A Few Random Thoughts About Socio-Economic "Rights" in the United States in Light of the 2008 Financial Meltdown

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INTRODUCTION

Socio-economic rights, first articulated in the Universal Declaration of Human Rights (UDHR) sixty years ago, are regaining currency. Legal practitioners around the world, emboldened by emerging constitutional democracies in Eastern Europe and South Africa that constitutionalized socio-economic rights, are actively seeking to enforce these rights. The UDHR "reaffirm[ed] faith in fundamental human rights, in the dignity and worth of the human person,"[1] and served as the basis for the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] Among those rights included in the Covenant are housing, food, and healthcare.[3]

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1. U.N. Charter pmbl. Socio-economic rights were included in the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. *See, e.g.*, UDHR, art. 17 (establishing the right to own property); art. 22 (establishing the right to social security and personal development); art. 23 (establishing the right to work, free choice of employment, and just employment conditions); art. 24 (establishing the right to rest and leisure); art. 25 (establishing the right to an adequate standard of living); art. 26 (establishing the right to education); and art. 27 (establishing the right to participate in community cultural life and the protection of moral interests).

2. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

3. *Id.* Article 11(1) of the ICESCR recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right." Carolee Heileman, Acting

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Although the United States signed the Covenant in 1979, during Jimmy Carter's presidency, America remains "the only major industrialized democracy that has not . . . ratified" the ICESCR.[4] Americans raised during the Cold War era (i.e., from the late 1940s through the early 1990s)[5] still associate socio-economic rights with "communism."[6] As recently as 1996, few Americans took socio-economic rights seriously, causing U.S. Supreme Court Justice Ruth Bader Ginsburg to remark that any attempt to constitutionalize socio-economic rights would result in a defeat "far more stunning" than the failed Equal Rights Amendment of the 1980s.[7]

Yet, as I have written elsewhere, citizens who lack the "necessities of life," like food, shelter, health care, and education, "are disadvantaged politically even in the most liberal democracy."[8] As we

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Permanent Representative of the U.S. Mission to the U.N. Agencies for Food and Agriculture, Rome, attached the following reservation to a report on world hunger at the 2002 World Food Summit: "The United States believes that the issue of adequate food can only be viewed in the context of the right to a standard of living adequate for health and well-being, as set forth in the Universal Declaration of Human Rights . . . . [T]he attainment of the right to an adequate standard of living is a goal or aspiration to be realized progressively that does not give rise to any international obligation or any domestic legal entitlement . . . . [T]he United States understands *the right of access to food to mean the opportunity to secure food, and not guaranteed entitlement*." U.S. Mission to the U.N. Food and Agriculture Organization, *Annex II: Explanatory Notes/Reservations*, *in* REPORT OF THE WORLD FOOD SUMMIT: FIVE YEARS LATER (2002) (emphasis added), *available at* ftp://ftp.fao.org/docrep/fao/meeting/005/y7106e.pdf. Article 12(1) of the ICESCR provides: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

4. Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 79 n.3, 80 (1992).

5. *See generally* MARTIN WALKER, THE COLD WAR: A HISTORY (1995); ALBERT FRIED, MCCARTHYISM, THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY (1996).

6. *E.g.*, MediaMatters.org, *Conservative Media React to Talk of Obama-led Economic Recovery by Attacking FDR and New Deal*, http://mediamatters.org/items/200811260002 (Nov 26, 2008); Janet Porter, *~~Socialism~~ Communism Scheduled for a Vote in Senate*, WORLDNETDAILY, Feb. 10, 2009, http://www.worldnetdaily.com/?pageId=88439 (arguing that the economic stimulus bill is not socialism but communism); Mark Leibovich, *'Socialism!' Boo, Hiss, Repeat*, N.Y. TIMES, Mar. 1, 2009, at WK1 (describing conservatives' use of the socialism label in attacking President Obama's proposals to stem the economic meltdown). *But cf.* Jon Meacham & Evan Thomas, *We Are All Socialists Now*, NEWSWEEK, Feb. 16, 2009, *available at* http://www.newsweek.com/id/183663 (cover story comparing Congress' economic stimulus efforts to European democratic socialism).

7. Peter Shinkle, *Justice Ginsburg: Constitution "Skimpy,"* THE BATON ROUGE ADVOCATE, Oct. 25, 1996, at 1B–2B.

8. Taunya Lovell Banks, *Balancing Competing Individual Constitutional Rights: Raising Some Questions*, *in* LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE 27, 29 (Penelope E. Andrews & Susan Bazilli eds., 2008).

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celebrate the 60th Anniversary of the UDHR, the United States of America faces a financial crisis reminiscent of the 1930s Great Depression. After more than two decades of hyper-capitalism, the economy crashed under the weight of the unpopular wars in Afghanistan and Iraq, the collapse of real estate markets, mountains of consumer debt, and mismanagement by financial institutions.[9] Byproducts of the financial meltdown will be unemployment; loss of housing, healthcare, and adequate food; and increased numbers of families in crises. The worsening financial crisis threatens Americans who, for more than two generations, have taken their comfortable lifestyles for granted.

The looming changes in the socio-economic fortunes of adult Americans and their children may increase discussions about socio-economic commitments in the United States. I use Frank Michelman's term "commitments"[10] rather than socio-economic "rights" or "entitlements" because reasonable people continue to debate about these and related issues.[11] Michelman argues that many Americans might attempt to explain away why the most "prominent, prosperous

9. Peter Beinart wrote in a Time Magazine feature article: "When Reagan took power in 1981, he vowed to restore the economic liberty that a half-century of F.D.R.-style government intrusion had stifled. . . . In the 1980s and '90s, the garden of American capitalism became a pretty energetic place. But it became a scarier place too. In the newly deregulated American economy, fewer people had job security or fixed-benefit pensions or reliable health care. Some got rich, but a lot went bankrupt, mostly because of health-care costs. As Yale University political scientist Jacob Hacker has noted, Americans today experience far-more-violent swings in household income than did their parents a generation ago." Peter Beinart, *The New Liberal Order*, TIME, Nov. 24, 2008, at 30.

10. Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 668 (2008).

11. Some scholars argue that the realization of socio-economic commitments is best accomplished by constitutionalizing them. *See, e.g.*, Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 158 (2003) (noting that South Africa's experience indicates that socio-economic rights are enforceable); Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 63–64 (2006). Opponents counter that positive (socio-economic) rights are more difficult to enforce than negative (political and civil) rights. *See, e.g.*, Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35, 36 (1993); David Beatty, *The Last Generation: When Rights Lose Their Meaning*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 321, 350–51 (David M. Beatty ed., 1994) (stating that courts should not make significant decisions that affect social and economic policy because of separation-of-powers concerns); Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 827 (2002) (discussing positive rights in the context of American state constitutional law and arguing that these rights are inherently non-enforceable).

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constitutional democracy" fails to guarantee even the most basic necessities of life, rather than accept that the country and its citizens reject socio-economic commitments.[12] Thus he suggests that arguments "explaining away" America's lack of commitment to socio-economic rights hide its lack of political will. I agree with Michelman's assessment and use this essay to briefly explore and expand upon this point.

The economic crisis of the first decade of the 21st century gives the United States another opportunity to reconsider its socio-economic commitments. The expectations that accompanied the election of Barack Obama as the United States' 44th President created an environment ripe for change. There is an opportunity to transform American society by challenging two deeply embedded cultural notions, American individualism and dislike of government-sponsored social legislation, that work against the socio-economic commitments favored by the UDHR and ICESCR. The brief comments that follow argue that Americans need a more collective notion of dignity, and changing public attitudes about socio-economic commitments may be more important than any debate over whether socio-economic commitments should be provided as a matter of constitutional right or legislatively created entitlement.

AMERICAN ATTITUDES ABOUT HUMAN DIGNITY

Dignity is the cornerstone of socio-economic rights discourse, yet apart from pronouncements in international human rights declarations and covenants, reasonable minds may differ over whether dignity, like equality, is an empty shell[13]—an ideal incapable of a singular definition.[14] Different cultures have different notions of dignity, but societal notions are not static. They are capable of changing, but not as a result of law or legal pronouncements alone. In this section I briefly explain why I believe American notions of dignity do not more fully embrace conventional human rights notions of dignity.

American notions of dignity and self-worth are based on two cornerstones: American individualism and a belief that government

12. Michelman, *supra* note 10, at 679–80.

13. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

14. *See* Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 MONT. L. REV. 133, 136–37 (2003); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT'L J. CONST. L. 267, 267 (2008).

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interference in the lives of citizens must be minimal. These cultural values work against widespread support for socio-economic rights because they generate no feeling of collective responsibility for the wellbeing of all societal members. Societies built on values like solidarity are more likely to embrace a broader range of welfare provisions than societies like the United States that embrace individualism.

While Americans intuitively believe that human dignity obligates the collective society to provide for certain basic needs of its members, like shelter, food, and emergency health care, this obligation arises only in times of natural disaster. Disaster relief, the United States' earliest social welfare program, temporarily provides food, water, and shelter for victims of natural disasters.[15] For almost two centuries, Americans tended to believe that government should step in to help "innocent" individuals harmed through no fault of their own by forces beyond their control. The most recent manifestation of this thinking is the widespread public criticism of the federal government's failure to rescue in a timely fashion, or provide adequate temporary shelter and food for, Americans caught in the path of Hurricane Katrina. Yet ironically, Americans on an individual basis are more charitable toward the poor than citizens in any other developed country.[16]

Michele Landis (Dauber) argues that Franklin Delano Roosevelt (FDR) understood American culture, which is why he couched his social welfare proposals in terms of responding to a natural disaster.[17] Landis explains how FDR stretched notions of who constitutes an "innocent victim" and what constitutes a "natural disaster" to cover the social and economic consequences of the Depression. Thus Landis characterizes the programs that came out of the New Deal as the "disaster-based welfare state."[18]

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15. Michele L. Landis, *Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 L. & SOC'Y REV. 257, 261–62 (1999) [hereinafter Landis, *Fate, Responsibility*]. For a more complete discussion of this point, see Michele Landis Dauber, *The Sympathetic State*, 23 L. & HIST. REV. 387 (2005).

16. *See* Arthur C. Brooks, *Philanthropy and the Non-Profit Sector*, *in* UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 539, 544 (Peter H. Schuck & James Q. Wilson, eds., 2008).

17. Landis, *Fate, Responsibility*, *supra* note 15, at 283–89.

18. *Id.* at 260–62. "Disaster relief became the template for the welfare state because people, engaged in practical politics and legal work, settled upon it as the most promising avenue for securing funding for relief of economic disaster." *Id.* at 260.

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Another scholar, Deborah Malamud, reminds us that not all Americans were treated equally under the New Deal. She contends that class distinctions marked the nature and kinds of New Deal social welfare programs.[19] Further hindering the initial effectiveness of many early programs was American pride in self-reliance (individualism) that caused many Americans hard hit by the economic crisis to reject direct relief as offensive to their dignity, even as their families struggled to survive.[20] As a result, Harry Hopkins, head of the Federal Emergency Relief Administration, recommended work relief, provided that the assigned jobs fit the class status of the job recipient.[21] Thus, class, as well as gender and race, controlled the type and extent of relief provided during the New Deal Era.[22] While there was a sense of collective despair, there was no sense that all Americans should be treated equally. The only dignity interests considered were those of middle-class white males.

Immediately following the 2008 presidential election, news media invoked the Depression-era legacy of FDR in discussing the economic situation faced by President-elect Barack Obama.[23] The

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19. Deborah C. Malamud, *"Who They Are—Or Were": Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019, 2021–22 (2003).

20. *Id.* at 2029–31.

21. *Id.*

22. Over 1,000 historians, in a letter to President-elect Obama about any economic stimulus plan wrote: "For all our admiration of FDR's reform efforts, we must also point out that the New Deal's jobs initiative was overwhelmingly directed toward skilled male and mainly white workers. This was a mistake in the 1930s, and it would be a far greater mistake in the 21st century economy, when so many families depend on women's wages and when our nation is even more racially diverse." Mary L. Dudziak, *Over 1000 Historians Write Obama About the Economic Stimulus Plan, the New Deal, and Working Women*, LEGAL HISTORY BLOG, Dec. 20, 2008, http://legalhistoryblog.blogspot.com/2008/12/over-1000-historians-write-obama-about.html (last visited Mar. 24, 2009).

23. Barack Obama, during his November 16, 2008 interview on *60 Minutes*, was asked by CBS news correspondent Steve Kroft "if he had been 'reading anything about the Depression, anything about FDR.'" *60 Minutes* (CBS television broadcast Nov. 16, 2008). "In recent weeks, as the current state of the economy is giving rise to references to the Great Depression, some media outlets have drawn comparisons between President-elect Barack Obama and former President Franklin D. Roosevelt, characterizing Obama as inclined or compelled to take dramatic New Deal-level measures to revive the economy." Media Matters.org, *supra* note 6. The cover of Time Magazine's November 24, 2008 issue had a picture of the newly elected 44th President of the United States, Barack Obama, dressed as Franklin Delano Roosevelt. TIME, Nov. 24, 2008, cover. An article in that same issue by journalist Peter Beinart repeated this theme. Beinart, *supra* note 9. Even a commentator for New Delhi Television Limited (NDTV) in India wrote: "All eyes are on Obama's transition to power and how he and his team will find some quick answers for the economic crisis. The President-elect is out with a 100 day plan to fix the economy, something last seen only

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media focused primarily on the early socio-economic programs of FDR's four-term presidency. Few commentators mentioned that late in his presidency FDR pushed unsuccessfully for Congress to enact an "economic bill of rights."[24] The proposed "rights" included the "necessities of life"—access to food, housing, employment, health care, education, and economic security in old age.[25] Roosevelt reasoned that "true individual freedom cannot exist without economic security and independence."[26] Congress, however, failed to enact the kind of comprehensive legislation Roosevelt envisioned.[27]

Constitutional scholar Cass Sunstein suggests that FDR was proposing to constitutionalize, albeit informally, socio-economic rights and argues that the Warren Court quietly attempted to move the country in that direction.[28] Frank Michelman, however, counters

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when Franklin D Roosevelt came up with such a resurrection package for the US during the Great Depression. Experts are calling this Obama's Roosevelt Moment." Shaili Chopra, *Barack Obama's 100-day Plan*, NDTV.COM, Nov. 10, 2008, http://www.ndtv.com/convergence/ndtv (search for "100 day plan"; then follow "Barack Obama's 100-day plan" hyperlink) (last visited Mar. 24, 2009).

24. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 13–14 (2004) (quoting FDR's January 11, 1944 State of the Union speech).

25. *Id.* Roosevelt proposed "the right to a useful and remunerative job . . . [t]he right to earn enough to provide adequate food and clothing and recreation; . . . [t]he right of every family to a decent home; [t]he right to adequate medical care and the opportunity to achieve and enjoy good health; [t]he right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; [and t]he right to a good education." *Id.* at 13.

26. *Id.* at 12. According to Sunstein, "Roosevelt believed that by 1944 the United States had 'come to accept' the second bill of rights. Badly scarred by the Great Depression and a world war, the nation was now committed to freedom from want and freedom from fear, which it saw as inextricably intertwined. The second bill was necessary to achieve both forms of freedom." *Id.* at 233.

27. According to Sunstein, the G.I. Bill of Rights was the closest Congress came to enacting the kind of economic measures proposed by FDR. "The G.I. bill gave millions of veterans a chance to attend colleges and universities. 'GI Bill beneficiaries,' according to Stanford historian David Kennedy, 'changed the face of higher education, dramatically raised the educational level and hence the productivity of the workforce, and in the process unimaginably altered their own lives.'" *Id.* at 15 (quoting DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR 786–87 (1999)).

28. *Id.* at 150–51, 156–62 (citing Plyler v. Doe, 457 U.S. 202 (1982) (holding discrimination based on immigration status in providing free public education unconstitutional); Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcripts for impoverished persons appealing criminal convictions); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for indigent defendants in criminal cases); Douglas v. California, 372 U.S. 353 (1963) (right to counsel for first appeal of a criminal conviction); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding the charging of court costs and fees for indigent party's civil divorce unconstitutional); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (outlawing the poll tax); Shapiro v. Thompson, 394 U.S. 618 (1969) (outlawing

that Roosevelt merely intended to expand the nature and array of socio-economic entitlements.[29] Whatever the intent of FDR, or the Warren Court, the election of Richard Nixon as President of the United States in 1968, coupled with his four appointments to the Supreme Court, reversed the momentum toward constitutionalizing socio-economic rights.[30] Despite these failed attempts and reversals, Sunstein argues that today "[l]arge-scale national programs do a great deal to provide food, housing, employment, and even health care."[31] But these programs fall far short of the socio-economic guarantees envisioned by the drafters of the UDHR and ICESCR.

Today, long-term entitlement programs like Social Security, Food Stamps,[32] Medicaid,[33] and Medicare[34] are the closest the United States comes to legislative socio-economic commitments. But these programs have never covered everyone and continue to exclude large numbers of needy people. Further, their existence depends on the whims of the legislative and executive branches. With perhaps the exception of Social Security,[35] public support for socio-economic

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residential requirements for welfare benefits); Mem'l Hosp. v. Maricopa County, 415 U.S. 250 (1974) (outlawing residency prerequisites for providing nonemergency medical care); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that welfare benefits, once conferred, cannot be taken without some due process hearing)).

29. Michelman, *supra* note 10, at 665.

30. SUNSTEIN, *supra* note 24, at 162–68. Nixon appointed "Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1972." *Id.* at 163.

31. *Id.* at 234.

32. "The Food Stamp Program helps low-income people buy food. Although it is a federal government program, it is run by state or local agencies." SOCIAL SECURITY ADMINISTRATION, PUBLICATION NO. 05-10101, FOOD STAMP FACTS, *available at* http://www.ssa.gov/pubs/10101.html. As of October 1, 2008, the Food Stamp Program has been renamed the Supplemental Nutrition Assistance Program. FOOD AND NUTRITION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP), http://www.fns.usda.gov/FSP (last visited Mar. 24, 2009).

33. A health care program for low-income individuals and families who meet certain criteria. *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICAID PROGRAM, TECHNICAL SUMMARY, http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp (last visited Mar. 24, 2009).

34. Medicare provides health care to individuals over 65 who also meet certain other criteria. *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICARE PROGRAM, OVERVIEW, http://www.cms.hhs.gov/MedicareGenInfo (last visited Mar. 24, 2009).

35. President Dwight D. Eisenhower wrote to his brother in 1954: "Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history." Letter from Dwight D. Eisenhower to Edgar Newton Eisenhower (Nov. 8, 1954), *in* THE PAPERS OF DWIGHT DAVID EISENHOWER, THE PRESIDENCY: THE MIDDLE WAY, VOL. XV (Louis Galambos & Daun Van Ee eds.), http://www.eisenhowermemorial.org/presidential-papers/

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entitlements waxes and wanes.

Without a strong public commitment to universalizing socio-economic commitments and creating permanent, rather than short-term, safety nets, American socio-economic commitments will continue to fall short of the ICESCR's mandate. Without persuasive leadership and massive grassroots activism, American culture will continue to resist the Covenant's understanding about the inter-connectedness of human dignity and socio-economic commitments. Yet, as the next section explores, even in countries like South Africa that have constitutionalized socio-economic rights,[36] and where courts attempt to enforce these rights, their realization often depends on grassroots political action and widespread cultural notions about the essentials of human dignity.

LESSONS FROM SOUTH AFRICA ABOUT SOCIO-ECONOMIC RIGHTS

The South Africa Constitution prohibits that government from carrying out arbitrary evictions or refusing emergency medical treatment.[37] Although these provisions are phrased in the negative, they compliment or reinforce the positive socio-economic rights to housing and health care. Also reinforcing these socio-economic rights are the constitutional rights to equality, human dignity, and life,[38] which impose restraints as well as affirmative obligations on government. The Constitutional Court of South Africa has received mixed reviews of its more than a decade-long experience enforcing constitutionally-guaranteed socio-economic rights.[39]

Shortly after the new Constitution was ratified, the Constitutional

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first-term/documents/1147.cfm.

36. S. AFR. CONST. 1996 ss. 26(1), 27(1), 29(1)(a). In addition, section 28(1)(c) provides for children's socio-economic rights, and section 35(2)(e) grants socio-economic rights to incarcerated individuals whether convicted or awaiting trial. These rights apply to citizens and non-citizens. Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4, 7 n.4 (2006). Goldstone notes that in *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development*, 2004 (6) SA 505 (CC) (S. Afr.), the Constitutional Court held that the use of the term "everyone" in the Constitution included non-citizens as well as citizens. *Id.* at 4.

37. S. AFR. CONST. 1996 ss. 26(3), 27(3).

38. *Id.* ss. 9–11.

39. For a positive critique of the Court, see Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?*, 6 L. DEMOCRACY & DEV. 159 (2002). For a more critical evaluation of the Court, see D. M. Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite?,'* 22 S. AFR. J. ON HUM. RTS. 301 (2006).

Court ruled that the constitutional right to healthcare was not violated when the government decided to restrict access to dialysis treatment because of limited government resources.[40] It took bolder action in *Minister of Health and Others v Treatment Action Campaign and Others* (*TAC*).[41] In *TAC*, the Court ruled unreasonable the government's refusal to make the retroviral drug Nevirapine available in public clinics when its use for HIV-positive pregnant women was indicated.[42] The government's refusal to provide appropriate treatment within its available resources violated the constitutional right to have access to health care.[43] The government's immediate response to the ruling was the development of a program for pregnant HIV-positive women which included, when appropriate, access to Nevirapine.[44]

The court's decision in *TAC* has been celebrated around the world, but what marked the success in that case, and the failure in the former case, was the internal and world-wide political pressure on the government generated by South African AIDS activists. Thus, one scholar cautions:

> Like many constitutional courts around the globe, South Africa's prefers to husband its political capital, to intervene modestly and in "compelling" cases, and to shun sweeping programmatic decrees. It prefers to help and rely upon civil society organizations and reform-minded political actors to develop the political and institutional contexts that make relatively modest, episodic and iterative judicial interventions yield maximal effects. This vision of judicial collaboration with civil society organizations and reform-minded state actors comports with what constitutional courts elsewhere seem willing to hazard in the name of social rights.[45]

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40. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

41. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.). For a discussion comparing the Constitutional Court's rulings in *Soobramoney* and *TAC*, see Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673, 684–94 (2007).

42. *Treatment Action Campaign*, (5) SA 721 para. 2.

43. S. AFR. CONST. 1996 ss. 27–28.

44. Celia W. Dugger, *Rift Over AIDS Treatment Lingers in South Africa*, N.Y. TIMES, Mar. 9, 2008, at A8.

45. William E. Forbath, *Realizing a Constitutional Social Right—Cultural Transformation, Deep Institutional Reform, and the Roles of Advocacy and Adjudication*, *in* STONES OF HOPE: AFRICAN LAWYERS USE HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY

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The South African government's quick and positive response to the Constitutional Court's ruling on healthcare was not repeated in the eviction cases.[46] During the apartheid era, arbitrary evictions were the norm and disproportionately affected nonwhites.[47] Then the Constitutional Court, in *Republic of South Africa v Grootboom*, a seminal socio-economic rights case, set the stage for a series of cases challenging evictions when it said that the right of access to housing contained in section 26(1) implicitly imposes, "at the very least, a negative obligation . . . upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."[48] Under section 26(3) of the Bill of Rights, "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all of the relevant circumstances. No legislation may permit arbitrary evictions."[49] In subsequent cases the Constitutional Court acknowledges that this provision is designed to prevent apartheid-type evictions and property-related injustices from recurring in post-apartheid South Africa.[50] Justice Mokgoro wrote, in *Jaftha v Schoeman and Others*, that section 26 of the Bill of Rights recognizes that "access to

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(Jeremy Perelman & Lucie White eds., forthcoming 2009).

46. For a discussion of the Constitutional Court's treatment of eviction claims, see Banks, *supra* note 8, at 38–43.

47. For an overview of apartheid era evictions, see Catherine O'Regan, *No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act*, 5 S. AFR. J. ON HUM. RTS. 361 (1989).

48. *South Africa v Grootboom* 2001 (1) SA 46 (CC) para. 34 (S. Afr.). In this case the Court considered the lawfulness of an eviction of residents from private property where they had gathered in an informal community to escape intolerable housing conditions, and took the government to task for not acting fast enough to provide Mrs. Grootboom and others temporary housing. More importantly, the Court replaced the less stringent rationality test it applied initially to socio-economic rights claims with a more demanding standard, whether "the measures taken by the state to realise the right . . . are reasonable." *Id.* para. 33.

49. S. AFR. CONST. 1996 s. 26(3).

50. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras. 8–10 (S. Afr.). Justice Sachs wrote: "In the pre-democratic era the response of the law to a situation like the present [eviction proceeding] would have been simple and drastic. . . . Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, [but also] were liable for criminal prosecution. . . . [The Prevention of Illegal Squatting Act] was an integral part of a cluster of statutes that gave a legal/ administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. . . . Residential segregation was the cornerstone of the apartheid policy. . . . Differential on the basis of race was . . . not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones." *Id.*

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adequate housing is linked to dignity and self-worth."[51]

More than a decade after the new Constitution, homelessness and inadequate housing remain as problems, especially for the neediest segments of South African society.[52] Although memories of the apartheid era are recent, there is no widespread grassroots opposition to arbitrary evictions or push for adequate housing on the local, national, or international level. South African jurist and legal scholar Dennis Davis concludes that despite constitutional guarantees of socio-economic rights, "for the moment, at least, South Africans seeking enforcement of their socio-economic rights may find quicker relief following the political rather than the judicial route."[53]

The importance of widespread public support for realization of socio-economic rights was reinforced in the remarks of Jai Singh, National Director of Human Rights Law Network in India, during the October 2008 Symposium at the University of Maryland School of Law celebrating the 60th anniversary of the Universal Declaration of Human Rights. Mr. Singh, speaking about India's attempts to realize the enforcement of India's commitment to provide food to the poorest members of its society through the courts, found that political pressure from Right to Food Campaign groups pushed the Indian Supreme Court and Central Government to act. According to Mr. Singh, human rights groups in India have given up on the Supreme Court to enforce the socio-economic rights it has recognized.

The experiences in South Africa and India suggest realization of socio-economic commitments will not occur simply by writing them into constitutions and making them enforceable in the courts. There must be a culture that believes in the importance of socio-economic commitments for their survival, and the political will throughout the society to actualize those commitments. Without strong public support, socio-economic commitments, even if constitutionalized, may not be realized.

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51. *Jaftha v Schoeman* 2005 (2) SA 140 (CC) para. 27 (S. Afr.).

52. "Mass land invasions by homeless members of South African society have become more commonplace as dissatisfaction with the slow pace of the government's housing program increases." Banks, *supra* note 8, at 39.

53. Davis, *supra* note 39, at 326. Davis elsewhere writes: "even when armed with progressive texts, judges retreat into models of adjudication that are based on earlier traditions of legal practice and that reduce the potential promise of the text." Dennis M. Davis, *Socioeconomic Rights: Do They Deliver the Goods?*, 6 INT'L J. CONST. L. 687, 711 (2008).

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CONCLUSION

During the 2008 U.S. presidential election, and even before the financial meltdown became apparent, there were serious discussions about, and strong public support of "universal" healthcare.[54] Now some post-election discussions have focused on how the economic "meltdown" may trigger radical reforms in the United States' economy and in the resources provided to its citizens.[55] Realization of these commitments requires that human rights advocates in the United States convince their local communities and government at all levels to believe in, recognize, and realize that *access to* food, housing, and healthcare, and not simply the *opportunity to obtain* them, is a universal requirement for ensuring human dignity.[56]

54. *See, e.g.*, Paul Krugman, *The Edwards Effect*, N.Y. TIMES, Feb. 1, 2008, at A25 (discussing how the presence of former North Carolina Senator John Edwards among the Democratic Party contenders forced the issue of universal health care onto the national presidential campaign); Michael Luo, *On Health Care, Affordability and Comprehensiveness*, N.Y. TIMES, Feb. 22, 2008, at A18 ("Health care was the flashpoint of one of the most contentious exchanges between Senators Barack Obama and Hillary Rodham Clinton . . . ."); Reed Abelson, *While the U.S. Spends Heavily on Health Care, a Study Faults the Quality*, N.Y. TIMES, July 17, 2008, at C3 (describing public dissatisfaction with existing health system in the U.S.).

55. "Progressives hope that the Obama administration, like the New Deal, will respond to the current economic and financial crisis by creating institutions, especially a universal health care system, that will change the shape of American society for generations to come." Paul Krugman, *Franklin Delano Obama?*, N.Y. TIMES, Nov. 10, 2008, at A29.

56. Frank Michelman writes: "Americans cannot hope to pass a welfare-state amendment without first accomplishing the political work required to bring national public opinion to the point of a constitutive commitment." Michelman, *supra* note 10, at 670.

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