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A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism

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A PROPOSAL TO AMEND THE ONTARIO HUMAN RIGHTS CODE:

Recognizing Povertyism

SHEILAGH TURKINGTON*

RÉSUMÉ

L'auteure soutient qu'historiquement, les gens vivant dans la pauvreté ont été victimes de discrimination systémique. La société a émis des suppositions quant à leur moralité à cause de leur piètre situation économique. Elle soutient qu'il faut étendre le *Code des droits de la personne de l'Ontario* de façon à inclure la discrimination se fondant sur la pauvreté puisque celle-ci est similaire au racisme, au sexisme, à la discrimination fondée sur la capacité physique, à l'hétérosexisme ou à l'âgisme.

* Copyright © 1993 Sheilagh Turkington. Sheilagh Turkington is a third year law student at the University of Toronto. The author wishes to thank Professor Janet Mosher, Bruce Porter, and April Burey for their helpful review and comments.

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Dawn Kearney[1] *is nineteen years old. She is pregnant and unemployed but her husband, also a youth, is employed in a low income position and supports the two of them. She and her husband were denied a tenancy in the rental unit that they wanted because the landlord had income qualifications for accommodation in its rental units stipulating that applicants could not be paying any more than 25% of their total income towards rent. Given that the rent for the apartment was $650, the landlord was essentially requiring a minimum income level of $30,000 of its tenants. After being refused accommodation, Dawn Kearney and her husband unofficially took over a tenancy from their parents in one of the landlord's other buildings. They have paid their rent on time every month despite the fact that such payments constitute 47% of their income.*

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An organization that serves some of the homeless people in downtown Toronto, Street Health, interviewed 450 homeless people to examine issues of access to adequate health care. Previous health care studies had excluded homeless people because they were conducted through surveys that randomly selected people with addresses and phone numbers. The study found that while homeless people suffer from the same health problems as the general public, the severity of these problems and the way in which they are able to respond to them is determined by their living and economic circumstances.

The report noted several problems with access to health care. For example, approximately seven percent of the respondents were refused health care services because they did not have an Ontario Health Card and most of these incidents occurred in hospital emergency departments.

Of those who were not refused, at least 40 percent had experienced an "incident of attitudinal discrimination:"

> *Many individuals reported having experienced encounters with mainstream health services which had been unsatisfying either because they had felt humiliated or discriminated against because they were poor and homeless, or because they had been given instructions or treatments that were impossible to carry out due to living circumstances.*[2]

1. *Dawn Kearney v. Bramalea Ltd.*, Case No. 50-914B, Ontario Human Rights Commission, from the files of Bruce Porter, Centre for Equality Rights in Accommodation, Representative for the complainant.

2. *The Street Health Report*, cited in Kathy Hardill, "Poverty and the Social Context of Health" (1992) 12 Canadian Woman Studies 86.

One example of such treatment instructions was bed rest. Hostels for the homeless generally close during the day thereby precluding a homeless person from being able to remain in bed.

Several of the respondents felt that they had been judged by health care staff "because they did not have an address or a place of work to give to a receptionist, or because they may have looked dirty or dishevelled." Most of the people reporting this ill-treatment were female.

The report made several recommendations to improve access to and quality of health care for people with low incomes. Several of the recommendations focus on reforming the attitudes of health care workers:

> *The authors of the report recognize that attitudinal change is not easy, but believe strongly that the impact of attitudinal barriers is as serious as those related to structural or systemic barriers.*

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Jane Doe is a twenty-eight year old Black woman and sole-support mother of two children. Her income consists entirely of public assistance.

Last year, Jane applied for funding for the Ontario Student Assistance Program to continue the undergraduate program she began last year. This year, she received less funding despite the fact that her financial circumstances remained unchanged. Since she had budgeted the year expecting the same amount, this difference could preclude her from attending.

Jane went to the Student Awards office to inquire about the change and the possibility of an appeal. She watched as the applicant before her, a white man in his late teens, received encouraging comments from the Student Awards officer who explained the appeal process to him and assisted him in filling out all of the forms. The officer appeared quite helpful and supportive. When Jane's turn came and the Awards Officer reviewed her application, Jane noticed a marked change in attitude. The attitude of the Awards Officer suggested that Jane did not deserve financial aid because he presumed she would be unsuccessful. Jane was also clearly given the impression that she was taking funding away from "more traditional" students who would make the most of it because of their greater likelihood of success. He repeatedly stressed that funding decisions were based on a very complicated process and only explained the appeals process once Jane asked several questions about it.[3]

3. Jane's story is based on the information in Carolyne A.Gorlick, "The Female Single Parent Student" (1992) 12 Canadian Woman Studies at 55-7.

Jane has also just moved out of the apartment she and her children were sharing with another family into a smaller apartment with just her own family. She has applied to have her phone line hooked up. Last year, the phone was in another person's name and it has been a few years since Jane had an account in her own name. The telephone company asked her several questions about her employment history and source of income. The agent then informed her that because the company does not have a record of a previous account from her (they only consider the previous twelve months), she would be required to put down a $100 deposit over and above the hook-up cost and the monthly charge that is required at the beginning of each month of service. That $100 deposit would be held for at least six months. She informed the company that she could not afford the deposit fee but could afford the service charges; while the $100 might be relatively significant to many people, it was prohibitive to her, given her financial circumstances. The agent informed her that the deposit was mandatory and that it was in place to discourage people who establish an account, run up an extensive long distance bill and then disappear.

INTRODUCTION

In the Fall of 1992, representatives from the Ontario Coalition Against Poverty (OCAP) emphasized to the Ontario Minister of Human Rights, Elaine Ziamba, that the *Ontario Human Rights Code*'s protection from discrimination in accommodation on the basis of "receipt of public assistance"[4] is "woefully inadequate."[5] This provision fails to acknowledge and protect against existing widespread discrimination against all people in poverty, not just those in receipt of public assistance, and not just in the area of accommodation.

Historically, people who live in poverty have been victims of systemic discrimination. Politicians, the media, law makers and enforcers, religious speakers, and the general public have stereotyped people in poverty, have made assumptions about their moral character because of their low economic status and have subjected them to unequal and often ill treatment. Even in an age of political correctness, when public derogatory comments about people of various disadvantaged groups are generally censured, such comments and condemnations of people in poverty and on public assistance remain rampant and unchecked.

4. R.S.O. 1990, c. H-19, s.2.

5. Personal interview with John Clarke of OCAP. Toronto: Ontario Coalition Against Poverty, December 8, 1992.

It is my position in this paper that the treatment that people in poverty are subject to is a form of discrimination analogous to that of racism, sexism, ablism, heterosexism, or ageism. The people facing such discrimination are the most disadvantaged people in our society in terms of economic advantage and therefore political advantage. They are the economically disadvantaged of the recognized disadvantaged groups. Ironically, all but three Canadian Human Rights Acts fail to acknowledge this form of discrimination and to offer protection to its victims. The three that partially recognize this discrimination, including the *Ontario Human Rights Code*, offer only limited protection.[6]

The purpose of this paper is to argue for an expansion of the *Ontario Human Rights Code* to include a ground of discrimination based on poverty. I will refer to such discrimination as "povertyism"[7] and I will begin this paper by elaborating on what it is I am referring to when I use this term. Also in this first section, I will emphasize that, throughout my paper, I intend to maintain a bottom-up perspective such that my paper might contribute to the growing body of jurisprudence identified by some as outsider jurisprudence.

In the second section of the paper, I will examine the historic and current role of law and government in exacerbating povertyism. In this examination, I will focus specifically on the role that law plays in developing and reinforcing povertyism. My main argument will be that law is a primary agent in promoting povertyism and, as such, it might also be a primary agent in alleviating it.

Having identified the problem of povertyism and the mechanisms which contribute to and maintain it, I will, in the third section, enlarge on a strategy for alleviating povertyism. I will consider the *Ontario Human Rights Code* and the Commission as mechanisms for counteracting some of the prevailing misconceptions and acts of povertyism. Furthermore, I will consider some

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6. *Nova Scotia Human Rights Act*, R.S.N.S 1989, c.214 ["receipt of public assistance"]; *Manitoba Human Rights Code*, S.M. 1987-88, c.45, s.9 ["source of income" as an applicable characteristic with respect to freedom from differential treatment].

7. I have adopted the word "povertyism" from a submission made to the House of Commons Sub-Committee on Poverty which reported the following:
"Povertyism...is a reference to the prejudice and subsequent discrimination against people who are poor. More than just low economic status, "poor" implies a kind of moral inferiority, akin to racism or sexism."
See Jennifer Hyndman of the Income Security Action Committee of the Social Planning and Research Council of British Columbia, cited in Chris Axworthy, M.P. (Social Policy/Anti-Poverty Critic), "Changing Course: An NDP Action Plan on Poverty" (May 1992) at 30.

of arguments against turning to a rights-mechanism like the *Code*. This consideration will focus primarily on proponents in the "rights debate." Ultimately, I will emphasize that the potential problems raised in this debate would be averted by realizing two essential factors: 1) the reform of the *Ontario Human Rights Code* to include "poverty" must be a process engaged and directed by people in poverty and 2) achieving such reform must be understood to be only one prong of a necessarily multi-pronged strategy of eliminating poverty.

In the fourth section, I will examine categorical, additive and interactive analyses of discrimination, ultimately emphasizing the need for a comprehensive understanding of the interactive nature of discrimination and the heterogeneous nature of the poor. In the context of this discussion, I hope to illustrate that as Human Rights tribunals and the courts generally move toward an interactive conception of discrimination, as I foresee they will, the inclusion of poverty in Human Rights Acts is essential. Its absence threatens that Human Rights legislation will fail to adequately address the needs of the most economically disadvantaged of disadvantaged groups.

1. Povertyism

In *The Stigma of Poverty*,[8] Chaim Waxman discusses the way in which poverty has become a stigma in much of Western society.[9] Working from the theories of Erving Goffman, Waxman notes that on meeting someone for the first time, people quickly form impressions as well as evaluations. When the person being met is somehow different from ourselves, that difference is factored into our impressions. When that different characteristic causes the observer to reduce the person observed from a "whole and usual person to a tainted, discounted one" then that characteristic is a stigma.[10]

Poverty, Waxman argues, is one such characteristic. In fact, "the stigma of poverty is a special type of stigma which attributes to the poor a status of being "less than human."[11] This argument is supported by several studies conducted in the United States and Britain which have indicated that many people perceive poverty to be the result of individual characteristics of

8. C. I. Waxman, *The Stigma of Poverty: A Critique of Poverty Theories and Policies*, 2nd ed. (New York: Permagon Press, 1983).

9. *Ibid.* at 69.

10. *Ibid.* at 69.

11. *Ibid.* at 70.

people living in poverty.[12] Similar beliefs have been found to be held by Canadians.[13] So, for example, a common stereotype illustrating this stigma would be that of the person on welfare as lazy and unmotivated, as a spendthrift in need of personal correction. The assumption is that poverty arises out of lack of effort and thrift. Therefore, anyone who is poor must be lazy and irresponsible. This logic stands behind povertyism: the logic translates incorrect assumptions about poverty into assumptions about the people who are poor.

The social construction of stigma is a useful tool for the privileged in society. Once stigmatized, people in poverty may then be characterized as anomalies in society, as deviants.[14] In a capitalist society, constructing the poor as anomalies to the reigning capitalist system reinforces the main principles of capitalism. A focus on the individual person in poverty as individually responsible for his/her misfortune diverts any criticism of existing economic and political systems as somehow culpable for the proliferation of poverty. Rather than considering the possible shortcomings of the dominant capitalist ideologies which have apparently provided some people in society with significant wealth and promises to reward the hard work of many others, society instead assumes personal shortcomings in the people who by their disadvantage threaten the American or, in this case, the Canadian dream.

Michael Katz notes that the condemnation of people in poverty is inextricable from our "culture of capitalism" which

> "measures persons, as well as everything else, by their ability to produce wealth and by their success in earning it; it therefore leads naturally to the moral condemnation of those who, for whatever reason, fail to contribute or to prosper. It also mystifies the exploitive relations that allow some to prosper so well at the expense of so many."[15]

Essentially, as long as such condemnation continues, the structural nature of the problem of poverty will never be adequately addressed. As Katz argues, the

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12. See Free and Cantril, "The Political Beliefs of Americans: A Study of Public Opinion" in Waxman, *ibid.* at 3; Feagin, *Subordinating the Poor: Welfare and American Beliefs.* (New York: Prentice Hall, 1975); Riffault & Rabier, *The Perception of Poverty in Europe* (Brussels: Commission of the European Countries, 1977) at 71.

13. Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 13 May 1988) at 29-32, 510-11 [hereinafter *Transitions*].

14. See P. Spicker, *Stigma and Social Welfare*, (London: Croom Helm, 1984) at 166.

15. M. Katz. *The Undeserving Poor: From the War on Poverty to the War on Welfare* (New York: Pantheon Books, 1989) at 7.

focus on the individual diverts the focus on poverty away from the relations between the poor and the non-poor which themselves contribute to poverty:

> "Mainstream discourse about poverty, whether liberal or conservative, largely stays silent about politics, power and equality. But poverty, after all, is about distribution; it results because some people receive a great deal less than others....political discourse has redefined issues of power and distribution as questions of identity, morality, and patronage. This is what happened to poverty, which slipped easily, unreflectively, into a language of family, race, and culture rather than inequality, power, and exploitation."[16]

However, shifting the focus of the political discourse on poverty from one of individual failure to one of unequal relations is encumbered by how widely and historically held the stereotypes about the individual nature of poverty are and by the ways in which laws reinforce these conceptions.[17]

As well as skewing the discourse on poverty generally, the stigmatizing of poverty as a personal failure also gives rise to povertyism. One commentator has suggested that "the imposition of stigma...is the commonest form of violence used in democratic societies."[18] Part of the reason for this is that stigma provides a justification for discrimination: once someone is somehow proven to be inferior, that person is then perceived as deserving inferior treatment.

It is not my intention to address the issue of the very incidence of poverty or the unequal distribution of poverty. Tackling those issues is far beyond the scope of this paper. I intend only to address the discrimination that occurs as a result of an individual's condition of poverty.

2. Outsider Jurisprudence

It is my hope that this paper will contribute to the body of legal writing that has been referred to as "outsider jurisprudence." The goal of such writing is to broaden the scope of perspectives represented in litigation, legislation and legal literature to include the perspective and experiences of outsiders. In the context of a discussion of legal discourse, Kim Lane Scheppele has described insiders and outsiders as falling on opposite sides of the we/they dichotomy:

> "We" are those who consent [to existing laws]; "they" are outside the reach of "our" laws..."We" are the forces of justice in the world who are on the right side of this [given] case; "they" are the opponents who want to thwart "us" at every turn..."We," the insiders, are those whose versions count as facts;

16. *Ibid.*

17. See discussion *infra*.

18. Spicker, *supra*, note 14 at 3.

> "they," the outsiders, are those whose versions are discredited and disbelieved. This can happen on an individual level, where specific persons find their truths not to be inevitable, or on a collective level, where whole groups of persons find their truths to be dismissed."[19]

I will emphasize throughout this paper that people in poverty are outsiders to legal discourse. In a welfare state, people in poverty are in heightened contact with law-making bodies and legal structures. That contact, however, is not as a participant or as a citizen perceived of as an equal active member of a social contract. Instead, people in poverty are subject to the expectations and assumptions, the beliefs and values of the economically privileged in society. The laws which affect them directly, which determine their relationship to the state and society, which have the potential to alleviate some of the inequality they experience are designed by the privileged according to the perceptions and experiences of the privileged.

Mari Matsuda has described the mandate of outsider jurisprudence as adopting a bottom-up perspective, focussing on the perspectives and experiences of the people who are persistently subordinated to the bottom of various social hierarchies.[20]She emphasizes that it is the hope of the writers of outsider jurisprudence that their work will lead to "a just world free of existing conditions of domination."[21] In order to accomplish such a goal, Matsuda argues, outsiders must focus on effects:

> "The need to attack effects of racism and patriarchy in order to attack the deep, hidden, tangled roots characterizes outsider thinking about law."[22]

An effects approach in this paper will involve maintaining a perspective that considers the effects of jurisprudence articulated by people in privilege on people in poverty, on the lives of the victims of povertyism.

The difficulty I face in attempting to adopt this approach is that I am not poor.[23] However, I do understand the experience of being an outsider by

19. K. L. Scheppele, "Foreward: Telling Stories" (1989) 87 Michigan Law Review 2073 at 2079-2080.

20. M. Matsuda, "Public Response to Racist Hate Speech: Considering the Victim's Story" (1989) 87 Michigan Law Review 2329, at 2324.

21. *Ibid.* at 2325.

22. *Ibid.*

23. I am currently a student and I am self-sufficient by means of student loans and part-time and summer employment. However, my family is middle class (my mother is in a white collar position and my father holds a blue collar job) and I generally have the option of their financial support if necessary. Furthermore, for most of my life, I lived in a middle class environment. The only exception to this experience was

virtue of being a woman and a lesbian. In offering this information, I am not attempting to conflate the experiences of all outsiders nor to ignore the differences between them. Outsider jurisprudence focussing on people of colour has broadened my awareness of the incongruence of some legal discourse and the experience of these particular outsiders. Furthermore, it has articulated the frustration that I have experienced as a lesbian and a woman. Overall, however, I do not claim to have a direct personal understanding of the perspectives of people in poverty.

One of the ways in which some writers of outsider jurisprudence incorporate and explore outsider experiences is through story. Richard Delgado has described storytelling as a particularly "counterhegemonic" strategy for engaging conscience:

> "We believe that stories, parables, chronicles, and narratives are potent devices for analyzing mindset and ideology—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place...it is the prevailing mindset through which members of the majority race justify the world as it is, that is with whites on top and Blacks on the bottom. Ideology makes current social arrangements seem neutral and fair."[24]

Following in this tradition, I began this paper with three stories which I will refer to repeatedly as I progress through my paper. The experiences of the people in these stories illustrate, more vividly than any abstract legal discourse, the outsider perspective I am attempting to explore .

3. The Law and Povertyism

3.1 Legal Construction and Discrimination

The earlier discussion on povertyism emphasized that the stereotypes and stigma at the root of such discrimination are socially constructed. At the helm of such constructions are the social and political institutions, such as schools, churches, media, the market, government bureaucracies, legislatures and the courts, that develop and maintain dominant ideologies.[25] The earlier discussion also emphasized that stigma arises out of some perceived differences. Because discrimination generally is so inextricably linked to difference, the social mechanisms creating or naming difference are

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when I was very young (pre-school) at which time our family income would have been below the poverty line.

24. Richard Delgado, cited in Scheppele, *supra*, note 19 at 2075.

25. For a discussion of state ideologies and the role of ideological state apparatuses, see Althussar, "Ideology and Ideological State Apparatuses" in *Lenin and Philosophy* (New York: Monthly Review Press, 1971), at 127-85.

extremely instrumental in the development of discriminatory beliefs and practices. Law, a mechanism that persistently names and categorizes people and activities, is therefore one such mechanism. This section will examine the role of law in institutionalizing povertyism.

The poor in society have been subject to persistent legal naming and categorizing since at least the early thirteenth century in Canadian legislation's British poor law roots. It is my submission that this history of being named and renamed has reflected, perpetuated and legitimized stereotypes about people in poverty that are widely held by society. Essentially, this legal history illustrates the systemic nature of povertyism.

A crucial factor to be realized in this discussion is that the power of legal naming has historically been vested in the privileged. The legislators who identify and categorize people in poverty are not themselves poor. The effect of this concentration of privilege is that the poor become objects to be manipulated by legal language for whatever economic or social purposes underlie the legislative scheme of the day. This objectification reinforces the sense of difference and creates an us/them dichotomy, clearly demarcating the poor as outsiders.

Naming is more than a process of identifying. It is a process of creating hierarchies and creating differences between the various named groups. Often, the motivation behind the naming, the rationale behind the categorical scheme, is determined by the interests of the namers rather than any inherent differences in the named. Therefore, when some form of an us/them dichotomy is created, there is an implicit hierarchy wherein "us" is privileged.[26]

As the namers work from a point of privilege in their naming, they operate on particular sets of assumptions and values. While the categories that they then name into existence may in themselves appear neutral because of often clinical/legal language, they are in fact charged with the sets of assumptions and values of those who named them.[27]

The power of the legal process of naming is that once differences are "identified," they are perceived as fixed, natural entities. They are assumed to be essential to the people named and the actual explanation for the category/name. Furthermore, once a label or category is in place, once a difference

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26. J. Culler, *On Deconstruction* (Ithaca: Cornell University Press, 1982).

27. D. Spender, "Extracts from *Man Made Language*" in D. Cameron, ed., *The Feminist Critique of Language* (London: Routledge, 1990) at 102-9.

is created, the label is imputed with value judgements that remain unstated but everpresent.[28]

The paradox in naming poverty is that, although legal categorization of the poor emphasizes distinctions and thereby facilitates and legitimizes prejudice and discrimination, the poor must be identified by law if legal mechanisms are to attempt to alleviate poverty.[29] In a welfare state, the poor will always be subject to legal naming and categorization.

It is not my intention in this paper to advocate the elimination of the legal naming of poverty and people in poverty. It is my submission, however, that the assumptions underlying this classification must be scrutinized and exposed. The purpose of this project is not to eliminate the naming but to challenge the assumptions and values implicit in them. Furthermore, while law is an instrumental mechanism in the creation of distinctions and classifications of the poor, it may also work towards dismantling the assumptions imputed to legal classifications of poor. Essentially, then, I am arguing that while law obviously constructs difference, it must also deconstruct any assumptions underlying those constructed differences in order to work towards the implosion of the myths and stereotypes plaguing people in poverty.

This section will, therefore, examine the legislated history of the poor in order to illustrate the process of naming/creating difference suggested above and the serious problems for the poor inherent in that naming. I will begin by considering the early Poor Laws in Britain and then turn to the history of Poor Laws in Canada, particularly Ontario. I will also look briefly at some of the recent directions the government has considered following in reforming laws related to the poor. This section is not intended in any way to be a complete history of said legislation and government action. My purpose is to examine the process of the legal naming of the poor in order to expose the attitudes behind the laws as well as the attitudes legitimized by them.

3.2 Methodology: History from the Bottom

It is not my intention to examine any purported economic justifications for the creation of poor laws. To adopt such a perspective would be to adopt the perspective or the justification of the law-makers. In effect, to adopt such a

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28. M. Minnow, *Making All The Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 52, 56-74.

29. This is essentially what Martha Minnow has called "the dilemma of difference"; *Ibid.* at 9, 20.

perspective would be to approach a review of the legal construction of poverty from the top.[30]

In discussing outsider jurisprudence, Mari Matsuda refers to a specific methodology used by legal scholars to examine issues affecting people outside of mainstream jurisprudence. She describes the methodology as

> "consciously both historical and revisionist, attempting to know history from the bottom...from the fear of namelessness of the slave, from the broken treaties of the indigenous Americans..."[31]

As I attempt to know history from the bottom, I will specifically focus on the effects of this legislation on people in poverty, not in terms of how it alleviated or worsened their impoverishment, but as it has legitimized prejudicial perspectives of the poor that contradict their felt experience and reality.

3.3 British Poor Laws

Early British legislation only began to name the poor in any way once they became a threat to the propertied class. This legislation characterized the poor as a homogeneous group, articulated stereotypes of the poor, eventually created distinctions among the poor according to their moral culpability for their low economic status, and ultimately embedded all of these assumptions in a repressive system of laws and practices that affected the lives of the poor daily and provided the foundations for the future treatment and regard of the poor in legislation in both Britain and North America.

An important realization in this discussion is that although the laws throughout this period gradually created distinctions between people who were poor, these differences were not nearly as clear as the laws suggested. Essentially, the experience of poverty is not easily categorized. The poor laws addressed poverty from the perspectives of the privileged. The ease with which the demarcations were created more accurately reflects the perceptions and bias of the privileged than the reality of the experiences of the poor.

In examining this early legislation, I will highlight the prejudicial attitudes it articulated and thereby legitimized.

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30. Interestingly, one might seriously consider whether in fact one could examine the legal construction of the poor from a top-down perspective since a top-down approach would fail to expose underlying assumptions. Essentially, then, such an approach would probably be incapable of recognizing the constructions as constructions and would surely be incapable of separating those constructions from prejudicial assumptions made about the (again-constructed) inherent nature of the poor.

31. *Supra*, note 20 at 2324.

a. Stereotype: the poor are idle and thieving.

With the transformation of English society from feudalism to capitalism came a transformation in the nature of economic insecurity for people in poverty. The freedom from servitude to feudal lords also created a state of freedom from the basic economic protection that patrons and lords previously provided to those under their control. Therefore, when struck by misfortune, some of the poor turned to begging or to theft for survival.

The propertied class, confronted by a lack of labour control as well as a new increase of a threat to the security of their property, pressed for some legislation to control the newly freed class of people of low economic status. By the mid fourteenth century, famine and plague left the propertied class with another threat: with so many deaths, the available labour supply fell dramatically and labourers began demanding higher wages and more benefits. The labourers were also willing to travel to find employers willing to meet their demands.

The combination of these factors culminated in the Statute of Laborers in 1349, part of which stated as follows:

> "Because that many valiant beggars, as long as they may live of begging, do refuse to labor, giving themselves to idleness and vice, and sometime to theft and other abominations; none upon the said pain of imprisonment, shall under the color of pity or alms, give anything to such, which may labour, or presume to favor them towards their desires, so that thereby they may be compelled to labor for their necessary living."[32]

The Statute clearly stereotypes all beggars and all unemployed persons. It also imputes a degree of moral culpability for not having employment.

Another part of the proclamation essentially punishes unemployment with a forced return to a state of servitude:

> "That every man and woman of our realm of England, of what condition he be, free or bond, and within the age of three-score years, not living in merchandize, nor exercising any craft, nor having of his own whereof he may live, nor proper land, about whose tillage he may himself occupy, and not serving any other, if he in convenient service, his estate considered, be required to serve, he shall be bounden to serve him which so shall him require; and take only the wages, livery, meed, or salary, which were accustomed to be given in the places where he oweth to serve...And is any such man or woman, being so required to serve, will not the same do,...he shall anon be taken...and

32. K. de Schweinitz. *England's Road to Social Security* (London: University of Pennsylvania Press, 1943) at 1.

> committed to the next gaol, there to remain under strait keeping, till he find surety to serve the form aforesaid."[33]

The earliest legislation dealing with the poor in the aftermath of the breakdown of feudalism immediately attached a stigma to unemployment. It attached assumptions about moral turpitude to both economic and employment status. For people who were poor one of the effects of such stereotyping and stigmatization was that they became, in a sense, as enslaved as had previously been the case in feudalism. Armed with these moral assumptions, the state was justified in restricting the freedom, in controlling the actions of people of low economic status.

Another important aspect of this early legislation is the fact that it was proclaimed in response to the needs of the propertied class, not the needs or interests of the poor:

> "...these monarchs were not moved by sentiments of piety or pity as they resolutely addressed themselves to the problem of poverty, but they were at the same time deeply persuaded that unrelieved and uncontrolled poverty was the most fertile breeding ground for local disorders which might by a kind of social contagion flame across the whole realm. Hence it was that the immense power of the Crown was steadily addressed to the problem of poverty."[34]

It is not surprising, then, that the characterization of the poor in the Statute would also further serve the interests of that privileged class. The propertied were provided with a labour force with a legislated wage ceiling.

The provisions in the legislation which might be said to address the possibility of alleviating poverty focus on forcing the poor into employment. The philosophy appears to have been that by depriving them of any other source of support, such as alms, and by punishing them when they even ask for such support, the poor will be left with no alternative other than attaining employment. The presumption was that such employment existed and that all of the poor were capable of working.

b. Stereotype: the poor are all the same and their poverty arises from their refusal to work

In 1350, another piece of legislation was enacted as a companion to the Statute of Laborers. The crux of this legislation was to restrict labourers from moving

33. *Ibid.* at 6.

34. W.K.Jordan, *Philanthropy in England 1480-1660: A Study of the Changing Pattern of English Social Aspirations* (London: Ruskin House, 1959) at 75; see also P. Slack, *Poverty & Policy In Tudor & Stuart England* (London: Longman House, 1988) at 115.

with the seasons to take other work if there was already work available in the town in which they resided. Therefore, not only was it somehow immoral to be without work and to demand more wages than were being offered, it was also somehow immoral or at least illegal to search for new or higher paying work if one was already employed.

An important implication of all of these provisions having been enacted together is the way in which the legislators perceived all of the problems as interrelated:

> "...the King and his lords saw begging, movement and vagrancy, and labor shortage as essentially the same problem, to be dealt with in one law...the beggar, in the concern of the Statute of Laborers, was not a problem in destitution but a seepage from the supply of labour."[35]

Waxman has argued that the process of the stigmatization of poverty began with two initial stages. First, the poor were identified as a group, as having a "collective status" thrust upon them. Second, most of that group of poor persons were then cast into a negative status group.[36] The Statute of Laborers essentially codified that negative status of the poor.

c. *Stereotype: Some poor deserve relief because their poverty is not their own fault; however most poor are undeserving and constitute an immoral menace.*

It was not until the very late fifteenth century that Parliament began to realize that people might be poor because of circumstances rather than moral turpitude. At this time, the laws began creating distinctions between poor, particularly the poor found begging. In 1495, less punishment was dealt to pregnant women and very sick people found begging.[37] Similarly, in 1504, "persons being impotent" and above 60 years old were treated more leniently than other beggars.[38] Implicit in the creation of these separate categories is a brief realization that people might beg because they are in fact in need and unable to support themselves.

Also in the late fifteenth and early sixteenth century, people were increasingly separated from the land as tillaging was replaced by pasturing.[39] Unable to live off the land, more and more people became impoverished, in need of some

35. De Schweinitz, *supra*, note 32 at 6.

36. Waxman, *supra*, note 8 at 75.

37. De Schweinitz, *supra*, note 32 at 8.

38. *Ibid.*

39. *Ibid.* at 9.

support for survival. The laws enacted to respond to this reality were similar to their predecessors in that they, once again, depicted poverty as a vice, a sign of personal and moral failure. These laws formed what is now referred to as the "Poor Laws."

The initial statute in this series of laws was enacted in 1531. The preamble to the statute maintains the stigmatizing of poverty and unemployment:

> "In all places in England, vagabonds and beggars have of long time increased, and daily do increase in great and excessive numbers, by the occasion of idleness, mother and root of all vices, whereby hath insurged and sprung, and daily insurgeth and springeth, continual thefts, murders, and other heinous offenses and great enormities, to the high displeasure of God, the unquietation and damage of the king's people, and to the marvellous disturbance of the common weal of this realm..."[40]

The preamble also noted the history of legislation before this statute which sought "reformation of the premises" and lamented that despite these "sundry good laws, strict statutes and ordinances," the presence of poor people had persisted and, in fact, increased.[41]

The tone of this statute is similar to the previously discussed legislation in that the poor are depicted as a menace to the King and England in the sight of God. Clearly, a threat to the propertied class was tantamount to a threat to England as a whole. Informing much of this legislation was the persistent notion or stereotype that "hungry men were simply invincibly idle men, that poverty was a consequence of moral fault."[42]

The poor were assumed to have a particular criminal element among them when, in fact, the criminal problems arising out of vagrancy, though acute, were also limited.[43] The legislation throughout this part of the century appeared to assume that "poverty and vagrancy were synonymous."[44] Once again, the motivation for this legislation was not the need of the poor as much as the need to subdue the poor and stem their threatening presence. One of the effects of the legislation would have been a further reinforcement of social condemnation of the poor because of their low economic status.

40. *Ibid.* at 20.

41. *Ibid.*

42. Jordan, *supra*, note 34 at 80.

43. *Ibid.* at 75.

44. *Ibid.* at 80.

Another similarity between this statute and other legislation was that it created categories among the poor. In fact, it mandated an inquiry in each local area of "all aged poor and impotent persons which live or of necessity be compelled to live by alms of the charity of the people."[45] These persons would be documented, assigned specific areas in which they would be permitted to beg, and be provided with a letter indicating this authorization.[46] Alms to "able-bodied" (read "undeserving") poor were strictly prohibited. Any person found providing such alms was subject to a fine. Any such able-bodied person found begging would be tied naked to a cart in the marketplace, whipped, and forced to return to his parish of origin.

d. Stereotype: the undeserving poor need to be reformed; they need a strict lesson in discipline; their personal failure justifies harsh treatment by the state.

The Statute of 1536 provided a codification of the provisions found in a previous series of statutes. Like the above, it provided for harsh treatment of able-bodied beggars. The first time such a person was found begging, he would be sent to their home parish; the second time, he would be whipped and the gristle of his right ear would be cut off; the third time, he would be executed.

Again, distinctions were made among the poor. For example, children between 5 and 14 would be appointed to apprenticeship positions. Other non-able-bodied poor people would be provided for by a systematic scheme for collecting and distributing charity through the local churches. The other categorizations, reminiscent of that of previous legislation, are indicated in the following excerpt detailing who would be eligible for such relief:

> "...the poor, impotent, lame, feeble, sick and diseased people, being unable to work, may be provided, holpen, and relieved so that in no wise they nor none of them be suffered to go openly in begging; and that such as be lusty or having their limb strong enough to labor, may be daily kept in continual labor, whereby every one of them may get their own sustenance and living with their own hands."[47]

This statute marks the beginning of a legislated scheme of organizing relief for the "deserving" or blameless poor, the poor who could not apparently help being poor.

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45. de Schweinitz, *supra*, note 32 at 21.

46. *Ibid.*

47. *Ibid.* at 23.

However, the Poor Laws did not contemplate the possibility that there could be people who were unemployed because there were no jobs for them. Instead, the legislation assumed them to be part of the groups of vagrants that the laws had focused on since they began to deal with poverty. By assuming that such persons were vagrants, were "below the line of respectability," the legislation failed to seriously contemplate the reason for the persistence of poverty and to acknowledge the legitimate needs of the poor; instead, it attempted to deal with poverty through essentially criminal measures.[48]

Sixteenth century legislation provided for a compulsory poor rate for relief of the deserving poor and penal measures against vagrants, or vagabonds. One of the distressing aspects of this law for poor people was the breadth of the definition of "vagabond" which included minstrels, tinkers, and "loitering" labourers. Legislation in 1572 provided that these vagabonds

> "were to be whipped and bored through the ear by order of sessions for a first offence, unless masters could be found who would take them on; and for a second offence they would be hung as felons, unless taken into service for two years."[49]

Another innovation of the Poor Laws in this period was the appointment of officers in each parish to oversee all categories of the poor led to another stereotype.

e. *Stereotype: the poor are almost presumptively financial risks; they must be scrutinized; economically privileged people are authorities on the character and likelihood of future success of the poor.*

The next major development in the Poor Laws occurred in 1662 with the implementation of the Law of Settlement.[50] This statute required that every individual or family who moved into a new parish and rented a tenancy for less than ten pounds a year be subject to the justices' scrutiny for the first forty days. If the justices formed the opinion that the newcomers might at some time in the future apply for relief, then the justices were required to return the newcomers to their home parish.[51]

48. Jordan, *supra*, note 34 at 88.

49. Slack, *supra*, note 34 at 124.

50. 13 & 14 Charles II, c. 12, an Act for the Better Relief of the Poor of this Kingdom, 1662 [The Law of Settlement].

51. de Schweinitz, *supra*, note 32 at 40.

The law mandated state scrutiny of people solely because of their low income and empowered justices to form speculative personal opinions about the character of poor newcomers with the presumption that many would burden the parish. A further effect was to create greater restriction on the movement of the poor than any other legislation before it. Not only did the statute place a burden on the poor who were ultimately removed, but also it subjected every poor newcomer to scrutiny. It also gave power to the landowners in the area who could refuse to rent a tenancy to anyone for over ten pounds if they wanted the person and her family to be watched and ultimately removed. Although the law was actually criticised,[52] it remained largely unchanged until 1795 when an amendment provided that the poor could only be removed once they had applied for relief.[53]

f. Stereotype: the able-bodied poor are an untapped resource of labour which could be exploited if reformed and trained.

By the late seventeenth century, the early characterization of the poor as a threat gave way to a regard for them as an untapped resource. In this vein, the labouring poor were identified as somewhat of another subgroup in the poor. Although not perceived as "deserving," the working poor were no longer as stridently associated with the "undeserving" vagrants of their group because they appeared to be reformable. This group of poor people were finally perceived as "a segment which should be neither punished, nor simply taken for granted and held in charity, but manipulated."[54]

The Poor Laws were subject to ardent criticisms by the late eighteenth century because of some of the support they provided to the poor. Behind these criticisms lay the same set of stereotypical assumptions about the poor highlighted above. In 1786, Joseph Townsend published an influential commentary, entitled, *A Dissertation on the Poor Laws: By a Well-Wisher to Mankind.*[55] He generalized about all of the poor as though they were a homogeneous group all suffering from the same vices and inherent moral frailties.

Below, I will review several of Townsend's propositions at length for several reasons. First, Townsend's short book was widely read at the time of its

52. Waxman, *supra*, note 8 at 79.

53. *Ibid.* at 44.

54. Slack, *supra*, note 34 at 32.

55. J. Townsend, *A Dissertation on the Poor Laws: By a Well-Wisher to Mankind* (Berkeley: University of California Press, 1971), [hereinafter "Townsend"]; forward by Ashley Montagu [hereinafter "Montagu"].

publication and for a substantial period afterwards.[56] Second, his ideas mark the origin of the theories of Malthus and, through Malthus, Darwin, who would profoundly influence social and legal thinking in that century and beyond.[57] Third, shortly after the publication of his book, the Poor Laws were changed in a way that would have been in direct opposition to Townsend's position. However, Townsend's perspectives would directly influence the reform of these laws for the next thirty years.[58] Fourth, Townsend's perspectives fuelled criticism of the Poor Laws and articulated stereotypes about the poor at a time when the same laws were under consideration in Upper Canada. Finally, Townsend's arguments illustrate an overarching perspective of the poor that encompasses all of the stereotypes highlighted above and they are remarkably similar to the perspectives of some current social commentators.

Essentially, Townsend criticized the poor laws for rewarding the poor through support even though they were naturally undeserving by the very fact of their poverty:

> "What have [the poor] to fear, when they are assured, that if by their indolence and extravagance, by their drunkenness and vices, they should be reduced to want, they shall be abundantly supplied not only with food and raiment, but with their accustomed luxuries, at the expense of others."[59]

He blatantly stereotypes the poor, characterizing their economic status as a direct indication of their personal morality. Furthermore, all of this commentary on the poor is set up as a direct comparison between the poor and the economically advantaged:

> "The poor know little of the motives which stimulate the higher ranks to action—pride, honour, and ambition. In general, it is only hunger which can spur and goad them on to labour; yet our laws have said, they shall never hunger...It is universally found, that where bread can be obtained without care or labour, it leads through idleness and vice to poverty."[60]

Townsend's perceptions of the poor as subordinated to the economically advantaged, of poverty as a personal characteristic and of the need for legislation to treat the poor and poverty as such are stated most clearly below:

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56. Montagu, *ibid.* at 1.

57. Waxman, *supra*, note 8 at 81.

58. *Ibid.*

59. Townsend, *supra*, note 55 at 23.

60. *Ibid.* at 23, 24.

> "A WISE legislator will endeavour to confirm the natural bonds of society, give vigour to the first principles on which political union must depend. He will preserve the distinctions which exists in nature independent of his authority, and the various relations which, antecedent to his creation, connected man to man. He will study the natural obligations which arise from these relations, that he may strengthen these connections by the sanction of his laws. Among the first of these relations stands the relation of a servant to his master...But our laws tend to weaken these bonds by compelling the occupier of land to find employment for the poor...The wisest legislator will never be able to devise a more equitable, a more effectual, or in any respect a more suitable punishment, than hunger is for the disobedient servant. Hunger will tame the fiercest animals, it will teach decency and civility, obedience and subjection, to the most brutish, the most obstinate, and the most perverse...Drunkenness is the common vice of poverty; not perhaps of poverty but of the uncultivated mind...When, therefore, by the advance of wages [the common people] obtain more than is sufficient for their bare subsistence, they spend the surplus at the alehouse, and neglect their business..."[61]

Finally, Townsend recognized that the subordination of the poor, the very existence of poverty, directly benefits the privileged in society. Not surprisingly, he perceived this as both a positive and a natural phenomenon:

> It seems to be a law of nature, that the poor should be to a certain degree improvident, that there may always be some to fulfil the most servile, the most sordid, and the most ignoble offices in the community. The stock of human happiness is thereby much increased, whilst the more delicate are not only relieved from drudgery, and freed from those occasional employments that would make them miserable, but are left at liberty, without interruption, to pursue those callings which are suited to their various dispositions, and most useful to the state. As for the lowest of the poor, by custom they are reconciled to the meanest occupations, to the most laborious works, and to the most hazardous pursuits; whilst the hope of their reward makes them cheerful in the midst of all their dangers...when hunger is either felt or feared, the desire of obtaining bread will quietly dispose the mind to undergo the greatest hardships, and will sweeten the severest labours."[62]

Townsend then posited his alternative to the poor law: relief for the poor should be "limited and precarious" in order to "promote industry and economy"[63] and the poor tax should be gradually reduced to approximately a tenth of what it was to force the labouring poor to "acquire habits of diligent application, and of severe frugality."[64] He noted that the poor already lived in their own societies and formed clubs amongst themselves and argued that they

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61. *Ibid.* at 26-7, 30.

62. *Ibid.* at 35.

63. *Ibid.* at 62.

64. *Ibid.* at 63.

should be required to pay up to a third of their wages into these clubs to provide common support for each other. Such a system, in his mind, would have the following effect:

> "Thus would sobriety, industry, and economy, take place of drunkenness, idleness, and prodigality, and due subordination would be again restored."[65]

Clearly, people were personally responsible for their poverty and, as such, should be personally responsible for its alleviation.

3.4 Poor Laws in Upper Canada

At the time that the poor laws were under such heavy criticism in England, Upper Canada was establishing itself as a new province. The first significant legislative treatment of the poor in Upper Canada was to make the poor invisible in the law by explicitly rejecting the British poor laws. In 1792, the first statute adopted by the legislature essentially transplanted the bulk of British civil law to Upper Canada. However, that statute, in its final clause, specifically provided that "nothing in this Act...shall...introduce any of the laws in England respecting the maintenance of the poor."[66] While the British poor laws were wrought with shortcomings and oppressive assumptions, their existence at least recognized the need for a legislated system of social assistance.

Significantly, the legislators rejecting the poor laws consisted of several loyalists who specifically came to Upper Canada after the American Revolution seeking an environment steeped in British legal and political tradition. Another significant factor is that New Brunswick and Nova Scotia had both replicated the British poor laws by 1786. Several historians have postulated theories as to this omission and the question appears to remain unresolved. There is no current consensus as to why Upper Canada diverged from these precedents.[67]

Some historians have suggested that the decision to abandon the poor laws was an administrative, pragmatic decision given the new and shifting set-up of the colony as compared to Britain. Furthermore, the tax base available in Britain was not to be found in Upper Canada. Finally, the governments in Nova Scotia

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65. *Ibid.* at 64.

66. Upper Canada, *Statutes*, 1792, c.1, cited in R. Splane. *Social Welfare in Ontario 1791-1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965) at 65.

67. Russell Smandych reviews the various theories in his work: Upper Canadian considerations about rejecting the English poor law, 1817-1837: a comparative study of the reception of law, (Faculty of Law, University of Manitoba; [unpublished] at 10-16.

and New Brunswick were having difficulties administering their transplanted system of poor laws.[68] One difficulty with this theory is that it does not explain why the decision was made so explicitly.[69]

Other historians have argued that the decision not to include a system of poor laws arose out of the frontier ideology of the new province, stressing rugged individualism and Darwinian notions of economic survival. Essentially, this argument suggests that the rejection of the poor laws reflected the belief that Upper Canada was

> "...a vigorously self-reliant society founded upon individual initiative exploiting almost unlimited resources. The fittest would survive; the temporarily distressed would be looked after by family or by locally organized private charity; those who could not "make a go of it" would perish or move on; and government would play a minimal role."[70]

Such an attitude clearly casts economic disadvantage as an individual shortcoming. Absent a clear reason for poverty such as illness or age, one's inability to prosper in the new country amounted to a personal failure, an indication of a lack of fitness.

Russell Smandych has recently added to the latter argument. Reflecting on the Tory histories of the main statesmen of Upper Canada at the time of its inception, Smandych argues that their staunch Tory beliefs motivated their decision to reject the English poor laws.[71]He emphasizes that these men would have been well aware of the debates in England and would actually have been in England when the animosity was building. Smandych notes that the decisions of 1791 were made by a wealthy elite. He compares the sentiments of Upper Canada to those of the old province of Quebec where wealthy English merchants and French landowners apparently supported the Governor of Quebec in his efforts to prevent the direct importation of British civil law[72] and, more particularly, laws aimed at various kinds of public relief.[73]

The decision not to adopt the poor laws of England in Upper Canada, whether administrative or ideological, was made by a wealthy elite with a tradition of disdain for the notion of public relief. Implicitly, it legitimizes the notion that

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68. The main proponent of this argument is Richard Splane.

69. See Smandych, *supra,* note 69.

70. J.C. Levy, cited in Smandych, *ibid.* at 13.

71. *Ibid.* at 17.

72. *Ibid.* at 20.

73. *Ibid.* at 22.

poverty is a personal, not a public phenomenon. With no real public support available, the poor relied on what few private sources existed, such as family and private philanthropy.[74] The distribution of private charity focussed, once again, on the "deserving" poor.[75]

Despite the fact that the laws of Upper Canada did not recognize the problem of poverty and the existence of the misconception that it would disappear if the poor were not pandered to, poverty persisted. In the early 1820s, public meetings were held to consider the creation of a system of public support because the voluntarism was inadequate to meet the needs of the poor. Local newspaper editorials reflected the assumptions and beliefs that Townsend had articulated in Britain in response to the early poor laws: public relief was "a premium for idleness."[76] The same reaction was heard in the 1850s as the Toronto *Globe* persistently condemned suggestions for a public relief system, arguing that "it contradicted sound economic theory and moral values of work and industry."[77]

The early British stereotypes of the able-bodied poor as distinct from the deserving poor and in need of personal correction were again legitimized in some of the first Upper Canadian legislation attempting to address people in poverty with the *House of Industry Act* of 1837. It provided for the creation of houses which would administer indoor relief by "serv[ing] as both 'houses of correction' for the 'idle and disorderly' poor, and as places of 'refuge' and 'charity' for those who were considered to be more deserving."[78] The principle of "less eligibility" was adopted from England in

74. D. Guest, *The Emergence of Social Security in Canada*, 2nd ed. (Vancouver: University of British Columbia Press, 1988) at 12.

75. *Ibid.* at 14, 24.

76. *Ibid.* at 25.

77. Houston, cited in Allan Irving, "From No Poor Law to the Social Assistance Review: A History of Social Assistance in Ontario, 1791-1987" (July 1987) [Unpublished] at 6.

78. Smandych, *supra*, note 67 at 34. The Act authorized justices to commit to the Houses the following people:

   (1) poor and indigent persons incapable of supporting themselves:
   (2) all persons able of body to work and without means of maintaining themselves, refusing or neglecting to do so; (3) all persons living a lewd, dissolute, vagrant life, or exercising no ordinary calling of lawful business sufficient to gain or procure a lawful living; (4) all such as spend their time and property in public houses to the neglect of their lawful calling.

   From Margaret Kirkpatrick Strong. *Public Welfare Administration in Canada* (Chicago:

the context of these workhouses.[79] This principle provided that people dependent on assistance must be kept at a standard of living markedly lower than the lowest paid labourer, which was assumed to be subsistence-level with the result that relief was frequently insufficient to meet the needs of the poor.[80] An extension of this principle adopted from England was the "workhouse test:"

> "People who refused to accept this form of help were considered to have fraudulently asked for assistance. Those who accepted it were clearly those in most desperate need and therefor the proper subjects of charity."[81]

Once inside the workhouse, there was essentially a "work" test: people would be required to perform often extremely heavy labour and those who did not perform as required were perceived as fraudulent claimers.[82]

This administration of indoor relief once again emphasized the presumption that many poor persons seeking relief were doing so by choice and, as such, were undeserving. The system also invited scrutiny of the poor in terms of their willingness to comply with the strenuous demands upon which relief was conditional. Furthermore, the fact that relief was in kind rather than in funds reinforces the stereotype of the poor as irresponsible spendthrifts, unable to budget their own affairs.

Overall, in the early history of Upper Canada, the initial lack of legislated support for the poor and the later legislated Houses of Industry essentially legitimated the same stereotypes about the poor and poverty discussed in the previous section: poverty was cast as a personal problem; relief was a private matter;[83] the poor were divided as deserving and undeserving; the able-bodied were presumed morally inferior and in need of reform.[84]

University of Chicago Press, 1930) at 27.

79. Guest, *supra,* note 74 at 36.

80. The lieutenant governor of Upper Canada, Sir Francis Bond Head, who was the Assistant Poor Law Commissioner in Kent, England before he came to Upper Canada articulated this policy while in England: his ways of implementing the policy included ensuring that the conditions of workhouses were deplorable, refusing food to anyone not working, and separating husbands and wives. Irving, *supra,* note 77 at 6.

81. Guest, *supra,* note 74 at 37.

82. *Ibid.*; see also Irving, *supra,* note 77 at 13.

83. The *Municipal Institutions Act* of 1866, with its 1867-8 amendments, and the *Charity Aid Act* of 1874 might be considered minor exceptions to this generalization: the former allowed municipalities to care for the poor without actually mandating them to do so while the latter established some provincial funding for private charities. See Splane, *supra,* note 66 at 72-3, 80; Irving, *supra,* note 77 at 12.

84. For an outline of the general developments and persistent themes in the treatment of

3.5 The Twentieth Century: An Emerging Social Welfare System

Any mechanisms in place in the nineteenth century to respond to the needs of the poor, such as the Houses of Industry or soup kitchens and hostels run by charitable organizations, provided relief to the poor in kind rather than in direct funds. In the twentieth century, the Canadian and Ontario governments began to recognize that a state response to poverty was necessary.

Part of this recognition might be attributed to the fact that the advance of industrialization in Canada in the 1900s did not eliminate unemployment as might have been expected. The realization that the root of unemployment might not be located solely in the personal shortcomings of individuals began to form.[85] With the recession of 1914-15, the government began to study unemployment in an effort to determine what else could be the cause and how it might be rectified.[86]

The state relief developed and considered in the twentieth was divided according to subgroups of the poor such that the groups provided with allowances were largely the groups that had been traditionally recognized as the deserving poor such as persons with disabilities and senior citizens. After World War I, a few of the deserving poor became the focus of attention:

> "As a result of the large number of psychiatric casualties in the armed forces, for example, interest in mental health and the care of the mentally ill received a new impetus, as did the care and treatmentof blindness. The high percentage of Canadians found unfit for military duty, coupled with the death of over sixty thousand young Canadians in France, helped promote a greater interest in health matters generally and in child welfare in particular."[87]

Furthermore, for some groups, public relief was often characterized as a kind of reward for hard work in the past.[88] Examples of such legislation is the *Workmen's Compensation Act, Old Age Pensions Act, Mothers' Allowances Act,*[89] and the *War Veterans' Allowance Act.*

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the poor during this period, see Irving, *supra*, note 77 at 7-8.

85. See Guest, *supra*, note 74 at 70:
"Unemployment 'ceased to be a novelty'...this view clashed with the older notion, more appropriate to a rural, pre-industrial Canada, that unemployment was evidence of an unwillingness to work."

86. *Ibid.* at 70-3.

87. *Ibid.* at 69.

88. Consider for example Mother's Allowance, a reward for assuming the responsibility of the state's future citizens. *Transitions, supra*, note 13 at 73.

89. Ontario Statutes, 1920. Within this act, mothers were divided into further subcategories which also reflected a "deserving" status. Mothers eligible for the allow-

The Great Depression in the 1930s posed a particularly compelling challenge to historical stereotypes about the personal responsibility of the unemployed for their poverty. The *Ontario Unemployment Relief Act* of 1935 was one of the earliest pieces of legislation recognizing the unemployed able-bodied people as "deserving" poor.[90] The province's program consisted of provincial and municipal relief works as well as municipal relief. The unemployed were required to work for relief by building highways, roads, and municipal buildings, sewers, street grading, and water mains; however, the relief was often insufficient to support the relief-workers' families, suggesting the persistence of the "less eligibility" philosophy.[91] Furthermore, there was not enough work to employ all of the unemployed and when they were laid off from the relief works, the municipal relief available was only in-kind relief.[92]

In the 1940s, the federal government established two particularly significant pieces of welfare legislation: the *Unemployment Insurance Act*[93] and the *Family Allowances Act*.[94] The first legislated a form of social security that provided benefits at a wage-related rate which suggested that, like early social allowance legislation, it was based on a reward system: the more productive worker receives the greater benefit. The benefits were also provided as of right, unlike previous benefits. This aspect of the legislation established "one of the more enduring myths of the welfare state...that benefits as of right are inseparably linked to contributions."[95] The programme also reflected a concern about complacency: it maintained work incentives by restricting benefit scales to the point that they failed to provide a "living wage" standard.[96]

The *Family Allowances Act*, the first universal welfare payment programme, was designed with the particular strategy of ensuring the well-being of

ance included widows and mothers who were married to men in asylums or men with permanent disabilities; the claimants also had to be British subjects have in their care at least two children under the age of fourteen. The Act was extended in 1921 to include deserted wives and foster mothers as well. The obvious omission in the legislation was mothers married to unemployed able-bodied men.

90. *Transitions, supra*, note 13 at 74.

91. Irving, *supra*, note 77 at 20.

92. *Ibid.* at 21.

93. Canada Statutes, 1940.

94. Canada Statutes, 1944.

95. Guest, *supra*, note 74 at 105.

96. *Ibid.* at 108.

Canadian children. This focus on children, a "deserving" group in Canada, would persist and actually characterizes much of the current federal commitments to alleviating poverty.

The reforms to social welfare legislation in the 1950s, providing for shared-cost conditional grant programs, proceeded largely on the same categorical basis initiated in the early 1900s: the *Old Age Assistance Act*,[97] the *Blind Persons Act*,[98] and the *Disabled Persons Act*.[99] In the same period, another shared cost program was initiated through the *Unemployment Assistance Act* which expanded the category of deserving unemployed persons to included divorced women and unwed mothers.[100]

The final major pieces of legislation constructing Ontario's social security net were the *General Welfare Assistance Act*[101] and the *Family Benefits Act*.[102] The first was intended as another form of residual relief, to be administered in response to "temporary distress and short-term need."[103] It added nothing to the level of relief provided to people who were able-bodied and unemployed[104] and, in fact, provided for close scrutiny of people who were unemployed but employables by welfare administrators who possessed the discretion to terminiate assistance. The *Family Benefits Act* provided higher rates of assistance to persons once again perceived as "deserving:" blind people, people with disabilities, elderly people and sole-support mothers.[105]

The persistent theme in the emergence of the social welfare system in Canada generally and Ontario specifically is that social assistance is only available on a permanent basis to the "deserving" poor. Whatever assistance is available to the unemployed able-bodied poor must remain at a level low enough to provide an incentive to retain employment. That level will often fail to meet basic needs as will some of the funding available to the "deserving" poor. Therefore, the principle of "less eligibility" persists. The assumption implicit

97. 1951.

98. 1951.

99. 1954.

100. *Transitions*, *supra*, note 13 at 75.

101. Ontario Statutes, 1958.

102. Ontario Statutes, 1967.

103. Irving, *supra*, note 77 at 26.

104. *Transitions*, *supra*, note 13 at 75.

105. *Ibid.* at 76.

in the maintenance of this principle is that there is employment available for the unemployed poor who are sufficiently motivated to find it. A further assumption is that employment will eradicate the poverty of the able-bodied poor. Such an assumption ignores the reality of the poverty of the working poor in Canada: in 1988, approximately 50% of low-income Canadian families were headed by full-time workers.[106]

Essentially the legal responses to poverty in Ontario and Canada have been shaped by the values and assumptions of the law-makers. The experience of the outsiders, the poor, particularly the able-bodied poor, is not acknowledged by the legislation. Instead, the legislation perpetuates myths about unemployment and employment that maintain Canada's capitalist political economy and support the high level of wealth of the privileged.

3.6 Current/Recent Government Action

Every discussion of reforming current legislation and attempting to alleviate poverty either addresses or assumes the stereotypes and assumptions emphasized throughout this section. Below, I will highlight some very recent examples of the persistence of these assumptions. This is by no means an exhaustive account of current legislative and governmental examples of creating and reinforcing stereotypes, of legitimizing prejudice and stigma.

3.6.1 Unemployment Insurance

Recent amendments to the *Unemployment Insurance Act*[107] provide that any person fired from a job because of misconduct or any person who quits his/her position is ineligible for collecting unemployment insurance. The rationale behind these provisions is reminiscent of the historical treatment of persons who were unemployed. If a person's unemployment is perceived to be the fault of that person, then he is "undeserving" of any form of public support or is deserving of only a lesser form of support. The potential effect of the new legislation will be to coerce people to remain employed in positions even if they are subjected to harassment or unacceptable conditions because of the fear of lack of financial support if they leave. This provision is tantamount to a punishment and reinforces the stereotyping of all unemployed persons as presumptively personally culpable without a consideration of individual circumstances.

The amendments also create the perception that any existing difficulties with the unemployment insurance system are subsumed in the alleged "misuse" of

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106. National Council of Welfare, "Fighting Child Poverty" (April 1990) at 27-32.

107. Unemployment Insurance Act, R.S.C. 1985, c. V-1.

the system. In the hearings before the Parliamentary Committee considering the amendments, a union presented evidence to the committee that the incidence of misuse is actually quite low. In fact, the group compared the incidence rate to the rate of fraud convictions of Conservative Members of Parliament. The presentation essentially challenges the whole assumption that misuse is rampant. The Committee reacted by requiring the group to leave and by striking their presentation from the record.[108]

Another example of this concentration on the alleged "misuse" of the system rather than substantial reform of the system was the recent reaction of the Federal Employment Minister, Valcourt, to the suggestion of establishing a free telephone line to encourage people to report allegations of fraudulent claims of unemployment insurance. The Minister acknowledged that his office was considering this idea and that he could see no reason why not to consider it.[109] This idea reflects a presumptive lack of trust on the part of legislators with respect to persons in receipt of public assistance. This lack of trust arises out of the historical set of stereotypical beliefs about people of low economic status generally and about unemployed persons particularly. The assumptions underlying the government's concern is that there are an inordinate number of undeserving people collecting unemployment insurance.

3.6.2 Where to Draw the Poverty Line

Another example of recent government action illustrating the persistence of the historical stereotypes of people in poverty is the debate of the Sub-Committee on poverty over how to define "poverty." This debate was sparked by some of the Progressive Conservative back-benchers on the Committee. The very existence of the debate fails to answer crucial questions: who is participating in the debate over the definition, how will the various definitions affect the poor, will the definition reflect the experience of outsiders; and is this a proxy for reiterating the divisions between the deserving and undeserving poor?

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108. Discussion with Consuelo Rubio, Clinical Legal Worker, Centre For Spanish Speaking People, who was a part of the group presenting the National Action Committee's (NAC) position on the legislation. March 15, 1993. Note also that Judy Rebick of NAC presented on a subsequent day and before beginning her submissions, she stated for the record her disapproval of the actions of the Committee and she also read into the record some of the information that the group had originally presented.

109. Graham Fraser, "Valcourt applauds idea of UI Fraud Phone Line" *The (Toronto) Globe and Mail* (11 February 1993). The Minister indicated the next day that "there will be no 1-800 snitch line." See "Snitch Line Goes Dead" *The (Toronto) Globe and Mail* (12 February 1993)

The latter question might be answered by the *Globe and Mail's* report of the debate:

> "The campaign to redefine poverty is another manifestation of a growing debate over the question of who is truly poor in Canada."[110]

Not surprisingly, "redefining the poverty line" in this context means lowering the line such that more people will be excluded from the category of the "truly poor." The implication is that there are people now who would consider themselves poor or who would be considered poor who do not *deserve* the classification.

The chairperson of the parliamentary subcommittee, Barbara Greene, was one of the main Members of Parliament encouraging the debate. Her rationale for focusing on the definition is that "with the current measures, it's impossible to eliminate poverty." This argument would suggest, then, that changing the definition of poverty is one way to actually eliminate part of it. Ironically, the Conservative argument suggested an understanding of poverty as a social construction: poverty is what society or the legislature defines it as being.

A bottom-up reaction to this recognition of the social constructedness of poverty would focus on the fact that so much of this construction has moral undertones. It would concentrate on the effects of that construction on people in poverty. The perspective of Greene and her government supporters, however, is top-down. To look at poverty from the top-down is not even to see those who are poor. From the perspective of the privileged, poverty is a social problem and privileged money is needed to eliminate it. Therefore, the main focus from the top is cost. If the government can construct poverty into a smaller problem, it will presumably cost less to eliminate it. The problem will become more "manageable."

Obviously, the difficulty with this perspective is that poverty becomes faceless. It becomes a set of numbers and questions about quality of life, freedom, and equality are factored out of the whole issue.[111] As argued by Patrick Johnston, the Executive Director of the Canadian Council on Social Development, finding a new measure of poverty is not going to make any difference to people living below what is currently considered the poverty line. Johnston emphasizes that there is already a clear indication that there is a depth of

110. Geoffrey York, "MPs try to move the poverty line" *The (Toronto) Globe & Mail* (24 February 1993) A1, A2.

111. This seemed to be the fear and frustration of Chris Axworthy who "stormed out" of the subcommittee meeting saying "you care about the numbers, I care about the people." See York, *ibid.* at A2.

poverty for people living with incomes below the Statistic Canada's Low Income Cut-Off Lines and above the basic needs line that Greene would advocate.

This debate over who is really poor and the pitting of a "basic needs line" resembles what Nancy Fraser has termed the "politics of need interpretation."[112] Fraser questions the assumptions behind interpretations of needs that are posited as unproblematic and notes that when dominant social groups interpret needs, those interpretations often reinforce the dominance of those groups.[113] One might question whether the debate over poverty lines is not really the same debate using a different alias.

Essentially, the debate between Johnston and Greene, and their respective supporters, is one of approach and the approaches being debated are bottom-up and top-down.For persons in poverty, the debate over where the poverty line should fall has serious implications for their voice and identity. Essentially, the government, economists, social activists, and academics will engage in a debate over how to define them.[114] This process involves an objectification of people and it reinforces relative positions of power. As Dale Spender has argued, only the privileged have the power to name and to define things into existence.[115] Without power, there is no voice. The debate in the sub-committee on poverty, in setting its agenda as seeking for a new measure of poverty, is an exercise of power. Their consultation is a further exercise of power as people who are *not* poor define who is poor.

Furthermore, focussing on the definition of poverty diverts public attention and resources away from more substantive issues such as eliminating poverty,

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112. N. Fraser, "Contests as Political Conflicts in Welfare-State Societies" (1989) *Ethics* 291 at 291.

113. *Ibid.* at 292-3.

114. This process is somewhat analogous to the government's presumption of defining who was and who was not native by way of the *Indian Act.* See K. Jamieson. *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women and Indian Rights for Indian Women, April 1978).

115. Spender, *supra*, note 27 at 106:
"Given that language is such an influential force in shaping our world, it is obvious that those who have the power to make the symbols and their meanings are in a privileged and highly advantageous position. They have, at least, the potential to order the world to suit their own ends, the potential to construct a language, a reality, a body of knowledge in which they are the central figures, the potential to legitimate their own primacy, and to create a system of beliefs which is beyond challenge (so that their superiority is 'natural' and 'objectively' tested)."

securing adequate minimum standards of living, or discrimination against people in poverty.

4. The Ontario Human Rights Code Route

4.1 Conducive Aspects of the *Ontario Human Rights Code*

The underlying philosophy of the *Ontario Human Rights Code*, stated its preamble, suggests that the it is an ideal mechanism for responding to the pervasiveness of povertyism:

> "WHEREAS recognition of the *inherent dignity and the equal and inalienable rights* of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario to recognize the *dignity and worth of every person* and to provide for equal rights and opportunities without discrimination that is contrary to law, and *having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community* and able to contribute fully to the development and well-being and the Province;"[116]

The discussion in the preceding section illustrated that there is clearly a lack of respect for the dignity and worth of people in poverty because of their poverty. Furthermore, for people in poverty, there appears to be a climate of stereotyping, not understanding. A climate of understanding would involve a common understanding of poverty as a social construction, not a widely-held assumption that poverty is an indisputable indication of personal and moral culpability.

The discussion in the previous section also illustrated that the stigma and stereotypes about the poor have enjoyed several hundred years of institutional legitimation. Povertyism permeates our legal structures, it is part of our culture of capitalism, it is a hegemonic ideology.

The systemic nature of povertyism requires a systemic remedy. Just as legislatures have legitimized and thereby perpetuated, if not created, stereotypes about people in poverty, so can legislatures begin to dispel such stereotypes. It is my submission that the *Ontario Human Rights Code* has the potential to undertake a systemic approach to the alleviation and eradication of povertyism. A systemic approach would involve challenging stereotypes about people in poverty at every social level: poverty must be understood to be a

116. *Supra*, note 4, Preamble [Emphasis added].

product of our political economy, a social construction rather than a personal failure.

The *Ontario Human Rights Code*, with the Human Rights Commission, could be a viable, vital avenue for this approach. Despite existing problems with the Commission, the *Code* has the ability to challenge the attitudes of more than just governments. In particular, the protected areas of services, goods, facilities, accommodation, and employment suggest a wide array of social relations that may be subject to investigation and challenge when discrimination is alleged.

One extremely attractive aspect of the *Ontario Human Rights Code* for fighting povertyism is the remedial potential of the Boards of Inquiry. Bruce Porter, Director of the Centre for Equality Rights in Accommodation (CERA), has speculated that part of the reluctance on the part of courts in equality litigation under the *Canadian Charter of Rights and Freedoms* to recognize povertyism is that they are afraid of the magnitude of the remedies involved and often, when the remedy would involve changes to legislation, the courts couch that reluctance in terms of deference to Parliament.[117]

The remedies available via the *Ontario Human Rights Code* are potentially far more creative that those available through *Charter* litigation. Where a Board of Inquiry finds that a party has contravened section 8 of the *Code* by infringing the various rights outlined in Part I, section 40(1)(a) empowers the board to, by order,

> "direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices."

The wording of the section suggests that the scope of this power rests on the imagination of the board, counsel and the parties involved. As Judith Keene notes, "it would be difficult to conceive of an award power more broadly drafted than that."[118]

Several boards of inquiry have made orders requiring extensive staff retraining in awareness and understanding of issues surrounding the protected ground found to have been discriminated against as well as orders which have stipu-

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117. Candian *Charter of Rights* and Freedoms, s.15, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter *Charter*). Interview with the author (2 December 1992), Centre for Equality Rights in Accommodation.

118. J. Keene, *Human Rights in Ontario*. 2d ed. (Toronto: Carswell, 1992) at 367.

lated ongoing monitoring of the practices of the parties contravening s.8.[119] As Chief Justice Dickson (as he then was) emphasized in *Action Travail des Femmes v. Canadian National Railway Co.*, "there simply cannot be a radical disassociation of remedy and prevention. Indeed there is no prevention without some sort of remedy."[120]

The link between training or educating as a remedial order and the prevention of povertyism is vital. As a case in point, consider the Street Health story at the beginning of the paper. If one of the people in the survey, or perhaps even Street Health itself, could bring a claim against a particular clinic or hospital alleging discrimination on the basis of poverty in the delivery of health services, it might be possible to alleviate the problems described in the story to some degree. If such an investigation found that discrimination had occurred or, perhaps, the duty to accommodate had not been fulfilled, staff training on poverty issues and the particular health needs of people in poverty might successfully dispel stereotypes and alter attitudes. Eventually, such action might result in substantive improvements in access to health services for people in poverty.

Similarly, Jane Doe's experience at the student awards office would suggest discriminatory treatment of her by the awards officer because of factors such as her income, race, age, and family and marital status that distinguish her from the "normal" undergraduates at an university. If such attitudes in the awards office were proved to have a disparate impact on people sharing common characteristics with Jane amounting to discrimination, staff might be given awareness training with respect to the differences that they discriminate against.

The Cornish Report also considered the issue of remedies and emphasized the need for "proactive measures to remove group disadvantages and thus deal with underlying discrimination rather than focusing only on individual compensation."[121] This is commensurate with the goal of the preceding scenario

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119. See for example, *Hendry v. Ontario (Liquor Control Board)* (1980), 1 C.H.R.R. D/160 (Ont Bd. of Inquiry); the Board ordered the design of a program to address sex discrimination and required that the party report back on its progress; *Dhillon v. F.W. Woolworth Company* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inquiry); the Board ordered the creation of a race relations committee with various specific objectives as a well as monitoring; *Booker v. Floriri Village Investments Inc.* (1989), 11 C.H.R.R. D/44 (Ont. Bd. of Inquiry) The Board ordered a landlord to change his rental application and also required future monitoring.

120. (1987), 40 D.L.R. (4th) 193 at 212 (S.C.C.).

121. Ontario, *Report of Ontario Human Rights Code Review Task Force: Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen's Printer, 26 June 1992) at 144 (Chair: Mary Cornish) [hereinafter "Cornish"].

and many situations of povertyism. As John Clarke of the Ontario Coalition Against Poverty has indicated, issues like the above do not fit naturally into an individual rights notion of adjudication: when the issue relates to poverty, "it's an issue for the whole impoverished community."[122] Therefore, the implementation of the Cornish Report's recommendations relating to a shift in focus to addressing group-oriented discrimination[123] would bolster the potential of the Commission to alleviate povertyism.

The Commission is capable of pursuing a proactive role in the community beyond the context of remedies. An education campaign addressing issues of povertyism could initiate dialogue in the community and might begin the necessary process of challenging the assumptions about people in poverty that many people may have even without realizing. As suggested earlier, povertyism, unlike many other forms of discrimination, exists uncensured in popular and political discourse.

While the potential use of the *Ontario Human Rights Code* in terms of challenging povertyism and possibly changing attitudes in a broad, systemic way is extremely important, it may or may not be the most important possible outcome of this use of the *Code* for some people in poverty. Far more pragmatically and immediately, the addition of "poverty" to the *Ontario Human Rights Code* would provide a mechanism for securing access to housing, services and facilities that might be crucial to the survival of people in poverty.

For example, currently, CERA will currently intervene immediately on a behalf of a client who has been denied housing on a discriminatory basis and secure the rental space before it is rented to someone else.[124] Therefore, if the *Human Rights Code* protected against discrimination on the basis of poverty, someone like Dawn Kearney could contact CERA as soon as she is denied housing. CERA could then contact the landlord to apprise them of the provisions in the *Code*. Such information might be sufficient to secure housing for Dawn. In the context of "receipt of public assistance," CERA found that many landlords were unaware that they could not legally refuse accommodation on this basis. Merely informing discriminating landlords of the section has secured accommodation for many CERA clients.[125]

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122. J. Clarke, *supra*, note 5.

123. Cornish, *supra*, note 120 at 146-147.

124. Bruce Porter, *supra* note 116.

125. *Ibid.*

In another example, Jane might be able to turn to the *Ontario Human Rights Code* because of the telephone company's refusal to provide their services to her. The issue in such a case would likely focus on whether the $100 is, in fact, a bona fide requirement for use of the service or not. If, for example, the company was capable of providing phone services without the options of long distance calls and Jane could make the monthly payments for such service, the company could potentially be required to allow that option rather than prevent people in poverty, like Jane, from having phone service. Such an argument would likely be particularly successful if there is only one phone company in the province and phone service was shown to be an essential service in today's society.

4.2 Potential Problems with the *Human Rights Code* Route: the Rights Critique

My undertaking in this paper is, in the words of Bartholomew and Hunt, to argue for a "rights-claim," to aspire "to convert a moral right [rights-talk within moral discourse] into a legal...right."[126] It is to aspire to expand the *Ontario Human Rights Code* to include "poverty" as a grounds of discrimination such that people in poverty may claim a legal right not to be discriminated against on the basis of that poverty. Such an undertaking necessarily calls into play the "rights debate," part of which might be invoked against my argument. I shall here contemplate various arguments in that debate briefly.[127]

4.2.1 The Debate

Several critical legal studies ("CLS") scholars have questioned the use of rights strategies in effecting social change. Such critiques have actually suggested that the liberal theory of rights reinforces the culture of capitalism, or at least the state's control over the individual. The main arguments criticizing the effectiveness of and reliance on rights are stated briefly below:

> "(1) Once one identifies what counts as a right in a specific setting, it invariably turns out that the right is *unstable*; significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated. (2) The claim that a right is implicated in some settings produces *no determinate consequences.* (3) The concept of rights falsely converts into an *empty abstraction (reifies)* real experiences that we

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126. Bartholomew & Hunt, "What's Wrong With Rights?" (1990) 9 *Law and Inequality* 1 at 7. See also Hunt, *infra* note 144, at 321: "Rights-claims are interests interpellated into the normative language of rights which embody some claim to legitimation by analogy or extension from other rights."

127. For a more detailed account of the debate, see Hunt and Bartholomew, *supra* note 125; see also Judy Fudge and Harry Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 Social & Legal Studies 45.

> ought to value for their own sake. (4) The use of rights in contemporary discourse *impedes advances* made by progressive social forces."[128]

Because of these shortcomings, rights-talk is precluded from any political effectiveness except for very transient advantages.[129] The root of all of these limitations is apparently the fact that rights-talk takes place outside of a social context; both the right and the incident analyzed are abstracted. Furthermore, the individual rights-bearer him/herself is also abstracted and removed from a social context, rendered autonomous. Therefore, his/her individual "awareness of [his/her] connection to and mutual dependence upon others" is inhibited.[130] If the individual is configured in relation to others, some CLS critics argue that such a relation is only made possible because the state has permitted its existence.[131]

Ultimately, the critics argue, rights are virtually useless if not harmful and all that rights discourse will have succeeded in accomplishing is the creation of false hopes and false consciousness on the part of the rights litigant.[132] Any success derived from rights litigation has little impact and is used by the status quo to prove that the existing system is just.

These rights critiques have themselves been critiqued particularly by outsiders such as feminist and minority scholars. One of the main contentions of such outsiders who disagree with the outright condemnation of rights discourse is that the rights critiques fail to distinguish between recognized legal rights and rights claims.[133] For example, Elizabeth Schneider, has argued from a feminist perspective, that rights critiques fail to contemplate the dialectical relationship that she identifies between "the assertion of rights and political struggle in social movement

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128. Tushnet, "An Essay on Rights" (1984) 62 Texas L. R. 1363 at 1363-4. See also Trubek, "Where the Action is: Critical Legal Studies and Empiricism" (1984) 36 Stanford L.R. 575.

129. *Ibid.* at 1371, 1384.

130. E. Schneider, "The Dialectic of Rights and Politics: Perspectives From the Women's Movement" (1986) New York U. L. R. 589 at 595; Tushnet, *ibid.* at 1393.

131. P. Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Texas L. R. 1563 at 1577; see also Gabel & Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1983) in *Critical Legal Studies*, A. Hutchinson, ed. (New Jersey: Rowman & Littlefield, 1989).

132. A.Hyde, "The Concept of Legitimation in the Sociology of Law," (1983) Wisconsin L. R. 379 at 397.

133. For example, Bartholomew & Hunt, *supra*, note 126 at 9.

practice."[134] According to Schneider, the claiming of a right is capable of constituting a political statement and the process of asserting that right may in itself be socially and politically transformative in its capacity to affect individual and collective consciousness.[135]

Similarly, the minority critique of CLS arguments also emphasize the CLS critiques' failure to recognize the political value of claiming rights.[136] Patricia Williams and Richard Delgado both suggest that the CLS condemnation and dismissal of rights discourse is informed by a white, privileged experience with rights, rather than a minority experience.[137] Delgado, in particular, questions the authority of "radical" CLS scholars who conclude that rights discourse only reinforces existing power structures, that some rights claims are allowed only to quell the discontented masses. He counters that "minorities know from bitter experience that occasional court victories do not mean the Promised Land is at hand" and that they are, therefore, not duped by the powers that be. Furthermore, Delgado challenges the assumption that all successes in exercising rights will induce complacency; instead, he emphasizes that some "whet the appetite for further combat."[138] Essentially, Delgado emphasizes the paternalism of several of the CLS assumptions. He maintains a bottom-up perspective which recognizes that piecemeal reform sometimes brings victories which may seem very insignificant to a privileged academic but extremely important to the historically victory-less.

Williams also questions the paternalistic approach of the CLS scholars in assuming that rights claimants will fall victim to false consciousness. She emphasizes that rights are not ends in themselves,[139] and while she acknowledges that rights may be indeterminate and unstable,[140] she rejects the conten-

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134. Schneider, *supra* note 130 at 597.

135. *Ibid.* at 599, 611-18; see also F. Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 Texas L. R. 387 at 394, 430.

136. P. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harvard Civil Rights-Civil Liberties L. R. 401; R. Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 Harvard Civil Rights-Civil Liberties L. R. 301.

137. Williams, *ibid.* at 405-6:

> It is my belief that blacks and whites do differ in the degree to which rights-assertion is experienced as empowering or disempowering. The expression of these differing experiences creates a discourse boundary, reflecting complex and often contradictory societal understandings.

See also Delgado, *ibid.*

138. Delgrado, *supra*, note 136 at 308.

139. Williams, *supra*, note 136 at 410.

tion that these inherent characteristics render rights discourse useless.[141] Williams acknowledges the symbolic significance of rights discourse for outsiders:

> "For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the dues, the respectful behaviour, the collective responsibility properly owed by a society to one of its own."[142]

Essentially, rights discourse has the potential of raising consciousness, not instilling false consciousness.[143] It is not the right itself that holds this potential but the process of engaging in the discourse of rights.

The crucial contention of all of these counterarguments to rights critiques is that CLS arguments are themselves abstract in that they fail to consider the perspectives of outsiders. Perhaps rights discourse is an insufficient mechanism for achieving the ultimate new world order that some CLS scholars envision. Dismissing rights discourse because of this, however, sacrifices the potential intermediary benefits of rights discourse afforded to outsiders. To reject rights discourse is to maintain the perspective of privileged scholars much like, in their argument, embracing rights discourse maintains the privilege of individuals of status quo social arrangements.

More recent voices in the rights debate have emphasized that a further difficulty with rights critiques is their conflation of "rights" and "litigation."[144] The problem of abstracting experiences and individualizing rights claims as though they are separate from a broader social context might more appropriately

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140. *Ibid.* at 409.

141. *Ibid.* at 410: "While rights themselves may not be ends in themselves, it remains that rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come...Change argued for in sheep's clothing of stability (ie "rights") can be effective, even as it destabilizes certain other establishment values...The subtlety of rights' real instability thus does not render unusable their persona of stability."

142. *Ibid.* at 416.

143. See also Delgado, *supra*, note 135 at 305:
"Crits argue that rights separate and alienate the individual from the rest of the human community. This may be true for the hard-working Crits who spend much of their lives in their studies and law offices. For minorities, however, rights serve as a rallying point and bring us closer together."

144. See A. Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17 J.L. and Society 309 at 309, 317.

be seen as a product of litigation rather than of rights discourse per se.[145] Similarly, the contention that rights bring only insignificant victories might be shortsighted: the actual demand made in any specific case might be relatively minor[146] but the mobilization around the issue and the process involved in making and deliberating the claim may in fact be quite significant in terms of awareness and structural change.[147] Alan Hunt also argues that litigation that "fails" may,"paradoxically, provide the conditions of "success" that compel a movement forward."[148]

The emerging ideas in the rights debate represent a move away from pro- and anti-rights stances.[149] Instead, the focus is on how to engage in rights discourse as a counter-hegemonic strategy.[150] Fudge and Glasbeek describe "hegemony" as

> a form of rule which exists not only in political institutions and relations but also in active forms of experience and consciousness."[151]

Under this form of rule, the ruling class [the insiders] convinces the subordinate classes [outsiders] to internalize the ruling class's "norms" and its values. Because the reality of the experiences of the outsiders conflicts with the norms which they internalize, hegemony must always be "reforged and reinforced."[152] Rights discourse, the assertion of and mobilization around rights, may possess the potential to constitute counter-hegemony, to challenge and dismantle existing hegemony such that perspectives and values other than those of the ruling class might come to exist in political institutions and relations, in active forms of experience and consciousness.[153]

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145. *Ibid.* at 317-18.

146. This suggestion is only for the purpose of the following argument. I still acknowledge that "minor" is a judgement that could very well differ between outsider and insider perspectives.

147. Hunt, *supra*, note 144 at 319. Hunt uses the example of litigation around single issues that are significant for larger movements such as the abortion issue for the women's movement.

148. *Ibid.* at 320.

149. See Bartholomew & Hunt, *supra*, note 126 at 53.

150. See Hunt, *supra*, note 144; Fudge and Glasbeek, *supra*, note 127.

151. Fudge and Glasbeek, *supra*, note 126 at 46.

152. *Ibid.* at 46.

153. *Ibid.* at 47.

4.2.2 The Debate and the Addition of "Poverty"

Rather than precluding the idea of expanding the *Ontario Human Rights Code* to include "poverty," the rights debate merely emphasizes that the process involved in adding the section as well as the process involved in using it are more crucial than the mere fact of its inclusion.

The debate also suggests that the addition of "poverty" cannot be a strictly legal strategy; it must be primarily both social and political. As such, the process around its addition and use must begin and continue with the involvement of people in poverty and anti-poverty groups. As indicated at the very beginning of this paper, the idea of expanding the *Ontario Human Rights Code* appears to have grown out of at least part of the poverty community.[154]

In this regard, outsiders must be directly involved in the process of legislative reform discussed in this paper such that the reform "respond[s] to [the] strategic needs that emerge as poor people mobilize."[155] With this involvement, the legislation and its use is more apt to reflect outsider perspectives. In other words, a truly counter-hegemonic strategy would be one which engages with outsiders such that it is the outsiders who challenge the hegemony with their own perspectives and experiences and not insiders who purport to challenge the hegemony with their interpretation of outsider perspectives.[156]

A very specific aspect that mandates the involvement of outsiders is the wording of the legislation. I have consciously refrained from discussing how a section including poverty would be worded because something so defining and crucial as the articulation of this section could only be achieved by the outsiders with the relevant experience and understanding of the discrimination.

The success of the addition and use of "poverty" must also be ultimately determined by outsiders. Whether the accommodation and services secured through the invocation of the section or the degree of awareness achieved through its proactive use are important and worthy of the effort involved must be judged by the outsiders whose lives are most affected by the section and its use.

5 Conceptions of Discrimination

One of the difficulties of this paper is that in arguing for the inclusion of "poverty" in the *Ontario Human Rights Code*, it may appear that I am perceiv-

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154. *Supra*, note 6.

155. L. E.White, "*Goldberg v. Kelly* on the Paradox of Lawyering for the Poor" (1990) 56 Brooklyn L. R. 861 at 872.

156. See L. E.White, "To Learn and Teach: Lessons From Driefontein on Lawyering and Power" (1988) Wisconsin L. R. 698 at 739-42.

ing povertyism as a narrow experience where the discrimination relates only or mostly to the low income level of the victim. It may also appear that I am suggesting that every person who is a victim of povertyism has had the same kind of experience. The stories opening this paper are testimony that such suggestions are untrue. Neither all people in poverty nor their experiences of povertyism are homogeneous. Furthermore, poverty is not the determining characteristic of a person's social identity.

The categorical structure of the *Human Rights Code* would suggest that discrimination is divisible along lines of race, gender, ableness, age, sexual orientation, and family and marital status. Adding poverty to this list of grounds, then, might also suggest that povertyism is separable from experiences such as racism and sexism. Both the structure of the legislation and the discourse on discrimination predisposes victims of discrimination and their counsel to choose between the various grounds available in order to identify the discrimination experienced. Victims are required to fit their experience into the structure of the legislation.

Discrimination, however, may be an act and experience consisting of various components of any one individual's identity. A focus on a person's low economic status in isolation from his/her other social identities such as gender, race, ableness, sexual orientation and age could well present an inaccurate depiction of the actual experiences of victims of discrimination.

Turning to the *Ontario Human Rights Code* as a mechanism for addressing povertyism may implicitly appear to accept the structural framework of the legislation and the complaints process. In fact, however, it is the problems of this framework that mandate a focus on the *Code* and its failure to consider poverty. Arguing for the inclusion of economic status challenges the existing categories of the *Code*. It forces the *Code* to consider the experiences of the economically disadvantaged members of the disadvantaged groups already protected by the existing categories.

Adding poverty to the *Ontario Human Rights Code* is not an attempt to protect a large group of people currently unprotected by the *Code*. Adding poverty would provide a different kind of protection to sub-groups of people who are currently only partially protected by the *Ontario Human Rights Code*.

In the following section, I will highlight the difficulties with a categorical approach to conceptualizations of discrimination and oppression generally. I will then focus specifically on how the absence of "poverty" in the *Ontario Human Rights Code* guarantees the legislation's inability to respond to the very real experiences of discrimination for disadvantaged people and ensures that the legislation will only benefit the most economically privileged of the

protected groups. Finally, I will emphasize that the existing approach to discrimination reflected in the *Ontario Human Rights Code* is an example of a top-down approach.

5.1 Analyses of Discrimination

5.1.1 Categorical Analyses

Scholarship in various fields of social science, including law, feminism, anthropology and sociology has tended to divide discussions of oppression and discrimination into watertight compartments or categories such as class, gender, and race.

a. Experience

The result of analyses which adopt such an approach is an outright inability to reflect the actual experiences of people who are members of more than one marginalized group. The analysis is defined by a categorical structure unconnected to real social experience. Whereas the analysis might privilege one part of a group's identity as determinative of the oppressive experience, many people experience oppression as the culmination of having a social identity with several marginalized components. Marlee Kline has noted the simultaneous nature of the experience of discrimination:

> "Descriptions and analyses by black women, First Nations women, Asian women, South Asian women, and other women of colour clearly demonstrate that these women cannot overlook or dismiss the complexity of interaction between racism, sexism and class oppression in their lives. Women of colour tend to experience various forms of oppression simultaneously. As a result, they find it difficult, if not impossible, to separate experiences they attribute to their gender from those ascribed to their race, class or other differentiating characteristics."[157]

Such simultaneity of experience and the difficulty of framing the experience under the framework of one area of discrimination might be observed in the situation of Jane Doe at the Student Awards office. She experienced discrimination in terms of receiving an inferior quality of service from the Awards Officer. Even if the *Ontario Human Rights Code* included poverty as a grounds of discrimination, her poverty, evidenced by her lack of employment and income from Family Benefits, may not have been what Jane perceived as the primary basis for the differential treatment. Similarly, the assumptions made by the Awards Officer may not have been related entirely to Jane's low economic status. Several other factors could well have been informing the

157. M. Kline, "Women's Oppression and Racism: A Critique of the "Feminist Standpoint"" in J. Vorst, ed., *Race, Class, Gender: Bonds and Barriers* (Toronto: Between the Lines/The Society for Socialist Studies, 1989) 37-64 at 43.

whole incident: her race and any stereotypes about inferior motivation or intelligence associated with it, her marital and family status as a single mother with any stereotypes associated with single mothers such as irresponsibility, her age as a mature student, or her gender. Clearly, it would be difficult initially to separate the grounds of discrimination and ultimately to base any claim of discrimination on any one ground.

The root of the difficulty with categorical approaches in social analyses is that they begin with pre-defined concepts extracted from social experience. These extractions are then studied as isolated units and once some "understanding" of the units is achieved, they are reapplied to experience. An analogy might be drawn to a designer removing a garment from a person, analyzing it, reducing it to a pattern, handing only that pattern back to the person and then expecting her to wear that in public. Once the "categories" are removed from social reality they are severed from the other overlapping experiences that give the "category" meaning for any one particular group or individual. As Roxanna Ng suggests,

> "the difficulties encountered by these [social] theorists in understanding the interrelationship between ethnicity and class has to do with the fact that they treat these phenomena as analytic categories whose relationship to each other can be established only abstractly, through the construction of clever analytic schema developed to discover correlations between variables. In this kind of approach, ethnicity and class are conceptualized as variables which have no actual relationship to one another in the everyday world...."[158]

In the every day world, people's experiences do not conform to "clever analytic schema."

If anti-discrimination legislation is to respond to and protect victims of discrimination in the every day world, it cannot simply follow a categorical approach. Asking a complainant to decide which ground to base her/his complaint on is asking him/her to separate her/his experiences, to draw arbitrary and inaccurate divisions in her/his identity. The complainant bears the burden of reducing her experience to a fiction for the convenience of the legislative scheme.

b. Privilege/Marginalization

Kimberle Crenshaw has illustrated further that, in the context of anti-discrimination legislation, a categorical approach or, in her words, a "single-axis approach"[159] serves to once again marginalize victims who are already most

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158. R. Ng, "Sexism, Racism, Nationalism" in Jesse Vorst, ed. *Race, Class, Gender: Bonds and Barriers* (Toronto: Between the Lines/The Society for Socialist Studies, 1989) 10-25 at 13.

marginalized in society. The experiences of the single categories are defined by the perspective of the more privileged members of that category. With respect to the experiences of Black women, for example, Crenshaw notes that

> "in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women."[160]

As people who are actually experiencing discrimination as a result of multiple aspects of the identity tailor their experience to fit the legislation, they actually reinforce the privileged conceptions of categorical discrimination described by Crenshaw. In the case of women of colour, for example, Nitya Duclos notes that

> "The law as it stands requires racial minority women to become what they are not. In order to win a discrimination case they must make themselves into people who diverge from the dominant group in only one respect."[161]

In effect, then, the categorical nature of the legislation leads to a privileged construction of the discrimination which not only fails to reflect the experience of victims but also forces them to participate in their own marginalization.

In the context of povertyism, a manifestation of this problem would be a situation where conceptions of poverty and povertyism are defined in the context of the experiences of white males in poverty. An example of the problem with such an analysis is that services like childcare would not be seen as a poverty issue. Instead, they would be constructed as "women's" or gender issues. As a gender issue, childcare services would likely then be approached with a distinctly middle class perspective.

Altough the categorical human rights legislation is attempting to protect people in marginalized groups, it protects the most privileged people of those groups. The most privileged are those who belong to one group alone.

5.1.2 Additive Analyses

Whereas a categorical approach to discrimination would tend to isolate the experience of discrimination by mandating either/or considerations, an additive approach[162] would recognize that victims of discrimination are sometimes

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159. K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) The University Of Chicago Legal Forum 139 at 139.

160. *Ibid.* at 140.

161. N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 5 Canadian J. of Women and the L. at 39.

members of more than one protected group. An additive approach would enable a claimant to conjoin grounds, to graft one form of discrimination onto another. An example might be the homeless women surveyed by Street Health. If they or a group on their behalf were to bring a Human Rights claim because of the discriminatory treatment they experienced in the context of health services, an additive approach to discrimination would enable them to make their claim as women and as people in poverty, on the on the basis of both poverty and gender, if both factors informed their experiences.

a. Privilege/Marginalization

Even where two categories are analyzed together, however, one is often reduced into an extension or peripheral concern of the other. For example, a Marxist analysis that also considers aspects of race or ethnicity will premise its analysis on class structure and then explain the existence of race differences and problems in terms of class rather than in its own right. Similarly, a feminist analysis that focusses on male oppression will define all women's experience of discrimination primarily in terms of gender and issues of race and class become more of an afterthought.

Sharene Razack has examined this additive approach in terms of the tendency of feminist theory to consider issues of race and class as "background scenery" in the larger picture of male oppression:

> "Along the path to a more inclusive feminist theory and practice, it is tempting to reduce the theoretical and practical tasks at hand to merely "adding" on layers of oppression by grafting racism on to sexism, as understood by white women."[163]

The difficulty with this approach is that a substantial part of some people's social identity becomes a subordinated issue.

As an example, consider again the women in the Street Health survey. An additive approach might focus, first, on the poverty issue analyzed primarily from a male perspective. The second addition to the analyses might then be the outstanding issues of gender.

Therefore, additive approaches reflect the privileged perspective of the analyzers. In terms of some feminist theory, for example, white middle class

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162. Another term for an additive approach to discrimination is "double discrimination." See P. Smith, "Separate Identities: Black Women, Work, and Title VII" (1991) 14 Harvard Women's L. J. 21 at 27.

163. S. Razack. "Speaking For Ourselves: Feminist Jurisprudence and Minority Women" (1992) 4 Canadian J. of Women and the L. 440 at 454.

feminists focus primarily on gender because their privileged whiteness and economic positions do not inform their experience of discrimination. Razack illustrates this problem with additive analysis through an analogy articulated by Elizabeth Spelman:

> "Additive analysis...is comparable to inviting someone to your home. The gesture is superficially inclusive but the guest visits under the terms of the host and is only there at the latter's desire."[164]

This difficulty has been illustrated in some American anti-discrimination jurisprudence in cases involving what has been termed a "sex-plus" discrimination—discrimination involving sex and another category.[165] In a situation involving discrimination against Black women, for example, such an approach focuses on the fact that the complainant is a woman and then turns to her being Black as a secondary concern. Black women are then considered a *sub-class* protected by the anti-discrimination legislation.[166] This additive approach, like the categorical approach, essentially imposes the same impossible choice on people of two disadvantaged groups with one slight difference: instead of deciding which ground under which they must frame their entire claim, they must decide which ground reflects the *principal* part of their identity and which reflects the *subordinate* part.[167]

b. Experience

A further difficulty with additive approaches is that, like categorical approaches, they do not adequately reflect the experience of the victim of discrimination or the assumptions implicit in the act of discrimination. The reason for this problem is that at the root of additive analyses are categorical compartments. Additive approaches are really simply evolved stages of categorical approaches.

Consider, for example, the sexual harassment of women of colour. A categorical approach would require the victims to decide whether what they experienced was sexual or racial discrimination. If they chose (or had chosen for them) sexual discrimination, issues of race would not enter the consideration of the experience of harassment.

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164. *Ibid.*

165. C. Scarborough. "Conceptualizing Black Women's Employment Experiences" (1989), 98 Yale L. J. 1457 at 1469. See also Smith, *supra*, note 162 at 40.

166. *Ibid.* See specifically *Jeffries v. Harris Community Action Ass'n*, F.2d 1025 (5th Cir. 1980).

167. See Scarborough, *supra*, note 165 at 1471.

An additive approach would enable a victim to claim both racial discrimination and sexual discrimination; however, as Crenshaw has indicated, the discourse of sexual and racial discrimination have developed from privileged perspectives and neither will adequately explain all situations of sexual harassment of women of colour.

For example, a Black female victim of sexual harassment might have been harassed or might perceive the harassment as inextricably linked to the stereotypical assumptions surrounding the sexuality of black women and the Black female slave experience of sexual exploitation by white slavemasters.[168] Similarly, a Chinese woman's experience of sexual harassment might arise directly from popular portrayals of Chinese women as passive and sex-slaves to white men.[169]

In these situations, the black female victim is not experiencing discrimination because she is a woman and because she is black. She is experiencing discrimination because she is a black woman. Similarly, the Chinese woman is experiencing harassment because she is a Chinese woman.

Sexual harassment is an example used by several writers challenging categorical approaches in anti-discrimination legislation. However, these examples could be further complicated by considerations of economic status. A woman of colour in a low-paying job may be particularly vulnerable to a harassing employer who knows that her economic status and that of her children depend on the job that he has the power to terminate. Furthermore, if the woman is a poor single mother, assumptions about promiscuity may also inform a harasser's assumptions about his victim, particularly if he knows her children were born outside of marriage.

As the above examples illustrate, to approach the experiences of these victims within an additive framework would fail to comprehend the interactive nature of the discrimination.

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168. See E. C. Jordan. "Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse" (1992) 15 Harvard Women's L. J. 1 at 17-19. See also J. Winston, "Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990" (1991) 79 California Law Rev. 775 at 785; "society continues to exploit black women sexually and to perpetuate the perception that they invite sexual encounters and abuse."

169. See Winston, *ibid.* at 785; "The modern American film industry portrays Asian women as stereotypical passive figures whose main purpose in life is to serve either as love interests for white men, or as devious madames and untrustworthy prostitutes."

5.1.3 Interactive Discrimination

"Interactive discrimination" is an approach to discrimination that acknowledges the overlapping, indistinguishable and mutually informing nature of discrimination as an act and experience. For example, the women in the Street Health survey might make a claim that they were discriminated against, not as woman and as people in poverty, but as women in poverty.

a. Experience

Arguing for an interactive approach to considerations of discrimination is not to replace one categorical analysis with another. In other words, it is not to suggest, that every incident of discrimination involving a victim from multiple marginal groups calls into play every aspect of her/his identity. Not all discrimination is interactive discrimination.

The goal of arguing for an interactive consideration of discrimination is to argue for a legislative scheme and judicial understanding that is as flexible and dynamic as life itself. It is extremely important that, even if we attain a forum for understanding interactive discrimination, we do not automatically presume that all aspects of a person's identity are relevant to the discrimination examined. Crenshaw notes that the experience of people who fall under more than one "category" do not always experience the effects of being members of that category in the same way. Again working from the perspective of Black women, Crenshaw illustrates the variety of possible experiences:

> "Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women."[170]

Therefore, what is important is that we approach discrimination with a bottom-up perspective. We must consider specifically what the effect of any one incident is on the specific victim. We must make space for the most disadvantaged people in society to adequately articulate their experience and we must have in place a system that will respond with adequate understanding and redress.

b. Privilege: A Bottom-Up Perspective

Throughout this paper, I have argued that a bottom-up perspective must be that of the most disadvantaged people in society, the people most likely to be discriminated against and most in need of a mechanism of redress.

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170. *Supra*, note 159 at 149.

As argued above, the most disadvantaged people in society are those who are members of several marginalized groups. Without "poverty" and without a mechanism for an interactive approach to discrimination, the *Ontario Human Rights Code* is unable to conceive of the complexity of experience of those who are most disadvantaged, those who have the least political influence, the least economic power, and the most silenced voices.

A piece of legislation with such an inability is a piece of legislation that reinforces a top-down approach. As Crenshaw indicated, when discrimination is discussed as divisible along fixed grounds, the result is a privileged conception of discrimination. Anti-discrimination legislation so constructed protects people who are disadvantaged because they are members of a marginalized group. However, the legislation is still framed from the perspective of the top of that disadvantaged group.

A bottom-up perspective would emphasize that there is not one common experience of racism, sexism, ablism, heterosexism, agism, and povertyism and that these "categories" frequently overlap and are indistinguishable.

c. *Some Complications*

Although anti-discrimination legislation which proceeds on an understanding of interactive discrimination would be ideal for protecting the most disadvantaged of marginalized people, it is a difficult concept to implement. Jody Freeman, in a discussion of the factum submitted by Egale (Equality for Gays and Lesbians Everywhere) et al. in *Mossop v. Canada (A.G.)*,[171] described some of the difficulties of attempting to explain interactive discrimination to the judiciary.[172] As she notes,

> "The effects of multiple discrimination are so entangled that they seem intransigent in the face of analytical attempts to separate them."[173]

In the American context, the potential complications of additive analysis alone has sufficed to scare some courts into extremely resistant reactions. For example, the court in one case[174] limited the "sex-plus" approach to a single plus. In other words, a Black single mother who felt she had been discriminated against on the grounds of gender, race and family status would only be allowed

171. (1993) (SCC) [unreported].

172. J. Freeman, "Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" University of Toronto Feminism and the Law Workshop Series (November 1992).

173. *Ibid.* at 31.

174. *Judge v. Marsh.*, 649 F.Supp. 770 (D.D.C. 1986).

to choose gender and one of the other two grounds. The court commented that it intended to preclude the possibility of the legislation being "splintered beyond use and recognition" and becoming a "many-headed Hydra, impossible to contain."[175]

One particular problem with attempting to argue a perspective of interactive discrimination is that the adjudicative body might somehow perceive the difficulty of the concept as the fault of the complainant. Duclos illustrates this problem by noting that

> "If the complainant straddles too many categories, she is increasingly likely to lose her balance and fall through the cracks: it is no longer discrimination, it is "just her"...[176]

These potential difficulties are not sufficient reasons for abandoning attempts to work towards legislative and judicial understandings of the interactive nature of discrimination. Furthermore, as indicated above, to avoid problematizing existing conceptions of discrimination analyses is to accept the status quo categorical and occasionally additive approach to discrimination which is inherently privileged. Only those whose experience is closest to the "norm" can afford not to problematize existing categorical conceptions. Patricia Williams eloquently illustrates the need to confront complication instead of hiding behind neat legal frameworks:

> "That life is complicated is a fact of great analytic importance. Law often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these as rhetorical gestures is, it seems to me, necessary for any conception of justice. Such acknowledgement complicates the supposed purity of gender, race, voice, boundary; it allows us to acknowledge the utility of such categorizations for certain purposes and the necessity of their breakdown on other occasions. It complicates definitions in its shift, in its expansion and contraction according to circumstance, in its room for the possibility of creatively mated taxonomies and their wildly unpredictable offspring."[177]

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175. *Ibid.* at 780. See Scarborough, *supra*, note 165 at 1471-3. Note also that an American court in an earlier case expressed reluctance to possibility of even "sex plus" and maintained that allowing the combination would "clearly rais[e] the prospect of opening the hackneyed Pandora's box"; Degraffenreid v. General Motors Assembly Division, 413 F.Supp. 142 (E.D. Miss. 1976) at 145. For discussion, see Scarborough, *supra*, note 165 at 1468; Crenshaw, *supra*, note 160 at 141-3; Smith, *supra*, note 162 at 30.

176. *Supra,* note 161 at 35.

177. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard U.P., 1991) at 10-11. Also cited in Duclos, *ibid.* at 48-9.

The relatively recent proliferation of scholarship on the concept of interactive discrimination, or at least on the inadequacies of categorical and additive analyses of discrimination might suggest a mounting challenge to current anti-discrimination legislation.

5.2 The Heterogeneity of Povertyism

At the beginning of this section, I emphasized that in discussing the assumptions underlying povertyism, I am not suggesting that it is always experienced in the same way. One factor which might create differences are the varying stereotypes of the poor, depending on whether they are perceived to be "deserving" or "undeserving." The distinction of deserving or undeserving will often also relate directly to other characteristics of that person's identity which are in themselves grounds of discrimination.

For example, the assumptions made about an unemployed young black male, a pregnant single mother on welfare, a Native woman living on the street, a young white schizophrenic street youth, or an unemployed lesbian couple with children may vary widely. The factors influencing those assumptions, other than but directly related to economic status and source of income, would include race, family status, marital status, age, mental ability, sexual orientation, and pregnancy.

Therefore, just as Crenshaw illustrated in the context of racism, the experience of povertyism will vary for individuals depending on their circumstances and the other aspects of their identity. For example, in Jane's story, the telephone company had a policy in place that adversely discriminated against people in poverty. This particular experience of povertyism may not necessarily be interactive whereas Jane's experience with the Student Awards Officer is more likely interactive.

5.3 The Faces of People in Poverty

The experience of povertyism is also particularly complicated in that the reason that some individuals are poor and the nature of their experience of poverty itself is directly related and arguably caused by other aspects of their identity and experiences of discrimination. The current and persistent distribution of poverty in Canada illustrates that poverty is often directly related to other parts of people's identity which are also often other grounds of discrimination.

A disproportionate number of Canadian women as compared to men will experience poverty in their lifetime.[178] The National Council of Welfare, in

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178. Gunderson & Muszynski, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 8.

their 1990 report, "Women and Poverty Revisited," noted that 60% of Canada's poor are women.[179] Many of these women are single mothers: 57% of all single mothers live in poverty,[180] which makes family status a factor of poverty.[181]

Older women also face a higher chance of living in poverty than older men: unattached women over 65 years old face a 44% chance of being poor[182] and the overall poverty rate for elderly women is double the rate for elderly men (22% as compared to 11%).[183] Age is also a factor on the other end of the continue, as one in six Canadian children are living in poverty.[184]

Like gender and age, disability is often a contributing factor in the distribution of poverty. The majority of Canadians with disabilities live below the poverty line. Sixteen percent of the Canadian population have disabilities and, of this group, according to 1986 statistics, 16% of women and 5% of men had no income. Of those that did have income, "76% of the women and 50% of the men received less than $10,000."[185] The National Council of Welfare noted that what is particularly distressing about these statistics is that, while people with disabilities earn less than abled people and, proportionately, more of them are living in poverty, persons "with serious physical impairments need more money than other people to maintain the same standard of living."[186] Their increased needs include medical supplies and prescriptions as well as costs arising from their need for help in completing daily chores such as shopping, cleaning, or travelling.[187] When disability and family status collide, these

179. National Council of Welfare, *Women and Poverty Revisited*, (Summer 1990) at 1; [hereinafter NCW].

180. *Ibid.* at 2. Note also that "half of all women using food banks are single mothers." See S. Cox, "Women Using Food Banks" 12 Canadian Woman Studies 48.

181. Gunderson & Muszynski, *supra*, note 178 at 16-22.

182. *Ibid.* at 9.

183. *Ibid.* at 2.

184. "Children in Poverty: Toward a Better Future" (1992) 12 Canadian Woman Studies 74.

185. NCW, *supra*, note 179 at 115. For a more detailed analysis of specific factors contributing to the impoverishment of disabled women, see M. Barile, "Disabled Women: An Exploited Underclass" 12 Canadian Woman Studies 32 at 33.

186. NCW, *ibid.* at 117.

187. *Ibid.*

costs increase as disabled single mothers are faced with extensive chores relating to childcare.[188]

Finally, recent immigrants and people belonging to visible minority groups also face a disproportionate chance of living in poverty. In particular, immigrants from countries with mostly Black populations as well as native Black Canadians experience discrimination in the workforce regularly. At least one study has suggested that, in Toronto alone, "whites have three job prospects to every one for blacks."[189] Furthermore, immigrants from these countries also receive lower salaries than immigrants with similar qualifications from other countries.[190]

The poverty rate among aboriginal people is unknown but statistics have shown that a disproportionate number of aboriginal people have no income at all. Among those aboriginal people that do have incomes, the average incomes are significantly lower than those of the rest of Canadians.[191] A further consideration is that the average number of single mothers among aboriginal women is higher than that of other Canadians.[192]

The relationship between the existing protected grounds in the *Ontario Human Rights Code* and the distribution of poverty suggests that extending the *Code* to include poverty would conceivably mandate an interactive approach to discrimination. The inclusion of poverty would challenge the discrete categorical structure of the *Code*, introducing a new dynamic between the grounds. A person in poverty might perceive herself to be poor because she is female, has a disability, is a single mother, is a person of colour, or because of any combination of these possibilities. However, a similar observation cannot readily be made with the other grounds: no one is of colour because of their gender or female because of their marital status. The very nature of poverty, then, refutes a strict categorical analyses.

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188. *Ibid.*

189. *Ibid.* at 119.

190. *Ibid.*

191. *Ibid.* at 112. In 1985, 25% of aboriginal women had no income and the average income for the remainder of the group was $9,828; 19% of Canadian women had no income and the average income for the rest was $12,615. Also, 13% of aboriginal men had no income and the rest averaged $15,760; 7% of Canadian men had no income while the rest averaged $23,265; see also "Economic Issues Facing Native Women in Ontario" (1987) 4 Currents, Readings in Race Relations 6 at 7.

192. *Ibid.* at 113.

5.4 A Subjective Perspective of Discrimination

A differentiation made several times in this section has been between what the victim of discrimination experiences and what the discriminator perpetrates. A bottom-up approach to discrimination would emphasize the perspective of the outsider, the person belonging to the disadvantaged group protected by the *Ontario Human Rights Code.*

A piece of legislation that is one of the primary mechanisms for hearing the exclusion stories of outsiders must be flexible enough to hear the victim's subjective perspectives of the nature of the discrimination experienced. Ideally, a victim of discrimination should be able to articulate her complaint as he experienced it. Occasionally, the discriminator might not even consider part of what the victim alleges. For example, a victim might claim she has been discriminated against as a woman of colour when the discriminator discriminated against her as a woman. If the victim were given the opportunity to frame her complaint as she perceived it, at the very least a dialogue might be started, the victim's perspective would be heard, the discriminator might realize that race did factor into his behaviour, and overall, a learning process will have begun.

6. Conclusion

Overall, any argument advocating the inclusion of poverty in the *Human Rights Code* must realize that poverty and povertyism have different meanings for different people in poverty, depending on various other components of their social identities. The inclusion of poverty will introduce a new dynamic to the legislation. To facilitate the adequate protection of people with claims based on this ground and to address the needs of the disadvantaged of the disadvantaged, an interactive approach to discrimination must be understood and implemented.