchment of socio-economic rights, the legal discussion of prong two within South Africa reflects both a constitutional and a statutory dimension. If the Constitutional Court fails to give a constitutional individual legally enforceable entitlement to socio-economic rights, that is, if the prong one articulation of the substantive right is not constitutionally established, there is also no individual process for retrieval. Therefore, the homeless individuals in Grootboom were not allowed relief by the Court other than a determination of the reasonableness of the government's housing plan, like the US 'state plan'. Within that framework, individuals have neither a substantive right to socio-economic benefits established within the
Constitution nor a procedural mechanism to retrieve constitutionally incorporated socio-economic rights.  

However, even if one reads no substantive, individual rights into the Constitution, South Africa is not providing a sufficient procedural mechanism within which to enforce even its statutory enactments. Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza  

established ‘on the books’ similar rights in South Africa to those announced in Goldberg in the US. Ngxuza holds that recipients of legislatively mandated social grants  

have the right to notice, reasons, and the opportunity for a hearing prior to termination of social grants. Ngxuza challenged the actions of the Eastern Cape social development department in summarily terminating the issue of social grants (old-age, disability and child-support grants) to thousands of recipients and requiring them to reapply in order to establish their eligibility. The High Court noted that between the first quarter of 1997 and August 1998, close to 100,000 recipients arbitrarily lost their entitlement to social grants with no notice, articulated reasons, or opportunity for a hearing.  

Yet even after the important decision in Ngxuza the third prong of entitlement, that is, ‘law in practice’, has thwarted individual entitlements. Provincial governments have not absorbed or acknowledged the full implications of Nngxuza, and they continue to act arbitrarily and fail to provide basic procedural systems that ensure benefits to eligible individuals and empower those inappropriately denied benefits to challenge illegal administrative action. This remains a central failure of the South African social welfare system  

and, again, is reminiscent of US social welfare policy. The Eastern Cape social development department still fails to act on, denies or terminates hundreds of cases, especially those involving child support grants (CSGs) or disability grants. It then defends its actions in court (usually unsuccessfully, often not even appearing to refute the applicant’s claim) at a cost of possibly R4 million a month.  

61 In addition to my hope that the Constitutional Court is moving toward establishing certain constitutional individual legally enforceable entitlements, I am also hopeful that the Court will eventually utilise s 33 of the Constitution giving . . . [e]veryone the right to administrative action that is lawful, reasonable and procedurally fair’ to establish a mechanism for retrieval of socio-economic rights.  

62 2001 (4) SA 1184 (SCA).  

63 Nngxuza (SCA) (ibid) did not address the important issue of retrievability of constitutional socio-economic rights.  

64 Nngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 (2) SA 609 (E), 617.  


66 S Mkokeli ‘Bisho’s Expensive Lawsuit Headache’ The Herald Online 2 August 2005. See also Kate (note 67 below). In addition, the KwaZulu-Natal Welfare Department incurred legal fees of R26.7 million between January 2000 and December 2004 because of judicial challenges to the department’s failure to approve or pay social grants. ‘Taxpayers Face R134m Welfare Bill’ The Mercury Online 8 February 2005.
high courts have regularly found that recipients of CSGs and disability grants have the right to a notice and opportunity for a pre-termination hearing. Provincial governments have effectively voided the substantive entitlement and the process for retrieval by simply ignoring these pronouncements. Olivier has noted that ‘there is little consistency, as different bodies or officials are called upon to hear complaints and appeals in respect of different parts of the social security system, undue delays are common and the power of the courts to deal with these matters is unsatisfactory’. While US poverty advocates must still regularly challenge specific ‘law in practice’ abuses by social assistance agencies and administrators, such as placement of offices in inaccessible locations, restriction of office hours, unnecessary verification requirements, and processing delays, the administrative and judicial oversight within the individual legally enforceable entitlement remaining after the enactment of the PRWORA has provided at least some means of keeping the practice of arbitrary discretion at bay. On the other hand, the judiciary in South Africa, in spite of Ngxuza and its progeny, does not seem equipped with sufficient institutional capacity or remedial powers to ensure that even statutory (as opposed to constitutional) entitlements are retrievable in practice.

In addition to ignoring the judicial mandate of procedural entitlement encompassed in Ngxuza and other cases, provinces have denied and continue illegally to deny benefits to eligible poor people. The administration of the previous State Maintenance Grants (SMGs) (during apartheid), much like the racial exclusion experienced under earlier mothers’ or widows’ pensions and then AFDC in the US prior to the establishment of an individual entitlement in the late 1960s and 1970s, involved abusive discretion and systemically incorporated huge racial inequalities. The SMG programme was not even operational in many African areas. When the SMG was replaced by the Child Support Grant (CSG), illegal discretionary manoeuvres continued. Recent

67 See, eg, Rangani v Superintendent General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T); Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government 2000 (2) SA 849 (E), 854E-F; Mpopo v MEC for Welfare and Population Development, Gauteng WLD 18 February 2000 (case no 2848/99) unreported; Mphumulo v MEC for Social Welfare and Pensions, KwaZulu-Natal DCLD 22 November 2000 (case nos 6306/00, 2973/00, 3741/00, 4040/00, 1358/00, 3592/00) unreported; Vumazonke v MEC for Social Development ECD 23 November 2004 (case nos 110/04, 826/04, 143/04, 254/03) unreported; Ntame and Manyaka v MEC; Department of Social Development ECD 11 January 2005 (case nos 3667/04, 3634/04, 3635/04) unreported; Kate v MEC; Department of Welfare, Eastern Cape 2005 (1) SA 141 (SE). For a discussion of some of these cases see C Plasket ‘Administrative Justice and Social Assistance’ (2003) 120 SALJ 494, 504-508.
70 The CSG was introduced into the Social Assistance Act 59 of 1992 by the Welfare Laws Amendment Act 105 of 1997.
interviews conducted in two provinces by Goldblatt reveal cases in which applicants were asked to produce documentation that is not legally required (such as a letter proving residence, or a clinic card), caseworkers turning away applicants based on the worker's personal prejudices (for example, that young women did not need benefits), applicants being sent to multiple locations to complete paperwork, resulting in abandonment of the applications due to prohibitive transport costs, and inconsistent interpretations by welfare offices of whether cooperation with the maintenance court is required.\textsuperscript{71} Likewise, in accessing statutorily mandated benefits, applicants and recipients face structural problems including lack of information about grants, illiteracy, inability to obtain birth certificates and other identity documents from the Department of Home Affairs, inefficient and corrupt welfare workers, and delays in processing grants.\textsuperscript{72} At other times, officials simply and arbitrarily rewrite the rules to include additional eligibility requirements, such as when Gauteng officials denied CSGs to caregivers under the age of 21.\textsuperscript{73}

It is interesting to note that the huge expansion in the number of social grants, which should be celebrated as a post-apartheid achievement of opening the rolls to Africans previously excluded, has instead led politicians and pundits to make pejorative comments about fraud and dependency, similar to what occurred in the US in the 1960s when the AFDC rolls were opened to African-American women and children.\textsuperscript{74}

Finally, a caveat about the advantages of establishing an individual legally enforceable entitlement, whether constitutionally or through Parliamentary action. Even if substantive entitlements are recognised, and even if retrieval procedures are widely available so that lawless practices are limited, what is retrievable from the enforcement of the entitlement, that is, what is gained in terms of 'food on the table', is only the benefit that the substantive entitlement establishes. The articulated substantive entitlement might be, and always has been in the US, highly defective because of gaps in coverage and seriously inadequate benefit amounts. The lack of recognition of entitlements to basic subsistence benefits as a communal responsibility — both in South Africa and in the US — leaves many people living in abject poverty. For example, while the implementation of the SMG was highly racialised, for those families who were found eligible, the programme covered poverty-stricken caregivers as well as children, unlike the ADC programme enacted in the US in 1935.\textsuperscript{75} But the CSGs (while expanding the racial inclusivity coverage and

\textsuperscript{71} B Goldblatt 'Gender and Social Assistance in the First Decade of Democracy: A Case Study of South Africa's Child Support Grant' 2005 Politikon (November) 32(2), 239.
\textsuperscript{72} B Goldblatt 'Teen Pregnancy and Abuse of the Child Support Grant. Addressing the Myths and Stereotypes' 2003 Agenda 56, 80.
\textsuperscript{74} See the discussion in part III below.
\textsuperscript{75} As noted, while the ADC programme established in 1935 only covered children, it was expanded in 1950 to include as eligible recipients the single parents caring for those children.
number of children receiving the social grants\textsuperscript{76} demeaned the value of caregivers and diluted the value of the grant to the child, both because the benefit amount was reduced from that provided under the SMG and because a portion of the grant would necessarily be required to cover the caregiver's subsistence. While allowing the grant to follow the child\textsuperscript{77} is vitally important in a country ravaged by the AIDS epidemic, the failure to cover the caregiver wrongly assumes, much as the US Supreme Court did in \textit{Dandridge},\textsuperscript{78} that children are not harmed when some household members are denied grants. In addition, with an increasing number of grandmothers and other family or community members taking in children orphaned by the AIDS epidemic,\textsuperscript{79} it is deeply troubling that the Department of Social Development has capped the number of non-biological children who can receive the CSG.\textsuperscript{80} Again, this is reminiscent of \textit{Dandridge}, a decision South Africans should be loath to emulate. These, and many other gaps, result from the government's failure to embrace the concept of the Basic Income Grant (see discussion below) and the failure of the Constitutional Court to define enforceable minimum core obligations.

\section*{III Privatisation of Poverty Reduction within Wage-Work and Family Structures}

Both US and South African government policies express the view that income from formal sector wage work and contributions by family members are the primary sources of income for poverty reduction (although this view is more pervasive in the US). While these two social institutions are extremely important avenues for providing subsistence income for many individuals, principal reliance on them ignores endemic structural inequalities and the persistence of unemployment.

In the US, welfare policy in regard to wage work shifted significantly in the mid-1960s when the AFDC rolls opened to African-American mothers, for the many reasons discussed above. Unlike white women who, under an ideology known as the 'domestic code', were encouraged to stay at home and propagate 'the race', African-American women had always been expected by the dominant (white) culture in the US to be in waged employment, primarily as domestic workers and sharecroppers. In

\begin{footnotes}
\item[76] National Treasury 'Trends in Intergovernmental Finances: 2000/01-2006/07' (August 2004) \texttt{http://www.treasury.gov.za} ("child support grant beneficiaries increased from 352 617 in 2000 to more than 4.3 million in 2004").
\item[77] Note the Lund Committee's view that "A focus on the child, rather than the nuclear family, in the face of changing family forms may be the best way to achieve the goal of family preservation" (note 68 above) 25.
\item[78] Note 14 above.
\end{footnotes}
keeping with this history, the first mandatory work programme for welfare recipients was enacted in 1967. 81 Over the years, work programmes for welfare recipients were consistently expanded, culminating in the 1996 PRWORA.

The PRWORA contained two major provisions relating to mandatory work programmes and the role of formal-sector wage work in US poverty reduction policy. First, states must require significant percentages of single mothers who receive welfare to participate in designated work activities for 20 to 30 hours a week. 82 Virtually all forms of job and skills training are excluded from the definition of 'work activity' for purposes of fulfilling the states' mandates. 83 The cheapest way for states to meet their required percentage is through a form of indentured servitude called 'workfare', in which mothers receiving TANF benefits provide public work for no pay other than their small welfare grant. 84 Second, claimants are prohibited under the PRWORA from receiving welfare for more than five years in their lifetime. 85 The assumption is that formal-sector wage work can and will provide adequate family support at all other times. 86

Elsewhere I have criticised the assumption that formal sector wage work should be the primary focus for poverty reduction. 87 First and foremost, while wage work and entrepreneurship are important, a policy which assumes that all individuals can earn sufficient wages through these means to support themselves and their families is preposterous, in light of the apparent inability or unwillingness of most governments to guarantee full employment.

Second, reliance on labour markets and work to provide dignity and family subsistence rests on the fundamentally gendered assumptions that 'work' means formal-sector paid work and 'worker' means someone whose primary focus is formal-sector wage work. This mindset ignores the vast quantities of unpaid work that are necessary to maintain society. Traditional theories of 'productivity' largely exclude the value of unpaid labour as an integral cost of production. Workplace productivity assessments are based on factors that isolate one's role in formal-sector paid work and ignore other parts of life that influence, contribute to, or detract from productivity. While economists and lawyers speculate about increased 'efficiency' and 'productivity', as if these were fixed or 'natural' concepts, they ignore production costs currently absorbed by the household, such as the provision of health care and childcare and the

82 42 USC § 607 (c) (1) (2003); 45 CFR 261.31 (2004).
83 42 USC § 607 (c) & (d) (2003); 45 CFR 261.33 (2004).
84 Note that the highest union density in the US is in public employment, therefore workfare workers can replace unionised employees and reduce the number of unionised workers.
enormous amount of what I call ‘subsistence work’, for example, uncompensated farming for family consumption. Policymakers take this form of subsidy largely for granted; typically they do not account for the production of value outside of and apart from formal-sector wage work. For most policymakers and academics, intra-family care work and subsistence work are not valued and do not count as work. However, society cannot do without this work — someone must do it. The people who do — overwhelmingly women — are to that extent constrained from performing formal-sector wage work. A poverty reduction policy with formal-sector wage work as its central instrument excludes them.

Third, a wage work-centred policy not only overlooks the needs of those who are not able to provide subsistence for their families by that means, but it also demonises them. If a caregiver fails to provide sufficient subsistence income for his or her family through formal-sector wage work (or through a woman’s marrying and creating a home for her wage-earning spouse), dominant culture is quick to attribute the household poverty to the caregiver’s social deviancy, rather than to the structure of the social system. In today’s political rhetoric, the caregiver is ‘dependent’ on ‘the state’. The language of dependency and deviancy plays into generalised myths, for example, that women get pregnant in order to receive TANF/CSGs, or that individuals move across provincial or international frontiers in order to increase benefit amounts.

Although both these canards have historically been themes of poverty discourse, policymakers in the US, particularly since Reagan’s presidency in the early 1980s, have honed this blaming rhetoric into an art form.

Fourth, a formulation that treats wage work as the opposite of non-wage work and deems non-wage-work ‘dependency’ positions wage work in the formal economy as the basis of ‘independence’. In so doing, mainstream theory complacently ignores or actively suppresses the alienated, subordinate, often authoritarian character of formal-sector wage work and most wage workers’ utter dependence on how competently their employers manage the business and cope with technological and market shifts.

Fifth, by defining wage workers as ‘independent’ of the state, mainstream theory ignores the role of government in creating and protecting the ‘entitlement programmes’ of the wealthy, namely, the background laws of property, contract, family, and tort, not to mention tax policy and other subsidies to business and to middle- and upper-class households.

Finally, privileging the labour market as a site for self-actualisation and independence, while ignoring, misunderstanding or effacing invidious class, gender, racial, and alienage inequalities, reinforces formal

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88 Cross-border migration and social welfare benefits are discussed in part IV below.
concepts of equality, individualism and self-reliance, and the view that individual responsibility (effort and entrepreneurship) is the primary route to ending poverty.

Sadly, the South African experience in the government’s refusal to embrace the concept of a Basic Income Grant (BIG) and its decision instead to favour, first, labour market participation and, more recently, public works programmes, as the primary instruments for poverty reduction, appears to replicate US mistakes.

South Africa is a country in which, depending on the definition of unemployment, 5.2 to 8.4 million persons are unemployed — between 31.2 per cent and 42.1 per cent of the working age population89 — not because of lack of initiative, but rather because of the lack of jobs in the formal-sector. Twenty-two million people live on less than R144 (approximately US$16) per month, income primarily generated through the informal economy, including subsistence farming and domestic labour.

The government-appointed Committee of Inquiry into a Comprehensive System of Social Security (commonly known as the ‘Taylor Report’)90 recommended the implementation of a universal Basic Income Grant under which all South Africans (regardless of need) would receive a monthly BIG of R100 per person, funded through a progressive income tax or wealth tax system. Even this modest amount (the equivalent of less than US$20) would ‘nearly completely eliminate’ extreme poverty in South Africa.91 The Taylor Report’s recommendation would not penalise people for earning additional income. Therefore, advocates argue that the BIG would reduce the dependence of the very poor on the working poor and give South Africa’s poorest households the economic security needed to invest in finding wage employment (when available) and educating their children.92 The Economic Policy Research Institute study commissioned by the Directorate: Finance and Economics recently confirmed this assessment, finding that:

(1) Social grants provide potential labour market participants with the resources and economic security necessary to invest in high-risk/high-reward job search.

(2) Living in a household receiving social grants is correlated with a higher success rate in finding employment.


91 Ibid 62. Of course, the concept of a BIG is not a complete solution to poverty and job creation is critical.

(3) Workers in households receiving social grants are better able to improve their productivity and, as a result, earn higher wage increases.93

Instead of implementing the Taylor Report’s recommendation of a BIG, the South African government has funded a public works programme (Expanded Public Works Programme (EPWP)) intended to provide short-term (four- to six-month) employment for only approximately 200 000 individuals per year. The targeted populations are women (60 per cent of participants), youth (20 per cent) and the disabled (2 per cent). The jobs to be performed include ‘‘soft services’’ such as home-based care for the ill and the aged, early childhood development, school feeding, and feeding at clinics, as well as in more conventional programmes such as the building of access roads in rural areas, fencing of national roads, removal of alien vegetation and school cleaning and renovation.94

Public works programmes, properly implemented, can be an important tool in poverty reduction. But, while these jobs are publicly funded, rather than being solely market driven, the underlying philosophy still relies on an assumption that the ‘‘free market’’ is ultimately the means of alleviating poverty, including that of poor mothers. That is to say, the premise of EPWP is that long-term poor, unemployed individuals can develop skills within four to six months that will translate into (currently non-existent) private market jobs.95

The idea behind the programme is that temporary employment in public works programmes will give the unemployed an opportunity to develop some work experience and learn skills that will help them find permanent jobs or start their own businesses.96

This in a country where the government acknowledges that, while the number of people employed in the formal-sector is increasing, the number of unemployed is increasing even faster.97

Unfortunately, the opening of eligibility rolls to poor Africans in South


Africa seems to have spawned political rhetoric \(^{98}\) reminiscent of the rhetoric that followed the expansion of US AFDC rolls to include African-Americans in the 1960s and 1970s. The reasons given for the government's embracing of the public works model are similar to many US policymakers' claims that those who receive social grants are 'dependent' on the state and that market work is the source of personal independence, while ignoring the role and value of caregiving work in the home. Some examples:

On poverty alleviation, the government is likely to maintain its opposition to the introduction of a basic income grant — on the grounds that it will become unaffordable to the state in the long term and encourage *dependency* among South Africans, who they would prefer to see secure an income through entrepreneurship and other sustainable initiatives.\(^ {100}\)

The image of able African men and women queuing monthly for a handout offends the Mbeki imagination of what country and continent could look like [A government spokesperson said:] [A]s many people as possible should come out of *dependency* through measures that increase growth.\(^ {100}\)

If you give everybody a R100 a month it will not make a difference. The notion that one single intervention would help is wrong.\(^ {101}\)

The EPWPW is a nation-wide programme that will draw significant numbers of the unemployed into *productive* employment, so that workers gain skills while they are gainfully employed, and increase their capacity to earn an income once they leave the programme.\(^ {102}\)

But what will happen to EPWP employees after six months? Presumably they will return to the informal-sector.\(^ {103}\) And where is caregiving work or the ways in which low wage formal-sector wage work induces dependency on employers taken into account? Who is going to care for women's children while the mothers remove alien vegetation and fence roads? Why should public funds go to pay women to provide caregiving for the ill, aged, and children outside the family, but not

99 'Getting Down to Business' (note 96 above) (emphasis added).
100 'Ideals of an African Utopia Hamper the BIG, Big Time' 30 May 2003 *Mail & Guardian Online* archives at <http://archive.mg.co.za> (emphasis added).
103 I Stephen 'Job Creation Project Gets Off to a Slow Start' *The Star* 14 April 2005, available at <http://www.thestar.co.za> ('Department of Public Works officials say it could take two to three years before they have figures on how many who were trained under the programme found permanent jobs ... Economist Anna McCord said jobs wouldn't be sustainable, and weren't meant to be.')
provide a BIG to allow a mother to provide those same services for family members within the home? Current South African social welfare policy appears to devalue or ignore caregiving work in the home, while advancing concepts of 'productivity' and 'work' limited to formal-sector wage work. In this, South Africa is reproducing some of the most regrettable features of US social policy.

A corollary of the assumption that labour in the formal-sector is the primary path for reducing poverty is the belief that the family is the societal structure to which people should look for economic subsistence. In other words, every adult should be able to provide for his or her family through formal-sector wage work. An adult who does not do so is deficient and lazy. US poverty policy and rhetoric perpetuate this belief with no regard for the enormous economic and earnings inequities present in that country. For example, US policymakers argue that child support from the absent parent (usually the father) will provide enough income for family subsistence, with little analysis of the labour market prospects of poor men. The 1996 PRWORA has specific language extolling the virtues of marriage (and indeed funding marriage initiatives for lone mothers receiving social grants), on the faulty assumption that the presence of two adults in the home will automatically rescue the family from poverty.104

Without using the pejorative language found in US welfare policy rhetoric, the South African Constitutional Court in Grootboom105 (with some modifications in TAC106) interpreted 28(1)(b) and (c) as placing primary responsibility for family subsistence on the family and requiring the state to ensure 'that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children'.107 Again, this in a country with more than 40 per cent unemployment and no prospect of an immediate surge in job creation. Khosa,108 however, adopted a different focus, which has nothing in common with US rhetoric. Khosa recognises that reliance on other family members for support may have serious negative consequences for poor families. Rather than viewing receipt of a state social grant as creating dependency, the Khosa court saw social grants as a way to ensure the dignity of a recipient who would otherwise be dependent on the family:

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. These families or dependants, who may be in need of social assistance themselves, are asked to shoulder burdens not asked of other citizens. The denial of the welfare

105 Grootboom (note 32 above) paras 75-78.
106 TAC (note 30 above) paras 75-77.
107 Grootboom (note 32 above) para 75 (emphasis added).
108 Note 2 above.
benefits therefore impacts not only on permanent residents without other means of support, but also on the families, friends and communities with whom they have contact. Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.109

I am not arguing that anti-poverty advocates should focus exclusively on state income transfers to the exclusion of market restructuring110 or that they should ignore or discourage the important role that formal-sector wage work and families can play in providing subsistence. But by failing to enact inclusive social assistance programmes, while instead relying on markets, public works and the family economy as the primary modes of poverty reduction, the South African government is disabling itself from addressing profound problems of structural inequality and is operating contrary to the African ethic of collective responsibility for social welfare of citizens embodied in the concept of ubuntu. Privatising poverty solutions transfers many welfare functions to a domestic economy that cannot accommodate this responsibility and results in demonising parents who are unable within the reality of today’s markets to provide for their families.

IV Social Welfare Within a Global Perspective

Poverty reduction advocates and scholars customarily work and conceive the implementation of anti-poverty strategies within a nation-state framework, focusing attention on the effectiveness of domestic social welfare policies. Indeed, US policy discussion often focuses within state (provincial) boundaries. This nation-state fixation, at least in the US, often reflects isolationism and intense parochialism. Yet viewing judicial and legislative strategies for poverty reduction in isolation from global mobility of capital and humans is highly problematic. This can be seen by considering the globalisation of social welfare within three framings: 1) across state/provincial borders, 2) across citizen/non-citizen status (including permanent residents, temporary residents and undocumented residents) within a nation-state, and 3) across nation-state borders.

First, the interstate (inter-provincial) movement of poor people has been the source of intense political and legal conflict in the US, because a number of social programmes do not mandate a federal (national) minimum benefit level. In a throwback to the Elizabethan Poor Laws, US states from time to time enact legislation reducing benefit levels or eliminating benefits entirely for US citizens who relocate across US state

109 Ibid para 76.
110 Indeed, I have argued quite the opposite, see Williams (note 87 above).
borders.\textsuperscript{111} The justificatory rhetoric assumes, in the face of solid empirical evidence to the contrary,\textsuperscript{112} that poor people move across state lines in order to receive higher social assistance amounts than are available in the state of first residence. This debate often surprises people outside the US, many of whom view the US as a monolithic nation-state. This was never true in the past, and is not true today. Two hundred and thirty years ago thirteen colonies joined together (with much of the same dialogue as has and is occurring within the African Union and the European Union), each deeply fearful of relinquishing its ability to control its own fiscal situation and the regulation of its 'citizens'. The legal autonomy of the states remains a judicially recognised concept to this day, although the precise contours and limits of state sovereignty continue to be a subject of endless debate.

At the height of the Warren Court era, the US Supreme Court ruled that the federal Constitution entrenched a 'right to travel' which bars the states from discriminating in benefit amounts against newly arrived residents who are otherwise eligible for social assistance benefits.\textsuperscript{113} Contrary to the current trend of enlarging states' prerogatives, the US Supreme Court recently reaffirmed the \textit{Saenz v Roe}.\textsuperscript{114} \textit{Saenz} struck down a 1992 California statute that limited for one year the TANF benefits available to newly arrived residents to the amount available in their prior state of residence. The opinion emphasises the rights of federal citizenship, and has been described as expressing 'a more solidaristic concept of entitlement derived from notions of citizenship'\textsuperscript{115} across state borders.

However, the same sense of solidarity is not extended by US law to all people living in the country, specifically non-citizens, regardless of

\textsuperscript{111} As noted earlier, the US has nationally administered programmes (some funded through tax revenue, such as Food Stamps, and others funded through employee/employer contributions, such as Social Security and Unemployment Insurance), state-funded and administered programmes, and federal-state cooperative programmes (jointly administered and funded through several means, including AFDC/TANF). The latter two categories of social assistance have great disparities in benefit amount and eligibility among states. For example, in 2003, the amount of TANF grants for a family of three without other income ranged from $170/month in Mississippi to $323/month in Alaska. (Committee on Ways and Means, US House of Representatives 2003 Green Book Table 7-11, 40-41 available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/Section7.pdf>), not necessarily dependent on need or local standard of living, but rather based on local political predilections.

\textsuperscript{112} S Allard & S Danziger 'Welfare Magnets: Myth or Reality?' May 2000 \textit{Journal of Politics} 62(2) 350-368 (reviewing recent literature and presenting empirical results concluding that 'single-parent families in general and welfare recipients in particular, have low rates of interstate movement and that benefit levels are not an important determinant of interstate migration' 352).

\textsuperscript{113} \textit{Shapiro v Thompson} 394 US 618 (1969).

\textsuperscript{114} 526 US 489 (1999).

immigration status. The circumstances surrounding the ratification of the 1994 North American Free Trade Agreement between Canada, Mexico, and the US provide a useful example.

Prior to 1996, legal immigrants to the US were eligible for virtually all social welfare programmes. Yet, while the US promoted 'open trade' through the North American Free Trade Agreement (NAFTA), it was unwilling to include questions of immigration and social protection in the discussion. Instead, two years after ratifying NAFTA, Congress eliminated the eligibility of legal immigrants for most means-tested social assistance programmes. As a result, for example, a person from Mexico who legally relocates to the US in search of wage work and who then becomes disabled is ineligible for the disability benefits that an otherwise similarly situated US citizen would receive. While some of the social protection benefits have recently been restored, the restorations are almost exclusively for legal immigrants who were in the United States prior to the date the PRWORA was passed. The huge influx of legal immigrants who entered and continue to enter the country each year since 1996 remains ineligible for the majority of social protection programmes which are not based on employee/employer contributions and a relatively high, long-term work-experience record.

Anti-immigrant enactments of this kind — as well as the debates surrounding ratification of NAFTA — reflected the rise of xenophobic, specifically anti-Mexican, rhetoric that has had a powerful effect on legal immigrants in the US. For example, Mexican immigrants are by far the

116 "The fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence." Mathews v Diaz 426 US 67, 80 (1976).
119 Including TANF, Food Stamps and Supplemental Security Income, a programme for aged and disabled individuals who do not have a sufficient tie to wage work to qualify for wage work Social Security benefits.
120 Eg, 8 USC § 1611(b)(5)(1999) (restoring Supplemental Security Income and Medicaid eligibility to certain immigrants, termed 'not qualified' immigrants, who were receiving assistance on 22 August 1996); 8 USC § 1612(a)(2)(F)(1999)(restoring Supplemental Security Income and Food Stamps to 'qualified' blind or disabled immigrants residing in the US on 22 August 1996).
121 In addition, there are other connections between migration and social protection benefits. For example, in 1997, certain legal residents were being stopped at the US border because the Immigration Service had received information from a state that the immigrant had received Medicaid, or health care, benefits. The immigrants were denied re-entry unless they agreed to reimburse the state for the past Medicaid received, although receipt of Medicaid does not create a legal debt. National Immigration Law Center 'Settlement Reached in Medi-Cal "Debt" Reimbursement Case' 16 September 1998 Immigrants' Rights Update 8.
largest group of US legal immigrants who have historically chosen not to become US citizens, reflecting a continuing identification with their home country. However, since the enactment of the PRWORA and certain other legal initiatives, in addition to the ratification of NAFTA, there has been a massive increase in the numbers of Mexican legal immigrants who have chosen to naturalise, significantly impacting on US voting patterns and ongoing immigration policy.

The question of the legality of federal and state statutes that exclude legal immigrants from social protection benefits is mired in the legal complexities of US federalism. The Supreme Court has interpreted a number of constitutional provisions to establish 'plenary power' in the federal legislative and executive branches over many immigration issues. Such plenary power at federal level pre-empts state legislative competency in the designated area, that is, states may not legislate about immigration matters within exclusive federal competency. In addition, 'the power of Congress to exclude aliens altogether from the United States or to prescribe the terms and conditions upon which they may come to this country' is virtually unlimited. Not only state government but all courts, federal and state, must defer to Congress with respect to such issues. As a result, while the states have considerable power in the social welfare field, the federal government retains the authority to determine social welfare benefits for non-citizens.

123 Cal Prop 187 (1994); note also the impact of the Immigration Reform and Control Act of 1986, Pub L No 99-603, 100 Stat 3359 which granted amnesty to certain undocumented workers, thereby allowing them to naturalise during this same period.
125 Eg. Tovar v Moreno 458 US 1, 10 (1982) grounded its holding in the naturalisation power, Art I § 8 Cl 4 and the Commerce Clause Art I § 8 Cl 3 of the US Constitution. For a more complete discussion of the various powers underlying this doctrine and the various forms of legislation encompassed within the purview of federal plenary power, see Evangelina G Abriel 'Rethinking Preemption for Purposes of Aliens and Public Benefits' (1995) 42 UCLA L Rev 1597, 1607 (finding that the 'principal reasons advanced for federal pre-emption are the need for uniformity in immigration laws and the federal government's superior ability and authority to deal with foreign nations')(citations omitted).
126 Lem Moon Sing v United States 158 US 538, 547 (1895).
127 The judiciary has articulated the allocation of legal authority most clearly in Mathews (note 116 above) (upholding the exclusion of legal immigrants from a federal medical insurance programme until the immigrant had continuously resided in the US for five years and was admitted for permanent residence) and Graham v Richardson 403 US 365 (1971) (invalidating two state welfare laws that imposed durational residency requirements on all non-citizens, applying a strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment of the US Constitution. The Mathews Court distinguished Graham by finding that 'the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization'. Mathews 86-87.
In addition to the policy discussion about the rights of legal immigrants to US socio-economic rights, the US economic structure relies heavily on undocumented immigrants primarily from countries south of the US. While the US population, including those across political spectrums, is quite divided about the place and importance of undocumented immigrants residing in the US, the bottom line is that undocumented immigrants cannot access most social welfare benefits.128

Finally, as noted above, the US in its NAFTA negotiations regarding a trade agreement not only failed to consider the role of social protection benefits for immigrants who come to the US, but also for citizens of other treaty countries who are employed by US companies moving across the border in order to take advantage of cheaper labour costs.

Of course, anti-poverty strategies must take account of and address numerous cultural and nation-state peculiarities. But in light of currently unfolding trends towards global economic integration, social welfare law cannot be viewed simply as a 'domestic issue'. Redistributive strategies need to incorporate a critique of several increasingly problematical assumptions: 1) that immigration can be regulated through border enforcement of legal prohibitions established by nation-states, towns, states, or provinces; 2) that neo-liberal policies will permit nation-states or regions to mitigate the devastating effects of capital flight and currency speculation; and 3) that people move based on a desire for better social welfare benefits rather than to obtain improved employment opportunities, escape political oppression, or for other reasons. Capital, jobs, information and humans move across borders with a fluidity that has not been recognised within social welfare law. In other words, the expansion and liberalisation of trade, mobility of capital and financing, breakdown of the Bretton Woods mechanisms for currency control, portability of equipment and many production techniques and the emergence of developing world manufacturing sharply call into question the assumption that social welfare policy can be made within a nation-state framework. Therefore to advocate or implement a social welfare policy that does not recognise human mobility (both legal and undocumented) across nation-state borders and capital mobility (moving finance and jobs) across borders is anachronistic.

South African provinces have not attempted, US-style, to discriminate against former residents of other provinces. However, the Constitutional Court has struggled with issues of inclusion and exclusion in terms of citizenship and immigration status in the context of s 27(1)(c) of the South African Constitution, which states: 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.

128 See note 143 below regarding undocumented workers' rights to certain labour law protections.
The Khosa decision took the bold step of extending South African social benefits to permanent residents. Regrettably, however, the Court differentiated between permanent residents, on the one hand, and temporary residents ('visitors') and undocumented ('illegal') residents, on the other.

Mokgoro J reads 'everyone' in s 27(1)(c) to mean 'some', specifically only permanent residents — much as the US Supreme Court in Dandridge read 'individual' to mean 'family', thereby denying grants to additional children in large households. But who is 'everyone', what poor do the wealthy share 'responsibility' for, what is 'the community as a whole'? The decision correctly holds that the legislative criteria excluding groups must be consistent with the Bill of Rights, particularly concepts of dignity, equality, and life. But the conclusion that a distinction between permanent residents and temporary and undocumented residents meets that test is ultimately flawed.

Initially, the court in Khosa recognises that exclusion of all non-citizens who are destitute, however, irrespective of their immigration status, fails to distinguish between those who have become part of our society and have made their homes in South Africa, and those who have not.

The Court then concludes that permanent residents should be treated the same way as citizens, based on a series of assumptions: permanent residents may have resided in South Africa for many years, they have homes and probably families in South Africa (including children born in South Africa), they have the right to work in South Africa, they have difficulty naturalising, and they (like citizens) contribute to the welfare system through tax payments. The Court states: 'the applicants [permanent residents] are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. By contrast, Mokgoro J states that temporary and undocumented residents have 'only a tenuous link with this country', and, by implication, do not share the listed experiences attributed to permanent residents. The

129 It is gratifying for US progressives that the Court rejected the US approach. Khosa (note 2 above) para 57, rejecting Mathews v Diaz (note 116 above). To be sure, the Court had the benefit of deciding Khosa in terms of a more progressive constitutional text.
130 Juxtapose this with the Soobramoney interpretation of s 27 (3) of the Constitution, which states: 'No one may be refused emergency medical treatment'. There the Court did not limit the interpretation of 'no one', but rather relied on an interpretation of 'emergency treatment'. Soobramoney (note 33 above) para 20.
131 Khosa (note 2 above) para 74.
132 Ibid.
133 See also Mashavha v President of the Republic of South Africa 2005 (2) SA 476 (CC).
134 Khosa (note 2 above) para 58.
135 Ibid paras 59, 71, 74.
136 Ibid para 74.
137 Ibid para 59.
Court cites no evidence to support this distinction and, indeed, such empirical evidence as we have is quite to the contrary. 138

While purporting to rely on the decision in *Larbi-Odam v MEC for Education (North-West Province)*, 139 Khosa ignores many of the important findings regarding the similarities of immigrants, regardless of official status, that Mokgoro J herself recognised and articulated in *Larbi-Odam*. *Larbi-Odam* challenged regulations issued by the Minister of Education prohibiting non-citizens from being hired as educators in a permanent capacity. The plaintiffs included both permanent residents and temporary residents. The *Larbi-Odam* opinion contains a nuanced understanding of the similarities between temporary and permanent legal residents regarding their societal involvement, connection and contribution, and the Court's order striking down the challenged regulation afforded relief to temporary as well as permanent residents.

*Larbi-Odam* discussed the lives of temporary residents whose experiences within South Africa were quite similar to that of permanent residents. One of the plaintiffs in *Larbi-Odam*, Mr Akwa, was a temporary resident who had lived in South Africa since 1984, was married to a South African woman and had four children born in South Africa. He had been employed at the same school since 1989 and had received annual work permits throughout that time. Five other plaintiffs were temporary residents who had similarly been employed for an extended period in South Africa based on annual work permits. The court recognised that 'Although six of the appellants have had the legal status of temporary residents, in substance, their employment in South Africa has in fact not been temporary.' 140

Likewise, the Court stated:

Citizens may make their living through taking up temporary employment in different capacities from time to time. On the other hand temporary residents may in fact have employment of a permanent nature through holding one job and renewing their temporary residents' permits from time to time. Although their temporary residence status may give rise to insecurity and expose them to the risk that they will be required to terminate their employment and leave the country, it could well be argued that they should not be exposed to discrimination in the job market for as long as they are permitted to live and work in South Africa. 141

Thus the distinction drawn in *Khosa* between permanent and temporary

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138 Note 145 below.
139 1998 (1) SA 745 (CC).
140 Ibid para 41.
141 Ibid para 43.
immigrants is anomalous and quite contrary to the analysis in Larbi-Odam.\footnote{Since, as noted, the applicants in Larbi-Odam included both permanent and temporary residents, the Court in that case had to and did address those two groups relying on evidence presented (importantly, the Court did not address the role of undocumented South African residents). However, in Khosa, the plaintiffs included only permanent residents. Thus the Court in Khosa chose to address the issue of temporary residents as dicta without an adequate record. I seriously question their conclusion without a full deliberation that included evidence of the lives and significant role of non-permanent residents in South African society.}

Neither Larbi-Odam nor Khosa questioned the distinction between 'legal' immigrants, whether permanent or temporary, and undocumented residents. In this, the Constitutional Court doctrine may actually be lagging behind US labour law, although not social welfare, protections.\footnote{Even in the US, there is considerable authority that undocumented workers are entitled to basic labour law protections, ie, minimum wage. US Dept of Labor 'Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division', <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>.} However, the Supreme Court of Appeal in Modderklip applied s 26(1) of the Constitution, which states that 'everyone has the right to have access to adequate housing', to craft a remedy for 40000 squatters, one-third of whom were undocumented residents.\footnote{Modder East Squatters (SCA) (note 51 above) para 3. While the Constitutional Court based its decision on alternative legal bases, it upheld the relief ordered by the Supreme Court of Appeal. Modderklip (CC) (note 49 above) paras 8, 66.}


In addition, the barriers to naturalisation are significantly higher for legal temporary and undocumented residents than the difficulties facing permanent residents noted in Khosa.
Thus, while I applaud the Constitutional Court’s decision to include permanent residents among those eligible for South African social grants, I question the long-term vision and assumptions upon which the Khosa determinations of inclusion/exclusion are based. Incorporating into the social welfare system only those with permanent residency status does not begin adequately to address the questions raised by unfolding trends such as massive increases in cross-border capital and labour flows, and the emergence of integrated, cross-border production chains.

I do not mean to advocate that South Africa should necessarily have open borders and provide social welfare benefits to all who enter the country without legal paperwork. However, I do suggest that negotiations regarding regional trade agreements (such as those being developed between the US and countries to the South and in the Southern African Development Community (SADC)) should include issues of socio-economic rights across borders; that implementation of socio-economic rights, whether by Parliament or the judiciary, should recognise the importance of cross-border financial, labour, and human mobility, and that cross-border social security harmonisation146 within geographical regions should be debated actively as an appropriate, if long-term, goal.

V CONCLUSION

It would, of course, be quite understandable for South Africans to say ‘We are not in the position of the US; our level of unemployment, homelessness and poverty is beyond your comprehension. We have enormous problems and extremely limited resources.’

While seriously recognising and respecting that argument, I would reply, as a US advocate for poverty reduction both within my nation and globally, that, sadly, many of the considerations articulated in South African social welfare debate resonate with US rhetoric in opposition to redistribution and the provision of minimally adequate conditions to the poor — whether they are US citizens, permanent legal residents, temporary legal residents, undocumented immigrants, or citizens of the ‘developing countries’. US arguments against provision of social assistance and redistribution are often couched as fiscal constraints. The racially discriminatory aspects of the Social Security Act (both on the books and in implementation), the Supreme Court decision in Dandridge, and the enactment of the PROWRA, all occurred in a highly developed country with enormous economic resources that could have been utilised or redistributed to the poor both within the US and globally.

The new South Africa is just beginning to develop its jurisprudence of

146 Not surprisingly, cross-border social security harmonisation is being discussed and developed (albeit that the discussions are only in the infancy stages) in the European Union and in SADC.
and legislative policy with respect to constitutional socio-economic rights. My hope is that an understanding of US/South African similarities might give South Africans some pause and incline South African progressives to take a much more critical view of the rhetoric about resource scarcity in addressing issues of entitlement, privatisation and globalisation.