Claiming Adjudicative Space: Social Rights, Equality and Citizenship

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1. Claiming Adjudicative Space

A lawyer/activist in Kenya specializing in social rights litigation recently told me of an experience representing a community facing a forced eviction from a squatter settlement.[1] Members of the community had asked for advice about launching a court action to challenge the planned eviction as a violation of the right to housing. He had to tell them that given the state of the law and the orientation of the court, the case was virtually hopeless. Still, the group insisted, they wanted to go to court to challenge the eviction, so they proceeded with the legal challenge.

On the day the judge's decision was to be handed down, all the members of the community showed up at the court, filling it to overflowing. When the judge appeared and began to read the judgment, he could scarcely be heard. *En masse*, the group began to sing and dance in celebratory fashion. They had lost the case, as it turned out, but whatever the judge's view of the legal merits of their claim, their celebration affirmed the success of a more fundamental claim to occupy an adjudicative space in which they were able to at least give voice to a challenge to a violation of human rights which they hoped would someday be recognized by courts.

I was reminded, on hearing this story, of a Poor Peoples' Conference held in Ottawa in October 1993 in conjunction with national meetings of the National Anti-Poverty Organization (NAPO) and the Charter Committee on Poverty Issues (CCPI),[2] at which claims to adjudicative space for social rights in Canada were similarly affirmed as victories, though neither legal remedies nor policy changes had been obtained.

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[1] Opiata Odindo, Coordinator of Legal Services at the Legal Advice Center (Kenya's oldest free legal aid clinic), recounted this story during the Economic, Social and Cultural Rights Litigation Strategy Workshop, 16-18 November 2003, hosted by the Centre on Housing Rights and Evictions, Geneva, Switzerland. See Odindo Opiata, "Litigation and Housing Rights in Kenya," in Bret Thiele and Malcolm Langford (eds) *Litigation of Economic, Social and Cultural Rights: The State of Play* (Sydney: University of South Wales Press, forthcoming).

[2] The Charter Committee on Poverty Issues (www.povertyissues.org) was formed at the initiative of the Court Challenges Program, the National Anti-Poverty Organization (www.napo-onap.ca), and the Public Interest Advocacy Centre (www.piac.ca) in 1989 to promote the rights of poor people under the *Charter* (*infra*, note 6) and other law in Canada. The National Anti-Poverty Organization is a national organization of poor people in Canada formed in 1971 to advocate for the interests of poor people and for the elimination of poverty in Canada. The 1993 Nation-Wide Poor Peoples' Conference was organized by NAPO to assess accomplishments to date and to develop new strategies for combating poverty. (The National Anti-Poverty Organization *Report of the 1993 Nation-Wide Poor Peoples' Conference:Fighting Back*. Ottawa: October 15-17.

Earlier, in May of the same year, NAPO and CCPI had become the first domestic non-governmental organizations (NGOs) to be given standing to appear before a United Nations treaty-monitoring body to make submissions with respect to a periodic review of a State Party's implementation of an international human rights treaty. NAPO and CCPI had written to the UN Committee on Economic, Social and Cultural Rights (CESCR) asking if we could make oral submissions during its second periodic review of Canada for compliance with the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).[3] We suggested in our letter that the established review procedures of dialogue with governments could be significantly enhanced by the participation of affected constituencies. Sarah Walsh (now Sharpe), then President of NAPO, wrote subsequently in the *NAPO News* of her elation when the CESCR decided to grant standing to the groups to make oral submissions. "I knew," she wrote, "that what we were about to do would be a part of history but, more importantly, it was an opportunity for poor people in Canada to have a voice—this time internationally."[4]

The intervention of CCPI and NAPO before the CESCR in May 1993 was an important advance in creating and using adjudicative space for social rights in Canada. A previously obscure UN review procedure and the findings of the UN Committee, which had previously received very little attention in Canada, became the subject of front-page headlines and heated debate in Parliament.[5] The CESCR released precedent-setting criticisms of emerging patterns of violations of social rights in Canada and of the inadequate response of lower courts to allegations of violations of the right to an adequate standard of living where poor people sought remedies under the *Canadian Charter of Rights and Freedoms*.[6] While the views of the Committee were not legally enforceable, and had not, in fact, resulted in any significant policy change by Canadian governments, poor people celebrated the intervention by NAPO and CCPI before the CESCR at the 1993 conference as a substantial victory. The success lay in winning what Matthew Craven has described as an "unofficial petition procedure" with respect to social rights at the

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[3] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [hereinafter *ICESCR*]. As the Executive Director of the Centre for Equality Rights in Accommodation (CERA) at the time, I represented CCPI and NAPO in this initiative. I wrote to the CESCR on behalf of these organizations and subsequently presented joint submissions from these two organizations, along with Sarah Sharpe, who was then the president of NAPO and a low-income member of the board of CCPI.

[4] Sarah Walsh , "Taking Poverty Issues to the U.N.," 40 *NAPO News* (Summer 1993) 1.

[5] Geoffrey York, "UN Body Chastises Canada on Poverty," *The Globe and Mail* (29 May 1993) A1; Rosemary Speirs, "UN Report on Poverty Levels is Flawed, Tories Say," *Toronto Star* (1 June 1993) A12.

[6] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN CECSR, UN Doc. E/C.12/1993/5 at para. 25, reprinted (1994), 20 C.H.R.R. C/1 [*Concluding Observations 1993*]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

international level.[7] The result of new participatory rights was that human rights violations, for which it had not previously been possible to even obtain a hearing, were made the subject of a formal review process. This access to an adjudicative forum was perceived in the anti-poverty community as confirmation that fundamental human rights issues were at stake in emerging patterns of poverty and homelessness, and that a human rights framework was critical to challenging structural changes that threatened the dignity and security of disadvantaged groups in Canada.[8]

At the same conference in Ottawa in October 1993, anti-poverty activists applauded the accomplishments of Jim Finlay, who had successfully claimed adjudicative space for social rights within domestic law, though again, without a victory in terms of legal remedy or the policy change he sought. In March 1993, Finlay had been handed a disappointing loss at the Supreme Court of Canada, after a nineteen-year battle against a five per cent claw back of his social assistance payments, imposed in order to recover a previous overpayment made in error.[9] He had argued that by receiving federal transfer payments for social assistance, the Province of Manitoba was obliged under the terms of the *Canada Assistance Plan* [*CAP*][10] to provide assistance to cover basic requirements. Taking a five per cent deduction from basic requirements, and still claiming to be in compliance with *CAP*, according to one of Jim Finlay's favourite expressions, "is just not common sensible." [11] When a majority of the Supreme Court held that ninety-five per cent of the regular entitlement constituted "reasonable compliance" with the requirements of *CAP*, Sean Fine, the justice reporter for *The Globe and Mail*, wrote in a front-page article that the decision "sent a disquieting signal to anti-poverty activists, who have begun turning to the judicial system for better treatment than they feel they've received from governments."[12] But at the Poor Peoples' Conference seven months later, Jim Finlay was celebrated by low-income advocates as a hero.

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[7] Matthew Craven, "Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights," in Krzysztof Drzewicki, Catarina Krause, and Allan Rosas, eds., *Social Rights as Human Rights: A European Challenge* (Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 1994) 91.

[8] For descriptions of the experiences of Canadian NGOs at the CESCR, see *Out of the Shadows* (2000), video produced for the International Human Rights Internship Program (IHRIP) by the Magic Lantern Foundation, New Delhi, India, online: Institute for International Education <http://www.iie.org/Website/WPreview.cfm?CWID=336&WID=171#shadow> (date accessed 9 August 2004).

[9] *Finlay v.Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080 [hereinafter *Finlay 1993*].

[10] *Canada Assistance Plan*, R.S.C. 1985, c. C–1 [*CAP*].

[11] Interview of Patrick Riley, Jim Finlay's lawyer, by author (29 May 2004 and 31 May 2004) [transcripts on file with author].

[12] Sean Fine, "Anti-poverty bodies hit by court ruling: Welfare deductions approved," *The Globe and Mail* (26 March 1993) A1.

A self-taught advocate who had been incarcerated in a cell in his youth as "treatment" for severe epilepsy, Finlay had insisted on framing his challenge to the five per cent claw back as an issue of rights.[13] He had insisted on the place of social assistance recipients as rights-holders in what others viewed as a mere arrangement between governments that, by definition, could not engage the rights of individuals. In a 1986 Supreme Court of Canada decision, Finlay won recognition of what the Court deemed "public interest standing" to bring before it the issue of alleged provincial non-compliance with the adequacy requirements of *CAP*.[14] Throughout the case, Finlay stood up against palpable resentment on the government side of his use of the legal system to effect what government officials perceived as an illegitimate intrusion on inter-governmental deal-making and decision-making.[15]

The federal government argued in the *Finlay* standing case that issues of compliance with inter-governmental agreements are best resolved between governments and that Finlay's claim was non-justiciable because it improperly imported a political issue into the judicial realm.[16] The issue of adequacy of assistance, it argued, is "not an issue appropriate for determination by a court, but was rather one that should be left to government review and inter-governmental resolution."[17] Justice Le Dain, writing for the Court, rejected these arguments, finding that "the particular issues of provincial non-compliance raised by the respondent's statement of claim are questions of law and as such clearly justiciable"[18] and that Finlay should be recognized as having standing to bring his action for a declaration to challenge the legality of the federal cost-sharing payments.[19] *NAPO News* welcomed the victory in the standing decision with a cartoon showing a significantly aggrandized poor person towering over the Parliament of Canada and the Legislature of Manitoba, and a front-page article entitled "Finlay Case Increases Power of Poor."[20]

Notwithstanding this ruling, six years later the Manitoba and provincial government interveners again argued that the Finlay claim was an illegitimate intrusion into governmental decision-making. At the Supreme Court of Canada hearing into whether the claw back violated *CAP*, they argued that *CAP* only required provinces to "look at" basic requirements in setting the rate of assistance, not to comply

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[13] Interview of Patrick Riley by author, *supra* note 11.
[14] *Finlay v. Canada (Minister of Finance*), [1986] 2 S.C.R. 607 [hereinafter *Finlay 1986*].
[15] Patrick Riley recalls that the lawyer for the federal government would not shake his hand at the end of the case.
[16] *Finlay 1986*, *supra* note 13 at para. 15.
[17] *Ibid*.
[18] *Ibid.* at para. 33.
[19] *Ibid*, at paras. 33-36.
[20] 16 *NAPO News* (Winter 1987) 1.

with any judicially reviewable standard of adequacy.[21] Significantly, even the majority of the Court, finding against Finlay, rejected these arguments against provincial government accountability. While Justice Sopinka, writing for the majority, found that the purpose of the adequacy requirements in *CAP* was not to dictate the precise terms of provincial programs but rather "to promote legislation which achieves substantial compliance with the objectives of *CAP*,"[22] he still found that *CAP* required provincial social assistance programs to provide social assistance "in an amount that is compatible, or consistent, with an individual's basic requirements."[23] Allowing for some provincial flexibility, a five per cent deduction was found to fall within a reasonable margin of discretion.[24]

Finlay's successful claim to adjudicative space for the right to an adequate level of financial assistance under *CAP* was, indeed, a legal victory worthy of celebration in the face of a technical loss on the issue he originally set out to address. On the basis of a recognized individual interest in accountable governance, and drawing on constitutional jurisprudence recognizing a "right of citizenry to constitutional behaviour by parliament,"[25] he had levered from an inter-governmental agreement and *CAP* what amounted to a justiciable social right: the right to insist that governments comply with an obligation to provide sufficient assistance to meet basic requirements of adequate food, clothing, housing, and other necessities.

Significantly, at a time when a number of lower courts across the country were beginning to reject similar social rights claims under the *Charter* on the grounds that adjudicating such claims would take

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[21] Quebec and Alberta intervened in the case along with Manitoba. In contrast, the intervener NAPO proposed that the right to an adequate standard of living in the *ICESCR* should frame a purposive reading of *CAP* so as to find within it a substantive "adequacy principle." In support of its position, NAPO referred the court to statements in Canada's Initial Report on the Implementation of the Provisions of the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic Social and Cultural Rights: Report on the Implementation of the Provisions of Articles 10 – 12 (Ottawa, 1982) and its Second Period Report (UN Doc. E/1990/6/Add.3) submitted by the Government of Canada under the *ICESCR* in which the Government of Canada had affirmed "that CAP was one of the main programs by virtue of which Canada is implementing article 11 [the right to an adequate standard of living, including adequate food, clothing, and housing]": *Finlay 1993*, *supra* note 9 (Factum of the Intervener National Anti-Poverty Organization at para. 23).

[22] *Finlay 1986*, *supra* note 13 at para. 78.

[23] *Ibid.* at para. 81.

[25] *Finlay 1986*, *supra* note 13 at para. 30.

courts beyond their competence and authority,[26] the Supreme Court rejected arguments made in the *Finlay* case against the justiciability of social rights. The Court expressed no doubts in its 1993 decision about its competence or authority to review compliance with the adequacy requirement in *CAP*. Jim Finlay thus established a critical precedent for the claiming of social rights and the role of the court in adjudicating them. He provided a model to be applied in other contexts during the next decade, when poor people in Canada would face unprecedented assaults on what they considered to be fundamental rights, as well as continuing attempts by governments to deny them access to adjudicative space.

2) Social Rights, Discrimination, and the Right to Equal Citizenship

The claim to adjudicative space for poverty issues and social rights remains a central and contentious issue in Canada. Prevailing patterns of prejudice and social exclusion reinforce the misunderstanding that rights claims advanced by poor people are opportunistic bids to secure political outcomes through the courts, rather than legitimate efforts to secure recognition of, and remedies for, what are in fact extremely serious infringements of human dignity and fundamental rights.

For most other groups and individuals in society, it is taken for granted that when serious infringements of human dignity occur, it is legitimate to look to the courts for redress. Poor peoples' use of adjudication, however, is often viewed as intrinsically suspect. The discrimination that poor people suffer, often linked to the denial of access to an adequate standard of living, is viewed as the product of individual moral failure or of legitimate political decision-making; in fact, it is frequently a manifestation of entrenched hostility, prejudice, or deliberate indifference to the needs of those who are disadvantaged. A double burden is thus imposed on poor people as rights claimants, under which they must first defend a claim to occupy adjudicative space before their rights claims will be given a meaningful hearing. Entrenched discriminatory attitudes towards poor people reinforce the notion that they ought not to be in court in the first place, and that they inappropriately apply a human rights framework to issues of personal or moral failure, complex social policy, "legitimate" democratic choice, or governmental largesse. These widespread notions that deny access to adjudication of poverty issues are linked to what Ferrier J.

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[26] See, for example, *Fernandes v. Director of Social Services (Winnipeg Central)* (1992), 93 D.L.R. (4th) 402 (Man. C.A.), leave to appeal to S.C.C. refused (1993), 99 D.L.R. (4th) vii; *Conrad v. Halifax (County)* (1993), 124 N.S.R. (2d) 251 (S.C.), aff'd (1994), 130 N.S.R. (2d) 305 (N.S.C.A.), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 264 (QL); *Gosselin v. Québec (Procureur Général)*, [1992] R.J.Q. 1647 (Sup. Ct.) at 1669 [hereinafter *Gosselin*], aff'd [1999] R.J.Q. 1033 (C.A.), aff'd [2002] 4 S.C.R. 429.

described in a recent decision as "widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are … responsible for their own plight." [27]

Such prejudice has been apparent in judicial responses to the first generation of social rights claims in Canada. When Louise Gosselin went to court to challenge grossly inadequate welfare rates provided in Québec to employable recipients under the age of thirty who were not enrolled in workfare or training programs, the trial judge found that her challenge was not a legitimate rights claim and ought not to be adjudicated by a court. His view of what constitutes a valid rights claim was informed by his ideas that poor people smoke at twice the average rate of Canadians and have a weak work ethic.[28]

A decade later, Chief Justice McLachlin, writing for the majority of the Supreme Court of Canada in the same case,[29] appeared to accept similar stereotypes when she found that the challenged regulation simply "reflects the practical wisdom of the old Chinese proverb: 'Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime.'"[30] No explanation was provided as to why young people reliant on social assistance, unlike others in society, require the deprivation of basic necessities as motivation to benefit from this ancient wisdom. In addition, the Chief Justice's determination that "evidence of actual hardship is wanting"[31] was puzzling, given the wealth of evidence on the record of hunger, homelessness, and destitution among those affected by the impugned provision. This conclusion suggested an inherent judicial prejudice that anyone with the means to take a case to the Supreme Court ought to be able to manage to feed, clothe, and house themselves. It was reminiscent of Sean Fine's report in *The Globe and Mail*, after the release of the 1993 *Finlay* decision, of comments from Sopinka J. at the time of the hearing:

> In an interview yesterday, [Patrick Riley, Finlay's lawyer] said, "I guess it's difficult for them to understand how people on subsistence really live. I don't know how much Supreme Court judges make, but I'm sure it's more than people on social assistance make." (The Chief Justice earns $199,900; the other eight earn $185,200.) In this regard, Mr. Finlay—who now receives $506.16 a month and lives in a subsidized apartment—may not have helped his case by sitting in the front row of the Supreme Court gallery when his case was heard. He is considerably overweight, and Judge Sopinka, after asking a reporter later whether that was indeed Mr. Finlay, noted privately that he did not appear to be going without food.[32]

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[27] *R. v. Clarke*, [2003] O.J. No. 3883 at para. 18 (Sup. Ct.) (QL).
[28] *Gosselin*, *supra* note 25 at 1676-77.
[29] *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 [hereinafter *Gosselin SCC*].
[30] *Ibid.* at para. 42.
[31] *Ibid.* at para. 83.
[32] Fine, *supra* note 11.

Poor peoples' recourse to courts for social rights claims is not based on naive optimism about courts being free of these kinds of discriminatory attitudes toward poor people, but rather on an acute understanding of how widespread and embedded are discriminatory attitudes toward the poor—within legislatures, in the media, among the public, and in courts. Rights claims advanced by poor people, like those of other equality seekers, are usually principled responses to injustice, entrenched discrimination, and social exclusion. In this sense, social rights claims fall squarely within the scope and purpose of well-established human rights protections against discrimination. Poor people in Canada have adopted rights-based responses in the face of unprecedented assaults on their dignity, including the erosion of social benefits that are among the incidents of social citizenship and preconditions for the enjoyment of other rights.

The report of the Canadian Human Rights Act Review Panel, chaired by former Supreme Court justice Gérard La Forest, states that in cross country consultations on the adequacy and inclusiveness of current protections from discrimination in Canada's national human rights legislation, the panel "heard more about poverty than about any other single issue."[33] The panel found "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy."[34] The panel concluded: "it is essential to protect the most destitute in Canadian society against discrimination."[35] The panel quoted from a confidential memorandum prepared for the federal government in 1997 by Frank Greaves of Ekos Research on public responses to a proposed initiative to address child poverty:

> Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs [social assistance recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.[36]

What the Ekos focus group had uncovered, without naming it, was a disturbing pattern of scapegoating the poor that had come to dominate the political landscape in Canada during the 1990s, a process through which the most vulnerable in society were blamed for societal problems and targeted for

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[33] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000), online: Department of Justice Canada <http://canada.justice.gc.ca/chra/en/> (date accessed 9 August 2004) at 106.

[34] *Ibid.* at 107.

[35] *Ibid.* at 110.

[36] *Ibid.* See also Ekos Research Associates Inc., *Memorandum Concerning Child Poverty Focus Groups: Revised Conclusions* (4 February 1997) [on file with author, secured through a Freedom of Information request].

public hostility and social exclusion. It is absurd to suggest that the dramatic rise in structural unemployment during the early 1990s was caused by a sharp increase in the incidence of moral failure on the part of the poor, leading them to become lazy, lose their incentive to work, and resort in large numbers to welfare dependency. Most people recognized that the increased unemployment and need for welfare during the recession was caused by complex factors beyond the control of affected individuals. Nevertheless, food banks that tracked the treatment of poverty issues in the media documented a dramatic shift from sympathy towards intolerance following the 1992 recession, precisely at the time when one would expect greater sympathy for the plight of the poor.[37] In March 1993, Premier Ralph Klein of Alberta noted: "There is a public mood that we have to get really tough on those who abuse the [welfare] system."[38] Six months later, Premier Michael Harcourt of British Columbia told the media: "We want to clean the cheats and deadbeats off the welfare rolls."[39] Premier Harcourt later expressed regret about these comments, acknowledging that welfare fraud was no more prevalent than other types of fraud, but explained that coverage of alleged welfare fraud in the media had become "relentless": "Every day, a camera in your face about this welfare case or that welfare case."[40] A year later, Prime Minister Jean Chrétien spoke of welfare recipients and the unemployed in a speech to an affluent audience, stating: "it is better to have them at 50 per cent productivity than to be sitting at home, drinking beer, at zero per cent productivity."[41]

Ontario was particularly hard hit by the recession, with the number of households relying on social assistance virtually doubling. These structural changes were linked to a dramatic rise in discriminatory scapegoating and a poisoned political environment for those forced to rely on social assistance. Pre-election polling in 1994 to 1995 surprised even the election campaign team of Mike Harris at the depth of resentment and hostility against welfare recipients. Harris's 1995 election campaign centred on promises of dramatic cuts to welfare rates and a "get tough" policy on "welfare cheats."[42] Once elected, the Harris

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[37] A 1991 Gallup poll found that eighty-four per cent of the public believed hunger in Toronto to be a "very serious or quite serious" problem. In 1993, after two years of increasing unemployment, economic hardship, and dramatic rises in the number of households relying on food banks, this number had dropped to fifty-five per cent: *Kearney v. Bramalea Ltd.* (1998), 34 C.H.R.R. D/1, [1998] O.H.R.B.I.D. No. 21 (QL) (Expert Report, Gerard Kennedy, "Coping Strategies of People Using Food Banks" (1994)).

[38] Todd Kimberly, "Reforms Open to Change - Klein," *Calgary Herald* (28 March 1993) 1.

[39] Quoted in Judy Rebick, "Kick 'Em Again: Welfare/Poverty," online: Community Action: Person to Person <http://www.alternatives.com/capp/v-rebick.htm> (date accessed 9 August 2004).

[40] Jean Swanson, *Poor-Bashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001) 100.

[41] Geoffrey York, "Foes Jump on Remark by Chretien," *TheGlobe and Mail* (22 April 1994) A4.

[42] Thomas Walkom, "There is Something Going on Among Voters," *Toronto Star* (27 May 1995) B1; "The Three Populist Feelings that Put Harris in Power," *Toronto Star* (30 September 1995) B4. .

government in Ontario unrelentingly stigmatized welfare recipients. When evidence of the widespread harm that would result from welfare cuts imposed in October 1995 was presented to the Minister of Community and Social Services in the legislature, the Minister responded that welfare recipients should learn how to barter for a reduced price on items at grocery stores.[43] When welfare recipients and health experts protested the elimination of a $37 monthly pregnancy benefit for expectant mothers, citing reliable evidence of the difficulty of maintaining a nutritious diet on welfare benefits,[44] Premier Harris responded that "what we're doing is making sure that those dollars don't go to beer."[45]

In support of its campaign against welfare "cheats," the Harris government disseminated misinformation designed to exaggerate the extent of fraud in the welfare system. The Government of Ontario released its annual *Welfare Fraud Report* and a "Welfare Fraud Cheat Sheet" in January 2002 under the headline "Thousands caught through Harris government's tough welfare fraud measures." The release stated that the "government's crackdown on welfare fraud continues to uncover thousands of people who are not eligible to receive benefits in Ontario."[46] According to the news release, fraud investigations "uncovered $58.2 million in social assistance that people were not entitled to receive," and led to assistance being reduced in over 17,700 cases, including thousands who were said to be in jail while collecting welfare.[47] The Minister of Community and Social Services stated "[p]eople who knowingly cheat the system are not only hurting those who truly need assistance, but stealing from the hard-working Ontario taxpayers who foot the bill."[48]

It was grossly misleading to suggest that 17,700 cases in the Welfare Fraud Report, involving over $58 million in overpayments, had anything at all to do with people "knowingly cheating the system," and

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[43] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36th Parliament. (5 October 1995) (Hon. David H. Tsubouchi), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/hansard/house_debates/36_parl/session1/l005.htm#P211_52438> (date accessed 9 August 2004). [

[44] Nicholas Vozoris, Barbara Davis, and Valerie Tarasuk, "The Affordability of a Nutritious Diet for Households on Welfare in Toronto" (2002) 93 Canadian Journal of Public Health 36

[45] Margaret Philp and Richard Mackie, "Beer Gibe Earns Harris a Blast: Ontario Premier Says Pregnancy Nutrition Allowance was Scrapped so 'Those Dollars Don't go to Beer,'" *The Globe and Mail* (17 April 1998) A1. For an analysis of the implications of this remark, see Janet E. Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other," in Sheila M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice, and Everyday Life* (Toronto: Oxford University Press, 2000) 30 [Mosher, "Disentitlement"].

[46] Government of Ontario, News Release, "Thousands Caught Through Harris Government's Tough Welfare Fraud Measures" (15 January 2002), online: Government of Ontario <http://ogov.newswire.ca/ontario/GPOE/2002/01/15/c2680.html?lmatch=&lang=_e.html> (date accessed 9 August 2004).

[47] *Ibid.*

it is difficult to imagine that the Minister was unaware of his government's misleading use of data. Overpayments were predominantly due to administrative and clerical errors; and there were many cases—conveniently omitted from the *Welfare Fraud Report*—in which administrative error had the opposite effect, depriving recipients of benefits for which they were eligible. The *2002 Annual Report of the Provincial Auditor of Ontario*[49] documented computer problems, staff overwork, and frequent administrative mistakes and oversights which led to thousands of overpayments, with no suggestion of welfare fraud as a significant problem. The government's website was simply a transparent attempt to perpetuate and inflame the prejudices and stereotypes that had been the basis for electoral success.

It is difficult to appreciate just how profound is the social exclusion that results from this kind of government-endorsed promotion of discrimination and scapegoating. It transforms social assistance from an entitlement of citizenship linked with the right to security and dignity, into a source of shame, guilt, and insecurity. Through the widespread promotion of a welfare "snitch line," the Harris Government promoted demeaning intrusions into the lives of social assistance recipients. Landlords and neighbours were encouraged to monitor the private lives of single mothers on assistance and to report how frequently a lover may have stayed overnight.[50] Neighbours could precipitate the withholding of desperately needed benefits until their report had been investigated, rendering recipients unable to pay rent or to provide for other basic requirements until they could prove themselves innocent of spurious accusations. Basic survival strategies of low-income households—such as borrowing money from a friend to meet a rent payment, eating regularly at the home of friends or family, or relying on a sister to feed one's children

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[48] *Ibid.*

[49] Office of the Provincial Auditor of Ontario, *2002 Annual Report of the Provincial Auditor of Ontario* (Toronto: Queen's Printer for Ontario, 2002), s. 3.01, online: Office of the Provincial Auditor of Ontario <http://www.auditor.on.ca/english/reports/en02/en02fm.htm> (date accessed 9 August 2004). For example, the Auditor found major deficiencies in the procedures designed to ensure that those who are ineligible are not put on assistance in the first place. In three-quarters of files reviewed, at least one piece of information necessary for verifying eligibility was lacking (*ibid.* at 45). Further, the information technology system itself performed inadequately: "Between May and December of 2001 [it] inexplicably produced 7,110 discretionary benefit payments totalling $1.2 million to recipients who were ineligible" (*ibid.* at 40). A review of 148 cases found that "in one month alone," social assistance workers had erroneously paid beneficiaries more than $123,457 for which they were not eligible (*ibid.*). The Auditor attributed these errors to, among other things, administrative and computer errors, poor file keeping leading to inadequate screening of ineligible applicants, lack of internal control procedures, and overwork among staff.

several times a month—could be the basis for allegations of undeclared income and fraud.[51] Events that others in society would experience as positive might have the opposite meaning for social assistance recipients, causing suspicion and accusations of cheating. The early stages of a romantic relationship might provoke a call to the "snitch line" and the termination of benefits. Wearing a nice coat, which was a lucky find at the Goodwill Store, might provoke an investigation for undeclared income. A special gift from a friend could result in an unwelcome imposition of declarable income, which could deprive the recipient of desperately needed basic needs allowance.

Perhaps the most invidious attack on the dignity and rights of welfare recipients was the imposition by the Harris government of a lifetime ban on the receipt of welfare for anyone convicted of welfare fraud, a policy that was stubbornly maintained by the Harris government even after a coroner's inquest urged its repeal.[52] Kimberly Rogers, eight months pregnant, died while living under house arrest for welfare fraud, before her constitutional challenge to an earlier three-month ban on receipt of assistance could be heard. In Ontario, the lifetime ban from welfare upon conviction for welfare fraud was added to a pattern of prosecution and sentencing that already treated welfare recipients dramatically more harshly

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[50] The Ministry of Community and Social Services reported in 1997 that forty-one per cent of terminations or reductions of benefits from "snitch line" reports related to an undeclared spouse: Janet Mosher *et al.*, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System* (5 April 2004) at 51, online: DisAbled Women's Network Ontario <http://dawn.thot.net/abuse.html> (date accessed 9 August 2004). The definition of "spouse" used by the Ministry was found to be discriminatory in *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), leave to appeal to S.C.C. granted, [2002] S.C.C.A. No. 297 (QL). The appeal to the Supreme Court of Canada is expected to be heard in the Fall 2004 session.

[51] For analysis of the criminalization of survival strategies and the threat of fraud allegations, see Margaret Jane Little, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998); Mosher, "Disentitlement", *supra* note 44; Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer and Janet Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002) 41; Mosher *et al.*, *supra* note 49.

[52] Ontario, Ministry of Public Safety and Security, Office of the Chief Coroner, *Verdict of Coroner's Jury into the death of Kimberly Ann Rogers* (19 December 2002), recommendation #1.

than more affluent offenders.[53] The welfare ban subjected recipients to a punishment that violates universally accepted human rights norms in regard to permitted forms of criminal sanction: the deliberate denial of basic necessities to offenders and their families.[54]

After Kimberly Rogers's tragic death, her constitutional challenge was taken up by other recipients subject to the ban.[55] Wright J. of the Ontario Superior Court summed up the Dickensian plight of Eugene Johnson, an Aboriginal man who pled guilty to fraud after inadvertently receiving an overpayment because he had not reported that his children had been temporarily placed in foster care:

> The unfortunate fact is that when he was sentenced on the fraud charge the applicant was granted a suspended sentence, conditional upon him repaying $175 a month [when his] rent alone was $400. From a realistic point of view it appears that we are back in the conditions of England of the 1840's. In the short term it appears that the jail will once again provide that service which Scrooge contemplated when he asked those soliciting funds for the poor "What are there no jails?"[56]

As Johnson would receive food and clothing in prison, his application for injunctive relief was denied.

The attack on entitlements of citizenship of the poor in recent years has also been evident in the growing acceptance of the idea that poor people do not have the right to procreate, that having children in poverty is an act of moral failure and social irresponsibility, and that poor people are inferior parents. In the early 1990s, a successful complaint was filed in Nova Scotia against a police officer who, at a

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[53] Welfare fraud is considerably more likely to be prosecuted criminally than income tax fraud. In 1999, there were 517 convictions for welfare fraud in Ontario, but only 32 convictions for income tax evasion. In 2000 to 2001, there were 430 convictions for welfare fraud and only 47 convictions for income tax evasion. While the Government of Ontario would not provide data on sentences imposed on welfare recipients convicted of fraud, conditional sentencing or prison—as Kimberly Rogers discovered—is the norm: Dianne L. Martin, "Punishing Female Offenders and Perpetuating Gender Stereotypes," in Julian V. Roberts and David P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 186 at 194-95.) Yet in 1999 to 2000 in Ontario, only one sentence for income tax evasion involved a prison term and there were no conditional sentences. In 2000 to 2001, there were only four prison sentences and two conditional sentences for income tax evasion. Data was provided through a special tabulation prepared by the Centre for Justice Statistics [on file with author]. Interviews with staff at Canada Customs and Revenue Agency confirmed that virtually all prosecutions for fraud are under s. 239 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1. Only in rare cases, perhaps those referred to the RCMP, are charges for fraud are laid under s. 380 of the *Criminal Code*, R.S.C. 1985, c. C-46. Such cases are not identifiable in the Centre for Justice Statistics data, so I have based my conclusions about prosecution patterns on prosecutions under the *Income Tax Act.*

[54] The UN Human Rights Committee has emphasized that minimum standards for those subject to detention are "**minimum** requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult": *Womah Mukong v. Cameroon*, UN HRC, 51st Sess., UN Doc. CCPR/C/51/D/458/1991 (1994) at para. 9.3 [emphasis in original].

[55] *Broomer v. Ontario (Attorney General)*, [2002] O.J. No. 2196 (Sup. Ct.) (QL).

[56] *Johnson v. Ontario (Attorney General)* (2003), 110 C.R.R. (2d) 15, [2003] O.J. No. 3085 at para. 15 (Sup. Ct.) (QL), leave to appeal to Ont. C.A. refused, [2003] O.J. No. 4440 (Sup. Ct.) (QL). The lifetime ban was repealed by the newly elected Liberal government in 2003 and the constitutional challenge has not proceeded.

community forum on drug abuse, stated that parents on welfare are "dipping into a limited gene pool" and ought to be on birth control.[57] While such offensive statements about genetic inferiority may thankfully be rare, the idea that poor people ought not to have children and that the children of parents living in poverty will become social problems was widely disseminated both in the mainstream media and even in progressive social policy circles in the later 1990s. The Canadian Human Rights Act Review Panel cites several examples from Toronto newspapers, such as a 1999 article in the *Toronto Sun* characterizing single mothers as "impossibly selfish" for entering parenthood "single, as a lark," not bothering to learn to feed their children nutritious breakfasts.[58] An editorial in *The Globe and Mail* stated that "children in poor families have the parental deck stacked against them" and that "[A] supply-side approach to poverty would invest mightily in the ... parenting skills of poor parents."[59] The Ontario government retained Angus Reid to conduct a poll in 1999 to test public reaction to the idea of forcing parents on social assistance to attend a parenting course. Sixty-seven per cent of respondents agreed with the idea.[60]

It is perhaps reasonable to assume that single mothers on social assistance, given the many challenges they face, might not measure up to every middle class standard of good parenting. Yet a special tabulation done by Statistics Canada's National Longitudinal Study on Children and Youth on the reading habits of parents belies even this assumption. An astonishing 94.4 per cent of single mothers in receipt of social assistance reported in the study that their children were read to once a week or more, slightly *higher* than the average for all two-parent households.[61] Given the lower education and literacy levels of social assistance recipients, these data suggest incredible determination on the part of single mothers relying on social assistance to be good parents in the face of immense hardship.

Attitudes toward poor parents became so negative during the 1990s that even progressive politicians and social policy experts would speak only about "child poverty" rather than poverty more generally. Strategies to address "child poverty" came to be identified with strategies to address perceived parental

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[57] *People on Welfare for Equal Rights v. Constable Michael Spurr* (8 October 1991) (Nova Scotia Police Review Board) at 4-5. [on file with author]

[58] *Promoting Equality*, *supra* note 32 at 109.

[59] *Ibid.*

[60] Tom Blackwell, "Even Tougher Welfare Rules on Back Burner: 1999 Ontario Poll Shows 67% Favoured Parenting Classes for Recipients," *Ottawa Citizen* (25 July 2000) A3.

inadequacies and other "risk factors" assumed to be linked to poverty.[62] The sole initiative to address increasing levels of poverty in Canada during the 1990s was a "child poverty" initiative designed to exclude parents relying on social assistance from any benefit. Heralded as a triumph of the new Canadian Social Union and "co-operative federalism," the National Child Benefit (NCB) Agreement was described as "the biggest social policy initiative since medicare was created."[63] Yet the agreement, reached in closed door inter-governmental meetings without public hearings, stipulated that provinces would claw the benefit back from welfare recipients and apply the monetary benefits of the claw back to programs for low-income families.[64] The result was that over half a million families—an estimated sixty-four per cent of families living in poverty across Canada, and many of the most destitute—would enjoy no benefit at all from the heralded initiative to address child poverty. Eighty-four per cent of single mothers would be denied the benefit.[65] The NCB Agreement has been applauded by governments and social policy experts because it will " take children off welfare."[66] In reality, increasingly inadequate financial assistance for families relying on social assistance comes from two sources rather than one, with the child benefit coming from the federal government as a tax credit and the remainder coming from social assistance provided by the province. Yet the family as a whole continues to descend into more severe poverty. As

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[61]Human Resources Development Canada, Strategic Policy, Applied Research Branch, Special Tabulation [on file with author]. Because of the longitudinal nature of this study, it is not possible to assess the statistical significance of these data, but it is possible to conclude that there is no significant difference between single mothers on social assistance compared to all couples. I appreciate the assistance of Michael Ornstein, Director of the Institute of Social Research at York University, in interpreting the data. See also J. Douglas Willms, "A Study of Vulnerable Children," in J. Douglas Willms, ed., *Vulnerable Children: Findings from Canada's National Longitudinal Survey of Children and Youth* (Edmonton: University of Alberta Press, 2002) .

[62] Wanda Wiegers, *The Framing of Poverty as "Child Poverty" and its Implications for Women* (Ottawa: Status of Women Canada, 2002), online: Status of Women Canada <http://www.swc-cfc.gc.ca/pubs/0662322177/index_e.html> (date accessed 9 August 2004).

[63]*House of Commons Debates*, 7 (8 October 2002) (Ms. Raymonde Folco), online: Parliamentary Internet <http://www.parl.gc.ca/37/2/parlbus/chambus/house/debates/007_2002-10-08/HAN007-E.htm#T1305> (date accessed 9 August 2004).

[64]Although two provinces, and subsequently a third, did not claw back the funds, the agreement, provides that: "*Corresponding with the increased federal benefit, provinces and territories will decrease social assistance payments for families with children*, while ensuring these families receive at least the same level of overall income support from governments" [emphasis added]: *Building a Better Future for Canadian Children*, online: The National Child Benefit <http://www.nationalchildbenefit.ca/ncb/5_e.html> (date accessed 9 August 2004).

[65]National Council of Welfare, *Child Benefits: Kids Are Still Hungry* (Ottawa: The Council, 1998) at 9, online: National Council of Welfare <http://www.ncwcnbes.net/htmdocument/reportchildbenefits/ChildBenefits_e.htm#_Toc535823812> (date accessed 9 August 2004).

[66] Ken Battle, "The National Child Benefit: An Idea Whose Time has Come," *Ottawa Citizen* (17 June 1996) A9 . Ken Battle played a central role, including having direct discussions with Paul Martin, in designing and implementing the program.

Gerard Boychuk has observed: "In rhetorically de-coupling children's and parents' well-being, the NCB is deliberately designed to make social assistance an "adults only" program—a separation that may be difficult to reverse once it takes root."[67] The exclusive focus on "child poverty" continues to erase from public discourse the realities of parents, primarily women, living in poverty, and to ignore the injustices and systemic patterns of discrimination that cause their poverty.

Resistance to ceding adjudicative space for poverty issues must therefore be understood as conforming to and exacerbating the broader patterns of systemic discrimination and prejudice to which poor people have been subjected in recent years.

3. Not 'Just Words'[68]: Social Rights and Interpretive Exclusions

Entrenched discrimination against poor people in Canada has been reflected in attacks on social programs and benefits on which they depend and, at the same time, on social rights and the means to claim them. Twenty-five billion dollar expenditure cuts over three years, introduced in 1995 by Paul Martin as Minister of Finance as "the largest set of actions in any Canadian budget since demobilization after the Second World War,"[69] were accompanied by the repeal of *CAP* and the adequacy requirements that were the basis of Finlay's ground-breaking social rights claim.[70] In the face of criticism from the CESCR, Canada argued that *CAP* and the Canada Health and Social Transfer that replaced it "were fiscal transfer mechanisms … not legislative vehicles to ensure rights or entitlements."[71] Faced with unprecedented cuts to social assistance and increased levels and severity of poverty and homelessness, poor people in Canada have been deprived of any basis in inter-governmental agreements from which to legally challenge the denial of adequate assistance for basic requirements.

At the international level, Canada has launched similar attacks on adjudicative space for social rights. Criticism from UN bodies for retrogressive measures have prompted what Craig Scott has described as "a mix of disingenuous complacency, inconsistency and hypocrisy" from the Canadian government.[72] Government representatives have expressed increasing resentment about NGO

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[67] Gerard W. Boychuk, "SUFA, the Child Benefit and Social Assistance," *Policy Options* (April 2000) 46.

[68] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

[69] *House of Commons Debates*, 160 (27 February 1995) at 10095 (Hon. Paul Martin) [Budget Speech], online: Parliamentary Internet <http://www.parl.gc.ca/english/hansard/previous/160_95-02-27/160GO2E.html#10095> (date accessed 9 August 2004).

[70] *Budget Implementation Act, 1995*, S.C. 1995, c. 17.

[71] UN CECSR, 19th Sess., 47th Mtg., UN Doc. E/C.12/1998/SR.47 at para. 9.

[72] Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10(4) Constitutional Forum 97 at 99.

involvement in the treaty monitoring process.[73] In concert with the United States, Canada has mobilized opposition to the development of a formal complaints procedure under the *ICESCR*, arguing that economic, social, and cultural rights are vague and uncertain and that "progressive realization is not a concept which easily lends itself to adjudication."[74]

With the loss of *CAP* in the mid-1990s and failures of the federal or provincial/territorial governments to implement new domestic statutory protections of social rights in human rights legislation or in inter-governmental agreements,[75] the claim to adjudicative space for poverty issues and social rights has focused increasingly on the *Charter*. In *Baker*, L'Heureux-Dubé J. affirmed for the majority of the Court that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*."[76] The extent to which the *Charter* will provide access to adjudicative space for poverty issues and social rights in the face of opposition from governments to ceding such space thus rests on critical questions of interpretation of broadly framed *Charter* rights, particularly the right to equality in section 15 and the right to life, liberty, and security of the person in section 7.[77]

While it is intuitively obvious to those living in poverty that governmental assaults on social assistance and other programs violate the right to security of the person and the right to equality by denying the most basic needs of vulnerable individuals and families, early jurisprudence from lower courts on this issue institutionalized a systemic exclusion of poverty issues from the scope of *Charter* protections. The challenge to Ontario's 21.7 per cent cut to welfare rates, considered in *Masse v. Ontario (Ministry of Community and Social Services)*[78] typified the prevailing approach of the lower courts. Despite uncontroverted evidence that approximately 120,000 families, including 67,000 single mothers,

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[73] See, for example, Jesse Clarke, "United Nation [*sic*] Challenges Canada's Stellar Status," 118(24) *University of Toronto Varsity Online* (30 November 1998) (comments by Sophie Garneau, Prime Minister's Office, about NGO involvement in the 1998 review [*supra* note 70]), online: <http://varsity.utoronto.ca:16080/archives/119/nov30/news/UN.html> (date accessed 9 August 2004).

[74] *Status of the International Covenants on Human Rights, Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Report of the Secretary-General,* UN Commission on Human Rights, 54th Sess., Annex, Agenda Item 13, UN Doc. E/CN.4/1998/84/Add.1 at para. 3.

[75] *Concluding Observations, 1993*, *supra* note 6 at para. 25; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN CECSR, UN Doc. E/C.12/1/Add.31 [*Concluding Observations, 1998*] at paras. 40, 51-52.

[76] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 70.

[77] Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 Journal of Law and Social Policy 117.

[78] (1996), 134 D.L.R. (4th) 20 (Ont. Gen. Div.), leave to appeal to Ont. C.A. refused (1996), 40 Admin. L.R. 87n, leave to appeal S.C.C. refused, [1996] S.C.C.A. No. 373 (QL) [hereinafter *Masse*].

would be forced from their homes,[79] and the acknowledgement by Corbett J. that in cities like Toronto "many may become homeless"[80] as a result of the cuts, the argument that the cuts violated the right to security of the person was rejected by all three judges on the basis of a categorical exclusion of poverty issues from the scope of rights protections. O'Brien J. agreed with the Attorney General for Ontario that "while poverty is a deeply troubling social problem it is not unconstitutional."[81] O'Driscoll J. concluded: "As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judge needs a clear mandate to enter that arena, and s. 7 does not provide that clear mandate."[82] The prevailing lower court jurisprudence raised concerns among anti-poverty activists that any kind of social rights claim challenging poverty as a violation of human rights was likely to lose. Yet the interpretive exclusion of poverty issues from the right to security of the person was of more than instrumental significance for the winning of particular cases. The same debate had come up in every poverty-related challenge. Should we risk making the obvious argument that hunger and homelessness violate the right to security of the person and the substantive right to equality, challenging poverty itself as a human rights violation, or should we focus the challenge on something more peripheral that fell more comfortably within prevailing Canadian legal thinking on rights? The risk of opting for arguments perceived to be winnable in each case was that the essence of the violation of human rights and the central assault on equal citizenship which poor people wished to challenge—the denial of basic necessities of dignity and security—would be accepted as being outside the scope of constitutional rights. Poverty issues would never, in themselves, count as human rights issues; and poor people, to quote McLachlin J. (as she then was), would largely remain "constitutional castaways."[83]

Exclusions from constitutional meanings and from the scope of constitutional rights are of more than technical or instrumental importance to low-income claimants seeking to challenge violations of social rights. Such exclusions deny those living in poverty equal status as rights-holders and are intricately linked to the assaults on social programs and entitlements that are frequently the subject of legal challenges. The discriminatory denial of an economic benefit in the NCB Agreement, for example, was itself the product of emerging patterns in socially-constructed meaning and of a prevailing rhetoric which excluded parents, particularly single mothers, from the discourse of poverty. It was also not at all clear

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[79] *Ibid.* (Evidence, Affidavit of Michael Ornstein, Affidavit of Gerard Kennedy).
[80] *Ibid.* at 69, Corbett J., dissenting in part.
[81] *Ibid.* at 49.
[82] *Ibid.* at 43, citing Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, ON: Carswell, 1992), at 44-9-44-10.
[83] *R. v. Prosper*, [1994] 3 S.C.R. 236 at para. 102 [hereinafter *Prosper*].

that a strategy of avoiding what might be rejected by courts as substantive social and economic rights claims in order to situate poverty issues more comfortably in prevailing rights paradigms had really proven helpful. In the *Masse* case, for example, the applicants had strategically disavowed the argument, central to a social rights framework and to international human rights law, that governments have positive legal obligations to put in place and to maintain adequate programs to ensure an adequate standard of living. They argued instead that government action to reduce rates below what is required for security of the person violates section 7. O'Driscoll J. jumped on the obvious paradox, however, noting that if the legislature could repeal the social assistance statutes, it could certainly reduce rates.[84]

The applicants in *Masse* were denied leave to appeal to the Ontario Court of Appeal and to the Supreme Court of Canada.[85] It was the case of Louise Gosselin, one of the earliest social rights claims addressing poverty under the *Charter*, which would provide the first occasion for the Supreme Court of Canada to consider to what extent there is any adjudicative space for social rights and poverty issues within sections 7 and 15 of the *Charter*.[86] Although Gosselin's claim challenged differential treatment between two groups of social assistance recipients on the basis of age, it also relied in part on the right to sufficient financial assistance contained in the Quebec *Charter of human rights and freedoms*[87] under the category of "social and economic rights." This was a rare case in which a social rights claim to positive measures to address poverty and financial need was explicit.

Unfortunately, despite attempts by the interveners, particularly the National Association of Women and the Law and the CCPI, to promote a substantive approach to section 15, the *Gosselin* court did not directly consider whether the social right to adequate financial assistance for those in need is a component of the substantive equality guarantee. The more controversial social rights claim to positive measures to ensure the right to an adequate standard of living therefore rested on the interpretation and scope of the right to security of the person in section 7. The dissenting judgment of Arbour J., supported by L'Heureux Dubé J. in a separate judgment, certainly provides a strongly-reasoned argument to include social rights in the scope of section 7, but these two judges have now unfortunately departed from the Court. More significant for the long term is the fact that in addition to the two dissenting judgments on section 7, six of the remaining seven justices found that the right to security of the person might be found to impose positive obligations on governments to provide adequate assistance in a future case, although

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[84] *Masse*, *supra* note 77 at 36.

[85] See *supra* note 77.

[86] *Gosselin SCC*, *supra* note 28. For a more detailed analysis of the *Gosselin* decision and of government pleadings in the case, see chapter by Gwen Brodsky in this volume.

they found insufficient evidence for a section 7 violation in this case. Bastarache J. alone found that the protection of section 7 is not available where there is no engagement with the judicial system or its administration, although in that context, positive obligations may well be affirmed.[88]

Like the *Finlay* decision, the *Gosselin* decision was a disappointing loss by a slim majority. As noted above, the unquestioning acceptance by the Chief Justice of many of the invidious stereotypes that poor people hope to challenge in courts suggests a long road ahead for poor people seeking inclusion in *Charter* interpretation. Nevertheless, it is important to recognize and celebrate what was won as well in the first social rights claim to an adequate standard of living under the *Charter* to be heard by the Supreme Court of Canada. The substantive social rights claim (which, it had been widely predicted, would be soundly rejected by the Court) actually received a hearing and has been decisively left open for future hearings. The feared loss of meaningful adjudicative space for social rights claims, which was a significant risk in the case, did not materialize. Conspicuously absent from the majority decision was any endorsement of the kinds of arguments typically accepted in lower court decisions suggesting that the adjudication of poverty issues and social rights claims is beyond the proper role or competence of courts. The arguments of Quebec and interveners such as Ontario for the categorical rejection of social rights

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[87] R.S.Q. c. C-12, s. 45.

[88] The issue of whether the *Charter* can be used to challenge inadequate response by governments to the needs of those living in poverty came to the fore during the Court's response to the intervener, the Attorney General for Ontario. Represented by Janet Minor, the Attorney General argued in *Gosselin*, as it had successfully done in *Masse*, for the categorical exclusion of poverty issues from the scope of the *Charter*: "The definition of poverty and the appropriate level of social assistance to address poverty are not legal concepts that can be established or applied by the judiciary. These are policy/political matters for determination by legislatures" (*Gosselin SCC*, *supra* note 28 [Factum of the Intervener, Attorney General for Ontario at para. 39]). In essence, the argument was the same as had been advanced by governments in the *Finlay* case, *supra* note 9, that there can be no adjudicative space for social rights claims (at least those related to poverty) under the *Charter* because courts are not institutionally competent to adjudicate such claims. Ms. Minor led off her intervention with the confident assertion that "what is being sought [by the Appellant] is, with respect, non-justiciable" (*Gosselin SCC*, *supra* note 28 [Oral argument, Intervener, Attorney General for Ontario at 93]). Ms. Minor, following the reasoning of Peter Hogg, argued that a positive right to an adequate standard of living would have to be expressed in explicit language to achieve judicial recognition; but Iacobucci J. turned the question around, asking whether "it is a big leap" to find such a fundamental right within the scope of the *Charter*, and questioning the basis for determining that "that's something that has been omitted by the *Charter*" (*ibid.*). When Ms. Minor argued, following *Masse*, that section 7 only protects the individual against state action, Iacobucci J. again questioned the assumption in light of what is at stake for the rights-holders, asking if courts "shouldn't make that much turn, when the stakes are so high, on failure [to act] versus [state] action" (*ibid.* at 96). When Ms. Minor insisted that the deprivation at issue in the *Charter* protection must be caused by the state, Binnie J. asked if there "isn't a problem with the causality argument" when "there's a conscious decision to select a public policy which foreseeably with eyes wide opened creates the problem we're now addressing" (*ibid.*). While it is risky to read too much into what is asked in hearings, these important questions, combined with a clear commitment by the majority of the Court to remain open to the "novel" interpretation of section 7 adopted by Arbour J., suggest that the Court will at least take very seriously future claims for adjudicative space for social rights in the *Charter*.

claims and the interpretive exclusion of poor people as rights-holders, such as occurred in *Masse* and other lower court decisions of its ilk, was simply not accepted by any members of the Court in *Gosselin*.

Furthermore, Bastarache J.'s dissent on s. 15 provides a basis for developing substantive equality arguments in future social rights cases, whereby a violation of section 15 could be established on the basis of governments' simple failure or refusal to provide adequate assistance to disadvantaged groups in need, rather than on the basis of differential treatment of categories of recipients. Bastarache J. accepts that the unique vulnerability of social assistance recipients in comparison to others in society must be a relevant factor in assessing whether the denial of adequate assistance assaults dignity, but finds that an inquiry into differential treatment on the ground of receipt of social assistance is not necessary in *Gosselin* because the program already imposes differential treatment on the basis of age.[89] A finding of positive obligations emanating from the unique vulnerability and disadvantage of those in need of assistance would not have to rely, however, on a finding of differential treatment within the program. It could rely on a finding of differential treatment between those who are in need of assistance and those who are not in need of assistance. This is precisely the kind of comparison that the Court described in *Vriend*[90] as the "substantive equality" comparison between those in need of human rights protection and those not in need of it. The minority decision on section 15 in *Gosselin*, and the endorsement by the majority of an opening for substantive social rights claims under section 7, thus represent important victories for poor people in the face of concerted attempts by governments to promote an interpretive exclusion of poverty issues from the *Charter*. Bonnie Morton of CCPI told Kirk Makim of the Glove and Mail that the decision will encourage low-income people who view the *Charter* as beyond their reach: "The *Charter* belongs to all of us."[91] This, we hope, will be the long-term legacy of the *Gosselin* decision.

5) Conclusion

Poor people, like other rights claiming constituencies, turn to the justice system not as an alternative strategy for pursuing political change, but more simply as a forum for the interpretation and adjudication of rights. Thus, the "strategy" of rights-claiming by poor people should be regarded as considerably less contentious than is often suggested. Although poverty and hunger are social and economic policy issues which legislatures, economists, and social policy experts ought to engage, and which courts alone cannot remedy, they are also impossible to disengage from the effects of legislative choices. Where such

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[89] *Gosselin SCC*, *supra* note 28 at para. 238.
[90] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 82.
[91] Kirk Makin, "Indigent optimistic despite loss at top court," *The Globe and Mail* (20 December 2002) A13.

legislative choice engages protected interests such as security of the person and equality, those affected by these choices look for effective means to hold governments accountable.

The 1998 Nobel Laureate in economics, Amartya Sen, has studied in depth the puzzling phenomenon of hunger and famine at times of high food production in a number of different contexts. Sen points out that the critical failures that often lead to famine amidst plenty are failures of "entitlement systems," or failures of rights rather than failures of market forces or economic policy. These failures arise in large part, he argues, from a devaluing of the rights claimed by the most vulnerable in society in comparison to the rights claimed by the more privileged.[92] How to balance and interpret different rights, and what status to accord the right to adequate food and housing in relation to other rights, are matters in which courts and tribunals regularly engage. It is only natural that poor people turn to courts, tribunals, and other adjudicative venues for redress against these prevailing imbalances of rights that deny them equal citizenship. Denying adjudicative space to social rights claims in these circumstances can only perpetuate the undervaluing of poor peoples' rights and increase the alarming patterns of what Sen calls rights or entitlement system failures within Canadian society.

Celebrations by poor people of victories in accessing adjudicative space even in the face of legal losses do not indicate nonchalance about legal outcomes, but rather an awareness of the critical importance of achieving equal status as rights-holding citizens and access to adjudicative space through which long-term outcomes may be achieved. For poor people, getting into the courts is the very first threshold to cross in order to be recognized as rights-holders, rather than "constitutional castaways."[93] Viewed in this broader framework, securing the right to a hearing of a social rights claim may represent a significant legal victory whatever its outcome in terms of instrumental policy change. In the face of concerted opposition from governments and others to the notion that poverty issues should be addressed at all, a fair assessment of the outcome of the first generation of social rights claims in Canada must recognize the significant achievement that occupying adjudicative space for social rights represents for those whose fundamental human rights are violated by poverty.

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[92] Amartya Sen, "Property and Hunger" (1988) 4 Economics and Philosophy 57, reprinted in Wesley Cragg and Christine Koggel, eds., *Contemporary Moral Issues*, 5th ed. (Toronto: McGraw-Hill Ryerson, 2005) 402.

[93] *Prosper*, *supra* note 82 at para. 102.