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Social Protections & Poverty

**A study of government social policy and
the economic security of women in
Canada and the United States**

Master thesis
30 credits

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Master's Programme in International Human Rights Law and
International Labour Rights

2011-2012

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Summary

Historically, the recognition of social rights began with the International Labour Organization's 1944 Declaration of Philadelphia and its principle of social justice. Since then, a number of international human rights instruments have enshrined the rights to social protection and non-discrimination. The Canadian and United States governments have varied greatly in their respective approaches to social and economic rights. In the absence of adequate recognition of these rights, women and their economic security are disproportionately affected, as evidenced by the high rates of poverty among single mothers and elderly women in both nations, though more so in the United States. Since their starting points, the social policies of these governments have been a reflection of various political agendas and this thesis is a study of each country's social protection system as it affects women. Using three social protections relevant to women's lives as examples – government pensions, maternity benefits and access to health care – this thesis seeks to show that non-recognition of social rights has a detrimental effect on the economic security of women and leaves women, as a group, invisible. While there is no 'one size fits all' solution, constitutional reforms tailored to reflect each country's particular circumstances are a promising option. In Canada, the goal is to preserve and strengthen the social protections already in place, while in the United States the aim is to find a constitutional legal basis for social rights and equality, noting that the most important chapters of constitutional law have yet to be written.

Preface

First and foremost, I must extend my gratitude and appreciation to my thesis supervisor, Mr. Lee Slepston, for his invaluable guidance and advice during the course of this work. He continues to support me as I pursue professional opportunities, and I am incredibly grateful for his assistance, positive comments, and encouragement.

I would also like to express my appreciation to the professors and staff of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Lund University's Faculty of Law for offering an excellent Master's Program in International Human Rights Law.

To all of my classmates, thank you for an amazing two years. And to my friends spread out all over the world, thank you for the moral support you have always provided me with.

Lastly, I am especially grateful to my family for their love, patience, and constant encouragement.

Abbreviations

ACA	Patient Protection and Affordable Care Act
CAD	Canadian Dollar
CAP	Canada Assistance Plan
CCPI	Charter Committee on Poverty Issues
CEDAW	Convention on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CHA	Canada Health Act
CHST	Canada Health and Social Transfer
CPP	Canada Pension Plan
CRC	Convention on the Rights of the Child
EEOC	Equal Employment Opportunities Commission
EI	Employment Insurance
ERA	Equal Rights Amendment
FMLA	Family and Medical Leave Act
GDP	Gross Domestic Product
GIS	Guaranteed Income Supplement
HDI	Human Development Index
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
LICO	Low Income Cut-Off
MCA	Medical Care Act
NAFTA	North American Free Trade Agreement
NAS	National Academy of Sciences
OAS	Old Age Security [Canada]
OAS	Organization of American States
OASDI	Old Age, Survivors and Disability Insurance
PDA	Pregnancy Discrimination Act
SPM	Supplemental Poverty Measure
SSI	Supplemental Security Income
SUFA	Social Union Framework Agreement
TDI	Temporary Disability Insurance
UDHR	Universal Declaration of Human Rights
UN	United Nations
USD	United States Dollar

1 Introduction

The recognition of social rights began with the International Labour Organization's Declaration of Philadelphia in 1944. This right has since evolved to view the human right to social protections as all-embracing and to see poverty as a legitimate starting point for forming social policies. It understands social protections not only as an individual right, but also as a collective right, and that a state is obligated to take infrastructural measures in order to protect against human misery. The Canadian and United States governments have varied greatly in their respective approaches to the concept of social and economic rights. Canada has given these rights more attention as evidenced by the government's ratification of the International Covenant on Economic, Social and Cultural Rights and regular litigation of social rights in domestic courts, although not always successful. The United States, on the other hand, has given them less attention due in part to the stance that social rights are not judicially enforceable. In the absence of adequate recognition of social rights, women and their economic security are disproportionately affected, as evidenced by the high rates of poverty among single mothers and elderly women in both countries, though more so in the United States. Inadequate social protections are a contributing factor to these high rates of poverty since women's poverty is connected with the way women are treated while formally employed and how they are situated when they find themselves outside of the formal economy.

In its earliest stages, the research question of this thesis was why Canada and the United States approach the right to social protections differently and how can they learn from each other. However, in researching each country's system, one significant realization came to light: although Canada and the United States are both examples of liberal welfare regimes and their social protection systems were quite alike in their beginnings, the similarities end there. Since their starting points, the respective social policies have been a reflection of various political agendas and other factors. Thus, this thesis morphed into an independent study of each country's system while attempting to demonstrate that regardless of politics or legal structure, there is indeed a clear connection between social protections, equality and women's economic security. Using three social protections relevant to women's lives as examples – government pensions, maternity benefits and access to health care – this thesis seeks to show that non-recognition of social rights has a detrimental effect on the economic security of women and leaves women, as a group, invisible. Still, there is no 'one size fits all' solution and recommendations must be tailored to reflect each country's particular circumstances.

In this work, the methodology used has mainly been a study of works by academic scholars, works written in different times and in various countries, therefore representing a variety of views and perspectives. Statistically, I worked with numbers on poverty published by the Canadian and United States governments. I have used reports written by several well-

established public interest non-governmental organizations based in Canada and the United States. I have also incorporated feminist literature from the 1970s when the concept of ‘feminization of poverty’ first arose and current literature examining what has changed and contemporary challenges. During the research phase of this work, the focus was on choosing scholarly articles, books, reports, and statistics that provided a full and comprehensive view of the issues. Hopefully, the sources chosen have properly addressed the subject.

The structure of this thesis is as follows: Chapter 2 is an introduction to social protections in Canada and the United States, covering the different welfare regimes, historical background and framework of government pensions, maternity benefits and access to health care in each country. Chapter 3 lays out the relevant international human rights instruments that address social and economic rights, social protections and non-discrimination. Chapter 4 details the limitations and weaknesses of each social protection system. Chapter 5 begins with statistics on women’s poverty rates in Canada and the United States, and goes on to discuss developments in international thinking, namely the concept of poverty and sociological feminist theory. Lastly, Chapter 6 considers the respective domestic legal bases for asserting the right to social protections, incorporating international instruments where applicable, and proposes durable solutions to ensure women’s full realization of their social, economic and equality rights.

2 Social Protections

Since its creation, the International Labour Organization has actively promoted social protection for all members of society.¹ Access to adequate social protections and the notion of social justice are recognized in the Declaration of Philadelphia², in subsequent ILO conventions, and in a number of United Nations instruments as a basic right of all individuals.³ In some contexts, the term ‘social protection’ is often interpreted as being broader than classic ‘social security’ such that it could include protections for family or community members. Meanwhile, in other situations, it is interpreted with a narrower meaning that only includes protections for the poorest and most vulnerable portions of society.⁴ So when there is no clear consensus on which term offers more protection, the two terms can be used interchangeably. In this work, the term ‘social security’ generally refers to the federal pension program in the United States, while the term ‘social protection’ will be used more broadly, covering all benefits intended to protect against a lack of work-related income, inadequate or unaffordable access to health care, insufficient family support, a defined level of poverty, and social exclusion.⁵ Furthermore, ‘social protection’ is defined as the protections a society provides to individuals and households to ensure income security in cases of old age, unemployment, maternity, or the loss of a breadwinner,⁶ with a focus on the social protections available to women.

People depend on four sources of income in order to support themselves and their families with regard to food, clothing, housing, and other expenses: (1) traditional property, including real property, bank deposits, or savings; (2) income earned through employment; (3) family support; and (4) social protection, in the form of social security and insurance programs, social assistance and poverty relief.⁷ A recent review of income security

¹ International Labour Organization, ‘Social Security Department’, <www.ilo.org/public/english/protection/secsoc/>, visited 19 February 2012 [hereinafter ILO].

² In 1944, the International Labour Conference meeting in Philadelphia adopted the ‘Declaration of Philadelphia’, which redefined the aims and purpose of the ILO. The Declaration embodies the following principles: labour is not a commodity; freedom of expression and of association are essential to sustained progress; poverty anywhere constitutes a danger to prosperity everywhere; all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. International Labour Organization, ‘Declaration Concerning the Aims and Purposes of the International Labour Organization’ [Declaration of Philadelphia] (adopted 10 May 1944) <www.ilo.org/ilolex/english/iloconst.htm>, visited 1 April 2012.

³ ILO, *supra* note 1.

⁴ International Labour Office, *World Social Security Report: Providing Coverage in Times of Crisis and Beyond* (ILO Publications, 2010-2011) p. 13 [hereinafter World Report].

⁵ *Ibid.*

⁶ *Ibid.* p. 14; W. Van Ginneken, ‘Social Security and the Global Socio-Economic Floor: Towards a Human-Rights Based Approach’, 9(2) *Global Social Policy* (2009) p. 229.

⁷ A. Kjønstad, ‘Poverty and Property – Human Rights and Social Security’, in L. Williams *et al.* (eds.), *Law and Poverty: The Legal System and Poverty Reduction* (Zed Books, London, 2003) p. 163.

programs concluded that the primary objective of social protection has changed from being an income replacement measure to being an indispensable tool for poverty alleviation.⁸ As a result, there is now more emphasis on a rights-based approach to social protections. Yet considerable problems arise in trying to assert social rights as fundamental rights within the existing institutions of welfare state regimes when many of them, including the classic North American liberal welfare regimes, face ongoing financial crises. The following chapter describes the characteristics of different welfare regimes, and the origins and current structure of government pensions, maternity benefits and access to health care in Canada and the United States.

2.1 Welfare Regimes

The theory of welfare regimes is most frequently associated with Danish sociologist Gosta Esping-Andersen's categorization of liberal, social democratic, and conservative welfare regimes. These regimes are distinguishable by the principles and rules that regulate transactions between the state, the market and the family.⁹ Canada and the United States are two examples of liberal welfare regimes, meaning that they prefer market solutions to welfare problems: private markets address social needs and entitlements are limited to instances of market failure.¹⁰ Entitlements are need-based rather than universal, with the state providing limited means-tested social programs and modest benefits, typically catering to the lower-income working class.¹¹ These regimes traditionally see reproduction as an individual choice, placing the responsibility largely on families, and presume that mothers are primarily responsible for child-rearing while fathers are primarily responsible for wage-earning.¹² One downside of these regimes is that they exclude many from the enjoyment of benefits by providing insufficient services to marginalized segments of the population.¹³

By comparison, the principles of universalism and de-commodification form the basis of social democratic welfare regimes, which aim to provide high quality services equally.¹⁴ Generally, social protections are not directly linked with employment and universal in order to provide security to those

⁸ Van Ginneken, *supra* note 6, p. 229.

⁹ Esping-Andersen used the term ‘regime’ to “denote the fact that in the relation between state and economy a complex and organizational features are systematically interwoven.” J. Myles, ‘How to Design a “Liberal” Welfare State: A Comparison of Canada and the United States’, 32(4) *Social Policy & Administration: An International Journal of Policy and Research* (1998) p. 342; *see also* G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, Princeton, 1990).

¹⁰ Myles, *supra* note 9, p. 341; L.A. White, ‘The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States’, 21 *Yale Journal of Law & Feminism* (2009-2010) p. 191.

¹¹ Esping-Andersen, *supra* note 9, p. 26; White, *supra* note 10, p. 191.

¹² White, *supra* note 10, p. 192.

¹³ *Ibid*, pp. 191-92.

¹⁴ Esping-Andersen, *supra* note 9, p. 27.

not actively involved in the formal labor market. The state also assumes significant responsibility for the social cost of reproduction so as to reduce gender inequality and in support of social citizenship.¹⁵ Conservative welfare regimes see social entitlements as linked with employment; rights are therefore attached to status and the state has a limited role in redistribution. These regimes assume some responsibility for reproduction, but state programs tend to support and reinforce a woman's role as caregiver.¹⁶

The model of the regime can differ depending on program design, and the regimes in Canada and the United States have varied greatly in terms of financing and distribution since the 1970s.¹⁷ Despite being a liberal welfare regime, Canada's social programs developed in a manner similar to the social democratic model, more comparable to the political culture of 'social citizenship'¹⁸ – a belief in universal entitlements funded by government revenue rather than employee contributions. Thus, there is a recent trend recognizing Canada as a 'social liberal' welfare regime because it reflects a greater commitment to state intervention and lower levels of inequality than the classic liberal welfare regime.¹⁹ This may be because, according to Esping-Andersen, the regimes are not absolute categories: each regime may include elements from another.²⁰ Nevertheless, this study primarily views Canada and the United States as two examples of liberal welfare regimes that have designed their social protection systems differently.

2.2 The History of Social Protections

The notion of social protection changed following the industrial revolution due to the transformation of an agricultural economy into an industrial wage-based economy.²¹ The idea of social security developed in Europe in the late 19th century as one form of economic security in a modern industrialized world.²² It was based on the assumption that risks to income security are a normal aspect of life in an urban-industrial society and not the result of individual shortcomings.²³ The world's first social security

¹⁵ White, *supra* note 10, p. 191.

¹⁶ *Ibid.*, pp. 190-92; Esping-Andersen, *supra* note 9, pp. 27-28.

¹⁷ Myles, *supra* note 9, p. 341.

¹⁸ *Ibid.*, p. 351; but see also T.H. Marshall's categories of civil, political and social citizenship in T.H. Marshall, 'Citizenship and Social Class', in J. Manza and M. Sauder (eds.), *Inequality and Society* (W.W. Norton and Co., 2009) pp. 148-49.

¹⁹ G. Olson, 'Toward Global Welfare State Convergence? Family Policy and Health Care in Sweden, Canada and the United States', 34 *Journal of Sociology & Social Welfare* 143 (2007) p. 146.

²⁰ Esping-Andersen, *supra* note 9, p. 28.

²¹ Social Security Administration, 'Social Security: A Brief History', 2005, <www.ssa.gov/history/pdf/2005pamphlet.pdf>, p. 4, visited 14 September 2011 [hereinafter Social Security History].

²² *Ibid.*

²³ The Historica-Dominion Institute, 'Social Security', *The Canadian Encyclopedia*, <www.thecanadianencyclopedia.com>, visited 24 July 2011 [hereinafter Historica-Dominion].

retirement program was put into effect in Germany in 1889,²⁴ followed by Britain, which introduced the world's first unemployment insurance scheme in 1911.²⁵ Social insurance programs provided a sense of entitlement, which helps explain their acceptance throughout the industrial world. Social protections developed in North America along the lines of the British 'poor law' tradition, by providing means-tested allowances to indigent women with children.²⁶

Social protections first developed in Canada with programs designed to provide income for the elderly, widows, deserted wives and their children, those considered to be the 'worthy' or 'deserving' poor. The first old age pension program was introduced in 1927, and in 1937 pensions for the blind were added, prime examples of how governments at this time restricted aid to the 'worthy' poor.²⁷ The United States system developed following the Great Depression in the 1930s, which caused a crisis in the nation's economic life and led to the Social Security Act, enacted by Congress in 1935 as part of the New Deal. Social security, as conceived by Secretary of Labor Frances Perkins and President Franklin D. Roosevelt, was an attempt to tackle the problems of old age, poverty, unemployment, and the burdens of widows and fatherless children.²⁸ The first means-tested old age pension was introduced in 1935, creating a work-related contributory system in which workers would provide for their own economic security through payroll taxes.²⁹

Following the Great Depression, the Canadian federal government was also compelled to remedy the massive problem of unemployment, and after World War II, both governments began to develop social protection systems adapted to advanced industrial societies.³⁰ At this point, Canada's programs developed in a manner similar to the Scandinavian model rather than following the trends of the United States, implementing universal flat-rate benefits for children in 1944, old age benefits in 1951, universal hospital coverage in 1958, and universal health insurance in 1965. Other protections included unemployment benefits in 1941, and sickness and maternity leave in 1971.³¹ In 1965, the government implemented the Canada Pension Plan, which provided social insurance protection for retirement, disability, and the provision of survivors' benefits.³² The plan addressed the problem that a majority of workers were not protected by occupational pension plans. This compulsory plan would cover almost the entire workforce and was the first

²⁴ Social Security History, *supra* note 21, p. 4.

²⁵ Historica-Dominion, *supra* note 23.

²⁶ Myles, *supra* note 9, p. 350.

²⁷ Historica-Dominion, *supra* note 23.

²⁸ H. Velloso, 'Social Security in the United States: Overview and Outlook', *United Nations Economic Commission for Latin America and the Caribbean*, <www.eclac.org/publicaciones/xml/0/27160/lcw89i.pdf>, visited 10 April 2011.

²⁹ *Ibid*; Myles, *supra* note 9, p. 350.

³⁰ Historica-Dominion, *supra* note 23.

³¹ Myles, *supra* note 9, p. 351.

³² Historica-Dominion, *supra* note 23.

to provide for automatic benefit increases as the cost of living increased,³³ an approach comparable to the Scandinavian political culture of ‘social citizenship’.³⁴

The United States took a different route and shied away from a universal ‘social citizenship’ model, implementing mixed programs targeting the elderly, children of indigent women, and social insurance programs for the elderly and unemployed.³⁵ The 1939 amendments to social security added benefits for the spouse and minor children of a retired worker, and survivor benefits paid to the family in the event of early death. Retirement benefits were low in the 1940s and covered only 50 percent of workers, but major amendments enacted in the 1950s increased benefits and placed the program on the path to the current near-universal coverage.³⁶ The reforms of the 1960s and 1970s replaced the means-tested old age program with Supplemental Security Income, which set national standards rather than state or local standards for qualifying conditions and benefit levels.³⁷ These reforms did not change the existing Medicare program, revenue-financed health insurance for the elderly, but did add Medicaid, another means-tested health insurance program still within the ideology of British ‘poor law’ tradition.³⁸ Disability insurance was later added, though family allowances and any form of funded maternity or paternity leave never developed. In the early 1980s, the program faced a serious financial crisis and President Reagan appointed a panel to study these issues and make recommendations for legislative changes.³⁹ The final bill, signed into law in 1983, introduced several changes to the program including the taxation of benefits, coverage of federal employees, raising the retirement age starting in 2000, and increasing the reserves in the Trust Funds.⁴⁰

In Canada, the 1980s brought high inflation followed by an economic recession leading the Canadian provincial and federal governments to revisit social protection programs and to consider some universal programs, such as family allowance and old age pensions, as burdensome to the economy.⁴¹ The old age pension policy became a major public issue with increased poverty among the elderly, particularly among single elderly women, concern for the cost of future pensions given the aging of the Canadian population, and the need for pension policy recognizing the changing role of women.⁴² Labor unions, welfare organizations, and women’s groups advocated for improvements in the public pension system and higher standards for private pensions, but when the rate of inflation declined in

³³ *Ibid.*

³⁴ Myles, *supra* note 9, p. 351.

³⁵ *Ibid.*

³⁶ Velloso, *supra* note 28.

³⁷ Myles, *supra* note 9, p. 351.

³⁸ *Ibid.*

³⁹ Velloso, *supra* note 28.

⁴⁰ *Ibid.*

⁴¹ Historica-Dominion, *supra* note 23.

⁴² *Ibid.*

1983, the pressure for reform eased and no substantive changes occurred.⁴³ In 1984, the Conservatives eliminated universality in family allowances and old age security, and introduced a ‘claw back’ to both universal programs that required higher-income beneficiaries to repay part or all of their benefits. The ‘claw back’ is calculated by determining the difference between income and the threshold amount for that year, and the beneficiary then repays 15 percent of that amount.⁴⁴

When the Liberals returned to power in 1993 their aim was to reform the unemployment insurance system and federal support for provincial health, welfare, and higher education programs.⁴⁵ The central issue was how to improve opportunities and access to jobs for Canadians – since it was the unemployed Canadians who had insufficient coverage – blaming passive income support programs such as unemployment insurance and social assistance, and giving little attention to actual job creation.⁴⁶ The developments in Canadian social security were designed with the view that social programs are primarily an adjunct to the economy. Benefits should be paid on the basis of merit, work performance and productivity, rather than on the basis of human need. These ideas are also behind the concept of ‘workfare’ that requires social assistance recipients to work for their benefits or undertake some kind of job training.⁴⁷ Such programs have been criticized in the United States for being substandard, offering little hope of leading to livable-wage employment, and perpetuating the notion that the poor are lazy and abusing the safety net.⁴⁸ In due course, both countries have moved away from the classic conception of liberal welfare regimes with the United States adopting ‘poor law’ traditions through social insurance for the elderly and means-tested benefits, while Canada’s system has preferred a mixed model of means-tested benefits, but also includes universal ‘social citizenship’ benefits.⁴⁹

Administration of social programs differs in each country with responsibilities generally split between the federal government and the state/provincial governments. In the United States, both federal and state constitutions and laws impact social policy, although this study focuses primarily on federal policies. The Department of Health and Human Services performs health and social science research, and administers Medicare, Medicaid, and several other social programs. The Labor Department enforces laws guaranteeing fair pay, workplace safety and equal

⁴³ *Ibid.*

⁴⁴ Service Canada, ‘The Old Age Security Recovery Tax’, <www.servicecanada.gc.ca>, visited 14 September 2011 [the threshold for 2009 was CAD 66,335. For example, if 2009 income was CAD 80,000, then the repayment amount would be 15% of the difference between CAD 80,000 and 66,335 (13,665), thus repayment on a CAD 80,000 income would be CAD 2,049.75 (13,665 x 0.15)].

⁴⁵ Historica-Dominion, *supra* note 23.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Myles, *supra* note 9, pp. 351-52.

job opportunity, administers employment insurance to state unemployment insurance agencies, regulates pension funds, and collects and analyzes economic data.⁵⁰ The Social Security Administration operates the old age, survivor and disability insurance programs, and these payments are distributed through state social security agencies. In Canada, services are quite centralized: the federal government's Service Canada agency works in partnership with other departments, agencies, and levels of government to administer social programs. Beneficiaries receive their retirement payments straight from the federal government, while those who qualify for maternity benefits receive one payment directly from the federal government and another from the employer if a collective bargaining agreement providing greater benefits has been reached.

2.3 Government Pensions

The Canadian pension system is a three-tier system: a universal flat-rate benefit, an earnings-related benefit, and income-tested benefits. Yet, in recent years, the Canadian government has moved in a United States-style direction marked by a conservative political agenda. In 1995, the federal government repealed the Canada Assistance Plan, which set standards for social assistance and social services. This repeal, and other changes such as substantial reductions in transfer payments to the provinces, has altered the country's social policy framework.

The current federal pension system provides financial benefits directly to individuals through the Old Age Security program (universal flat-rate benefit) that can be topped up by the Canada Pension Plan (earnings-related benefit) and the Guaranteed Income Supplement, Allowance, and Allowance for the Survivor (income-tested benefits). The OAS program is the oldest component of the income security system, introduced in 1952 to replace the original income-tested program from 1927.⁵¹ The program is available to anyone over the age of 65 who meets certain residence requirements, and most Canadians qualify. The OAS pension is a uniform amount, calculated depending on how long the person has lived in Canada.⁵² Employment history is not a factor in determining eligibility, and OAS pensioners pay federal and provincial income tax, with higher-income pensioners repaying part or all of their benefit through the tax system.⁵³

⁵⁰ United States Department of Labor, 'Career Guide to Industries, 2010-2012 Edition', <www.bls.gov/oco/cgs041.htm>, visited 14 September 2011.

⁵¹ J. Gruber and D. Wise, *Social Security Programs and Retirement around the World: Micro-Estimation* (University of Chicago Press, 2004) p. 103.

⁵² Service Canada, 'Overview of the Old Age Security Program', <www.servicecanada.gc.ca>, visited 1 August 2011 [if a person who has lived in Canada, after reaching age 18, for periods that total at least 40 years, may qualify for the full pension, while a person who does not meet the requirements for the full pension may qualify for a partial pension earned at the rate of 1/40th of the full monthly pension for each full year lived in Canada after his or her 18th birthday].

⁵³ *Ibid.*

The Canada Pension Plan (and the equivalent Quebec Pension Plan) is similar to social security in the United States, as it is funded by payroll taxes and works on a ‘pay-as-you-go’ system, but eligibility is based solely on employment contributions. A ‘pay-as-you-go’ system is a retirement system that finances retirees’ benefits by taxing younger workers’ earnings.⁵⁴ Employees contribute 4.95 percent (as of 2011) of their gross yearly earnings throughout their working lifetime, with the employer matching the employee’s contribution, effectively doubling it. The pension is designed to replace about 25 percent of a person’s earnings from employment, up to a maximum amount.⁵⁵ The pension is based on how much and for how long a person contributed to the CPP, and it protects the pension by making certain adjustments before calculating 25 percent of the earnings contributed over a working life.⁵⁶ For example, some low-earning periods during a career – such as unemployment, disability and child-rearing – may be ‘dropped out’ so they do not reduce the amount of the pension. Both the OAS and CPP pensions usually start the month after the pensioner’s 65th birthday, but a pensioner can begin receiving smaller payments anytime after the age of 60. As of 2023, the eligibility age for a full OAS pension will rise from 65 to 67.⁵⁷ The CPP survivor benefits are paid to a deceased contributor’s estate, surviving spouse, or common-law partner and dependent children.⁵⁸

Lastly, the Guaranteed Income Supplement provides a monthly non-taxable benefit to OAS recipients who otherwise have little or no income. The amount may increase or decrease according to changes in the recipient’s yearly income, and unlike the OAS pension, the GIS is not subject to income tax. As additional benefits, the Allowance is for those with low income and whose spouse or common-law partner receives or is eligible for the GIS, and the Allowance for the Survivor is for persons whose spouse or common-law partner has died. These benefits are designed to recognize the difficult circumstances faced by many survivors and by couples living on the pension of only one person. These benefits are not

⁵⁴ E.K. Browning, ‘The Autonomy of Social Security and Medicare’, 13(1) *The Independent Review: A Journal of Political Economy* (2008).

⁵⁵ For 2010, it was CAD 934.17 per month.

⁵⁶ Service Canada, ‘Survivor Benefits’, <www.servicecanada.gc.ca>, visited 1 August 2011 [hereinafter Survivor Benefits].

⁵⁷ *Ibid*; BBC World News, ‘Canada Budget Raises Pensions Benefit Age and Cuts Penny’, 29 March 2012.

⁵⁸ Three types of benefits: (1) the death benefit is a one-time, lump-sum payment made to the deceased contributor’s estate, and if there is no estate, the person responsible for the funeral expenses, the surviving spouse or common-law partner or the next of kin may be eligible; (2) the survivor’s pension is paid to the person who, at the time of death, is the legal spouse or common-law partner, and if separated and there is no cohabiting common-law partner, the legal separated spouse will still qualify for this benefit. If a deceased same-sex common-law partner contributed to the CPP, they could be eligible for survivor’s benefits; (3) the children’s benefit is paid to a dependent natural or adopted child of the contributor or a child in the care of the deceased contributor at the time of death. Benefit amount depends on age and whether recipient is already receiving another CPP benefits. See generally Survivor Benefits, *supra* note 56.

considered as income for tax purposes, and are paid monthly to the spouse or common-law partner of an OAS pensioner or the survivor.⁵⁹

By comparison, the United States was originally dubbed a ‘reluctant welfare state’ in the 1960s, and became even more reluctant in the following decades with conservative governments rarely in favor of federal responsibility for social welfare.⁶⁰ The original Social Security Act of 1935 and current amended version encompass several programs: Old Age, Survivors and Disability Insurance (OASDI), unemployment benefits, Temporary Assistance for Needy Families, Medicare, Medicaid, and Supplemental Security Income (SSI).⁶¹ However, what is commonly known as ‘social security’ in the United States refers to OASDI, while SSI serves as a safety net to ensure that the elderly and disabled have a minimum level of income if their pension benefits are too low or they do not qualify for social security. Medicare and Medicaid are health insurance programs, which will be discussed later in the section on health care.

The United States pension system is a two-tier system: one benefit is earnings-related and the other is income-tested. The first tier – social security – has a progressive benefit formula and eligibility is based on either work history or marriage. Like the CPP in Canada, it is a ‘pay-as-you-go’ system, funded by payroll taxes on the working-age population that are then deposited in a government trust to pay current benefits.⁶² Congress introduced this pre-funding system in 1983 by increasing payroll taxes so that social security would take in more tax revenue than it paid out, with the surplus directed towards supplementing tax revenue for when the ‘baby-boomers’ began to retire.⁶³ Initially, the program’s coverage was sporadic but today it covers 96 percent of working people.⁶⁴ The social security

⁵⁹ For both the Allowance and Allowance for the Survivor: to qualify, an applicant must be between the ages of 60 and 64 and must have lived in Canada for at least 10 years after turning 18, and must have been a Canadian citizen or a legal resident of Canada on the day preceding the application’s approval. The combined yearly income of the couple, or the annual income of the survivor, cannot exceed certain limits which are established quarterly. The OAS and GIS benefits are not included in their combined yearly income, for the purpose of income-tested benefits only. The Allowance stops when the recipient becomes eligible for an OAS pension at age 65, if the beneficiary leaves Canada for more than six months or dies, if the pensioner ceases to be eligible for the GIS or if the spouses or common-law partners separate or divorce. The Allowance for the Survivor stops if a survivor remarries or lives in a common-law partnership for more than 12 months. *Ibid.*

⁶⁰ G. Schaffner Goldberg, ‘Feminization of Poverty in the United States: Any Surprises?’, in G. Schaffner Goldberg (ed.), *Poor Women in Rich Countries: The Feminization of Poverty Over the Life Course* (Oxford University Press, 2010) p. 230 [hereinafter Goldberg – U.S.].

⁶¹ United States Social Security Administration, ‘Social Security Programs in the United States’, <www.ssa.gov/policy/docs/progdesc/sspus/>, visited 13 April 2012 [hereinafter Social Security Programs].

⁶² *Ibid.*; Browning, *supra* note 54.

⁶³ C. Hill, ‘Why Privatizing Social Security Would Hurt Women’, *Institute for Women’s Policy Research*, March 2000, <www.iwpr.org>, visited 14 September 2011.

⁶⁴ United States Social Security Administration, ‘Retirement Benefits’ (SSA Publication No. 05-10035, September 2011) [hereinafter Retirement Benefits].

system prides itself with lifting more than 14 million men and women aged 65 years and older above the poverty line in 2009. Among women aged 65–74, one-third are lifted above the poverty line by social security, while among women 75 and older, half are lifted above the poverty line.⁶⁵

A person's social security benefit is based on 35 years of the highest taxable earnings, with a progressive benefit formula that replaces a higher percentage of earnings for lower-income workers than for higher-income workers. Benefits are adjusted annually to account for inflation and are paid as long as the recipient lives. The current retirement age in order to receive full pension benefits is 65, but one could retire at 62 with reduced benefits. Like Canada, the eligibility age for full benefits has recently been changed from 65 to 67, to be fully incorporated into the pension scheme by 2022. In the current system, a married woman is eligible for either 100 percent of her own worker benefit or 50 percent of her spouse's benefit, whichever is larger. Survivors are entitled to 100 percent of the deceased spouse's benefit if it is larger than their own. Men and women are entitled to the same benefits, but in practice, spousal and survivor beneficiaries are more likely to be women.⁶⁶ A divorcee who was married for at least ten years, who is not married at age 62, and whose former spouse is still living is entitled to spousal benefits equal to 50 percent of the former spouse's benefit or 100 percent of their own benefit, again whichever is larger.⁶⁷ Divorced persons married at least ten years are also entitled to survivor benefits; when one partner dies, the surviving partner is entitled to 100 percent of the benefits.⁶⁸

The second tier of the pension system is Supplemental Security Income, a minimum-benefits program funded by general government revenues rather than taxes. SSI ensures that the elderly and disabled have a minimum level of income if their pension benefits are too low or do not qualify for social security, and all participants receive the same basic monthly benefit. The program provides cash benefits to those with low income that have applied for benefits, are aged 65 and older, blind, or disabled, and legally reside in one of the 50 states. SSI is a needs-based program providing basics – such as food, clothing and shelter – to those with little or no income. SSI is different from social security as SSI benefits do not require, and are not based on, prior work or a spouse's prior work. SSI is a redistributive scheme, serving as a safety net if the applicant can establish they have income and assets that fall below the specified levels set by program guidelines, but the program has numerous eligibility restrictions.⁶⁹

⁶⁵ H. Hartmann *et al.*, ‘Social Security: Especially Vital to Women and People of Color, Men Increasingly Reliant’, *Institute for Women’s Policy Research*, January 2011, <www.iwpr.org>, visited 22 April 2012.

⁶⁶ P. Herd, ‘Reforming a Breadwinner Welfare State: Gender, Race, Class, and Social Security Reform’, 83(4) *Social Forces* (2005) p. 1370 [women account for roughly 98% of those claiming spousal or survivor benefits].

⁶⁷ Social Security Programs, *supra* note 61; Retirement Benefits, *supra* note 64.

⁶⁸ *Ibid.*

⁶⁹ For 2012, the income level is USD 698 for an individual and USD 1,048 for a married couple, while the assets limit is USD 2,000 for an individual and USD 3,000 for a married

2.4 Maternity Benefits

Canada was an early leader among liberal welfare states in providing paid parental and maternity leave.⁷⁰ In the 1989 case of *Brooks v. Canada Safeway*, the Supreme Court of Canada stated that there is a fundamental inequality in imposing “all of the costs of pregnancy upon one half of the population,” and that “those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged.”⁷¹ In *Reference re: Employment Insurance*, the Court emphasized that the interruption in employment that results from childbearing “can no longer be regarded as a matter of individual responsibility.”⁷² As a result, Canadian law has accepted that society should share in the social cost of reproduction, and that the state plays a role in providing benefits to encourage employees to take family leave and to ensure that employers do not discourage the taking of leave.⁷³ The Court has ultimately rejected the general stance of liberal welfare regimes that a state has limited responsibility for reproduction. In its 2001 expansion, the government increased the number of partially paid leave weeks from 10 to 35 weeks, and thus, unlike their American counterpart, there is little recent litigation on the issue since Canadian Employment Insurance provides for paid family leave benefits.

Maternity benefits are covered and protected by the labor and employment standards legislation of every Canadian jurisdiction and in most collective agreements. They provide a birth mother or a surrogate mother with 15 weeks of partial paid leave for physical recovery. In order to receive maternity benefits, the mother must have worked 600 hours during the previous 52 weeks and must prove her pregnancy by signing a statement declaring the expected due date or actual date of birth. In 1971 the Canadian government introduced its parental leave program, providing 10 weeks of partially paid benefits within the framework of EI, later increasing the number of partially paid leave weeks to 35. These benefits are payable to either parent while they care for a newborn or adopted child, and have the same eligibility requirements as maternity benefits. Parental benefits can be claimed by one parent or shared by both, and must be taken before the child turns one.⁷⁴ There is no specific paternity leave program; if a new father wishes to take leave, he does so through the parental leave program.

Because these benefits are part of Employment Insurance, income replacement rates while on leave are subject to program funding. As of 2012, the pay during the 50 weeks of total leave is 55 percent of the average gross salary over the past 26 calendar weeks, up to a maximum of CAD 485

couple. See United States Social Security Administration, ‘Supplemental Security Income’ (SSA Publication No. 05-11000, February 2012).

⁷⁰ White, *supra* note 10, p. 217.

⁷¹ *Ibid*, p. 228 [citing *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219 (Can.)].

⁷² *Ibid* [citing *In Reference re: Employment Insurance* [2005] 2 S.C.R. 669 (Can.)].

⁷³ *Ibid*.

⁷⁴ Service Canada, ‘Employment Insurance Maternity and Parental Benefits’, <www.servicecanada.gc.ca>, visited 20 March 2012.

per week.⁷⁵ Leave provisions in collective bargaining agreements often include employment protection safeguards and provide additional financial benefits. Most commonly, when a collective agreement has been reached, employers will add an amount to the base 55 percent income replacement, referred to as a ‘top up’, which may give a new parent up to 100 percent of their regular salary while on leave. The recent Fairness for the Self-Employed Act extended EI benefits, including maternity and parental leave, to those people who are self-employed.⁷⁶

In contrast, the United States has chosen a radically different approach to paid family leave than Canada and other industrialized nations. Employers may provide paid leave (at their discretion)⁷⁷ and five states offer paid leave through state disability insurance. However, there is no national law requiring paid maternity, paternity or parental leave, nor does the federal government sponsor paid leave or provide any incentive for employers to do so. Maternity protection at the national level therefore focuses on two laws intended to provide workers with pregnancy-related rights: the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993.

2.4.1 The Pregnancy Discrimination Act

Before the passage of the Pregnancy Discrimination Act in 1978, the Equal Employment Opportunities Commission, set up as a result of the Civil Rights Act, argued that denial of maternity leave represented a form of sex discrimination.⁷⁸ The Supreme Court disagreed, deciding a number of cases addressing the issue of equal protection and limiting the applicability of Title VII of the Civil Rights Act.

In the 1974 case of *Geduldig v. Aiello*, California operated a disability insurance program that provided payments for disabilities not covered by ordinary workers compensation.⁷⁹ The list of non-compensable disabilities included certain pregnancy-related conditions and the plaintiffs brought suit challenging the program as an unconstitutional sex-based classification, but the Supreme Court ruled that the program did not violate the 14th Amendment.⁸⁰ It divided the recipients into two groups – pregnant women and non-pregnant persons – and since the ‘non-pregnant persons’ group included both men and women and there were non-compensable conditions

⁷⁵ *Ibid.*

⁷⁶ Fairness for the Self-Employed Act, SC 2009, c-33.

⁷⁷ But, in 2011, only 11% of private sector workers and 17% of public sector workers reported having access to paid family leave through their employer. L. Houser and T. Vartanian, ‘Policy Matters: Public Policy, Paid Leave for New Parents, and Economic Security for U.S. Workers’, *Rutgers Center for Women and Work*, April 2012, <www.cww.rutgers.edu>, p. 1, visited 25 April 2012.

⁷⁸ N. Folbre, ‘The Pauperization of Motherhood: Patriarchy and Public Policy in the United States’, *Review of Radical Political Economics* (1984) pp. 79-80.

⁷⁹ *Geduldig v. Aiello*, 417 U.S. 484, 491 (1974).

⁸⁰ See text of 14th Amendment, *infra* note 430.

affecting both men and women, the excluded conditions did not affect women alone.⁸¹ Even though only women experience pregnancy, “it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”⁸² Two years later, in *General Electric v. Gilbert*, several female employees again argued a violation of the Civil Rights Act when their employer’s disability plan, similar to that in the *Geduldig* case, excluded any pregnancy-related conditions from its coverage.⁸³ Finding that the *Geduldig* case was precisely on point, the Court again acknowledged that only women experience pregnancy, but it could be categorized differently from other medical conditions because pregnancy “is often a voluntarily undertaken and desired condition” rather than an unwanted disease.⁸⁴ Therefore, pregnancy discrimination was not a sex-based classification under Title VII.

In response to the Supreme Court’s decisions in these cases, Congress added the Pregnancy Discrimination Act to Title VII in 1978 to clarify “that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions”.⁸⁵ The PDA does not provide specific rights related to leave, rather it requires employers to treat pregnant workers the same as other employees and forbids employers from discriminating against pregnant women.⁸⁶ The PDA does not require employers to provide paid leave, but if they provide it for some medical conditions, they must include pregnancy and pregnancy-related conditions.⁸⁷ If an employee is temporarily unable to perform her job because of pregnancy, the employer must treat them the same as any other temporarily disabled employee.⁸⁸ Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as other medical conditions.⁸⁹ Since the PDA’s introduction, the Supreme Court has interpreted it quite broadly, finding that in enacting the PDA, Congress intended “to construct a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.”⁹⁰ Put another way, states may provide broader and greater protections for pregnant workers, but may not reduce the protections provided by Congress. The Court has also held that the PDA prohibits an employer from discriminating against women because of their potential to become pregnant.⁹¹

⁸¹ *Geduldig*, *supra* note 79, at 496-97 and footnote 20 [“there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not”].

⁸² *Ibid.* at 497.

⁸³ *General Electric Co. v. Gilbert et al.*, 429 U.S. 125, 133 (1976).

⁸⁴ *Ibid.* at 136.

⁸⁵ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁸⁶ V. Lovell *et al.*, ‘Maternity Leave in the United States: Paid Parental Leave is Still Not Standard, Even among the Best U.S. Employers’, *Institute for Women’s Policy Research*, August 2007, <www.iwpr.org>, visited 1 August 2011.

⁸⁷ *Ibid.*

⁸⁸ Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982).

⁸⁹ *Ibid.*

⁹⁰ *California Federal Savings & Loan Association v. Guerra*, 497 U.S. 272, 280 (1987).

⁹¹ *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

The most recent development with regard to the PDA is the 2009 case of *AT&T Corp. v. Hulteen* where AT&T's employee benefits were based on a calculation from an employee's hire date and then adjusted forward for any time that an employee was not working and thus not earning credit. Prior to 1977, employees who took pregnancy leave were granted a maximum of 30 days of leave before their date was adjusted forward for any additional time used. During this same period, employees on regular temporary disability leave had no such limits on the number of days they could use before credit was removed.⁹² The plaintiffs argued that the pensions they received after retiring were smaller because of AT&T's failure to provide them with full credit for pregnancy leave taken before the effective date of the PDA in violation of Title VII. The 9th Circuit Court of Appeals held that, although the initial act of discrimination occurred before the passage of the PDA, calculating the plaintiffs' retirement benefits according to the adjusted date was discriminatory because it deprived them of benefits received by those not affected by pregnancy.⁹³

The Supreme Court overruled the 9th Circuit, finding that the benefit practice was based on a bona fide seniority system and that there was a presumption against applying the PDA retroactively unless there is implicit intent by Congress to do so, which the Court did not find.⁹⁴ In her dissenting opinion, Justice Ginsburg was critical of the Court for essentially ruling that the PDA does not require redress for past discrimination: "It does not oblige employers to make women whole for the compensation denied them when, prior to the Act, they were placed on pregnancy leave, often while still ready, willing, and able to work, and with no secure right to return to their jobs after childbirth."⁹⁵

2.4.2 The Family and Medical Leave Act

The Family and Medical Leave Act was passed by Congress under the Clinton administration in 1993 as a means of easing the time conflicts that developed as more and more married mothers began to work outside the home.⁹⁶ Prior to the FMLA, parental leave was at the discretion of individual employers, workers could be denied a leave request for any reason, and could be fired for taking family-related leave.⁹⁷ Moreover, leave policies lacked consistency as some employers had uniform formal leave policies, while others had informal policies that depended on an individual worker's particular circumstances.⁹⁸ The FMLA protects a worker's job security during leave taken for the employee's own serious health condition

⁹² *AT&T Corp. v. Hulteen*, 498 F.3d 1001 (reversed), 556 U.S. 701, 705-06 (2009).

⁹³ *Ibid.* at 706-07.

⁹⁴ *Ibid.* at 708-13.

⁹⁵ *Ibid.* at 719 [dissenting opinion].

⁹⁶ L. Levine, 'Explanation of and Experience under the Family and Medical Leave Act', *Federal Publications: Paper 197* (2003), p. crs-2.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

(including pregnancy and childbirth) and the care of the employee's new child.⁹⁹ It only applies to covered employers – all public agencies and private companies who employ more than 50 people within 75 miles – and ensures that eligible employees receive up to 12 weeks of unpaid leave within a 12 month period, continued health insurance benefits (if already provided), and a guarantee of return to the same or similar job.¹⁰⁰

The most relevant of the FMLA-based litigation in the context of sex discrimination is the 2003 case of *Nevada Department of Human Resources v. Hibbs* where the plaintiff was dismissed after he had exhausted his FMLA leave and failed to return to work on the date specified by his employer.¹⁰¹ The case centered on whether a plaintiff could sue a state for damages in federal court for violation of the FMLA, but the Supreme Court's decision entertained a substantive equality approach, focusing on the purpose behind the act, namely to protect against gender-based discrimination. A review of the FMLA's legislative record by the Court indicated that stereotype-based beliefs about family duties still existed at the time of enactment, and employers continued to rely on such beliefs to establish discriminatory leave policies:

“Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.”¹⁰²

The Court concluded that the FMLA’s leave provision was “narrowly targeted” at “sex-based overgeneralization” and thus a valid exercise of Congress’s power under Section 5 of the 14th Amendment.¹⁰³

In sum, while these laws provide some protection from pregnancy-related discrimination and may allow workers to take unpaid leave during pregnancy and after the birth of a new child, Congress has fallen short of enacting legislation giving pregnant/expectant workers an unqualified right to paid maternity, paternity or parental leave.

⁹⁹ Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*

¹⁰⁰ *Ibid*, § 2611(2)(A)-(B). Additional restrictions apply, including that the worker must have worked for the covered employer for at least 12 months prior to taking leave and must have worked at least 1250 hours in those 12 months. *Ibid*, § 2611(2)(A).

¹⁰¹ *Nevada Department of Human Resources et al. v. Hibbs et al.*, 538 U.S. 721, 725 (2003).

¹⁰² *Ibid*, at 736.

¹⁰³ *Ibid*, at 738, 722.

2.4.3 State Legislation

At the state level, several states have required employers that offer Temporary Disability Insurance programs to also allow new mothers to apply for TDI benefits. TDI maternity programs allow for a partial wage replacement for the time period during which a woman is medically unfit to work after giving birth,¹⁰⁴ with leave averaging between four and thirteen weeks. California's program provides six weeks of paid leave for new parents through the Paid Family Leave Act, passed by the legislature in 2002, and providing a benefit covering roughly 55 percent of earnings with a maximum amount per week.¹⁰⁵ The program is funded by the state's TDI program and is paid for entirely by employee contributions, rather than employer taxes. However, this type of program, while a considerable step towards providing adequate paid leave to new parents, still has problems. The program is financed by employee contributions, such that it is not a benefit provided by the state, but rather a type of insurance program. Moreover, the employer need only grant leave if the employee pays into the state disability insurance program, and must only hold a job for the employee if covered by the FMLA.¹⁰⁶ Thus, the restrictions of the FMLA still trickle down to any additional maternity protections attempted by individual states.

2.5 Access to Health Care

One last division in the social protection systems of Canada and the United States is access to adequate and affordable health care. In the immediate post-war years, Canada and the United States had similar health care systems consisting of private care with fees, non-profit hospitals, private insurance programs, and charity-funded care for the poor.¹⁰⁷ Then, as of 1957, the two countries went in markedly different directions when Canada introduced a national insurance program to cover all hospital services.¹⁰⁸ Access to health care, always a problem for the poor, became a problem for the majority of Canadians during the Great Depression, and in 1957, the federal government agreed to share in the cost of provincial hospital insurance programs.¹⁰⁹ The government then passed the Medical Care Act in 1966, through which the federal government would contribute financially to provincial insurance plans provided that such plans met the central federal goal of ensuring universal coverage for a comprehensive range of health services, available to all regardless of age, condition, or ability to pay in a uniform manner.¹¹⁰

¹⁰⁴ California, Hawaii, New Jersey, New York, Rhode Island. Houser, *supra* note 77, p. 4.

¹⁰⁵ State of California, Employment Development Department, 'FAQs for Paid Family Leave', <www.edd.ca.gov/Disability/FAQs_for_Paid_Family_Leave.htm>, visited 14 September 2011.

¹⁰⁶ *Ibid.*

¹⁰⁷ Myles, *supra* note 9, p. 360.

¹⁰⁸ *Ibid.*

¹⁰⁹ Historica-Dominion, *supra* note 23.

¹¹⁰ *Ibid.*

In 1984, with the support of all political parties, the federal government passed the Canada Health Act, which reasserted the principle of universal access by requiring the provinces, as a condition of receiving federal contributions to health care costs, to eliminate hospital user fees and extra billing by physicians within three years or suffer a financial penalty. By 1987, the CHA had largely achieved its aim.¹¹¹ Although some claimed that health care costs were out of control and additional revenue was needed, a review of public spending on health care by a federal commission in 1984 revealed relatively stable public spending in this sector since the 1966 inception of the MCA.¹¹² The public later rejected an attempt to introduce a two-tier system of health care – one paid for by private dollars and the other by public funds – as it would have led to first class service for those with sufficient financial resources, but steadily deteriorating service for the majority of the population.¹¹³

The United States introduced similar reforms in the 1960s, but they were intended solely for the needy and elderly, rather than the entire population.¹¹⁴ The current health care system involves multiple for-profit insurance companies, and limited government health programs targeting the needy and elderly. Throughout the 1970s and 1980s, the Canadian system matured into a single-payer system without any copayments or deductibles, all one has to do is present a health care card to receive health care services.¹¹⁵ This system is highly popular among the general public, while the United States system remains popular only with higher-income and employed individuals.¹¹⁶ Those outside the formal economy or with inconsistent work histories benefit the least. Meanwhile, health care expenditures continue to rise: in 1960 both countries spent just over 5 percent of their GDP on health care. By 1990 Canada was spending 8.9 percent of its GDP on health care, whereas costs in the United States had risen to 12.2 percent. Canada's spending in 2008 was 10.4 percent of their GDP, while the United States' was at 16 percent.¹¹⁷ In the United States today the result of the multiple-insurance system is per capita costs double those of Canada's single-payer system.¹¹⁸ This difference is attributed to lower administrative costs in Canada coupled with the government's ability to regulate the prices and supply of services.¹¹⁹ Despite the high costs of the

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Myles, *supra* note 9, p. 360.

¹¹⁵ Historica-Dominion, *supra* note 23.

¹¹⁶ R.M. Landers, ‘‘Tomorrow’’ May Have Finally Arrived – the Patient Protection and Affordable Care Act: A Necessary Step toward Health Care Equity in the United States’, 6 *Journal of Health & Biomedical Law* (2010) p. 67.

¹¹⁷ Kaiser Family Foundation, ‘Health Care Spending in the United States and Selected OECD Countries’, April 2012, <www.kff.org/insurance/snapshot/oecd042111.cfm>, visited 22 April 2012.

¹¹⁸ *Ibid.*

¹¹⁹ Myles, *supra* note 9, p. 360; Van Ginneken, *supra* note 6, p. 234.

United States health care system, it provides no better services to its people: in 2010, there were an estimated 49.9 million people not covered by any type of health insurance. Between the years 2007 and 2009, 87 million people lacked coverage at least temporarily.¹²⁰

In the United States, there are two health care programs designed for those in need: Medicare and Medicaid. The Medicare program provides health insurance coverage for the aged and disabled, and is divided into several parts. Part A provides hospital insurance and is funded by payroll taxes, equally split between employers and employees. Part A is generally provided automatically, and free of premiums, to persons aged 65 and over who are eligible for social security benefits, whether they have claimed these benefits or not. Part B provides supplemental medical insurance that covers the cost of physician and other services, and is funded in part by premiums paid by beneficiaries and contributions from the general fund of the United States Treasury. A third part of Medicare, sometimes known as Part C, is the Medicare Advantage Program that expands beneficiaries' options for participation in private health care plans. A prescription drug benefit plan, also known as Part D, began in 2004.¹²¹

Medicaid, unlike the Medicare entitlement program, is a means-tested and needs-based social protection program, and covers a wider range of health care services than Medicare. It is jointly funded by state and federal governments, but is managed by the states, thus qualifying depends on the state of residence. Roughly 16 percent of the population, or 48.6 million people, were covered by Medicaid in 2010.¹²² For a woman to qualify for Medicaid, she must fit into a certain category, such as being pregnant, the mother of a child under age 18, a senior citizen, or have a disability. Each category has different income eligibility criteria, and while the federal government has established minimum income thresholds, states set specific eligibility levels and can exceed the minimum thresholds.¹²³ Thus, 'poverty' alone does not necessarily qualify someone for Medicaid.

While universal access to adequate health care remains constant in Canada, it is a contentious issue in the United States. John Myles accurately describes how difficult it has become to implement a health care program with even an inkling of universality to it:

¹²⁰ Senator E.M. Kennedy, 'Health Care as a Basic Human Right: Moving from Lip Service to Reality', 22 *Harvard Human Rights Journal* (2009) p. 165; United States Census Bureau, 'Income, Poverty, and Health Insurance Coverage in the United States: 2010', September 2011, <www.census.gov/prod/2011pubs/p60-239.pdf>, visited 1 March 2012 [*hereinafter USCB Health*].

¹²¹ United States Government, 'The Official U.S. Government Site for Medicare', <www.medicare.gov>, visited 14 September 2011; Velloso, *supra* note 28.

¹²² USCB Health, *supra* note 120. In 2008, 21 million women were covered by Medicaid, see Kaiser Family Foundation, 'Medicaid's Role for Women across the Lifespan: Current Issues and the Impact of the Affordable Care Act', *Women's Issue Brief*, January 2012, <www.kff.org/womenshealth>, visited 25 March 2012 [*hereinafter KFF Medicaid*].

¹²³ *Ibid*; United States Department of Health and Human Services, 'Medicaid Eligibility', <www.cms.gov/MedicaidEligibility/>, visited 14 September 2011.

“National health insurance faced stiff opposition from entrenched interests in both Canada and the United States when the idea was first proposed in the 1940s and 1950s. But after three more decades of expansion and maturation of a large and sophisticated health insurance industry, the Clinton administration faced even stiffer opposition three decades later. Early decisions profoundly limit later ones.”¹²⁴

The issues surrounding health care are certainly evident now with President Obama’s Patient Protection and Affordable Care Act, passed by Congress and signed into law by the President in March 2010, and the political fallout. Designed to address the most severe problems associated with access to health care, President Obama faced significant challenges passing the ACA in Congress and, at present, in the courts.

The ACA’s intended benefits include the creation of a temporary subsidized insurance program for individuals who have been unable to obtain insurance because of pre-existing medical conditions, prohibiting insurers from rescinding coverage except where there has been fraud or misrepresentation, and creating health insurance exchanges to make it easier and more affordable for individuals to purchase non-group policies.¹²⁵ The ACA targets the problem of underinsurance – having insufficient coverage for certain catastrophic conditions – by authorizing the Department of Health and Human Services to establish essential health benefit requirements at different cost levels for health plans.¹²⁶ The reforms also enable children under 26 to stay on their parents’ health insurance plans. The most controversial aspect of the ACA is the individual mandate that requires individuals to maintain health insurance coverage or pay a penalty (as of 2014).

President Obama’s administration contends that the ACA gives women greater control over their own health care by providing tax credits (also as of 2014) for women who cannot afford health insurance, greater access to affordable plans, prohibiting insurance companies from charging women more than men for the same coverage, requiring new plans to cover prevention and wellness benefits at no charge, and ensuring coverage of basic health services, such as maternity services.¹²⁷ The ACA also aims to cover more of the nation’s poor by expanding Medicaid eligibility to all legal residents with incomes up to 133 percent of the federal poverty

¹²⁴ Myles further questions why Canada was able to introduce universal health insurance and the U.S. was not, considering institutional differences and political forces that shaped the development of health care policy. Myles, *supra* note 9, p. 361.

¹²⁵ Landers, *supra* note 116, p. 68.

¹²⁶ *Ibid*, p. 69.

¹²⁷ The White House, ‘Health Reform for American Women’, <www.whitehouse.gov/files/documents/health_reform_for_women.pdf>, visited 14 August 2011 [currently, a healthy 22-year-old woman can be charged premiums 150% higher than a healthy 22-year-old man, see National Women’s Law Center, *infra* note 289, for further discussion of these ‘gender ratings’].

level.¹²⁸ There will no longer be categorical requirements for eligibility; women who have no children or are not pregnant will be eligible if their incomes fall below the new level. Recent coverage data suggests that as many as 10 million currently uninsured women could qualify for Medicaid under the new rules.¹²⁹ Since most of the reforms will not go into effect until 2014, the public will not immediately experience all of the intended benefits. While a longer transition period ensures meaningful implementation at the federal and state levels, one risk of this delay is that the ACA could be repealed or weakened prior to reaching its full potential.¹³⁰

In late March 2012, the Supreme Court began its historic review of the ACA and will decide the constitutional question of whether Congress exceeded its powers. The key questions the Court will address are: is the challenge timely? Is the individual insurance mandate constitutional, and if not, should the rest of the ACA stand? And is the ACA's expansion of Medicaid to cover a greater portion of the poor constitutional?¹³¹ The Court is expected to rule on the case by late June 2012, but as an unprecedented law, it is hard to predict at this writing how the justices will rule. As the legal challenges proceeded through the lower courts, federal judges were evenly split on whether Congress had exceeded its power. At the appellate level, two courts upheld the ACA, one said it was unconstitutional, and another said the challenge was premature because the individual mandate requiring people to buy insurance does not take effect until 2014.¹³²

A recent study by the RAND Corporation concluded that eliminating the individual insurance mandate would sharply lower the number of people gaining health insurance coverage. Using a micro-simulation model, the study concluded that the number of Americans predicted to get coverage in 2016 under the ACA would drop from 27 million to 15 million if the individual mandate were eliminated.¹³³ Another consequence would be a sharp increase in the amount of government spending for each person newly enrolled in a health insurance plan. Because most individuals who will remain enrolled if the mandate is eliminated are eligible for significant government subsidies, government spending for those newly insured would

¹²⁸ KFF Medicaid, *supra* note 122; *see also* Supplement A – Table 2 for the 2008 federal poverty thresholds.

¹²⁹ *Ibid.*

¹³⁰ Landers, *supra* note 116, p. 69.

¹³¹ On 14 November 2011, the Supreme Court granted certiorari to review the ACA, merging the case of *National Federation of Independent Business v. Sebelius* (Docket No. 11-393), with portions of *United States Department of Health and Human Services v. Florida* (Docket No. 11-398) and *Florida v. United States Department of Health and Human Services* (Docket No. 11-400).

¹³² R. Barnes, 'How the Roberts Court Could Save Obama's Health-Care Reform', *The Washington Post*, 16 March 2012.

¹³³ C. Eibner and C. Price, 'The Effect of the Affordable Care Act on Enrollment and Premiums, With and Without the Individual Mandate', *RAND Corporation*, 2012, <www.rand.org/pubs/technical_reports/TR1221>, p. 11, visited 22 April 2012.

more than double, rising to USD 7,468 from USD 3,659.¹³⁴ In sum: “The individual mandate is critical not only to achieving near-universal health care coverage among Americans, but also to yielding a high value in terms of federal spending to expand coverage... Without the individual mandate, the government would have to spend more overall to insure a lot fewer people.”¹³⁵

2.6 Conclusion

Canada and the United States are two examples of liberal welfare regimes that have structured their social protection systems differently, as revealed by this chapter’s discussion of the historical background and overview of each government’s social policies. Following this focus on the social protection systems and their complexities in the domestic context, Chapter 3 will explore social rights and protections in the international context. It incorporates standards from a wide array of international instruments, ranging from the International Labour Organization’s notion of social justice to United Nations conventions and those of the Inter-American human rights protection system.

¹³⁴ *Ibid*, pp. 8-9.

¹³⁵ RAND Corporation, ‘Ending Individual Mandate Would Cut Health Coverage, but Not Dramatically Hike Insurance Price’, *Press Release*, 16 February 2012.

3 International Legal Standards

The right to social protection¹³⁶ and non-discrimination are intrinsically linked with the broader concepts of social justice and equal citizenship. Historically, the recognition of social rights began with the International Labour Organization’s Declaration of Philadelphia and its principle of social justice, with Section III(f) providing for “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care.” The Declaration served as the foundation for Article 55 of the Charter of the United Nations:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹³⁷

Article 22 of the Universal Declaration of Human Rights explicitly guarantees the right to social security.¹³⁸ UDHR Article 23(3) reads: “Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.” Moreover, Article 25(1) recognizes the right of everyone to security in the event of unemployment, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his or her control, while Article 25(2) recognizes special care and assistance with regard to motherhood.¹³⁹ The UDHR is not legally binding, but it has laid the groundwork for the recognition of social protections as rights in subsequent treaties.

¹³⁶ For the purpose of consistency, the term ‘social protections’ as defined in the introductory paragraph of Chap. 2 is used throughout this section even though the ILO and other instruments often use the term ‘social security.’ Noting that many organizations use the two terms interchangeably, ‘social security’ will still be used in direct quotes.

¹³⁷ United Nations, ‘Charter of the United Nations’ (adopted 24 October 1945) 1 UNTS XVI; *see also* Declaration of Philadelphia, *supra* note 2.

¹³⁸ “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” United Nations General Assembly, ‘Universal Declaration of Human Rights’ (10 December 1948) 217 A(III) [*hereinafter* UDHR].

¹³⁹ “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

The right to social protection is a core element of international human rights law, and is interconnected with the rights to equality, health, and a decent standard of living, as well as a state duty to protect individuals and families. In its origins, a narrower view of social protections, associated only with the loss of work, was the view enshrined in human rights treaties, rather than using poverty as the starting point.¹⁴⁰ Former ILO Director General Winant then defined a more ‘classical concept’ of social protections as “the security that society furnishes through appropriate organisation against certain risks to which its members are exposed” stressing that ‘security’ is both a state of mind and an objective fact.¹⁴¹ From there, a third approach has been recognized, one that views the human right to social protection as all-embracing and sees poverty as a legitimate starting point for forming social policies. This approach understands social protection not only as an individual right, but also as a collective right, and that the state is obligated to take infrastructural measures in order to protect against human misery.¹⁴²

3.1 The International Labour Organization

The specific ILO standards addressing social protections developed differently in two eras. The first era, from 1919 to 1944, was defined by a social insurance approach, the objective being compulsory social insurance schemes for specific concerns such as unemployment, industrial accidents, and occupational diseases.¹⁴³ The next era, following World War II, gave rise to an innovative view of social protections, one that included universal and comprehensive coverage, guaranteed income security, and medical care. Thus, new conventions were created with the purpose of unifying various protection schemes within a single protection system to cover all social contingencies, workers, and citizens.¹⁴⁴ Neither Canada nor the United States have ratified any of the relevant conventions on social protections, but these ILO instruments are internationally-recognized standards that both countries should strive to comply with.

ILO Convention 102 lays down the minimum standards recognizing the following nine specific branches of social security: medical care, sickness benefits, unemployment benefits, old age benefits, unemployment injury benefits, family benefits, maternity benefits, invalidity benefits, and survivors’ benefits.¹⁴⁵ The minimum requirements include coverage of the population, the content and level of benefits, and protection of the rights of

¹⁴⁰ A. Nußberger, ‘Interpretation of International Social Security Standards – Problems and Prospects’, in F. Pennings and L. Bijleveld (eds.), *International Social Security Standards: Current Views and Interpretation* (Intersentia, Antwerpen, 2008) p. 37.

¹⁴¹ *Ibid.*, p. 38.

¹⁴² *Ibid.*, pp. 38-39.

¹⁴³ F. Pennings and L. Bijleveld (eds.), *International Social Security Standards: Current Views and Interpretation* (Intersentia, Antwerpen, 2008) p. 3.

¹⁴⁴ *Ibid.*

¹⁴⁵ ILO C102: Social Security (Minimum Standards) Convention (adopted 28 June 1952, entered into force 27 April 1955).

contributors and beneficiaries, with the intention of establishing general social protection at a national level.¹⁴⁶ Convention 102 is worded with flexibility in mind to allow for various techniques of protection and levels of development.¹⁴⁷ Higher standards of conduct can be found in the issue-specific ILO Conventions that cover maternity protection,¹⁴⁸ equality of treatment of nationals and non-nationals,¹⁴⁹ employment injury benefits,¹⁵⁰ invalidity and old age benefits,¹⁵¹ medical care and sickness,¹⁵² maintenance of social security rights,¹⁵³ and employment promotion and protection.¹⁵⁴

The ILO has tied social protection rights to employment, although it increasingly promotes a broader view of social protections in which the state, employers, and workers all play a role in financing benefits. The ILO has proposed the idea of a ‘socio-economic floor’: “A minimum level of social protection for individuals and families needs to be accepted and undisputed as part of the socio-economic floor of the global economy”.¹⁵⁵ This ‘social protection floor’ refers to a basic set of social rights and services that each citizen has a right to enjoy and is directly linked with core obligations, that there is an obligation to ensure the minimum level of rights in human rights treaties, if not beyond that.¹⁵⁶ The UN has suggested that a ‘social protection floor’ consists of services and transfers, and the ILO specifically promotes the transfer aspect, that transfers in-case and in-kind could ensure a minimum level of income security and health care.¹⁵⁷

Non-discrimination and gender equality are core values linked with the ILO’s goal of social justice. Convention 111 defines discrimination broadly

¹⁴⁶ Pennings, *supra* note 143, p. 4 [yet less than a quarter of ILO member states have ratified C102, indicating that specific social security standards are not universally accepted].

¹⁴⁷ *Ibid.*

¹⁴⁸ ILO C103: Maternity Protection Convention [Revised] (adopted 28 June 1952, entered into force 7 September 1955); ILO C183: Maternity Protection Convention (adopted 15 June 2000, entered into force 7 February 2002).

¹⁴⁹ ILO C118: Equality of Treatment (Social Security) Convention (adopted 28 June 1962, entered into force 25 April 1964).

¹⁵⁰ ILO C121: Employment Injury Benefits Convention (adopted 8 July 1964, entered into force 28 July 1967).

¹⁵¹ ILO C128: Invalidity, Old Age and Survivor’s Benefits Convention (adopted 29 June 1967, entered into force 1 November 1969).

¹⁵² ILO C130: Medical Care and Sickness Benefits Convention (adopted 25 June 1969, entered into force 27 May 1972).

¹⁵³ ILO C157: Maintenance of Social Security Rights Convention (adopted 21 June 1982, entered into force 11 September 1986).

¹⁵⁴ ILO C168: Employment Promotion and Protection against Unemployment Convention (adopted 21 June 1988, entered into force 17 October 1991).

¹⁵⁵ World Report, *supra* note 4, p. 17.

¹⁵⁶ *Ibid.*, p. 17.

¹⁵⁷ ‘Services’ refers to “geographical and financial access to essential services such as water and sanitation, health, and education”, while ‘transfers’ refers to “a basic set of essential social transfers, in cash and in kind, as aid to the poor and vulnerable to provide minimum income security and access to essential services, including health care.” *Ibid.*

and forbids discrimination in employment.¹⁵⁸ Convention 111's supplementary Recommendation 111 contains standards for the promotion of equal opportunity and treatment for, *inter alia*, work conditions including hours of work, rest periods, occupational safety and occupational health measures, as well as *social security measures and welfare facilities and benefits* provided in connection with employment.¹⁵⁹ Resolution III addresses gender equality, noting that social protections are powerful tools to alleviate poverty and inequality, but are not fully accessible, least of all to women.¹⁶⁰ The Resolution also views sustainable enterprise as a means of advancing gender equality:

“Sustainable tax-based or other national models of universal social security that provide citizens with access to key services such as quality health care, unemployment benefits, maternity protection and a basic pension are key to improving productivity and fostering transitions to the formal economy.”¹⁶¹

Lastly, a government's responsibility for social and economic policy encompasses maternity protection, and public support systems can and need to be developed in order for paid family leave to occur.¹⁶² In addition, states should take measures to promote and encourage a better work/family balance. Tensions in combining work and family responsibilities impede the full participation of women in the workforce and economic empowerment, and policies that encourage men to participate in care responsibilities have been shown to work across a variety of countries.¹⁶³

3.2 The International Covenant on Economic, Social and Cultural Rights

As compared to the more comprehensive UDHR description, Article 9 of the ICESCR simply recognizes “the right of everyone to social security, including social insurance.”¹⁶⁴ The Committee on Economic, Social and

¹⁵⁸ “Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” ILO C111: Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960), art. 1(a). The terms ‘employment’ and ‘occupation’ include access to vocational training, access to employment and to particular occupation, and terms and conditions of employment. *Ibid.* art. 1(b)(2).

¹⁵⁹ ILO R111: Discrimination (Employment and Occupation) Recommendation (adopted 25 June 1958), § 2(b)(vi) [emphasis added].

¹⁶⁰ International Labour Conference (98th Session), ‘Resolution III: Concerning Gender Equality at the Heart of Decent Work’ (Geneva, June 2009) p. 8, para. 25.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.* para. 27.

¹⁶³ *Ibid.* para. 28.

¹⁶⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [*hereinafter ICESCR*] [Canada has ratified the ICESCR, however, the United States had signed but not ratified, meaning that while they are not legally bound by the convention, they may not take steps which contradict its purpose].

Cultural Rights has analyzed the right in view of the independent elements of availability, accessibility, and quality.¹⁶⁵ Moreover, through its redistributive character, social security “plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.”¹⁶⁶ The CESCR identifies the goals of income security in times of economic distress, access to health care and family support, basing its analysis on the same nine branches of social protection as ILO Convention 102.¹⁶⁷ The use of these nine branches might suggest that a right to social assistance to meet basic subsistence needs is excluded. However, such a right could be derived from ICESCR Article 11, which recognizes the “right to an adequate standard of living, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.” The CESCR seems to understand the right to social protection as a collective right, referring to benefits “provided for the relevant social risks and contingencies”¹⁶⁸ in addition to the basic aims, indicating that the needs go beyond simply the loss of work.

As to state obligations, while everyone has the right to social security, “States should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, particularly women... workers inadequately protected by social security, [and] persons working in the informal economy”, and even in times of limited financial capacity, special attention must be given to disadvantaged and marginalized individuals and groups.¹⁶⁹ Whereas Article 10(2) recognizes the right of working mothers “to paid leave or leave with adequate social security benefits”, all women should be granted paid maternity leave, including those involved in atypical work, and benefits should last for an adequate amount of time.¹⁷⁰ According to the CESCR, Article 3 (equality of men and women) in relation to Article 9 requires, *inter alia*, ensuring that women receive the equal benefit of public and private pension schemes, and guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.¹⁷¹

The CESCR includes non-discrimination as a main aspect of social protections. In situations where benefits are linked with contributions, steps should be taken to address unequal contributions between men and women,

¹⁶⁵ W. Vandenhove, ‘Article 26: The Right to Benefit from Social Security’, in A. Alen *et al.* (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, Leiden, 2007) p. 2.

¹⁶⁶ United Nations Economic and Social Council, ‘General Comment No. 19: the right to social security (art. 9)’ (February 2008) E/C.12/GC/19, para. 3 [*hereinafter General Comment 19*].

¹⁶⁷ Nußberger, *supra* note 140, p. 39 [citing General Comment 19, *supra* note 166, para. 2]; see ILO C102, *supra* note 145.

¹⁶⁸ General Comment 19, *supra* note 166, para. 11.

¹⁶⁹ *Ibid.* paras. 38, 59.

¹⁷⁰ *Ibid.* para. 19.

¹⁷¹ United Nations Economic and Social Council, ‘General Comment No. 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)’ (August 2005) E/C.12/2005/4, para. 26.

namely intermittent workforce participation because of family responsibilities and unequal wages.¹⁷² The state obligation to eliminate discrimination exists both formally (in law) and substantively (in practice); merely addressing formal discrimination in a state's constitution, laws, and/or policies will not ensure substantive equality as intended by Article 2(2) of the ICESCR.¹⁷³ Accordingly:

“Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination.”¹⁷⁴

3.3 The Convention on the Elimination of Discrimination Against Women

The Convention on the Elimination of Discrimination Against Women addresses both the elimination of discrimination and the right to social protection.¹⁷⁵ With regard to non-discrimination,¹⁷⁶ CEDAW obligates all state parties to “eliminate all forms of discrimination against women with a view to achieving women’s *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms.”¹⁷⁷ Article 11(1)(e) compels state parties to eliminate discrimination against women in the field of employment in order to ensure equal rights between men and women, in particular “the right to social security, specifically in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave”. Article 11(2)(b) requires state parties to adopt measures to institute paid maternity leave or leave with comparable social benefits, while Article 12(1) aims to eliminate discrimination against women in health care in order to ensure equal access to health care services, including family planning.

Regarding damaging and discriminatory gender stereotyping, CEDAW’s Preamble emphasizes the need for “a change in the traditional role of men as well as the role of women in society and in the family.”¹⁷⁸

¹⁷² *Ibid*, para. 32.

¹⁷³ United Nations Economic and Social Council, ‘General Comment No. 20: non-discrimination in economic, social and cultural Rights (art. 2, para. 2)’ (July 2009) E/C.12/GC/20, paras. 38 and 8(b).

¹⁷⁴ *Ibid*, para. 8.

¹⁷⁵ United Nations General Assembly, ‘Convention on the Elimination of Discrimination Against Women’ (18 December 1979) 1249 UNTS 13 [*hereinafter CEDAW*] [Canada has ratified CEDAW, while the United States has signed but not ratified].

¹⁷⁶ See the introductory paragraph of Chap. 4 for CEDAW’s definition of discrimination.

¹⁷⁷ R.J. Cook and C. Simone, ‘Combating Discrimination Based on Sex and Gender’, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Institute for Human Rights, Åbo Akademi University, Turku, 2009) pp. 205-26.

¹⁷⁸ *Ibid*, p. 223.

Since CEDAW addresses both formal and substantive equality, Article 2(f), which requires states “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”, also requires states to examine the outcome of laws and practices that may discriminate against women. In order for states to meet their treaty obligations, they must treat men and women identically where there are similar interests. However, states must also “acknowledge and accommodate biological as well as socially and culturally constructed differences” between men and women, and thus in certain situations, non-identical treatment will be necessary to accommodate these differences.¹⁷⁹

3.4 The Convention on the Rights of the Child

Article 26 of the Convention on the Rights of the Child recognizes, for every child, the right to benefit from social security, including social insurance.¹⁸⁰ In addition, Article 27(1) recognizes the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral, and social development. Under Article 27(2) and (3), state parties must, in accordance with national conditions and within their means, take measures to help parents implement this right, providing material assistance and support programs in cases of need. The wording of Article 26 – the right of a child *to benefit from* social protection – rather than a direct right or claim, is especially relevant in the context of women’s access to social protections since it implies the parents’ right to directly claim benefits, including children’s benefits.¹⁸¹ This wording effectively makes the parents the first beneficiaries of benefits and places them in a position as the right-holder.

3.5 The Inter-American Human Rights System

The American Declaration of the Rights and Duties of Man and its additional protocol identify the right to social security, but again, neither Canada nor the United States has ratified.¹⁸² Article 16 recognizes the right of every person to social security “which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control and make it physically or mentally impossible for him to earn a living.” The American Convention on Human Rights does not

¹⁷⁹ *Ibid*, p. 206 [many of these ideas are also found in ILO C156: Workers with Family Responsibilities Convention (adopted 23 June 1981, entered into force 11 August 1983)].

¹⁸⁰ United Nations General Assembly, ‘Convention on the Rights of the Child’ (2 September 1990) 1577 UNTS 3 [Canada has ratified the Convention and the United States has signed but not ratified].

¹⁸¹ Vandenhole, *supra* note 165, p. 15.

¹⁸² American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted by the 9th International Conference of American States (1948).

specifically mention social protections,¹⁸³ but under Article 9 of the Protocol of San Salvador:

“Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence... In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.”¹⁸⁴

3.6 Conclusion

After describing the social protection systems of Canada and the United States in Chapter 2, this chapter presented the wide range of international human rights standards addressing social protections and non-discrimination, linked with the principle of social justice, and in the broader context of social and economic rights. The goal was to establish that there is indeed a general consensus in the international legal community that social protections should be viewed as a basic human right, and that such protections must be provided without discrimination. With this foundation in mind, the following chapter addresses the limitations and weaknesses of each country’s social protection system.

¹⁸³ Art. 26 of the American Convention on Human Rights only addresses progressive development: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.” American Convention on Human Rights (entered into force 18 July 1978) 1144 UNTS 123.

¹⁸⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, ‘Protocol of San Salvador’ (entered into force 16 November 1999) OAS Treaty Series No. 69 (1988).

4 The Challenges of Current Social Policy

As previously discussed in Chapter 2, Canada and the United States are two examples of liberal welfare regimes that have structured their social protection systems differently, and Chapter 4 will now examine each system's limitations. In analyzing a system's limitations or weaknesses, it is important to note that inadequate social protections are not always overtly discriminatory or insufficient. They are often designed to be gender neutral, yet the result is still harmful and this chapter will cover these distinctions. As used here, 'discrimination against women' means:

"[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁸⁵

I would add to this that discrimination is often based on preconceived notions or prejudices about the group as a whole. Both the male-centered design of social protections and government actions limiting social spending exacerbate women's pre-existing social and economic inequality, making women more vulnerable to a violation of other rights.¹⁸⁶

In this connection is the difference between formal and substantive equality. Formal or *de jure* equality is the basic concept that things alike should be treated alike. This is the general understanding of equality today, based on the belief that fairness requires consistent and equal treatment. Formal equality is the form of equality found in most non-discrimination clauses of various constitutions, such as the guarantee of 'equal protection' in the Canadian and United States Constitutions. One aspect, and weakness, of formal equality is that it requires comparison, creating a situation that ignores the personal characteristics of a group or individual. The limitations of formal equality are acknowledged by the CEDAW Committee, which has stated that Articles 1 to 5 and 24 together indicate that state parties to CEDAW are required to go beyond the formal interpretation of equal treatment between men and women to counter and improve the *de facto* situation of women, and address prevailing gender relations and the persistence of gender-based stereotypes that affect women.¹⁸⁷

¹⁸⁵ CEDAW, *supra* note 175, art. 1.

¹⁸⁶ G. Brodsky and S. Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty', 14 *Canadian Journal of Women and the Law* (2002) p. 187 [hereinafter Brodsky/Day – Beyond the Debate].

¹⁸⁷ United Nations Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 25, on article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women (Temporary Special Measures)', 2004, para. 6.

This is where substantive or *de facto* equality would require that the outcome of laws and policies be examined to determine whether they are discriminatory. Substantive equality differs from formal equality in that it forms a mechanism for achieving the equality goal by removing barriers associated with a group or individual's special characteristics rather than securing an equal treatment result. The CEDAW Committee's view of substantive equality is that:

“The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.”¹⁸⁸

4.1 Limitations of the Canadian Social Protection System

The United Nations Human Development Report for 2010 ranked Canada as eighth in the world on its Human Development Index.¹⁸⁹ However, the HDI does not include indicators such as gender or income inequality and respect for human rights. Many women in Canada lack the income security to participate fully in the social and political life of their communities¹⁹⁰ as the government continues to limit social and economic protections and reduce benefits, leaving gaps in the programs and services previously granted.¹⁹¹

4.1.1 Government Pensions

Canada's social safety net is broader than that of the United States and has been more successful in achieving lower poverty rates for certain segments of the population. The universal Old Age Security benefit is claimed by approximately 95 percent of Canadians aged 65 and over, and the Guaranteed Income Supplement targets low income seniors. Like the United States, the eligibility age for OAS will rise to 67 in 2023, but this is a common trend as life expectancies also rise. The safety net provided to elderly women is stronger than that for single mothers, evidenced by the fact

¹⁸⁸ *Ibid*, para. 10.

¹⁸⁹ The HDI provides a composite measure of three dimensions of human development: living a long and healthy life (measured by life expectancy), being educated (measured by adult literacy and enrolment at the primary, secondary, and tertiary levels), and having a decent standard of living (measured by purchasing power parity and income). Norway, Australia, New Zealand, United States, Ireland, Liechtenstein, and the Netherlands ranked higher than Canada. M. Townson, ‘Women’s Poverty and the Recession’, *Canadian Center for Policy Alternatives*, September 2009, <www.policyalternatives.ca>, pp. 14-15, visited 24 July 2011; United Nations Development Program, ‘International Human Development Indicators’, <hdr.undp.org/en/statistics/>, visited 24 July 2011.

¹⁹⁰ G. Brodsky, ‘What do Rights Have To Do With It?’, *Poverty and Human Rights Project*, 21 May 2002, <www.povertyandhumanrights.org>, visited 27 July 2011.

¹⁹¹ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 185.

that poverty rates among the elderly have fallen.¹⁹² Yet it is believed that further decline should not be expected; if anything, rates may very well increase in the current economic and political climate. One issue is pension income-splitting. As of 2006, this has allowed a higher-pension income spouse to transfer tax liability, but not income, to a lower earner in order to reduce the family's taxes.¹⁹³ The concern is that this is discriminatory towards women and could lead to full income-splitting. The benefits of full income-splitting would go mainly to higher-income earning men, and unpaid caregivers could suffer a financial burden because it would appear that they earn more than they actually do, making them ineligible for income-tested social programs should they later require them.¹⁹⁴ It has also been suggested that income-splitting could discourage women's workforce participation as the family would lose tax benefits if the secondary earner increases their income. This policy would only favor families with a sole high-income earner, and the CEDAW Committee has specifically discouraged the use of tax cut strategies to eliminate poverty and strengthen women's economic security.¹⁹⁵

4.1.2 Maternity Benefits

The 50 weeks of paid combined maternity and parental leave are generous when compared to the United States, although it could still be argued that the benefits are too short in duration and inaccessible to those who do not qualify for Employment Insurance.¹⁹⁶ Moreover, because benefits fall under the purview of EI, they are subject to program funding cuts. The 55 percent income-replacement rate is already rather low when compared to other industrialized nations,¹⁹⁷ and provides insufficient financial support to those without a strong collective bargaining agreement. While the United States government has focused on gender-neutrality and rejected social policy acknowledging that pregnancy and childbirth permit differential treatment in law, the Canadian government and courts have another perspective, creating policy that does acknowledge such differences. Thus, the debate between formal and substantive equality arises. Some feminists remain committed to the notion of formal equality and argue that pregnancy should be treated just

¹⁹² P. Evans, 'Women's Poverty in Canada: Cross-Currents in an Ebbing Tide', in G. Schaffner Goldberg (ed.), *Poor Women in Rich Countries: The Feminization of Poverty Over the Life Course* (Oxford University Press, 2010) pp. 165-67.

¹⁹³ The Ad-Hoc Coalition for Women's Equality and Human Rights, 'Women's Equality and Human Rights', in T. Healy (ed.), *The Harper Record* (Canadian Center for Policy Alternatives, 2008) pp. 336-37 [hereinafter Ad-Hoc Coalition].

¹⁹⁴ *Ibid.*, p. 337.

¹⁹⁵ *Ibid.*

¹⁹⁶ C. Hoeppner (MP Chair), 'Federal Poverty Reduction Plan: Working towards Poverty Reduction in Canada', *House of Commons Canada, 40th Parliament, 3rd Session*, November 2010, <www.intraspec.ca/403_HUMA_Rpt07-e.pdf>, p. 130, visited 29 July 2011 [hereinafter House of Commons].

¹⁹⁷ For a global comparison of paid parental leave, where many countries provide 100% income-replacement funded by social security, see Human Rights Watch, 'Failing its Families: Lack of Paid Leave and Work-Family Support in the US', February 2011, <www.hrw.org>, pp. 32-36 and appendix I, visited 10 March 2012 [hereinafter HRW].

like any other temporary disability, while others argue that we ought to embrace a view of equality that recognizes the ‘uniqueness of pregnancy’.¹⁹⁸ So is it better to have gender neutral laws that result in no paid leave for men or women? Or is it preferable to have legislation that provides for paid leave, but also focuses on the differences between men and women, running the risk that women could then be susceptible to other, more subtle, forms of discrimination?

One example is a judicial ruling that Employment Insurance provisions prohibiting non-birth mothers from accessing the 15 weeks of paid maternity benefits do not violate equality rights under the Canadian Charter of Rights and Freedoms.¹⁹⁹ Under EI, adoptive mothers are only entitled to 35 weeks of paid benefits in total, not 50 weeks of combined maternity and parental leave benefits.²⁰⁰ The question before the Court of Appeal in *Tomasson v. Canada* was whether the differential treatment at issue had a purpose or effect that is discriminatory within the meaning of the equality guarantee.²⁰¹ Tomasson argued that the purpose and effect of the maternity benefits is to give biological mothers more time for bonding and childcare than is afforded to adoptive mothers, and this differentiation is therefore discriminatory to adoptive mothers.²⁰² Nevertheless, the Court stated that exact parity between biological and adoptive mothers would then be discriminatory to biological mothers. The distinction in legislation favoring pregnant women is legitimate because it seeks to accommodate their needs in the workforce as a disadvantaged group. If adoptive mothers were to be entitled to maternity benefits then “this would implicitly constitute a finding that birth mothers deserve no more time off from work than adoptive mothers, even if they must go through the burden of pregnancy and childbirth.”²⁰³

Canadian law has accepted that a society should share in the social cost of reproduction, yet the belief that the ability to bear children is a negative attribute still very much exists. This characterization of pregnancy and childbirth as a “burden” implies that it is the actual act of being pregnant that is burdensome, not being a new parent, and pregnancy is unique to women alone. It appears that neither legislation created under formal equality nor substantive equality is able to take the law beyond this archaic perception of pregnancy. The Court’s ruling could be easily criticized by those in support of legislation that focuses on women’s differences because of its characterization of pregnancy. Meanwhile, those who support gender neutral laws may worry that recognition in law of the differences between birth mothers and adoptive mothers is harmful to gender equality.²⁰⁴ The

¹⁹⁸ P. Cain, ‘Feminism and the Limits of Equality’, 24 *Georgia Law Review* 803 (1989-

1990) pp. 828-29 [see generally for a more thorough discussion of feminist legal theory].

¹⁹⁹ White, *supra* note 10, p. 231.

²⁰⁰ *Ibid*; see Chap. 6.2.1 for Canada’s equality guarantee.

²⁰¹ *Tomasson v. Canada (Attorney General)* [2007] 2007 F.C.A. 265, para. 2 (Can.).

²⁰² *Ibid*, paras. 20-21.

²⁰³ *Ibid*, paras. 130-31.

²⁰⁴ White, *supra* note 10, p. 231.

ruling focuses in on an immutable characteristic, the ability or inability to bear children, and this alone could be discriminatory. While it is certainly preferable to provide paid leave to new parents, the tension between same ('equal') treatment and differential ('special') treatment persists.

4.1.3 Access to Health Care

When viewed as a whole, the Canadian health care system appears to function well. The publicly-funded system requires no out-of-pocket payments, though average wait times are usually longer than those in privately-funded systems. However, since 2007, there has been growing concern over Prime Minister Harper's vision of health care policy, moving away from the current collective systemic approach to population health towards a system that places individual responsibility at the center of health care policy.²⁰⁵ A leading example was the government's new (2006-2007) approach to drug addiction, preferring enforcement and incarceration over harm reductions programs that primarily focused on treatment and rehabilitation.²⁰⁶ Progressive public health advocates contend that reducing poverty and social exclusion is the best way to improve health outcomes, and therefore require investment in social programs, but the federal government remains skeptical and continues to propose policies suggesting that health is an individual responsibility.²⁰⁷

The subject that inevitably arises in the context of women's access to health care is reproductive rights. Simply put, women's reproductive rights are not infringed in Canada as they are in the United States, which will be discussed in the following section. In Canada, prior to 1988, abortion was not a woman's decision. Abortion services were limited by criminal law to situations where a three-doctor panel had determined that the pregnancy endangered the woman's health.²⁰⁸ Then, in 1988, the Supreme Court of Canada ruled that this restrictive law resulted in unbalanced access to health care and arbitrary obstacles for women, thereby violating their constitutional rights under the Charter of Rights and Freedoms.²⁰⁹ In particular, the law discriminated against disadvantaged women who were unable to access abortion services. The Court also found that the law violated a woman's 'security of the person' by limiting her effective and timely access to medical services when her life or health was endangered. This substantially increased a pregnant woman's health risks, and thus, the law was not in accordance with fundamental justice.²¹⁰ With no legal restrictions in place, abortion care must be provided in the same manner as other medically necessary services under the Canada Health Act, which guarantees fully-

²⁰⁵ J.H. Edwards, 'Harper and Public Health Policy', in T. Healy (ed.), *The Harper Record* (Canadian Center for Policy Alternatives, 2008) p. 361.

²⁰⁶ *Ibid.*, pp. 361-62.

²⁰⁷ *Ibid.*

²⁰⁸ Criminal Law Amendment Act, SC 1968-69, c-38 [as amending § 251 of the Criminal Code, RSC 1985, c-C46].

²⁰⁹ *Regina v. Morgentaler* [1988] 1 S.C.R. 30 (Can.).

²¹⁰ *Ibid.*

funded health care to Canadians.²¹¹ There is currently no law in Canada legislating when an abortion can be performed, the decision is made between a woman and her doctor, and Prime Minister Harper has publicly stated that his government has no intention of reopening the abortion debate.²¹²

4.1.4 The Government's Actions & Diminishing Social Rights

In examining social protections, it is necessary to consider the broader context of social and economic rights generally. In this connection is the Canadian government's decreased social spending, the gradual and consistent weakening of the social safety net over the past several decades, and the government's current approach to women's poverty. In the early 1990s Canada experienced a period of economic recession, with a rise in unemployment rates and a drop in the GDP, the amount of public debt approached 90 percent of the GDP.²¹³ Then, when Canada entered into NAFTA with the United States, the governments took steps to converge the income security systems of the two countries. Taken together, this led to tax cuts benefiting higher-income earners and considerable reductions in income security spending, decreasing the income security spending gap between Canada and United States.²¹⁴ Indeed, over the past 15 years, the Canadian federal government has chosen to spend roughly CAD 340 billion on tax cuts, rather than investing in comprehensive anti-poverty legislation or strengthening the health care system. Naturally, this is worrisome to women's rights groups since delivering benefits through the tax system, instead of investing social programs, fails to target poverty and income inequality between men and women.²¹⁵

Although this study does not focus on social assistance, government actions in this area are suggestive of the government's general approach to social policy. In 1995, the Liberal government repealed the Canada Assistance Plan, which set standards for social services and provided for cost-sharing by the federal government of social assistance expenditures incurred by the provinces.²¹⁶ CAP protected the rights of beneficiaries by requiring provinces to respect these rights as a precondition for receiving full federal cost-sharing. In its submission to the CESCR, the Charter Committee on Poverty Issues described the introduction of CAP in 1966 as

²¹¹ Canada Health Act, RSC 1985, c-C6, § 2-3.

²¹² CBC News, 'Abortion Debate Will Not be Reopened: PMO', 30 December 2008.

However, provinces can limit coverage for abortions, provided there is authority to make such a regulation, *see* National Abortion Federation, 'Abortion Coverage by Region', www.prochoice.org/canada/regional.html, visited 2 April 2012.

²¹³ N. Habibov and L. Fan, 'Comparison of Inequality Reduction and Income Security in Canada from a Mixed to Neo-Liberal Welfare Regime: Micro-Data Simulations and Policy Implications', 24(1) *Journal of Comparative Social Welfare* (2008) p. 34.

²¹⁴ *Ibid.*

²¹⁵ Ad-Hoc Coalition, *supra* note 193, p. 335.

²¹⁶ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 185.

“a dramatic step forward in the recognition of a person’s right to social assistance when in need” as, up until that point, provincial programs treated people in poverty as “charity cases”.²¹⁷ However, the replacement of CAP with the Canada Health and Social Transfer has removed most of the substantive and procedural protections that CAP ensured. According to the CCPI, the net effect for the poor after the repeal of CAP has been a complete loss of the federal legal protections regarding entitlement to social assistance when in need, an implicit degradation of the poor’s social standing, and little recognition of their legal rights.²¹⁸ There has also been criticism of the limited social program funding available under the CHST.²¹⁹ As well, during this time, national income security standards were cancelled, unemployment insurance became less generous because of lower benefits, and universal social programs became income-tested programs.²²⁰

Single mothers and elderly women have been described as “the forgotten poor” in Canada since they are not mentioned in budgets, no specific programs have been developed to address their needs, and many government policies have aggravated the problem and contributed to increased poverty rates.²²¹ Changes have been made or proposed to income security programs intended to prevent poverty by providing financial support for people when they are most vulnerable, including single mothers, older women, and those who have lost their jobs.²²² Instead of strengthening these programs, the government has limited their effectiveness and made it more likely that women’s poverty will increase in future. Women’s poverty is not high on the current administration’s policy agenda. Of the four major political parties in the May 2011 federal election, the Conservatives were the only party not to include poverty reduction as a main issue in their political platform. The Conservative party went on to win a majority government for the first time since coming into power in 2006. Prior to this majority win, initiatives taken by the Conservatives continued to promote the earlier-instituted narrow view of social rights, seriously undermining progress towards achieving equality for women and reducing women’s poverty.²²³ The current government has been described as “a government

²¹⁷ The Charter Committee on Poverty Issues, ‘Submissions to the Committee on Economic, Social and Cultural Rights re: The Review of the Third Report of Canada at the Committee on Economic, Social and Cultural Rights [19th Session] (November-December 1998)’, 16 November 1998, para. 10.

²¹⁸ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 185.

²¹⁹ Poverty-related organizations argue that the funds provided to social programs through CHST are a sliver of what is needed to alleviate poverty; it is a huge step backwards from CAP, *see* House of Commons, *supra* note 196, pp. 99-101.

²²⁰ Habibov, *supra* note 213, p. 34.

²²¹ Townson, *supra* note 189, p. 11.

²²² *See generally* Ad-Hoc Coalition, *supra* note 193, pp. 327-28.

²²³ There have been considerable partial or full funding cuts to programs designed to document women’s inequality: research activities of the Status of Women Canada were terminated, the Law Commission of Canada was abolished, and the Canadian Labour and Business Centre was closed. The Court Challenges Program that helped finance women and other equality seekers to take legal action to secure their equality rights was abolished, and funding cuts forced the National Association of Women and the Law that helped women with these issues to close. *Ibid*, p. 327.

that supports programs and projects that contribute to women's equality, but does nothing to address the framework of institutional systemic inequality faced by women in this country.”²²⁴ The government has already cut social program funding and poses a threat to other programs currently in place; without full recognition and respect for social and economic rights, one could likely assume that further cutbacks are in store.

4.2 Limitations of the United States Social Protection System

The idealized belief that private markets will address social needs is misplaced when most American workers receive little support and there are immense disparities in access to social protections.²²⁵ Women's economic security is particularly vulnerable considering the outdated nature of the pension system, the lack of adequate maternity protection, and the absence of any form of universal health care. Despite the general wealth of the United States, women's poverty rates remain very high as compared with other wealthy nations.²²⁶ Government social programs have not been effective in addressing those most vulnerable to poverty, and there is no comprehensive anti-poverty legislation, rather a patchwork of laws with no uniformity.²²⁷ The United States has not ratified any of the ILO's social protection conventions²²⁸ or human rights instruments discussed in the last chapter. Thus, one limitation is that the social protection system does not encompass the internationally-recognized minimum standards enshrined in these instruments and they are not legally binding upon the government. The following sections detail other challenges of the social protection system, some so deeply ingrained in American society that they have proven difficult to overcome.

4.2.1 Government Pensions

The breadwinner model of distribution is based on the outdated notion that women are natural caregivers and nurturers whereas men are providers, an ideology perpetuated by the philosophy of the classic liberal welfare regime. It creates a situation that “allows male working patterns (full-time, permanent employment) to be put forward as the ‘norm’, while women’s working pattern, if they deviate from this norm, are seen as exceptional or unorthodox.”²²⁹ Social security was initially fashioned around this model,

²²⁴ *Ibid*, p. 328.

²²⁵ HRW, *supra* note 197, p. 2.

²²⁶ A. Sengupta, ‘Human Rights and Extreme Poverty Report: Mission to the United States of America’, *United Nations Economic and Social Council* (March 2006) E/CN.4/2006/43/Add.1, p. 2.

²²⁷ *Ibid*.

²²⁸ International Labour Organization, ‘Ratification of ILO Conventions’ [United States], up-to-date ratifications by country available at <www.ilo.org/ilolex>, visited 24 April 2012.

²²⁹ S. Nott, ‘Gender Mainstreaming as an Instrument for Combating Poverty’, in L. Williams *et al.* (eds.), *Law and Poverty: The Legal System and Poverty Reduction* (Zed Books, London, 2003) p. 209.

where distinct ‘public’ and ‘private’ spheres are recognized and supported through social policy.²³⁰ The social security system therefore acknowledges and rewards the traditional family comprised of a male breadwinner and a female caregiver. When the system was first developed, the breadwinner model was logical since fewer women were actively involved in the formal labor market.²³¹ However, the very concept of what a family is has evolved significantly since the introduction of social security, but the system has not been updated to match.

The current system is unable to cope with the employment patterns of most women. It protects those who have either a consistent work history or those who get married, stay married, and do not work in the formal economy, thus benefiting from spousal or survivor benefits.²³² Yet not all American women fit this role. Women are likely to work more than their mothers did, yet the home responsibilities remain the same.²³³ In 2011, only 20 percent of families had stay-at-home mothers,²³⁴ and with declining marriage rates, fewer women are likely to benefit from spousal or survivor benefits.²³⁵ Today, the gender neutral pension system does better at disadvantaging women from all economic groups rather than benefiting them, with the exception of the woman who stays married, never works in the formal economy, and whose spouse earns a high wage.²³⁶ As to the low-wage earning married women, if her own benefit is no more than 50 percent of her husband’s, she will receive the same benefit as a woman who has never worked. Her income could even be exceeded by a non-employed wife whose spouse was a high-wage earner.²³⁷ This is why the traditional male breadwinner ideology is problematic: it provides greater rewards to women who marry well rather than those who are employed. The message this ideology sends is likely what CEDAW had in mind when it addressed damaging and discriminatory gender stereotyping, emphasizing the need for “a change in the traditional role of men as well as the role of women in society and in the family.”²³⁸

There have long been arguments for recognition of women’s work in the informal economy and the creation of a system that rewards women for raising children.²³⁹ The reality is that there are risks primarily affecting

²³⁰ C.L. Estes, ‘Social Security Privatization and Older Women: A Feminist Political Economy Perspective’, 18 *Journal of Aging Studies* (2004) p. 11.

²³¹ Goldberg – U.S., *supra* note 60, p. 233.

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ United States Department of Labor, Bureau of Labor Statistics, ‘Table 2. Families by Presence and Relationship of Employed Members and Family Type, 2010-2011 Annual Averages’, *Economic News Release*, <www.bls.gov/news.release/famee.t02.htm>, visited 29 March 2012.

²³⁵ Goldberg – U.S., *supra* note 60, p. 248.

²³⁶ Herd, *supra* note 66, p. 1366.

²³⁷ *Ibid.*

²³⁸ Cook, *supra* note 177, p. 223.

²³⁹ Herd, *supra* note 66, p. 1367.

female workers, such as income insecurity due to maternity and caregiver responsibilities.²⁴⁰ The current system neglects the informal economy and fails to consider equality of treatment, especially for women who have never worked, or had inconsistent work, in the formal economy albeit they benefit more than some formally employed women. In order to benefit from social security, one must have paid into the system for at least ten years. If not, then they could qualify for a spousal benefit, which is no more than 50 percent of the earner spouse's benefit, but if the spouse retires at 62, it may be only 32.5 percent.²⁴¹ This policy assumes that the spouse who has stayed at home has not contributed to the economy in the same way as the earner spouse. It puts the spouse who has never worked, or worked inconsistently, in a position where they are fully reliant on the earner spouse, despite the years spent contributing to the economy as a non-remunerated worker. At present, unpaid caregivers are only compensated based on their marital status. As a result, some caregivers receive generous benefits (those in traditional breadwinner families with a high-earning spouse), while others receive no compensation for their caregiver work (those who have never been married or who divorced prior to meeting the ten-years-of-marriage requirement).²⁴²

While it is a real injustice to those outside the formal economy, it is also a difficult problem to address. The SSI program provides a minimum benefit to those with little or no income, but it is not universal, thus one option is to implement a universal benefit based on citizenship or residency, rather than marriage or employment. Yet a system that recognizes work in the informal economy and rewards women (or men) for raising children is still needed. But how does one go about implementing a program aimed at the informal economy when the workers do not make actual financial contributions to the system? How does the government place a dollar value on unpaid work? In a 2011 report released by the Social Security Administration, analysts examined the adequacy of current spousal and survivor benefits, and how changing marital patterns and family structures have increased the risk of old age poverty among certain groups of women.²⁴³ The report suggested providing caregiver credits to individuals for time spent outside the workforce while caring for dependent children, sick or elderly relatives. These caregiver credits, used in almost all public pension systems in the European Union, would benefit women whose inconsistent work histories and/or work in the informal economy resulted in

²⁴⁰ A. Orloff, 'Equality, Employment, and State Social Policies: A Gendered Perspective', in J. Clasen (ed.), *What Future for Social Security?* (Kluwer Law International, 2002) p. 71.

²⁴¹ If the earner spouse dies, the survivor will then get the larger of the two checks as a survivor benefit. United States Social Security Administration, 'Benefits for Spouses', <www.ssa.gov/OACT/quickcalc/spouse.html>, visited 24 July 2011.

²⁴² J. Jankowski, 'Caregiver Credits in France, Germany, and Sweden: Lessons for the United States', *United States Social Security Administration* (Social Security Bulletin, Vol. 71, No. 4, 2011).

²⁴³ In 2008, 11.9% of women aged 65 or older fell below the poverty line compared with 6.7% of men, but these rates were even higher for certain subgroups of women: non-married (16.9%), widowed (15.4%), and divorced (19.5%). *Ibid.*

lower lifetime earnings and lower pensions.²⁴⁴ While this type of reform is certainly needed, it has yet to be seen whether the proposal will be incorporated into the pension system.

The ongoing economic crisis in the United States inevitably brings up the problem of long-term funding. This is of particular importance when women are more reliant than men on social security benefits:

- For men aged 65 and older: 55 percent rely on social security for half or more of their income, 35 percent rely on it for 80 percent or more of their income, and 20 percent rely on it for all of their income.
- For women aged 65 and older: 68 percent rely on social security for half or more of their income, 50 percent rely on it for 80 percent or more of their income, and 29 percent rely on it for all of their income.²⁴⁵

The existing system is not sustainable without reform. The ‘baby-boomer’ generation is aging, resulting in a lower ratio of paying workers to retirees, and the current low birth rate, as compared to the ‘baby-boomer’ period, is expected to continue. Meanwhile, life expectancy is increasing and unemployment rates remain high. The most common, and hotly debated, solution has been to privatize the system so that workers can divert all or a specific percentage of their contributions to personal retirement accounts and invest as they wish.²⁴⁶

Supporters of privatization argue that it would make workers more interested in a free economy and the stock market, giving them back their right to invest their wages.²⁴⁷ Nevertheless, it could also be detrimental to the old age poverty level. The current system’s goal is to maintain a balance between individual equity and social adequacy: social security benefits are proportional to individual contributions (individual equity), thus benefits are higher for workers who contribute more to the system and who had higher pre-retirement earnings; the system also aims to provide a proportionately greater benefit for lower-income workers to help alleviate poverty among the elderly (social adequacy).²⁴⁸ Critics argue that there will be no common fund in a privatized system, resulting in limited redistribution.²⁴⁹ With lower earnings, greater incidence of insecure paid employment, and the need to combine paid and unpaid work, women would be seriously disadvantaged by such proposals for privatization.²⁵⁰ But it is still a threat to the population in its entirety since the risk transfers to the worker. Those who retire when the market reaches a peak collect large pensions, while those retiring with a

²⁴⁴ *Ibid.*

²⁴⁵ Hartmann, *supra* note 65; Herd, *supra* note 66, p. 1366.

²⁴⁶ Velloso, *supra* note 28.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Estes, *supra* note 230, p. 205.

poor market may receive little money to live on. Those who outlive their savings, even after collecting a reasonable return on their investment, could end up below the poverty line.²⁵¹ Indeed, the Bush administration proposed privatization for years, and had it succeeded, the financial collapse of 2008 would have pushed millions of retirees into poverty.

4.2.2 Maternity Benefits

Women as a group are discriminated against because of the perception of women's delicate and motherly nature. Society fixates on a woman's ability to bear children as a justification for the public/private sphere dichotomy. Even beyond theory, the complete absence of federally-funded maternity leave is overtly discriminatory because only women get pregnant. While two laws give workers pregnancy-related rights, they both come with numerous limitations.

The Pregnancy Discrimination Act prohibits employers from discriminating on account of pregnancy, but does not apply to employers of fewer than 15 people or to women who work part-time and religious organizations are exempt,²⁵² leaving at least 15 percent of female workers unprotected. If employers provide no leave or limited leave to their employees, then they are not required to provide leave to pregnant employees, a situation primarily affecting low-wage workers.²⁵³ There is also much confusion in the courts over what constitutes a "related medical condition" (to pregnancy or childbirth) under the PDA.²⁵⁴ The FMLA protects job security during leave taken for an employee's own serious health condition (including pregnancy and childbirth) and the care of the employee's new child. In many ways, the FMLA is well-formulated, acknowledging workers' dual roles in family life, giving fathers the right to

²⁵¹ T.W. Farnam, 'Social Security, Medicare Face Insolvency Sooner', *Wall Street Journal*, 13 May 2009.

²⁵² However, the religious organization exemption has been interpreted as a limited exception. *Vigars v. Valley Christian School of Dublin, California*, 805 F.Supp. 802, 806 (N.D. Cal. 1992).

²⁵³ For judicial interpretation of the PDA in this context, see A. O'Leary, 'How Family Leave Laws Left Out Low-Wage Workers', 23 *Berkeley Journal of Employment and Labor Law* (2007) pp. 30-35.

²⁵⁴ The PDA says that sex discrimination includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions"; see e.g. *International Union*, *supra* note 91 [the Supreme Court found that the PDA also prohibits discrimination on the basis of the potential to become pregnant]; *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266 (W.D. Wash. 2001) [the court held that employer-based insurance plans must cover prescription contraceptives as a matter of federal anti-discrimination law]; but see also *Standridge v. Union Pacific Railroad Co.*, 479 F.3d 936 (8th Cir. 2007) [the court held that contraception is not a 'related medical condition' under the PDA, even though the Court held in *International Union* that the statutory text was broad enough to encompass potential pregnancy, payment for contraception under a company's benefit plan may be denied as long as it excludes both male and female contraception]; *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3rd Cir. 2008) [the Court of Appeals held that the plain language of the PDA "together with the legislative history and EEOC guidelines, support a conclusion that an employee may not discriminate against a woman employee because she has exercised her right to have an abortion"].

take leave for the care of a new child, and is a fine early attempt to target the intersectionality of work and family life. However, the FMLA only applies to covered employers²⁵⁵ and ensures that eligible employees receive up to 12 weeks of unpaid leave. It does not require employers to provide flexible works hour and, due to the numerous eligibility restrictions, the FMLA covers about half (or fewer) of all private sector workers,²⁵⁶ leaving many women ineligible for any leave at all.

These laws support the ideology of the traditional family and fail to protect women who do not fit this model, exposing non-traditional female workers who become pregnant to risks that men are not. Both laws fall short of the ILO's Maternity Protection Convention standard – all women are entitled to maternity leave of not less than 14 weeks, including six weeks compulsory leave²⁵⁷ – while the Maternity Protection Recommendation calls for an even higher standard of 18 weeks.²⁵⁸ As to salary, the Convention requires cash benefits at a level that ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.²⁵⁹ While the United States is not bound by the Convention, it is certainly one of the government's shortcomings that it fails to provide adequate protections on par with international standards to this portion of the workforce. In order for a protection system to be effective, it must be comprehensive and protect against any circumstance that would threaten a person's ability to maintain an adequate standard of living.

One reason a government is more likely to provide maternity benefits is to combat low birth rates and encourage women's paid labor market participation.²⁶⁰ Yet the United States does not face these same challenges; the birth rate is high relative to other industrialized nations, it has strong immigration, and high maternal labor market participation, resulting in low demand for social policies to motivate behavioral changes.²⁶¹ Saul Levmore observes that it is not that the government is completely opposed to social programs since it mandates expensive accommodations for the disabled, imposes expensive occupational safety rules, and expends considerable resources in relative terms on education and health care.²⁶² Rather, “it is one thing to want a cross-section of families to have more births, or perhaps a cross-section of women to marry or begin bearing children earlier, but it is quite another to have a system in which the least educated and poorest

²⁵⁵ All public agencies and private companies who employ more than 50 people within 75 miles. FMLA, *supra* note 99, § 2611(2)(A)-(B).

²⁵⁶ White, *supra* note 10, p. 223 [restrictions include that the worker must have worked for the covered employer for at least 12 months prior to taking leave and must have worked at least 1250 hours in those 12 months].

²⁵⁷ ILO C183, *supra* note 148, art. 4(1).

²⁵⁸ ILO R191: Maternity Protection Recommendation (adopted 15 June 2000) § 1.1.

²⁵⁹ ILO C183, *supra* note 148, art. 6(2). Where previous earnings are the basis of cash benefits, the amount shall not be less than two-thirds of previous earnings. *Ibid*, art. 6(3).

²⁶⁰ White, *supra* note 10, p. 229.

²⁶¹ *Ibid*.

²⁶² *Ibid*, p. 230 [citing S. Levmore, ‘Parental Leave and American Exceptionalism’, 58 *Case Western Law Review* (2007) p. 207].

families are deployed to boost the reproduction rate.”²⁶³ Levmore’s argument supports the American sense of individualism; since individuals choose to have children, it is presumed that they can and should save money and plan for pregnancy just as they do for other life choices.²⁶⁴ This type of thinking differs greatly from that in Canada, which has accepted that society should share in the cost of reproduction. Collective responsibility for reproduction is virtually unknown in the United States, but current social policy does not necessarily reflect the wishes of the people. A 2010 survey of registered voters found that 76 percent of respondents endorsed laws to provide paid family leave.²⁶⁵ That same year, three bills related to paid family leave were introduced – and subsequently died – before the 111th Congress.²⁶⁶

Businesses are particularly resistant to mandatory paid leave, lobbying to prevent passage of the FMLA and state initiatives to permit the use of unemployment insurance funds for family leave.²⁶⁷ Levmore notes that maternity benefits are still regarded with hesitation by employers: “From an employer’s point of view, the problem with parental leave, and perhaps with paid leave, is that the employee has no particular incentive to return to work after the period of leave.”²⁶⁸ Among the other arguments against paid family leave: it would be expensive for taxpayers and employers; it would diminish productivity by encouraging absences and lead to high turnover rates; it puts an unfair burden on small businesses; and that such benefits should be at the employer’s discretion and not mandated.²⁶⁹

However, most of these arguments are ill-founded. Paid family leave actually leads to lower employee turnover rates: one study found that 94 percent of leave-takers who received full pay during family leave returned to the same employer, compared to 76 percent of employees who took unpaid leave.²⁷⁰ With lower turnover rates, employers avoid extra recruitment and training costs. Another study found that the extension of paid parental leave benefits in Canada from 10 to 35 weeks did not appear to have affected mothers’ return-to-work rate.²⁷¹ Research on California’s paid family leave program found that most businesses reported either a positive effect or no noticeable effect on productivity, profitability and employee morale, and small businesses were less likely than large ones to report

²⁶³ *Ibid*, p. 213.

²⁶⁴ *Ibid*, p. 228.

²⁶⁵ HRW, *supra* note 197, p. 18.

²⁶⁶ *Ibid*, pp. 20-22; H.R. 1723: Family Leave Insurance Act of 2009 (111th Congress, 2009-2011); H.R. 2339: Family Income to Respond to Significant Transitions (FIRST) Act (111th Congress, 2009-2011); H.R. 626: Federal Employees Paid Parental Leave Act (111th Congress, 2009-2011).

²⁶⁷ White, *supra* note 10, p. 228.

²⁶⁸ *Ibid*, p. 229.

²⁶⁹ *Ibid*, pp. 228-29; HRW, *supra* note 197, p. 26.

²⁷⁰ HRW, *supra* note 197, p. 24.

²⁷¹ White, *supra* note 10, p. 229.

negative effects.²⁷² Lastly, employers would not cover the costs alone. Employer and government contributions are certainly desirable, but it is employee payroll deductions, not employer contributions, that fund two current state leave programs.²⁷³ Nevertheless, businesses remain resistant to mandatory leave and the substantial political lobbying power they hold cannot be overlooked.

Efforts to implement state-level legislation rather than focusing on federal protection have not received overwhelming support since there is much debate within feminist circles about how to approach maternity protection.²⁷⁴ The fear is that legislation that singles out or focuses on women's differences would be harmful to gender equality.²⁷⁵ This brings us back to the conflict between formal and substantive equality. The United States Congress has rejected the creation of social policy acknowledging that pregnancy and childbirth require and permit differential treatment in law.²⁷⁶ The FMLA is thus a piece of gender neutral legislation, and is certainly more gender neutral than Canadian law, but the outcome has been no federally-mandated paid leave at all, revealing how formal equality often falls short. This gender neutral approach is detrimental to the economic security of all persons, male or female, wishing to start a family.

The lack of paid leave and current economic downturn mean that women in the United States return to the workforce relatively soon after giving birth when compared to women in other countries. In *Tomasson*, the Canadian Federal Court of Appeal reasoned that birth mothers require a flexible period of leave during pregnancy, labor, birth, and the postpartum period in order to cope with the physiological changes they undergo.²⁷⁷ A 2005 study confirmed this reasoning, finding that longer maternity leave was associated with fewer and less frequent depressive symptoms among mothers; increasing leave by one week was associated with a six to seven percent decline in depressive symptoms.²⁷⁸ Even for adoptive mothers who do not undergo these exact changes, cross-national studies have found that extended parental leave is associated with lower infant and child mortality.²⁷⁹ Whereas the FMLA requires employers to maintain health insurance benefits during leave, roughly half of the workforce is ineligible for leave under the FMLA. As a result, workers who take non-FMLA leave, or take more than the 12 weeks permitted by the FMLA, may lose both income and health insurance, endangering the health of new parents and their children.²⁸⁰

²⁷² HRW, *supra* note 197, p. 24.

²⁷³ *Ibid*, pp. 26-27.

²⁷⁴ White, *supra* note 10, p. 230; *see also* Chap. 4.1.2.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid*, p. 231.

²⁷⁷ *Tomasson*, *supra* note 201.

²⁷⁸ HRW, *supra* note 197, p. 42.

²⁷⁹ *Ibid*, p. 46.

²⁸⁰ *Ibid*, p. 52.

4.2.3 Access to Health Care

The United States government spends twice as much per capita on health care than Canada, yet had roughly 50 million uninsured residents in 2010. Even those individuals who have health insurance worry that a serious medical problem could lead to loss of coverage or unaffordable costs.²⁸¹ There are a number of reasons for being uninsured, such as a job not offering insurance or being unemployed and unable to afford insurance. Lack of insurance often leads individuals to delay seeing a doctor or avoid follow-up care, which leaves them in poorer health and with a shorter life expectancy.²⁸² Being uninsured or underinsured can create significant medical debt, high out-of-pocket costs, and financial stress when individuals and families must choose between paying for medical needs and other life necessities.²⁸³ These issues affect both men and women, but when women are disproportionately affected by poverty, they are also disproportionately affected by the consequences of being uninsured or underinsured.

When women are more likely than men to have inconsistent work histories, earn lower wages, or work in the informal economy, they are less likely to receive employer-sponsored health insurance. As it stands now, employer-sponsored health insurance, which has been a source of coverage for many Americans, is becoming increasingly unsustainable for many businesses due to rising costs.²⁸⁴ This forces employers to make difficult financial choices and decide whether to reduce coverage or end health benefits altogether.²⁸⁵ Low-wage workers are less likely than higher-income workers to receive employer-sponsored health coverage, and less likely to afford it on their own. There is also a gap in federal health care services, whereby an individual is not poor enough to qualify for Medicaid, yet not financially secure enough to afford personal coverage. Meanwhile, Medicare currently faces the same funding problems as social security: in May 2009 the government stated that the Medicare fund will be depleted in 2017 with 2009 marking the first time that Medicare ran a deficit, paying out more in benefits than it generated from taxes and other revenue.²⁸⁶ Hence, much like social security, Medicare is not sustainable without reform. The Affordable Care Act was intended to remedy some of the problems associated with being uninsured or underinsured. However, with the current (April 2012) legal challenge pending before the Supreme Court – and full implementation spanning a number of years – it is unknown how this legislation will help those most in need of affordable health care.

Women's health is greatly affected by the extent and quality of health services available to them. Research has identified major gender inequalities in access to services and in the way men and women are treated by the

²⁸¹ Kennedy, *supra* note 120, p. 165.

²⁸² *Ibid.* p. 166.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ Farnam, *supra* note 251.

health care system, with little attention given to differences in needs when defining the quality of health care.²⁸⁷ Women's organizations are in agreement that "gender sensitive health care should be available, accessible, affordable, appropriate and acceptable".²⁸⁸ In many ways, the ACA was successful in strengthening women's access to health care: it prohibits 'gender rating' in health care plans²⁸⁹ and requires all new health plans to cover and eliminate cost-sharing for preventive services and screenings.²⁹⁰ The ACA prohibits health plans from denying coverage for pre-existing pregnancy-related conditions, such as a cesarean section, and by 2014, these discriminatory practices are banned for all plans except existing individual health plans.²⁹¹ The ACA also includes the Medicaid Family Planning State Option, which would facilitate states to make more women eligible for family planning services under the Medicaid program.²⁹²

During the passage of the ACA, women's reproductive rights were, and continue to be, fiercely debated. In early 2012, the Obama administration issued a mandate declaring that under the ACA, all employers, including religious organizations, will be required to offer free insurance coverage for contraceptives to their employees.²⁹³ The mandate was based on a report by the Institute of Medicine, which found that access to contraceptives is essential to women's health, yet they are insufficiently accessible to many women.²⁹⁴ The ensuing controversy led the administration to revise its decision and put in place 'accommodations' for organizations that object, for religious reasons, to covering contraceptives.²⁹⁵ The accommodations grant these organizations a one-year grace period (until August 2013), during which they do not have to comply with the mandate. The Department of Health and Human Services will then issue rules requiring the insurance

²⁸⁷ C. Gijsbers van Wijk *et al.*, 'Gender Perspectives and Quality of Care: Towards Appropriate and Adequate Health Care for Women', 43(5) *Social Science and Medicine* (1996) p. 708.

²⁸⁸ *Ibid.*

²⁸⁹ 'Gender rating' is the practice of charging women different premiums than men, and results in significantly higher rates for women throughout the country. In states that have not banned the practice, the vast majority, 92%, of best-selling plans, 'gender rate' (*i.e.* charge 40-year-old women more than 40-year-old men for coverage) and only 3% of these plans cover maternity services. Based on an average of current premiums and the most recent data on the number of women in the individual health insurance market, 'gender rating' costs women approximately USD 1 billion a year. National Women's Law Center, 'Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act', 16 March 2012, <www.nwlc.org>, p. 3, visited 20 March 2012.

²⁹⁰ National Women's Law Center, 'The Affordable Care Act and Reproductive Health: What's at Stake', <www.nwlc.org>, visited 14 September 2011.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ The White House, 'Fact Sheet: Women's Preventative Services and Religious Institutions', *Office of the Press Secretary*, 10 February 2012.

²⁹⁴ Institute of Medicine, 'Clinical Preventative Services for Women: Closing the Gaps', 19 July 2011, <www.iom.edu>, visited 26 February 2012.

²⁹⁵ Churches, synagogues, houses of worship are exempt from the coverage requirement completely. Kaiser Family Foundation, 'Insurance Coverage of Contraceptives', 21 February 2012, <healthreform.kff.org>, visited 25 March 2012.

companies selling plans to these organizations to offer contraceptive coverage without cost-sharing directly to all employees and their dependents who want it.²⁹⁶ This debate is ongoing in American politics and while there is a firm federal commitment to keeping protections in place, the anti-contraception (or arguably, anti-women's rights) movement remains. Since religious organizations are not required to cover the cost of contraceptives, the real issue is providing *access* to contraceptives.

Incidentally, abortion care is treated differently than all other health care services. For instance, the House of Representatives passed the Hyde Amendment in 1976 following the Supreme Court's landmark 1973 ruling in *Roe v. Wade* that legalized abortion.²⁹⁷ It is not a permanent law, but a legislative provision that is routinely attached to federal spending bills before Congress.²⁹⁸ It restricts the use of Medicaid funds for abortion, leaving low income women without abortion funding except in cases of life endangerment, rape or incest, but not the general health of the woman.²⁹⁹ Abortion is the only medically necessary service excluded from Medicaid coverage, and since only women endure the physical consequences of unwanted pregnancy, the Hyde Amendment impacts and discriminates against a group composed solely of women (and poor women at that). A 1980 Supreme Court decision held that the Hyde Amendment is constitutional;³⁰⁰ meanwhile, courts in at least 13 states have held that similar restrictions on state funds violate women's equality and/or privacy rights, interfering with women's ability to exercise their constitutional right to abortion and protect their right to health.³⁰¹ The Hyde Amendment applies to the ACA as well. Health care plans cannot use federal funds for abortion services beyond those permitted, and plans that include abortion coverage are required to abide by regulations as to collection and segregation of funds. The Hyde Amendment has effectively stigmatized abortion care rather than recognizing it as a part of women's health care.

²⁹⁶ *Ibid.*

²⁹⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁹⁸ *But see H.R. 3: No Taxpayer Funding for Abortion Act*, *infra* note 303, which would codify the Hyde Amendment by permanently prohibiting taxpayer funding of abortion across all federal programs.

²⁹⁹ At first the Hyde Amendment offered no exceptions, but were later added by Congress.

³⁰⁰ *Harris v. McRae*, 448 U.S. 297 (1980): the Court's finding was based primarily on the right to privacy and secondarily on discrimination based on indigency (but not sex discrimination) and the government need not remove obstacles to freedom of choice not of its own creation: "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Ibid.*, at 316; "the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all." *Ibid.*, at 317.

³⁰¹ For example, in *Doe v. Maher*, 515 A.2d 134 (Conn. Super. 1986), the court was unable to reconcile the mandate and logic of the Supreme Court's decision in *Roe v. Wade* with the *Harris v. McRae* decision. "Medicaid reimbursement funds are made available for all the health care costs of women, including those medical costs necessary to carry the fetus to term, but not for the medically necessary abortion. Surely, this constitutes infringement on the right to an abortion." *Ibid.*, at 151.

The ACA also expressly permits states to pass laws banning private insurance coverage of abortion in any insurance exchange set up in their state, and 20 states currently have such laws. As a result, a woman will not be allowed to use her own money to purchase an exchange-based health plan that covers abortion services, and may not be able to purchase a plan that provides insurance coverage for abortion at all.³⁰² Likewise, two bills introduced in the 112th Congress – H.R. 3: No Taxpayer Funding for Abortion Act and H.R. 358: Protect Life Act – would jeopardize the insurance coverage for abortion that millions of women currently have.³⁰³ H.R. 3 passed in the House and will soon be voted on in the Senate. H.R. 358 passed in the House by simple resolution and became H.Res. 430.³⁰⁴ At the state level, 2011 saw unprecedented attention related to reproductive rights: more than 1,100 reproductive rights-related provisions were introduced in state legislatures, up from 950 in 2010. By end of 2011, 135 of these provisions were enacted, 68 percent of which restrict abortion services (92 provisions in 24 states), up from 34 abortion restrictions in 2005.³⁰⁵

In the international context, discrimination includes laws that have either the purpose or effect of preventing women from exercising their human rights or fundamental freedoms on a basis of equality with men,³⁰⁶ but United States law requires both discriminatory intent and disparate impact.³⁰⁷ Still, restrictive legislation and regulations are discriminatory when they target services only women need, coerce only women into unwillingly continuing their pregnancies to term, and have the effect of denying women access to services that may be necessary for realization of the right to health. Moreover, the quality of a woman's health insurance coverage should not be dictated by the state or defined by her employer's religious beliefs. If every person has indivisible and indispensable rights related to an adequate standard of living, then women should be able to control their health through proper services and information. When a woman is denied this right, be it through poor preventative services or limited access to contraceptives or safe abortion care, she is denied the right to make her own choices, protect her health, and exercise her rights.

³⁰² National Women's Law Center, 'State Bans on Insurance Coverage of Abortion Endanger Women's Health and Take Health Benefits Away from Women', 16 March 2012, <www.nwlc.org>, visited 15 April 2012; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(a)(1).

³⁰³ H.R. 3: No Taxpayer Funding for Abortion Act (112th Congress, 2011-2013) [to prohibit taxpayer-funded abortions and to provide for conscience protections]; H.R. 358: Protect Life Act (112th Congress, 2011-2013) [to amend the Patient Protection and Affordable Care Act to modify special rules relating to coverage of abortion services under such Act]; *see* <www.govtrack.us/congress.com> for up-to-date information on bills before Congress.

³⁰⁴ A simple resolution addresses matters entirely within the prerogative of one house, and is also used to express the sentiments of a single house. They do not require the approval of the other house or the signature of the president, and do not have the force of law. United States Senate, 'Legislation, Laws, and Acts', <www.senate.gov>, visited 1 April 2012.

³⁰⁵ Guttmacher Institute, 'Laws Affecting Reproductive Health and Rights: 2011 State Policy Review', <www.guttmacher.org>, visited 26 March 2012.

³⁰⁶ CEDAW, *supra* note 175, art. 1.

³⁰⁷ See Chap. 6.3.2.

4.3 Conclusion

This chapter addressed the limitations of each country's social protection system and the various dimensions of discriminatory social policy. Canada's system is strong, but still offers insufficient financial support during maternity and parental leave. Furthermore, the government's emerging individualistic view of public health care and failure to invest in social programs targeting poverty and income inequality suggest that poverty rates will increase. The United States system is highly fragmented and there are immense disparities in access to social protections. Women's economic security is particularly vulnerable because of the pension system's inability to cope with the working patterns of most women, the lack of mandated paid maternity leave, and absence of any form of universal health care. With these shortcomings in mind, Chapter 5 aims to build on the central argument of this thesis – that inadequate social protections are detrimental to the economic security of women – by looking at poverty rates among women in Canada and the United States, and examining poverty as an emerging human rights violation and the underlying feminist theory.

5 The Feminization of Poverty

Poverty has been feminized around the world.³⁰⁸ Canada and the United States are no exception, and their respective social policies have been ineffective in targeting this growing concern. Poverty can be linked with factors such as the female sex, motherhood and being single.³⁰⁹ Women are more likely to be poor than men and to be poor for different reasons than men. In *Women and the Equality Deficit*, Gwen Brodsky and Shelagh Day elaborate on the complexity of women's poverty:

"Women's persistent economic inequality is caused by a number of interlocking factors: the social assignment to women of the unpaid role of caregiver and nurturer for children, men, and old people; the fact that in the paid labour force women perform the majority of the work in the 'caring' occupations and that this 'women's work' is lower paid than 'men's work'; the lack of affordable, safe child care; the lack of adequate recognition and support for child care and parenting responsibilities that either constrains women's participation in the labour force or doubles the burden they carry; the fact that women are more likely than men to have non-standard jobs with no job security, union protection, or benefits; the entrenched devaluation of the labour of women of colour, Aboriginal women, and women with disabilities; and the economic penalties that women incur when they are unattached to men, or have children alone. In general, women as a group are economically unequal because they bear and raise children and have been assigned the role of caregiver. Secondary status and income go with these roles."³¹⁰

Along this line of thought, limited access to social protections plays a large role since women's poverty is also connected with the way women are treated while formally employed, and how they are situated when outside of the formal economy or paid employment.³¹¹ Moreover, the horizontal and vertical segregation of the labor market, sex-specific working histories, and pay gaps combine to hinder women's access to social protection schemes, resulting in fewer benefits and lower entitlements.

5.1 The Numbers Game: *Poverty in Canada v. Poverty in the United States*

The sole objective of this section is to present the differences in poverty rates among women in relation to the general public. Comparing the percentage of people living in poverty between countries is a difficult task, especially when Canada uses a relative poverty measurement and the United

³⁰⁸ See generally G. Schaffner Goldberg (ed.), *Poor Women in Rich Countries: The Feminization of Poverty Over the Life Course* (Oxford University Press, 2010) [a study of women's poverty over the life course focusing on the economic condition of single mothers and single elderly women in eight wealthy countries].

³⁰⁹ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 192.

³¹⁰ G. Brodsky and S. Day, *Women and the Equality Deficit: the Impact of Restructuring Canada's Social Programs* (Status of Women Canada, Ottawa, 1998) p. 7 [hereinafter Brodsky/Day – Status of Women].

³¹¹ Townson, *supra* note 189, p. 15.

States uses an absolute poverty measurement. Absolute income may not reflect the actual number of poor as this depends on the relative income and cost of living in each country. Each country has its own definition and threshold of what ‘poverty’ is, but is not adjusted for cost of living and social benefits. Thus, this section should be read as supporting evidence for the premise that poor social protections are detrimental to the economic security of women, while also realizing that there are always other factors to consider. This section uses five categories in comparing the poverty levels in Canada and the United States: (1) total percent of population in poverty/low income, and then comparing the poverty/low income rates of (2) women and men, (3) lone female-headed households and lone male-headed households, (4) elderly women and men, and (5) elderly women and men living alone.

Canada does not have an official poverty line as the United States does, but rather measures poverty by using the Low Income Cut-Offs calculated by Statistics Canada.³¹² This measure defines the income level at which a family may be in straitened circumstances because it has to spend a greater proportion of its income on necessities than the average family of similar size.³¹³ Specifically, the LICOs provide a relative measure of low income by calculating the income level at which households spend at least 20 percent more of their income than the average household on food, clothing and shelter.³¹⁴ The number and proportion of households whose incomes fall below this threshold, and who are therefore considered to be living on low income, can then be determined.³¹⁵

The most recent poverty statistics available, for 2009, of people living in low income situations before tax reveal:

- (1) 13.5 percent of the total population
- (2) 14.1 percent of women compared with 13 percent of men
- (3) 30.4 percent of female lone-parent families compared with 12.1 percent of male lone-parent families
- (4) 15.1 percent of women 65 and older compared with 7.9 percent of men 65 and older
- (5) 33.8 percent of women aged 65 and older living alone compared with 26.1 percent of men 65 and older living alone.³¹⁶

Compare to the after-tax LICOs, used by the government:

- (1) 9.6 of the total population

³¹² Statistics Canada has stated that the LICOs are not a ‘measure of poverty’, but they are generally accepted as the ‘measure of poverty’ when there is no official measure.

³¹³ Townson, *supra* note 189, p. 7 [income is defined as the total including government transfers after tax].

³¹⁴ House of Commons, *supra* note 196, p.10.

³¹⁵ See Supplement A – Table 1 for 2008 LICOs. The LICOs vary according to family and community size and are calculated on a before-tax and after-tax basis.

³¹⁶ Statistics Canada, ‘Persons in Low Income Before Tax’, <www40.statcan.gc.ca/l01/cst01/famil41a-eng.htm>, visited 22 April 2012.

- (2) 9.6 percent of women compared with 9.5 percent of men
- (3) 19.9 percent of female lone-parent families compared with 9.1 percent of male lone-parent families
- (4) 6.7 percent of women aged 65 and older compared with 3.4 percent of men aged 65 and older
- (5) 15.2 percent of women aged 65 and older living alone compared with 12 percent of men aged 65 and older living alone.³¹⁷

The LICOs refer to *relative* poverty; families and individuals are considered to be ‘poor’ if their incomes are low in relation to the incomes of other families and individuals.³¹⁸ For this reason, critics view the LICOs as measures of inequality rather than poverty.³¹⁹ These critics also see the importance of an *absolute* measure of poverty, as used in the United States, that would count among the poor only those individuals and families who do not have enough money to purchase basic life necessities.³²⁰

In the United States, the Census Bureau uses an absolute poverty measurement: a set of thresholds for families of different sizes that are compared to before-tax cash income³²¹ to determine a family’s poverty status. At the time they were developed, the official poverty thresholds represented the cost of a minimum diet multiplied by three (to allow for expenditures on other goods and services).³²² The 2010 statistics are available but for purposes of comparison the 2009 numbers are used, which reveal the highest poverty rate since 1994 and the largest absolute number of people in poverty in the 51 years that poverty estimates have been published:

- (1) 43.6 million people – 14.3 percent of the population – lived in poverty. 6.3 percent of the population lived in ‘deep poverty’, those living on less than half of the poverty threshold
- (2) 13.9 percent of women (5.9 percent in deep poverty) compared with 10.5 percent of men (4.6 percent in deep poverty)
- (3) 38.5 percent of female lone-parent families (14.8 percent in deep poverty) compared with 23.7 percent of male lone-parent families (8.3 percent in deep poverty). Only 7.2 percent of married couple

³¹⁷ Statistics Canada, ‘Persons in Low Income After Tax’, <www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil19a-eng.htm>, visited 22 April 2012.

³¹⁸ Townson, *supra* note 189, p. 13.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ The sources of income used to compute poverty status include earnings, unemployment compensation, workers’ compensation, social security, SSI, public assistance, veterans’ payments, survivor benefits, pension or retirement income, interest, dividends, rents, royalties, income from estates, trusts, educational assistance, alimony, child support, assistance from outside the household, and other miscellaneous sources. Noncash benefits (such as food stamps and housing subsidies) do not count. It is calculated *before* taxes, and excludes capital gains or losses. United States Census Bureau, ‘How the Census Bureau Measures Poverty’, <www.census.gov/hhes/www/poverty/about/overview/measure.html>, visited 2 April 2012 [hereinafter USCB Poverty Measure]; see Supplement A – Table 2 for the thresholds.

³²² *Ibid.*

- families with children were living in poverty (2.4 percent were in deep poverty)
- (4) 10.7 percent of women 65 and older compared to 6.6 percent of men 65 and older
 - (5) 17 percent of women 65 and older living alone compared to 12.2 percent of men 65 and older living alone.³²³

Since the official poverty levels were created back in the 1960s, there is much debate over their relevance in today's economy. The poverty line was proposed by the United States Department of Agriculture in 1961 and became the official poverty line during the 1969 'war on poverty.' It has been used ever since to draw the line between the poor and non-poor and is adjusted only for inflation.³²⁴ The same thresholds are used throughout the United States; they do not vary geographically and do not take into account the differences in cost of living for different areas, say rural versus urban living.³²⁵ As a result, they do not reflect changes in American society or what constitutes an adequate standard of living.

Hence, just as critics in Canada argue for an absolute measure of poverty, critics in the United States advocate in favor of a relative measure. In a 2000 letter to the United States government, 40 prominent scholars stated that unless "we correct the critical flaws in the existing measure, the nation will continue to rely on a defective yardstick to assess the effects of policy reform."³²⁶ A panel from the National Academy of Sciences concluded that the current measure "no longer provides an accurate picture of the differences in the extent of economic poverty among population groups or geographic areas of the country, or an accurate picture of trends over time."³²⁷ The NAS panel proposed using disposable income rather than cash income as a more adequate measure, though this proposal is limited by available data.³²⁸

In response to such criticisms, an Interagency Technical Working Group was formed in 2009 and charged with developing a set of initial starting points to facilitate a new measure of poverty.³²⁹ The resulting Supplemental Poverty Measure will not replace the official poverty measure and will not be used to determine eligibility for government programs, but is

³²³ Legal Momentum, 'Reading between the Lines: Women's Poverty in the United States, 2009', <www.legalmomentum.org/assets/pdfs/reading-between-the-lines.pdf>, visited 1 August 2011; National Women's Law Center, 'Poverty among Women and Families, 2008-2009: Great Recession Brings Highest Rate in 15 Years', September 2010, <www.nwlc.org>, visited 8 September 2011; National Center for Law and Economic Justice, 'Poverty in the United States: A Snapshot [2009]', <www.nclj.org/poverty-in-the-us.php>, visited 22 April 2012.

³²⁴ Sengupta, *supra* note 226, p. 9.

³²⁵ USCB Poverty Measure, *supra* note 321.

³²⁶ Sengupta, *supra* note 226, para. 26.

³²⁷ *Ibid.*

³²⁸ *Ibid.*, para. 27.

³²⁹ United States Census Bureau, 'Poverty – Experimental Measures', <www.census.gov/hhes/povmeas/>, visited 2 April 2012.

designed as an experimental poverty measure that defines income thresholds and resources in a manner different from the official measure.³³⁰ The numbers released from this report were in comparison to 2010 and saw both increases and decreases:

- an increase from 15.1 percent of the population to 15.5 percent
- a decrease from 34.2 percent of female lone-parent households to 30.8 percent
- an increase from 9.0 percent of people aged 65 and older to 16.5 percent.³³¹

It is difficult to say what these new numbers actually mean, but the SPM could be indicative of how some federal programs help reduce poverty and how some common classes of expenses exacerbate it.³³² For instance, low pensions, high medical costs, and poor access to health care could be the explanation for the large increase in poverty among those aged 65 and older.

These poverty rates are useful for marking trends and may signify a government's improvement, or lack of, in addressing specific issues. Yet such rates should be considered carefully and with some degree of skepticism since there is not always a direct connection between a declining poverty rate and improved living standards.³³³ For example, a single mother may have improved her financial situation by increased employment, taking her above the poverty line. However, such numbers do not consider additional expenses, such as childcare, that increased employment entails, which would take her back down below the poverty line.³³⁴ Thus, poverty rates may decrease while government services are also decreasing, and the official numbers presented do not take into account social well-being.

5.2 The Concept of Poverty

While poverty alone is not a human rights violation *per se* under international human rights law, the conditions of poverty are recognized as both a cause and a consequence of non-realization of concrete rights. Therefore, poverty must be viewed in the context of larger social and economic objectives, not alone. Women's poverty and economic inequality is a manifestation of their social, political, legal, and historical

³³⁰ It accounts for the costs of working, including items like childcare. It also includes benefits received from government programs intended to reduce poverty, such as food stamps, energy assistance, the Earned Income Tax Credit and excludes taxes and other unavoidable expenses, such as out-of-pocket medical costs. S. Burd-Sharps and K. Lewis (co-directors at the American Human Development Project), 'The Supplemental Poverty Measure: A (Small) Step in the Right Direction', *The Huffington Post*, 30 November 2011.

³³¹ United States Census Bureau, 'Table 2: Experimental Poverty Estimates based on National Academy of Sciences Recommendations, by Selected Demographic Characteristics and by Region (CE): 2010', <www.census.gov/hhes/povmeas/data/nas/tables/2010/index.html>, visited 2 April 2012.

³³² Burd-Sharps, *supra* note 330.

³³³ Evans, *supra* note 192, p. 155.

³³⁴ *Ibid.*

disadvantage.³³⁵ For centuries women were treated in law and custom as unfit to vote, hold office, own or inherit property, testify in court, sit on a jury, decide to marry or divorce, have care and control of their own children, enter many professions and occupations, or enjoy personal or sexual autonomy.³³⁶ Governments enacted laws and policies that privileged men and subordinated women. Even when discriminatory laws are repealed and replaced with gender neutral laws, the subordination of women persists, and women's economic inequality is just one of its effects. As Brodsky and Day put it: "Even though not all women are poor, and not all poor people are women, poverty is a condition closely associated with being female. Economic inequality and disproportionate vulnerability to poverty are characteristics of women as a group."³³⁷

The Committee on Economic, Social and Cultural Rights endorses the following definition of poverty, which reflects the vulnerability that accompanies poverty and the interdependent nature of all human rights:

"[A] human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."³³⁸

When discussions of poverty focus solely on lack of income, they tend not to take into account the social, cultural and political aspects of the phenomenon, and thus, a human rights definition of poverty leads to "more adequate responses to the many facets of poverty."³³⁹ This definition looks at the vulnerability and assaults on human dignity that accompany poverty. It focuses not just on resources, but how security and power are needed for the enjoyment of an adequate standard of living and other fundamental rights.³⁴⁰ The CESCR also emphasizes that equality and non-discrimination are essential elements of a human rights approach to poverty reduction.³⁴¹ Since poverty is not only the deprivation of economic or material resources, but also a violation of human dignity, successful strategies to prevent, alleviate or reduce poverty should attempt to respond to all needs, not just the need for greater income.³⁴² From a human rights perspective, a society has an obligation to its most vulnerable members to promote and protect their well-being, not as charity, but as a matter of right.³⁴³

³³⁵ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 215.

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ United Nations Economic and Social Council, 'Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) E/C.12/2001/10, para. 8 [*hereinafter CESCR Poverty*].

³³⁹ Townson, *supra* note 189, p. 7.

³⁴⁰ CESCR Poverty, *supra* note 338, paras. 8, 10-12.

³⁴¹ *Ibid.*, para. 11.

³⁴² *Ibid.*

³⁴³ Sengupta, *supra* note 226, p. 5.

5.3 The Feminization of Poverty & Pauperization of Motherhood

The ‘feminization of poverty’ was first discussed by Diana Pearce in 1978 as she researched how women were “poor in their own right”.³⁴⁴ It implied a trend towards women’s predominance among the poor and the evolution of poverty rates in the United States between the early 1950s and the mid-1970s, specifically the difference in poverty levels between women and men, and between lone female-headed and lone male-headed or couple-headed households.³⁴⁵ It is a relative concept based on a women/men (or female/male or couple-headed households) comparison, where the focus is on the differences between women and men’s poverty at each moment. Since the concept is relative, the feminization does not necessarily imply a worsening in poverty among women or female-headed households, but rather if poverty were to be sharply reduced among men and only slightly reduced among women, there would still be a feminization of poverty.³⁴⁶ In Canada, the feminization was found to exist between 1973 and 1990 when it was understood as an increase in poverty among female-headed households, but not when the ‘increase among women’ definition was applied.³⁴⁷

The causes of poverty among women may also cause poverty among men. Therefore, in attempting to understand the causes behind the feminization of poverty, it is crucial to consider the gender inequalities of poverty. When households are headed by a single parent, they are more likely to be poor and the hardships from the family are transferred to the children, continuing the cycle of poverty. Moreover, the focus lies on lone mothers since, according to Schaffner-Goldberg, the way in which a society treats lone mothers is indicative of its policies towards women in general: “The kinds of state support solo mothers receive can be seen as a measure of the strength or weakness of the social rights of women in families.”³⁴⁸ It also clarifies the nature and causes of economic inequalities between men and women, since they are so clearly seen in the situation of lone mothers. The factors linked with the feminization of poverty include:

- family composition and organization (divorce and gender roles within the home)
- labor market inequalities (occupational segregation, differential levels of employment in paid work, wage discrimination)

³⁴⁴ D. Pearce, ‘The Feminization of Poverty: Women, Work and Welfare’, 11 *Urban and Social Change Review* (1978) p. 28.

³⁴⁵ G. Schaffner Goldberg, ‘Revisiting the Feminization of Poverty in Cross-National Perspective’, in G. Schaffner Goldberg (ed.), *Poor Women in Rich Countries: The Feminization of Poverty Over the Life Course* (Oxford University Press, 2010) pp. 3-4.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*, p. 6 [citing P. Lister, *Citizenship: Feminist Perspectives* (New York University Press, New York, 1997) p. 194].

- inequality in the access to, or quality of, public services (lack of women specific health services)
- inequality in social protection (contributory pensions systems reproducing previous labor market inequalities, lower access to pensions and social assistance by women, inequality in benefit concession or in benefit values in targeted policies).³⁴⁹

In an extension of the feminization of poverty, economist Nancy Folbre later coined the term ‘pauperization of motherhood’ in 1984, arguing the involvement of patriarchal and discriminatory institutions in this process of sex-biased impoverishment.³⁵⁰ Folbre looked at the relationship between patriarchy, parenthood and the state, addressing father/paternal patriarchy (social relations that enable men to garner direct economic benefits from their children as well as their wives).³⁵¹ More on point in the area of social rights, Folbre discussed public patriarchy where the power of individual fathers is replaced by the power of men who use the state to dictate family laws that help preserve patriarchal privilege.³⁵² In her analysis, Folbre examined the policies and illustrated the patriarchal bias of family policy, labor market policy, and the welfare system in the United States, ultimately suggesting that state policies toward motherhood have consistently benefited men and disadvantaged women and children.³⁵³ Single mothers pay a disproportionate price for raising the next generation, inequality that is exacerbated by public policies as patriarchy became ‘public’ in the sense that the state is reluctant in terms of assistance.³⁵⁴

5.4 Conclusion

There is an emerging trend recognizing that the way in which the poor are forced to live is an assault on human dignity and often violates their fundamental human rights. In asserting that poverty is one result of inadequate recognition of the right to social protections, this chapter sought to illustrate how poverty is not just a lack of income, but part of a larger problem in society. The discourse on the ‘feminization of poverty’ and ‘pauperization of motherhood’ is of particular importance. These theories are still pertinent today considering the increasingly high rates of women living in poverty, especially for lone female-headed households: 30.4 (before-tax LICO) or 19.9 percent (after-tax LICO) in Canada, and 38.5 percent in the United States. Taking into account the weaknesses of each country’s social protection system against this background, the following chapter turns to constitutional reform as a means of ensuring greater social and economic rights for women.

³⁴⁹ *Ibid*, p. 7.

³⁵⁰ Folbre, *supra* note 78, p. 73.

³⁵¹ *Ibid*, pp. 73-74.

³⁵² *Ibid*, p. 74.

³⁵³ *Ibid*, p. 73.

³⁵⁴ *Ibid*, p. 85.

6 Analysis

In its earliest stages, the research question of this thesis was why Canada and the United States approach the right to social protection differently and how can they learn from each other. Then, in studying each country's system, a significant realization came to light: although Canada and the United States are both examples of liberal welfare regimes and while their social protection systems were quite alike in their beginnings, the similarities end there. Since their starting points, these social policies have been a reflection of various political agendas, each country's ratification (or not) of international human rights instruments, legal systems and jurisprudence of the courts, views of equality, and distinct poverty measurements that make true poverty levels difficult to gage. Thus, this thesis morphed into an independent study of each country's system while attempting to demonstrate that regardless of politics, there is still a clear connection between social protections, equality and women's economic security.

Despite these differences, there are still some similarities in the underlying principles. It is fair enough to say that both the Canadian and United States governments have failed to develop policies that specifically target women's poverty. This is not to say that social protections alone are a sufficient response to poverty. Poverty is worsened by legislative measures that limit funding for affordable housing programs, cut public education, increase tuition rates making advanced education unattainable for low income families, and providing fewer public health services.³⁵⁵ For the groups primarily affected by poverty, it is often the result of long-term discrimination against marginalized groups of a society. Because of the gendered patterns of discrimination that last throughout their lives, women are disproportionately disadvantaged and marginalized, resulting in a cycle of poverty.³⁵⁶ What this thesis has sought to assert is that social protections are one recognized tool for poverty alleviation and thus require a strong legal foundation.

There is no 'one size fits all' approach to women's poverty and social protections. Broadly, constitutional reform is the best option for both Canada and the United States, but such reforms must be tailored to reflect the particular circumstances of each country. In Canada, the goal is to preserve and strengthen the social protections already in place, while in the United States it is to find a solid constitutional legal basis for both social rights and equality. Though, before discussing these reforms, we must first address a significant hurdle: courts and governments that continue to support the premise that social and economic rights are non-justiciable.

³⁵⁵ These are just a few examples; there are many more actions that exacerbate poverty. G. Brodsky and S. Day, 'Poverty is a Human Rights Violation', *Poverty and Human Rights Project*, October 2001, <www.povnet.org>, p. 2, visited 22 April 2012.

³⁵⁶ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 187.

6.1 The (In)divisibility of Rights

The premise that social and economic rights are non-justiciable is due to the supposed division of rights in international law into two categories: civil and political rights on one side, and economic, social and cultural rights on the other. This classification is based on a negative rights model of human rights, where they only serve as restraints on harmful state action. Yet in the interpretation of human rights standards, there are arguments and a recent trend in favor of the *indivisibility* of rights. By accepting that all human rights are interdependent and indivisible, states accept that both civil and political rights, and economic, social and cultural rights, should be protected and promoted to the same degree.

These rights combine to form an indivisible whole and only if they are guaranteed can an individual live decently and in dignity: “Freedom from fear and want can only be realized if conditions are created where everyone may enjoy his or her economic, social and cultural rights and his or her civil and political rights.”³⁵⁷ The interdependence of human rights is also embodied in the 1993 Vienna Declaration,³⁵⁸ and is evident in the work of the ILO, likely due to its focus on social justice. Decisions by the ILO’s Committee on Freedom of Association incorporate a number of rights including the right to due process of law and the right to strike, along with freedom of movement and freedom of opinion and expression.³⁵⁹ The Declaration on the Right to Development incorporates the basic principle that all human rights are indivisible and interdependent, and that a failure to observe civil and political rights, as well as economic, social and cultural rights, constitutes an obstacle to development.³⁶⁰ CEDAW also challenges the divisibility of rights and prioritization of one group over the other by giving equal and full attention to both groups.

Even as there are attempts to create a unified theory of rights at the international level, the national thinking in Canada and the United States remains orientated toward the theory of divisibility. Social and economic rights are redistributive or mere expressions of what governments aspire to, whereas civil and political rights are perceived as ‘real rights’.³⁶¹

³⁵⁷ UDHR, *supra* note 138, preamble.

³⁵⁸ “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious background must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” United Nations General Assembly, ‘Vienna Declaration and Programme of Action’ (12 July 1993) A/CONF.157/23, para. 4.

³⁵⁹ See generally International Labour Organization, ‘Digest of the Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO’, 5th (revised) ed. (2006).

³⁶⁰ United Nations General Assembly, ‘Declaration on the Right to Development’ (4 December 1986) A/RES/41/128, arts. 2(1), 6(2)-6(3).

³⁶¹ Brodsky/Day – Status of Women, *supra* note 310, p. 6.

6.2 Social Protections & the Canadian Legal System

In Canada, the Constitution Act, the Charter of Rights and Freedoms, and the Social Union Framework Agreement all apply to preserving and strengthening social protections. The rights to equality and security of the person are entrenched in the Constitution, an expression of Canada's agreed-upon fundamental values, and these rights are enunciated in the international human rights treaties that Canada has ratified.³⁶² Therefore, when the government continues to cut funding for social programs that its people rely on for income security and health care, it may well be a justiciable issue.³⁶³

Unlike their neighbor to the south, Canada has ratified the relevant international instruments addressing social protections and non-discrimination. Accordingly, the Canadian government has international obligations to strengthen social protections as a means to alleviate poverty. Canada is a signatory to the ICESCR and parties to this covenant "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."³⁶⁴ It also means that the Canadian government has agreed to take steps, to the extent of its available resources, to progressively realize the economic, social and cultural rights recognized in the covenant.³⁶⁵ In ratifying the ICESCR, the government has acknowledged that social programs are indeed social rights.

However, the CESCR's 2006 review of Canada voiced concerns over Canada's restrictive interpretation of its ICESCR obligations, in particular the government's position that it may implement the covenant's legal obligations by adopting specific measures and policies rather than by enacting legislation explicitly recognizing economic, social and cultural rights.³⁶⁶ The lack of effective enforcement mechanisms and legal redress were also among the CESCR's concerns, stating that such inadequacies are the result of domestic legislation that fails to properly cover economic, social and cultural rights.³⁶⁷ Lastly, the CESCR considered the government's stance on justiciability of rights, criticizing "the practice of governments of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights".³⁶⁸ If a state party views social and economic rights as solely policy objectives and non-

³⁶² Brodsky, *supra* note 190.

³⁶³ *Ibid.*

³⁶⁴ ICESCR, *supra* note 164, art. 11.

³⁶⁵ N.A. Kinsella, 'Can Canada Afford a Charter of Social and Economic Rights? Toward a Canadian Social Charter', 71 *Saskatchewan Law Review* (2008) p. 7.

³⁶⁶ United Nations Economic and Social Council, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada' (May 2006) E/C.12/CAN/CO/4-5, para. 11(a)-(b).

³⁶⁷ *Ibid.*, para. 11(b).

³⁶⁸ *Ibid.*

justiciable then it fails to meet the obligation to provide an effective remedy for violations of covenant rights.³⁶⁹ Indeed, over the years, there has been considerable litigation on the issues of social protections, the principle of non-discrimination, and to what extent the Canadian government has a positive obligation to its people.

6.2.1 The Charter of Rights and Freedoms

The rights to an adequate standard of living, social protections, and non-discrimination are enshrined in the Charter of Rights and Freedoms.³⁷⁰ Sections 7, 15, 28, and 36 are strongest when read together since they are mutually reinforcing.

Section 7 states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The right to ‘security of the person’ has been interpreted to include a person’s physical and psychological integrity.³⁷¹ Section 15 is the guarantee of formal equality with 15(1) providing: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 15(2) permits some types of acceptable affirmative action, and Section 28 finds that: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”³⁷² Section 36 commits governments in Canada to promoting equal opportunities for the well-being of all Canadians, furthering economic development to reduce disparity in opportunities, and providing essential public services of reasonable quality to all Canadians. Jurisprudence on Section 36 is limited, but the legislative record indicates a commitment to adequate social programs.³⁷³

6.2.2 Judicial Interpretation of the Charter

The 2002 case of *Gosselin v. Attorney General Quebec* was the first constitutional welfare rights case to reach the Supreme Court of Canada.³⁷⁴ Throughout the *Gosselin* litigation were implications of the ICESCR as they

³⁶⁹ B. Porter, ‘Social Rights and the Question of a Social Charter’ (presentation to the Symposium on the Social Union), *Center for Policy Alternatives*, 18 September 1998, <www.equalityrights.org>, visited 20 April 2012 [hereinafter Porter – Social Rights].

³⁷⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act (1982).

³⁷¹ Brodsky, *supra* note 190.

³⁷² Moreover, sex alone, of all the prohibited grounds of discrimination, is protected by § 28 from the legislative override otherwise permitted to government by § 33. A. McColgan, *Women under the Law: The False Promise of Human Rights* (Pearson Education Limited, 2000) p. 38.

³⁷³ Brodsky, *supra* note 190.

³⁷⁴ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 193 [citing to *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429 (Can.)].

applied to Charter interpretation. Gosselin argued that Article 11 of the ICESCR supported reading the right to ‘security of the person’ in Section 7 of the Charter as including the right of every individual in need to the financial support necessary to obtain the necessities of life.³⁷⁵ This claim was countered by two main arguments: social and economic rights are non-justiciable, and even if they are justiciable, governments are required to realize the rights *progressively*.³⁷⁶ Intervening attorney generals contended that the international human rights regime supports the view that social and economic rights are non-justiciable. Their argument was based on the division of rights in two separate and distinct treaties – the ICESCR and the ICCPR. This was offered as evidence that social and economic rights are different in kind from civil and political rights, and not intended to be justiciable.³⁷⁷

The Court ultimately ruled against the plaintiff, leaving open the question of whether the Charter includes the right to adequate social assistance. Yet, in her dissenting opinion, Justice Louise Arbor stated that:

“A minimum level of welfare is so closely connected to issues relating to one’s basic health (or security of the person), and potentially even to one’s survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.”³⁷⁸

This indicates perhaps an emerging recognition, even in a minority opinion, for the importance of access to minimum social protections, such as pensions, maternity benefits and health care.

In the 2007 Supreme Court case of *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* the issue was collective bargaining, but is relevant nonetheless because the Court incorporated the jurisprudence of the ILO into their decision. The Court departed from precedent – that freedom of association did not encompass collective bargaining – and found that the freedom of association enshrined in Section 2(d) of the Charter did include a right to bargain collectively.³⁷⁹ One reason behind this extension was that international law can be used to inform the interpretation of Charter rights and freedoms, and collective bargaining is an integral component of freedom of association in international law.³⁸⁰ The majority relied on the statement that “the Charter

³⁷⁵ *Ibid.*, p. 196.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Gosselin*, *supra* note 374, para. 358 [dissenting opinion].

³⁷⁹ *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* [2007] 2 S.C.R. 391, para. 19 (Can.) [*hereinafter* B.C. Health Services].

³⁸⁰ The three other reasons for the court’s decision: that the reasons expressed by the Court in its § 2(d) jurisprudence for previously denying protection for collective bargaining “can no longer stand”; its prior stance was inconsistent with Canada’s historic recognition of the importance of collective bargaining and to freedom of association; and that Charter protection for a right to collective bargaining is consistent with other Charter rights, freedoms, and values. B. Etherington, ‘The B.C. Health Services and Support Decision – the Constitutionalization of a Right to Bargain Collectively in Canada: Where Did it Come

should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”³⁸¹ The Court’s adoption of this premise appears to confirm its willingness to look at Canada’s international obligations as an interpretive tool, if not a set of binding principles, when addressing Charter rights and freedoms.³⁸² The Court considered three instruments: the ICESCR, the ICCPR, and ILO Convention 87 (concerning freedom of association and protection of the right to organize).³⁸³ The Court found that the interpretation of these instruments supported the right to collective bargaining in international law and that it should also be recognized under Section 2(d).³⁸⁴

The Court considered a review by the ILO that summarized principles concerning a right to collective bargaining under the ILO and the 1998 Declaration on Fundamental Principles and Rights at Work.³⁸⁵ The Court has been criticized for finding the right to collective bargaining as a fundamental right in the 1998 Declaration without noting that the Declaration is not legally binding on members of the ILO other than to recognize and promote the principles underlying the four core rights.³⁸⁶ But the fact that the 1998 Declaration was relatively new³⁸⁷ and not legally binding on the Canadian government did not seem to be of much significance to the Court. The majority made it clear that it was not limiting itself to Canada’s binding international law commitments when looking for guidance on the interpretation of Charter rights and freedoms:

“[T]he Charter, as a living document, grows with society and speaks to the current situation and needs of Canadians. Thus Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter.”³⁸⁸

This decision is promising with regard to full recognition of social and economic rights. It signifies a potential precedent within the courts to give greater weight to the standards incorporated in international instruments, including those of the ILO that speak directly to social protections – legally binding or not – and to use them as either established law or as recognized standards to strive for.

From and Where Will it Lead?”, 30 *Comparative Labor Law & Policy Journal* (2009) pp. 724-25 [citing *B.C. Health Services*, *supra* note 379, para. 20].

³⁸¹ *B.C. Health Services*, *supra* note 379, para. 70.

³⁸² Etherington, *supra* note 380, p. 728.

³⁸³ Canada has ratified all three instruments. *B.C. Health Services*, *supra* note 379, para. 71.

³⁸⁴ *Ibid*, paras. 71-76.

³⁸⁵ *Ibid*, para. 77 [the Court cited B. Gernigon *et al.*, ‘ILO principles Concerning Collective Bargaining’, 139 *International Labor Review* 33 (2000) pp. 51-52]; International Labour Conference (86th Session), ‘ILO Declaration on Fundamental Principles and Rights at Work’ (Geneva, June 1998).

³⁸⁶ Etherington, *supra* note 380, p. 728.

³⁸⁷ The 1998 Declaration was renewed in 2008, see International Labour Conference (97th Session), ‘ILO Declaration on Social Justice for a Fair Globalization’ (Geneva, June 2008).

³⁸⁸ Etherington, *supra* note 380, p. 729 [citing *B.C. Health Services*, *supra* note 379, para. 78].

6.2.3 Substantive Equality & Positive Obligations

As they argued in the *Gosselin* case, government attorneys in constitutional cases involving social protections have relied on the divisibility of rights as a defense by claiming that rights related to social and economic policy should be treated differently from civil and political rights. Attorneys claim that the Charter of Rights and Freedoms is not a positive, but a negative rights instrument in that it restrains excessive or improper government action, but does not require the government to affirmatively act to eliminate disadvantage.³⁸⁹

As far as Section 15 of the Charter and substantive equality are concerned, the Supreme Court of Canada has held that Section 15 is not just a guarantee of mere formal equality, but also a guarantee of substantive equality that requires pre-existing group-based inequalities be taken into account.³⁹⁰ This understanding began with the 1989 case of *Andrews v. Law Society of British Columbia* where the Supreme Court rejected the formal equality approach that ‘things alike should be treated alike’, replacing it with a substantive test of historical disadvantage on enumerated concrete grounds.³⁹¹ The actual substance of each inequality is to construct the law on that ground, so the first question is whether the challenged inequality is part of a previous inequality.³⁹² Unlike United States law, Canadian equality law has no intent requirement “because most inequality is not, in reality, intentional and because its doctrine, having no empty center to fill, does not need it.”³⁹³ Despite some uneven jurisprudence over the years, as recently as 2008, the Court was still adhering to its *Andrews* understanding of substantive equality.³⁹⁴

Two other Supreme Court rulings have shaped the issue of substantive equality and whether there is a positive duty on the government to remedy disadvantage and inequality: *Eldridge v. British Columbia* and *Vriend v. Alberta*. In *Eldridge*, the question was whether the province had violated Section 15 by failing to provide interpreter services for the deaf in the provision of health care.³⁹⁵ In *Vriend*, the question was whether the province had violated Section 15 by failing to protect gays and lesbians from discrimination because of sexual orientation.³⁹⁶ In both cases the Court of Appeal rejected arguments that Section 15 creates a positive duty on the

³⁸⁹ Brodsky/Day – Beyond the Debate, *supra* note 186, p. 6.

³⁹⁰ *Ibid.*, p. 7.

³⁹¹ C. MacKinnon, ‘Substantive Equality: A Perspective’, 91 *Minnesota Law Review* 1 (2011) p.10 [citing *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 (Can.)].

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid* [referring to *Law v. Canada* [1999] 1 S.C.R. 497 (Can.) and *R. v. Kapp* [2008] 2 S.C.R. 483 (Can.)].

³⁹⁵ *Eldridge v. British Columbia* [1997] 2 S.C.R. 624 (Can.).

³⁹⁶ *Vriend v. Alberta* [1998] 1 S.C.R. 493 (Can.).

government to provide benefits and/or create necessary protections for disadvantaged groups.³⁹⁷ The Supreme Court heard the cases and reaffirmed, first in *Eldridge* and then again in *Vriend*, that Section 15 guarantees both formal and substantive equality.³⁹⁸

However, the Court left open the question of what actually amounts to substantive equality. By citing to the *Andrews* case, all the Court did was affirm that identical treatment may produce inequality and that differential treatment will not always create inequality.³⁹⁹ This approach ensures that it is *not* discriminatory if positive actions are taken by the government in addressing systematic discrimination, but it does not create a framework by which to do so.⁴⁰⁰ The Court has essentially adopted a substantive equality approach without specifically saying so, yet still clings to the formal equality paradigm. A discussion or debate on the obligation to remedy disadvantage should be central to the Court's substantive equality approach, but the Court fell short by not fully exploring the potential of substantive equality jurisprudence.⁴⁰¹ Since there is still an additional step needed between rejecting a same-treatment approach and imposing a positive duty under Section 15, the Court effectively side-stepped the issue. Ultimately, the Court's decision enforced the "peculiar Canadian resistance to the notion that the Charter imposes positive obligations on governments to provide legislative and social protection for disadvantaged groups – so central to international human rights norms."⁴⁰²

6.2.4 A Canadian Social Charter

Social rights are not just shared values and social policy objectives, but rather principles for which elected governments should be held responsible, even if there is no clear answer on whether the government has a positive obligation to remedy disadvantage. While the Supreme Court has affirmed that the Charter guarantees both formal and substantive equality, and the *B.C. Health Services* decision shows promise for the use of international standards as a means of Charter interpretation, the status of social and economic rights and positive obligations remains vague. The UN Human Rights Council has expressed concern regarding the high rates of poverty in an affluent country like Canada, and has repeatedly called on the government to develop a national strategy to integrate social and economic rights into poverty reduction strategies.⁴⁰³

³⁹⁷ B. Porter, 'Beyond Andrews: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*', 9(3) *Forum Constitutionnel* (1998) p. 71.

³⁹⁸ *Ibid.*, p. 72.

³⁹⁹ *Ibid.*, p. 73.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*, p. 81; MacKinnon, *supra* note 391, p. 11 [referring to *R. v. Lavallee* [1990] 1 S.C.R. 852 (Can.)].

⁴⁰² Porter, *supra* note 397, p. 81.

⁴⁰³ House of Commons, *supra* note 196, p. 94.

Thus, a specific charter for social and economic rights may be the best solution in order to strengthen current rights and provide greater protections. If anything, Canada's legislative history suggests that the government may be responsive to such a proposition. Essentially, the social charter would be an extension of Section 36 of the Charter. Politicians have stated that Section 36 is already a social charter, "it just needs some teeth."⁴⁰⁴ Additionally, the symbolic value of Section 36 is insufficient on its own:

"[I]t is generally recognized that these principles are neither specific nor comprehensive enough to ensure that the actions of governments in Canada continue to uphold and strengthen national standards of social programs across the country. A broad set of well-defined principles would make a positive contribution to placing an obligation on all Canadian governments to respect and abide by the social contract."⁴⁰⁵

Past proposals for a social charter have considered using the European Social Charter as a guide. Similar rights were included in the Charlottetown Accord, a package of proposed amendments to the Constitution including the Social and Economic Union, which set out rather vague policy objectives.⁴⁰⁶ The Accord failed in a 1992 public referendum, but this failure has never been attributed to the general public since the social union provisions were not a deciding factor in the considerable amendments proposed.⁴⁰⁷ In 1999, following the failure of the Accord, the federal government and provinces entered into the Social Union Framework Agreement, a joint agreement that expanded the principles of Section 36.⁴⁰⁸ Among its many principles, the SUFA strives to ensure access for all Canadians to essential social programs and provide appropriate assistance to

⁴⁰⁴ Kinsella, *supra* note 365, p. 11 [quoting Newfoundland Premier Clyde Wells].

⁴⁰⁵ *Ibid*, pp. 11-12 [citing Canada Ministry of Intergovernmental Affairs, 'A Canadian Social Charter: Making Our Shared Values Stronger' (1991) p. 15].

⁴⁰⁶ It included a health care system that is comprehensive, universal, portable, accessible; adequate social services and benefits; education; reasonable standard of living; protecting labor rights; etc. Kinsella, *supra* note 365, p. 17.

⁴⁰⁷ *Ibid*, p. 18.

⁴⁰⁸ Canada's social union should reflect and give expression to the fundamental values of Canadians - equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities for one another. Within their respective constitutional jurisdictions and powers, governments commit to the following principles:
All Canadians are equal: treat all Canadians with fairness and equity; promote equality of opportunity for all Canadians; respect the equality, rights and dignity of all Canadian women and men and their diverse needs.

Meeting the needs of Canadians: ensure access for all Canadians, wherever they live or move in Canada, to essential social programs and services of reasonably comparable quality; provide appropriate assistance to those in need; respect the principles of medicare: comprehensiveness, universality, portability, public administration and accessibility; promote the full and active participation of all Canadians in Canada's social and economic life; work in partnership with individuals, families, communities, voluntary organizations, business and labour, and ensure appropriate opportunities for Canadians to have meaningful input into social policies and programs.

Sustaining social programs and services: ensure adequate, affordable, stable and sustainable funding for social programs.

Government of Canada, 'A Framework to Promote the Social Union for Canadians', 4 February 1999, <www.socialunion.gc.ca>, visited 30 July 2011.

those in need.⁴⁰⁹ Unlike Section 36, the SUFA clearly applies to social programs. At first glance, it may seem that between Section 36 and SUFA, there is already adequate recognition of social and economic rights in place, thus no need for an extra social charter on top of this legislation.

Nevertheless, a separate charter, distinct from the current Charter and SUFA, would create a unified institution designed solely with the purpose of overseeing and monitoring Canada's obligations under the ICESCR.⁴¹⁰ This is the root of New Brunswick Senator Noël Kinsella's push for a charter that goes beyond a mere agreement to actual constitutional reform based on a social rights-based approach. While there are various programs and agreements in place that seek to fulfill Canada's social and economic obligations, there is no specific document that tells Canadians what to *expect* from their government in terms of the social and economic rights they hold. A social charter would inform Canadians of their rights, and protect them by transforming what would usually be thought of as public services into enforceable rights.⁴¹¹ It would also mean recognizing that, even in the development of social policy and in decisions about how to allocate the budget, there are certain democratic values and basic human rights that elected governments must agree not to violate.⁴¹² Equality rights under a social charter would be interpreted substantively and expansively so as to include many of the social and economic rights recognized in international law, while giving special attention to the needs of women and other historically disadvantaged groups.⁴¹³ In the end, the proposal is quite clear. In a rapidly changing society, a distinct charter is necessary to ensure that the government continues to fulfill its social contract obligations and secure the social and economic rights of all Canadians.⁴¹⁴

6.3 Social Protections & the United States Legal System

The best way to protect social and economic rights in the United States is also constitutional reform, but the type of reform and approach differs greatly. In Canada, substantive equality and social rights are already in the Charter, and are enforced through the jurisprudence of the courts and domestic integration of international human rights instruments. Therefore, the proposed social charter is merely an extension of already existing rights. On the other hand, the United States Constitution cannot be read in the same way as the Charter, there is limited room for social and economic rights, and it lacks a substantive equality guarantee. As a result, the following sections will discuss social rights, but the argument and basis for constitutional reform mainly center on a woman's right to equal protection of the law.

⁴⁰⁹ *Ibid.*

⁴¹⁰ Kinsella, *supra* note 365, p. 14.

⁴¹¹ *Ibid.*, p. 22.

⁴¹² Porter – Social Rights, *supra* note 369.

⁴¹³ *Ibid.*

⁴¹⁴ Kinsella, *supra* note 365, p. 19.

6.3.1 Social Rights & Positive Obligations

In 1941, Franklin D. Roosevelt included “freedom from want” as one of four fundamental freedoms that should characterize a future world order.⁴¹⁵ Then in his 1944 State of the Union address he declared: “We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.”⁴¹⁶ Security and independence could be guaranteed only if certain needs were met including health care, education, and housing.⁴¹⁷ Roosevelt’s ideals never took root in the jurisprudence of the courts, and today, the idea of incorporating economic and social rights into the Constitution is incomprehensible when American law schools teach that constitutional rights depend on judicial enforceability.⁴¹⁸ There is also the belief that courts can only effectively enforce negative rights – those rights that serve as protections by denying power – as suggested by the fact that the Bill of Rights seems to only contain such denials.⁴¹⁹

The ideals of liberalism and an autonomous individual were incorporated into 19th century constitutional law and resulted in a version of rights that focused on preventing the government from interfering with an individual’s freedom to act.⁴²⁰ In the 1970 case of *Dandridge v. Williams*, the Supreme Court found that social and economic rights do not rise to the level of positive constitutional obligations in the context of social benefits.⁴²¹ As Justice Stewart stated: “The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.”⁴²² In *Lindsay v. Normet*, the plaintiff argued that the need for decent shelter and the right to retain peaceful possession of one’s home were fundamental interests under the Constitution, and therefore, subject to intrusion only after a showing of countervailing

⁴¹⁵ “Freedom from want” includes the right to a useful and remunerative job; the right to earn enough to provide adequate food and clothing and recreation; the right of every family to a decent home; the right to adequate medical care; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and the right to a good education. M.H. Good, ‘Freedom from Want: the Failure of United States Courts to Protect Sustenance Rights’, 6 *Human Rights Quarterly* (1984) p. 335.

⁴¹⁶ F.D. Roosevelt, ‘State of the Union Message’, 90 *Congressional Record* (1944) p. 57.

⁴¹⁷ Roosevelt also proposed an Economic Bill of Rights, and in 1944, a Committee drafted an International Bill of Rights which included education, work and reasonable conditions of work, adequate food and housing, and social security. See United Nations, ‘Statement of Essential Human Rights’ (1947) A/148, arts. 11-15.

⁴¹⁸ H. Schwartz, ‘Do Economic and Social Rights Belong in a Constitution?’, 10 *American University Journal of International Law & Policy* (1994-1995) p. 1235; this notion has been developed to identify appropriate occasions for judicial action. Black’s Law Dictionary (6th ed., West, 1990).

⁴¹⁹ Schwartz, *supra* note 418, p. 1235.

⁴²⁰ Brodsky/Day – Status of Women, *supra* note 310, p. 6.

⁴²¹ *Dandridge v. Williams*, 397 U.S. 471, 473 (1970).

⁴²² *Ibid*, at 497.

government justification.⁴²³ The Court rejected the argument and upheld a state's summary eviction procedure, finding that "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality."⁴²⁴

The United States ratified the ICCPR in 1992, but the national ethos has always been anti-government and negative, especially where social and economic rights are concerned.⁴²⁵ This is one reason why it is unlikely that the United States will ratify the ICESCR in the near future. The ICESCR, CEDAW and CRC have been signed by American presidents meaning that, at best, "the United States cannot violate or contravene the 'object and purpose' of these treaties".⁴²⁶ One could argue that the inclusion of the phrase to 'promote the general welfare' in the Preamble to the Constitution meant that the framers were concerned about poverty and social and economic rights.⁴²⁷ However, the Bill of Rights has been interpreted to provide procedural mechanisms for fair adjudication of these rights, rather than creating an obligation on the government to ensure that individuals have any social or economic assets to protect.⁴²⁸ Roosevelt's ideals recently made a comeback in 2011 when the State Department announced its new policy embracing social and economic rights.⁴²⁹ Since congressional action presently governs these rights – making them *privileges* rather than *rights* – it is a long-awaited and encouraging change to see that social and economic rights could be a reality for marginalized Americans, even though it is thus far unknown what the new policies will look like.

The 14th Amendment to the United States Constitution guarantees due process of law and equal protection of the laws⁴³⁰ but falls short of providing

⁴²³ *Lindsay v. Normet*, 405 U.S. 56, 59-60 (1972).

⁴²⁴ *Ibid*, at 74.

⁴²⁵ Schwartz, *supra* note 418, p. 1235.

⁴²⁶ Restatement of the Law, Third, Foreign Relations Law of the United States § 312(i).

⁴²⁷ "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, *promote the general welfare*, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." United States Constitution (adopted by the Constitutional Convention 17 September 1787, ratified 21 June 1788) [emphasis added].

⁴²⁸ M.F. Davis, 'To Promote the General Welfare', part of *ACS Constitution Week Symposium*, 15 September 2011, <www.acslaw.org/acslawblog/to-promote-the-general-welfare>, visited 15 March 2012; *see also Goldberg v. Kelley*, 397 U.S. 254, 262 (1970) [the Supreme Court held that welfare benefits were a "matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'."].

⁴²⁹ M. Posner (Assistant Secretary - Bureau of Democracy, Human Rights and Labor), 'The Four Freedoms Turn 70', *U.S. Department of State*, 24 March 2011, <www.state.gov>, visited 27 February 2012.

⁴³⁰ "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

for full realization of social and economic rights. In areas of social and economic policy, a classification “that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁴³¹ It has been proposed by legal scholars that the 14th Amendment provides a “minimum protection against economic hazard”⁴³² but this argument has been rejected by the Supreme Court.⁴³³ Furthermore, the Court has consistently refused to find a constitutional basis for the rights to welfare, housing, education, or other basic necessities.⁴³⁴

Yet positive rights are not unknown in American constitutional law, and many state constitutions cover the rights to education, welfare, housing, and health.⁴³⁵ Some even include a state constitutional obligation to care for the sick and needy, and while most courts ignore these provisions, New York’s Supreme Court once ruled that: “The aid, care and support of the needy are public concerns and shall be provided by the State... as the legislature may from time to time determine” and required that the legislature not deny aid to needy individuals for reasons unrelated to need.⁴³⁶ This type of case could have been addressed as a discrimination issue, but that holds true for many cases with social and economic dimensions. Indeed, a society can always demand from its government programs that promote the general welfare, regardless of whether it involves non-conventional social rights.⁴³⁷ This is because citizens, as such, are entitled to them.

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” United States Constitution, 14th Amendment (passed by Congress 13 June 1866, ratified 9 July 1868).

⁴³¹ *FCC v. Beach Communications Inc.*, 508 U.S. 307, 313 (1993).

⁴³² See F. Michelman, ‘On Protecting the Poor Through the Fourteenth Amendment’, 83 *Harvard Law Review* (1969) p. 7.

⁴³³ The majority described the 14th Amendment as a “limitation on the State’s power to act [rather than] a guarantee of certain minimal levels of safety and security.” *DeShaney v. Winnebago*, 489 U.S. 189, 195 (1989).

⁴³⁴ See e.g. *Dandridge*, *supra* note 421 [upholding a regulation which imposes a ceiling on Aid to Families with Dependent Children grants to families with dependent children]; *Lindsey*, *supra* note 423 [holding that the Constitution does not guarantee access to housing]; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) [holding that the right to education is neither explicitly nor implicitly protected by the Constitution].

⁴³⁵ The 13th Amendment’s prohibition of slavery covers private action, and this might seem to impose an obligation on the federal government to protect people against private violations of this right. The 7th Amendment requires the federal government to provide jury trials in civil and federal cases even though, unlike criminal cases, the state is not directly involved. And in the criminal context, the Supreme Court has required the state to provide counsel and other aids to defendants.

North Dakota’s constitution states that the “the legislative assembly shall provide for a uniform system of free public schools throughout the state”, while Hawaii’s constitution provides that “the State shall provide for the protection and promotion of the public health.” *Davis*, *supra* note 428.

⁴³⁶ Schwartz, *supra* note 418, pp. 1240-41.

⁴³⁷ *Ibid*, p. 1241.

6.3.2 Equal Protection & the 14th Amendment

For years, attorneys and human rights advocates have tried to use the 14th Amendment⁴³⁸ to protect women's rights, but have met with only moderate success. The 14th Amendment enshrines the right to equal protection of the law and non-discrimination, and has been interpreted by the Supreme Court to apply to the federal government through the 5th Amendment's due process clause.⁴³⁹ The constitutional concept of equal protection therefore applies to all governments of the United States: federal, state and local.

As originally drafted, the 14th Amendment does not confer any rights on women as women or specifically mention sex.⁴⁴⁰ It was passed to remedy the Supreme Court's ruling in the *Dred Scott* case, with the central purpose to guarantee equal citizenship and equality before the law for all citizens and for all persons.⁴⁴¹ It has been asserted that the 14th Amendment was also intended to protect against sex discrimination,⁴⁴² but the jurisprudence of the Supreme Court has been uneven at best. An early decision on sex discrimination recognized the "wide difference in the respective spheres and destinies of man and woman" and that "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."⁴⁴³ It is now 140 years later and, arguably, the Supreme Court's decisions and reasoning have not much improved.

According to the Court's interpretation, differential treatment is not discriminatory *per se*. A challenger must prove both a disproportionate or

⁴³⁸ 14th Amendment, *supra* note 430.

⁴³⁹ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954): "the Fifth Amendment... does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive... discrimination may be so unjustifiable as to be violative of due process." [Substantive due process overlaps with equal protection and prohibits the government from infringing on fundamental rights; thus, the controlling issue is liberty and the courts must determine the nature and the scope of the liberty protected by the Constitution before affording litigants a particular freedom, *see* E.G. White, *The Constitution and the New Deal* (Harvard University Press, Cambridge, 2000) pp. 244-46.]

⁴⁴⁰ Supreme Court Justice Antonin Scalia has argued that the 14th Amendment was not intended to prohibit sex discrimination: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws." California Lawyer, 'Legally Speaking: the Originalist' (interview with Justice Scalia), January 2011, <www.callawyer.com>, visited 25 March 2012.

⁴⁴¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856) [the Supreme Court ruled that people of African descent brought to the U.S. and held as slaves (or their descendants, whether or not they were slaves) did not have Constitutional rights and could never be U.S. citizens].

⁴⁴² See J. Balkin (Professor of Constitutional Law at Yale Law School), 'Scalia on Sex Equality', *Balkinization*, January 2011, <www.balkin.blogspot.com/2011/01/scalia-on-sex-equality.html>, visited 13 March 2012 [rejecting Justice Scalia's argument that the 14th Amendment was not intended to prohibit sex discrimination].

⁴⁴³ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

disparate effect on a particular group *and* the effect must be intentional.⁴⁴⁴ Equal protection ensures that every classification made in law or practice is related to the purpose it is said to serve, thus the standard of review depends on the classification. If a law or practice discriminates on the basis of race, citizenship or national origin (suspect classes), or if it burdens the exercise of a fundamental right, ‘strict scrutiny’ applies: the classification must be justified by a compelling government interest and be narrowly tailored to further that interest.⁴⁴⁵ If the law or practice discriminates on the basis of gender or legitimacy (quasi-suspect classes), the lesser standard of ‘intermediate scrutiny’ applies: the classification must further an important government interest in a way that is substantially related to that interest.⁴⁴⁶ Lastly, non-suspect classes merely require a ‘rational basis’ standard of review: the classification must be rationally related to a legitimate government interest, and the burden lies with the challenger. It was not until 1971 that the Supreme Court struck down legislation that favored men over women,⁴⁴⁷ and in 1976, the standard of review for sex discrimination cases was upgraded from ‘rational basis’ to ‘intermediate scrutiny’.⁴⁴⁸

The requirement of both effect and intent differs from international law, which prohibits treatment that has *either* discriminatory effect or purpose.⁴⁴⁹ The ‘suspect classes’ also vary with international law. United States courts will scrutinize equal protection claims more carefully, and differently, if they involve discrimination on the basis of race, citizenship, national origin,

⁴⁴⁴ In writing for the Court, Justice Powell stated that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause”, disparate impact merely has an evidentiary value, and absent a stark pattern, “impact alone is not determinative”. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977). See also *Washington v. Davis*, 426 U.S. 229 (1976).

⁴⁴⁵ Strict scrutiny was first introduced in *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴⁴⁶ However, in *United States v. Virginia*, 518 U.S. 515 (1996), the Court used a type of ‘exacting scrutiny’ requiring “exceedingly persuasive justification” for VMI’s gender-based admission policy that “must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females.” *Ibid*, at 532. Justice Scalia’s lone dissent argued that the standard applied by the majority was closer to strict scrutiny than intermediate scrutiny: “If the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational basis review.” *Ibid*, at 574-75 [dissenting opinion]. But the Supreme Court later undermined this standard: “While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents.” *Nguyen v. INS*, 533 U.S. 53, 74 (2001) [dissenting opinion].

⁴⁴⁷ *Reed v. Reed*, 404 U.S. 71 (1971) [the Supreme Court ruled that the administrators of estates cannot be named in a way that discriminates between sexes and, in a unanimous decision, held that a law’s dissimilar treatment of men and women was unconstitutional].

⁴⁴⁸ *Craig v. Boren*, 429 U.S. 190 (1976); but see also *Frontiero v. Richardson*, 411 U.S. 677 (1973) where four Justices concluded that classifications based on sex are inherently suspect and must therefore be subjected to strict judicial scrutiny. Three concurring Justices felt that a “general categorizing of sex classifications as invoking the strictest test of judicial scrutiny” should be deferred until completion of the Equal Rights Amendment “which if adopted will resolve the substance of this precise question.” *Ibid*, at 692.

⁴⁴⁹ M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (Clarendon Press, Oxford, 1995) p. 163; CEDAW, *supra* note 175, art. 1.

gender, or legitimacy, but Article 2(2) of the ICESCR requires state parties to guarantee enjoyment of rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This definition bans any difference in treatment based on the prohibited grounds, and the CESCR has found violations for classifications not specifically mentioned in Article 2, such as distinctions based on age, health status, and disability.⁴⁵⁰ ILO Convention 111 also has a more exhaustive definition of discrimination.⁴⁵¹

Likewise, there are numerous barriers to broad protection in sex discrimination cases under the 14th Amendment.⁴⁵² To begin, the ‘intermediate scrutiny’ standard has been criticized for being vague and poorly defined, providing insufficient guidance and giving broad discretion to individual judges, which has led to confusion and inconsistent results in the lower courts.⁴⁵³ In addition, because a plaintiff must prove both impact and intent, the Court does not consider the difference between equal intent and equal outcome. Absent proof of intentional discrimination, the Court is generally unwilling to closely scrutinize gender neutral policies that disparately impact women.⁴⁵⁴ This is problematic when many detrimental forms of state action “are embedded in sexist stereotypes, but expressed in gender neutral language.”⁴⁵⁵ Equal protection, as applied only to direct discrimination, allows disadvantages women suffer simply because they are women to go on. The jurisprudence of the Supreme Court identifies “as wrongful only some of the practices and understandings that maintain inequality in the social position of women and men, and obscures – or affirmatively vindicates – many others.”⁴⁵⁶

Under the strict formal equality approach of the 14th Amendment, if men and women are ‘similarly situated’, the regulation is gender neutral, and there is no evidence of intentional discrimination, then there is no violation of the constitutional equality guarantee. This ‘similarly situated’ requirement is conceptually limited: if members of the dominant gender

⁴⁵⁰ See Chap. 3.2 for the CESCR’s statements regarding non-discrimination.

⁴⁵¹ See ILO C111, *supra* note 158, art. 1(a).

⁴⁵² Another barrier, though not entirely relevant here, is that the 14th Amendment has been interpreted as a prohibition on discriminatory government action only, not purely private discrimination by individuals, organizations, employers or businesses. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁴⁵³ L.J. Wharton, ‘State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination’, 36 *Rutgers Law Journal* (2005) p. 1213.

⁴⁵⁴ *Ibid*, p. 1205; see *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) where the Court upheld a policy granting lifetime preference to veterans for state civil service positions. The policy was neutral on its face, but over 99% of veterans were male and thus the preference operated overwhelmingly to the advantage of men. Impact provides an “important starting point” but purposeful discrimination is “the condition that offends the Constitution.” *Ibid*, at 274.

⁴⁵⁵ *Ibid*, p. 1225 [citing S.A. Law and A.E. Freedman, ‘Thomas I. Emerson: A Pioneer for Women’s Equality’, 38 *Case Western Law Review* (1988) p. 552].

⁴⁵⁶ R.B. Siegel, ‘She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family’, 115 *Harvard Law Review* (2002) p. 949.

(men) enjoy rights that members of the non-dominant gender (women) want, then women must argue that, as to the right in question, women are ‘similarly situated’ to men.⁴⁵⁷ This is how formal equality falls short. There is no violation so long as men and women are treated alike, but formal equality does not look at the extent to which men and women are *not alike* and does not consider the disadvantages women suffer as women, or rather, measures them by a standard designed for men.⁴⁵⁸ The Court has allowed differential treatment when it corresponds to differences between men and women in biological or legal status, but then often fails to distinguish between biology and the social consequences or perceptions of biology.⁴⁵⁹ This tendency persisted in a 2001 case where the Court accepted and reinforced “the stereotype of motherhood as an ‘unshakable responsibility’ and fatherhood as an ‘opportunity’.”⁴⁶⁰

6.3.3 The Equal Rights Amendment

Realizing that the Constitution falls short of recognizing a right to social protections and that the jurisprudence of the 14th Amendment is insufficient in ensuring equality, the best solution is constitutional reform through an Equal Rights Amendment. The 19th Amendment protects women’s right to vote,⁴⁶¹ but there is no specific wording in the Constitution enforcing women’s right to equality. While 22 states have amended their constitutions to include the ERA in full or in part, implementation at the federal level would be a significant step towards ensuring equality for all women. Laws have been established strengthening women’s rights yet women still face discrimination in society, such as disparities in equal pay and social protections, which aggravates their already-existing economic inequality. The patchwork of laws protecting women’s rights is not enough to promote

⁴⁵⁷ Cain, *supra* note 198, p. 831.

⁴⁵⁸ McColgan, *supra* note 372, p. 37; Wharton, *supra* note 453, p. 1217 [referring to the *Geduldig* case, *supra* note 79, as “injurious to women by ignoring important sex-based differences, or ultimately holding women to standards that have been established principally by men in a sexually unequal past”].

⁴⁵⁹ Wharton, *supra* note 453, p. 1218 [referring to *Geduldig*, *supra* note 79, where the Court’s analysis turns a blind eye to the reality that “the fundamental problem is … [the] willingness to transmute woman’s ‘real’ biological difference to woman’s disadvantage”; *Michael M. v. Superior Court*, 450 U.S. 464 (1981) where the Court upheld a statutory rape law applied only to men, failing to scrutinize the gender distinctions at the heart of the case; *Rostker v. Goldberg*, 453 U.S. 57 (1981) where the Court held men and women were not ‘similarly situated’ with regard to the draft and upheld the exclusion of women, deferring to Congress and disregarding the stereotypes about the capabilities of men and women].

⁴⁶⁰ *Ibid*, p. 1223; see *Nguyen*, *supra* note 446, the Court upheld an immigration law that explicitly distinguished between parents based on sex, making it significantly easier for an out-of-wedlock child born overseas to a U.S. citizen to claim citizenship through a U.S. citizen mother than a U.S. citizen father. Justice O’Connor argued the law was based “not in biological differences but instead in a stereotype, *i.e.* ‘the generalization that mothers are significantly more likely than fathers… to develop caring relationships with children.’”

Ibid, at 88-89 [dissenting opinion].

⁴⁶¹ “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” United States Constitution, 19th Amendment (passed by Congress 4 June 1919, ratified 18 August 1920).

equality because they do not have a strong constitutional foundation, leaving them vulnerable to being repealed by judges and lawmakers. The current protective legislation, namely the PDA and FMLA, is already limited but could be further weakened or repealed by Congress. Without constitutional protection, a law is in a permanent state of insecurity.

Just as the 14th Amendment was enacted to remedy the Supreme Court's decision in *Dred Scott*, the Equal Rights Amendment should be enacted to help remedy the history of sex discrimination in law. The ERA would establish a strong foundation for women's rights in all areas, not only civil and political, but also social and economic, thus allowing women to experience their full equality and due process rights. As proposed, the ERA would include three sections:

- (1) Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
- (2) The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
- (3) This amendment shall take effect two years after the date of ratification.⁴⁶²

The ERA was first written in 1923 by suffragist leader Alice Paul. After the 19th Amendment was ratified giving women the right to vote, the ERA was the next logical step towards guaranteeing constitutional equality for all citizens. Since 1923, the ERA had been introduced at every session of Congress. It was adopted by Congress in 1972, but when it was sent to the states for ratification, only 35 of the 38 required states passed it, falling three votes short of ratification by the end of the time limit in 1982.⁴⁶³ In 1983 the ERA passed in the House committees, but failed by six votes to achieve the necessary two-thirds vote on the House floor, and has not received a floor vote in the Congress since. In the most recent 112th session of Congress (2011-2013), ERA ratification bills were introduced in the House of Representatives and the Senate.⁴⁶⁴ As were resolutions to remove the ERA's ratification deadline and make it part of the Constitution when three more states ratify.⁴⁶⁵ It is indeed promising that some politicians see the necessity of the ERA and continue to advocate for it.

The ERA would clarify the law by providing the lower courts with direct authority to treat sex discrimination as highly suspect, therefore

⁴⁶² S.J. Res. 21: Joint resolution proposing an amendment to the Constitution of the United States relative to equal rights for men and women (112th Congress, 2011-2013); H.J. Res. 69: Proposing an amendment to the Constitution of the United States relative to equal rights for men and women (112th Congress, 2011-2013) [as of April 2012, H.J. Res. 69 has been referred to committee].

⁴⁶³ The original time limit was seven years which would have been up in 1979, but was extended to 1982.

⁴⁶⁴ S.J. Res. 21 and H.J. Res. 69, *supra* note 462.

⁴⁶⁵ H.J. Res 47: Removing the deadline for the ratification of the Equal Rights Amendment (112th Congress, 2011-2013); S.J. Res. 39: Joint resolution removing the deadline for the ratification of the Equal Rights Amendment (112th Congress, 2011-2013) [as of April 2012, H.J. Res 47 has been referred to committee].

requiring the ‘strict scrutiny’ standard of review.⁴⁶⁶ With the ERA in place, it would also be difficult for lawmakers to repeal existing legislation that protects women’s rights.⁴⁶⁷ Since the Constitution has not yet been amended to include this equality guarantee, it is difficult to predict how it would directly benefit women’s rights beyond the higher standard of review and general assurance of equality, although the jurisprudence of courts in states with ERAs serves as a useful guide. Some state courts have utilized their ERAs to move beyond formal equality and employ a substantive equality approach that closely scrutinizes all sex-based classifications to assess their discriminatory nature and impact.⁴⁶⁸ In doing so, they have rejected federal equal protection precedent, examined the history of sex discrimination in their own states, and contemplated how biological differences have been used to discriminate. A few courts have even extended state ERAs to gender neutral policies that disproportionately impacted men or women; however, the plaintiffs in these cases did not have to establish discriminatory purpose.⁴⁶⁹ More often, state ERAs have motivated legislative action prohibiting gender neutral regulations that disparately impact women.⁴⁷⁰

Many of the inequities in the current social security system are due to gender assumptions based on the breadwinner model of distribution. Back in 1981, the United States Commission on Civil Rights argued that the ERA would help regulate government policies that fail to recognize women’s work in the informal economy and eliminate sex discrimination in pensions involving government action.⁴⁷¹ This may still be true today since state ERAs have inspired state legislatures to modify their laws and regulations. The high rates of poverty among elderly women are also due to the long history of unequal pay between men and women. In 2010, women working

⁴⁶⁶ The Supreme Court’s use of strict scrutiny or intermediate scrutiny is based on the unique history of the 14th Amendment. Thus, the standard used in sex discrimination cases under the ERA would also depend on the legislative history and purpose of the ERA. Most state courts have interpreted their state ERAs as requiring a strict scrutiny standard for gender-based classifications, and a few have even required a more stringent ‘near absolutist’ standard, condemning the vast majority of sex-based classifications except where physical differences dictate a different result. Wharton, *supra* note 453, pp. 1215, 1240-41.

⁴⁶⁷ “Laws can be repealed. Judicial attitudes can shift. We continue to see demonstrable cases of systematic gender discrimination – even in this day and age when women have come so far. Establishing the clear unambiguous language of the Equal Rights Amendment into the U.S. Constitution would have a real impact on our national consciousness.” Congresswoman Carolyn Maloney (D-N.Y.) speaking as she reintroduced the Equal Rights Amendment (H.J. Res. 69) on 22 June 2011.

⁴⁶⁸ Wharton, *supra* note 453, p. 1247.

⁴⁶⁹ *Ibid.*, pp. 1256-58.

⁴⁷⁰ *Ibid.*, pp. 1283-84 [when Pennsylvania adopted the ERA in 1971, the Governor appointed a commission on the status of women to review state law for sex bias, which led to the passage of 19 statutes implementing the mandate of its ERA and to the repeal or revision of over 140 discriminatory laws; at the executive level, the Attorney General issued a number of opinions on a wide range of topics, such as the right of women to use their birth names and prohibitions on gender discrimination in insurance].

⁴⁷¹ United States Commission on Civil Rights, ‘The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution’, 68 *United Commission on Civil Rights Clearinghouse Publication* (1981).

full-time earned on average 77 percent of what men earned.⁴⁷² The ERA could lessen or eliminate this pay gap, resulting in higher contributions to the social security system (and private pensions) by working women over their lifetimes and larger pensions upon retirement. Similarly, it is interesting to note that had the ERA passed in the 1970's there would be no need for the ACA's equality provisions. The ERA would have eliminated the higher premiums women pay for health care simply because they are women and ensured access to all preventative services on the same basis as they are provided to men.

With regard to mandated paid maternity leave, there is potential for action if discrimination on account of pregnancy is found to be a form of sex discrimination. Through enforcement of the Pregnancy Discrimination Act, courts have accepted that discrimination on account of pregnancy can violate federal employment law, but the Supreme Court has fallen short of explicitly recognizing pregnancy discrimination as a form of sex discrimination.⁴⁷³ The *Geduldig* case is commonly read as holding that men and women are 'similarly situated' with regard to pregnancy and that discrimination on account of pregnancy is never sex discrimination.⁴⁷⁴ On the other hand, the Court's substantive equality approach in *Hibbs* suggests "that it is time to read *Geduldig* more precisely, as holding that discrimination against pregnant woman is not always sex discrimination – but sometimes can be."⁴⁷⁵ Following similar logic, the Colorado Supreme Court has found that, in contrast to the Supreme Court's decision in *Geduldig*, men and women are not 'similarly situated' with regard to pregnancy, and that exclusion of normal pregnancy care costs from otherwise comprehensive insurance coverage constituted sex discrimination under the Colorado ERA.⁴⁷⁶

⁴⁷² American Association of University Women, 'The Simple Truth about the Gender Pay Gap', 2012 edition, <www.aauw.org/learn/research/simpleTruth.cfm>, p. 3, visited 17 March 2012.

⁴⁷³ N.S. Siegel and R.S. Siegel, 'Struck by Stereotype: Ruth Bader Ginsberg on Pregnancy Discrimination as Sex Discrimination', 59 *Duke Law Journal* (2010) pp. 793-94.

⁴⁷⁴ See Chap. 2.4.1; *Geduldig*, *supra* note 79.

⁴⁷⁵ See Chap. 2.4.2; Siegel and Siegel, *supra* note 473, pp. 794-96 [the Court's reasoning cited the U.S. Congress: "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be." *Hibbs*, *supra* note 101, at 736. When women are still required to serve as principal caregivers, mere formal equality in family leave benefits would "exclude far more women than men from the workplace" and would not effectively combat the stereotypes Congress sought to eliminate. *Ibid.*, at 738, 734.].

⁴⁷⁶ *Colorado Civil Rights Comm. v. Travelers Insurance Co*, 759 P.2d 1358, 1363-64 (Colo. 1988); "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions because of sex." Colorado Constitution, Art. II, § 29 (1973). However, there is still some confusion on how to approach sex-specific classifications. One assertion is that sex-based classifications would be *per se* invalid under the ERA as a basic principle and, as a subsidiary principle, classifications based on sex-specific characteristics be given strict scrutiny review. K.T. Bartlett, 'Pregnancy and the Constitution: the Uniqueness Trap' 62 *California Law Review* (1974) p. 1565 [citing T. Emerson *et al.*, 'The Equal Rights Amendment: A Constitutional Basis for Equal Rights for

Opponents of the ERA argue that the Hyde Amendment's funding restrictions might be unconstitutional under the ERA as it would be denying women a medically necessary health care service. The Supreme Court has already ruled that the Hyde Amendment is constitutional and that states can discriminate between childbirth and abortion in allocating government funds.⁴⁷⁷ Nevertheless, state courts have been willing to abandon the formal equal protection analysis of federal precedent and extend greater protection in the area of abortion rights, as evidenced by the use of state ERAs to successfully argue that a state must fund medically necessary abortions for Medicaid-eligible women.⁴⁷⁸ However, these decisions addressed a very narrow issue and are not decisive in how a federal court would rule. It was once stated that abortion is a "unique problem for women" and thus not an issue of equal protection.⁴⁷⁹ Indeed, on the federal level, the right to abortion has always been interpreted under the right to privacy, not as an equality issue.⁴⁸⁰ Women therefore hold this right "as a private privilege, not as a public right."⁴⁸¹ But surely laws that target women's bodies and leave men's bodies alone should be viewed as an issue of equality.

Even though these issues will not soon be resolved, it is necessary to recognize – or at least consider – that government policies based on stereotypes, ineffective protective regulations, and laws that infringe upon a

Women', 80 *Yale Law Journal* 871 (1970-1971) pp. 893-94, this article is part of the 1972 ERA's legislative history].

⁴⁷⁷ *Harris*, *supra* note 300; *Maher v. Roe*, 432 U.S. 464 (1977) [holding that a state participating in the Medicaid program is not required by the Constitution to pay for non-therapeutic abortions even where it pays for childbirth]; *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) [upholding bans on performance of abortions in public hospitals].

⁴⁷⁸ *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1999) [the Court found that needy women and men relying on Medicaid are 'similarly situated', and since Medicaid covered medically necessary treatments for men without restriction, the Court struck down the restrictions on Medicaid abortion coverage]; *Doe*, *supra* note 301, at 160 [the Court found a violation of the right to privacy, and since only women become pregnant, discrimination against pregnancy since not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex-oriented discrimination: "It is therefore clear, under the Connecticut ERA, that the regulation excepting medically necessary abortions from the Medicaid program discriminates against women, and, indeed, poor women"]; *but see also Fischer v. Dept. of Public Welfare*, 502 A.2d 114 (Pa. 1985) [rejecting an argument that limitations on abortion funding violate the Pennsylvania ERA].

⁴⁷⁹ T. Butler, 'Abortion Law: "Unique Problem for Women" or Sex Discrimination', 4 *Yale Journal of Law and Feminism* (1991) p. 140 [citing a letter from T. Emerson, 'The Impact of the Equal Rights Amendment', Hearings on S.J. Res. 10 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary' (98th Congress, 1985). Ironically, Emerson was also the legal scholar who suggested the subsidiary principle with regard to sex-specific classifications, *see* Emerson, *supra* note 476, illustrative of the great divide in opinions of how to approach abortion under a federal ERA].

⁴⁸⁰ Justice Ginsberg has stated that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) [dissenting opinion].

⁴⁸¹ C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1988) p. 100.

woman's reproductive rights are in effect a form of sex discrimination. In doing so, all branches of government in the United States will be directly confronted with the question of how they must respond when women are discriminated against as women.⁴⁸² As with any legislation or amendment, the scope, interpretation and effect of the ERA would depend on the jurisprudence of the courts. State court ERA decisions, while sometimes inconsistent, have been successful in promoting equality and demonstrate how a federal ERA could provide broad protection in cases of sex discrimination. It is certainly not a perfect fix, but it is fair to say that a federal ERA would have significant influence on the tone of legal reasoning regarding women's equality and their social and economic rights.

6.4 Conclusion

While there is no 'one size fits all' solution for inadequate social protections and women's poverty, constitutional reforms tailored to reflect the particular needs and circumstances of each country are a promising option. In Canada, with its formal and substantive equality guarantees, the goal is to preserve and strengthen the social protections already in place by creating a distinct social charter. This charter would inform Canadians of what they should expect from their government and transform perceived public services into enforceable social rights. In the United States, not only is there limited room for social rights in the Constitution, but equality legislation is also severely lacking. It is impossible to imagine full realization of social and economic rights if they are not firmly grounded in the tenet of non-discrimination, and thus, an equal rights amendment is essential. The symbolic value of both a social charter in Canada and an equal rights amendment in the United States should not be discounted. The law operates "as a system of cultural and symbolic meanings", and consequently, these constitutional reforms would signify that the embedded principles are so important as to be "deemed worthy of constitutional magnitude."⁴⁸³

⁴⁸² Butler, *supra* note 479, p. 145.

⁴⁸³ Wharton, *supra* note 453, p. 1284 [Wharton was referring to sex equality but the principle can easily be applied to social and economic rights as well].

7 Concluding Remarks

Looking at the literature and statistics on poverty, law and social protections, we can arrive at two conclusions: there is indeed a link between gender inequality and poverty, and current legislation is not sufficient since this type of poverty persists.⁴⁸⁴ The law plays a significant role in the continuation of poverty, but it could also contribute to its elimination by sending a message that poverty is unacceptable. If we view poverty as one result of systematic discrimination, then logically, laws enacted to end such discrimination should be the solution. But the creation of a woman's legal right to equal treatment will not simply eradicate inequality, just like social protections alone are not a sufficient response to poverty. Poverty is socially and legislatively created, and for the groups primarily affected by it, it is often the result of long-term discrimination against marginalized groups of a society. Because of the patterns of discrimination that last throughout their lives, women are disproportionately marginalized, resulting in a cycle of poverty. Therefore, one must examine the root of inequality, that it is created by societal perceptions and perpetuated by damaging stereotypes, and take measures targeting the underlying causes.⁴⁸⁵ However, social protections are a recognized tool for poverty alleviation and thus require a strong legal foundation.

Using three social protections relevant to women's lives as examples – government pensions, maternity benefits and access to health care – this thesis sought to show that non-recognition of social rights has a detrimental effect on the economic security of women and leaves women, as a group, invisible. The federal governments of Canada and the United States have been ineffective in addressing women's poverty and this study has attempted to reveal how regardless of politics or legal structure, there is still a clear connection between social protections, equality and women's economic security. Solutions must be tailored to reflect the needs of women in each country, but the courts and governments of both Canada and the United States must also acknowledge that 'equal protection' is comprised of formal *and* substantive equality, and that substantive equality requires states to take positive steps towards remedying group disadvantage. These governments have it within their power to implement constitutional legal reforms, which would help regulate government social policy, promote gender equality, strengthen social protections, and protect women's equal access to such protections, ultimately improving the status of all women living in these wealthy nations.

⁴⁸⁴ Nott, *supra* note 229, p. 210 [Nott was referring to European data, but since women's poverty is not isolated to Europe and similar data exists for North America, I can apply the same conclusions here].

⁴⁸⁵ *Ibid*, p. 207.

Supplement A

Table 1: Low Income Cut-Offs, Canada, Before Tax, CAD (2008)⁴⁸⁶

	Rural Areas	Urban Areas			
		Less than 30,000	30,000 to 99,999	100,000 to 499,999	500,000 and over
1 person	\$15,262	\$17,364	\$18,946	\$19,094	\$22,171
2 persons	\$19,000	\$21,615	\$23,623	\$23,769	\$27,601
3 persons	\$23,358	\$26,573	\$29,041	\$29,222	\$33,933
4 persons	\$28,361	\$32,264	\$35,261	\$35,480	\$41,198
5 persons	\$32,165	\$36,594	\$39,992	\$40,239	\$46,727

Table 2: Poverty Thresholds, United States, Before Tax, USD (2008)⁴⁸⁷

	Weighted Average Thresholds	Related Children Under 18			
		None	One	Two	Three
1 Person	\$10,991				
Under 65	\$11,201	\$11,201			
65+	\$10,326	\$10,326			
2 People	\$14,501				
Householder under 65	\$14,489	\$14,417	\$14,840		
Householder 65+	\$13,030	\$13,014	\$14,784		
3 People	\$17,163	\$16,841	\$17,330	\$17,326	
4 People	\$22,025	\$22,207	\$22,570	\$21,834	\$21,910

⁴⁸⁶ Statistics Canada, ‘Table 3 – Low Income Cut-Offs (1992 Base) Before Tax’, <www.statcan.gc.ca/pub/75f0002m/2009002/tbl/tbl-3-eng.htm>, visited 22 April 2012.

⁴⁸⁷ United States Census Bureau, ‘Average Poverty Thresholds (XLS table)’ <www.census.gov/hhes/www/poverty/data/historical/families.html>, visited 22 April 2012.

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