Dossier nº 41210

COUR SUPRÊME DU CANADA

(EN APPEL D'UN JUGEMENT DE LA COUR D'APPEL DU QUÉBEC)

ENTRE :

PROCUREUR GÉNÉRAL DU QUÉBEC

APPELANT
(appelant /
intimé incident)

- et -

BIJOU CIBUABUA KANYINDA

INTIMÉE
(intimée /
appelante incidente)

- et -

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

INTIMÉE
(mise en cause /
appelante incidente)

- et -

PROCUREUR GÉNÉRAL DE L'ALBERTA

PROCUREUR GÉNÉRAL DE L'ONTARIO

PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE

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Chen, Y.Y. Brandon, « The Future of Precarious Status Migrants' Right to Health Care in Canada », (2017) 54(3) Alberta Law Review 649

THE FUTURE OF PRECARIOUS STATUS MIGRANTS' RIGHT TO HEALTH CARE IN CANADA

Y.Y. BRANDON CHEN*

This article examines how health care services in Canada are denied to precarious status migrants, either through outright exclusion based on immigration status, or due to the realities in migrants' lives that make it difficult for them to access health care services. The author argues that this situation is unfair, given the contribution made by precarious status migrants to Canada's sociocultural and economic fabric, and exhorts the courts and policy-makers to do more to make health care services available to these migrants.

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I. INTRODUCTION

With perhaps the exception of the staunchest supporters of libertarianism, it is generally agreed today that governments ought to play a role in facilitating the pursuit of health care for all.[1] In Canada, this public responsibility was acknowledged as early as half a century ago by then federal health minister A.J. MacEachen, who described the government's push for a universal medical care system as grounded in a "fundamental principle that health is not a privilege tied to the state of one's bank account, but rather a basic right which should be open to all."[2] Such commitment to universal health care, depending on one's philosophical bent, has been hailed as a critical step toward the achievement of either equality of opportunity or equal human capability, as well as an important mechanism that fosters and strengthens the bonds between members of a community.[3]

In this article, I adopt the view from the outset that the normative underpinnings of universal health care apply equally to citizens and foreign residents in a given society. This stance echoes that of Norman Daniels and Keren Ladin. They, writing in the context of

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1 But see Paul Menzel & Donald W Light, "A Conservative Case for Universal Access to Health Care" (2006) 36:4 Hastings Center Report 36.

2 *House of Commons Debates*, 72nd Parl, 1st Sess, Vol 7 (12 July 1966) at 7545.

3 See e.g. Norman Daniels, "Justice, Health, and Healthcare" (2001) 1:2 American J Bioethics 2 at 3–6; JP Ruger, "The Moral Foundation of Health Insurance" (2007) 100:1 QJM 53; "Universal Access to Health Care" (1995) 108:6 Harv L Rev 1323.

undocumented migration in the United States, argue that migrants should constitute cooperating members of the receiving society insofar as they contribute to its economy and social fabric. And to ensure the fairness of their social cooperation, migrants' equality of opportunity must be safeguarded in part by their being extended health care coverage.[4] Michael Walzer has arrived at a similar position from a communitarian line of thought. Relying on guest workers in Europe as his point of reference, he insists that migrants who "do socially necessary work, and … are deeply enmeshed in the legal system of the country to which they have come"[5] must be accepted as members of said political community. This membership bestowed on migrants both the responsibility and the right to partake in the collective provision of security and welfare such as health care, and this arrangement of mutual aid in turn reinforces the special links between migrants and their fellow community members.[6]

Prevailing international human rights norms also stipulate for the equal incorporation of citizens and migrants in governmental actions that aim at achieving health care for all. Foremost, the *International Covenant on Economic, Social and Cultural Rights* guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,"[7] and prohibits discriminatory enforcement thereof.[8] This right has been interpreted as encompassing a right to timely and appropriate health care, which requires governments to, among other things, refrain "from denying or limiting equal access for all persons, including … asylum-seekers and illegal immigrants, to preventive, curative and palliative health services."[9] Such a principle of non-discrimination has been reiterated by multiple international human rights actors. For example, the United Nations Special Rapporteur on the right to health notes in his report concerning migrant workers that, as a part of their legal obligations, governments of receiving countries must "ensure availability and accessibility of quality health facilities, goods and services, including existing health insurance schemes, to migrant workers, on the basis of equality with other nationals."[10] Likewise, the UN Committee on the Elimination of Discrimination Against Women has called on receiving states to "take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers,"[11] including securing their access to linguistically and culturally appropriate, gender sensitive health services.[12]

When compared with these international standards, the degree of health care protection enjoyed by migrants in Canada often falls short. This unfortunate fact will serve as my starting point in this essay as I seek to appraise the future prospects of migrants' continued

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4 Norman Daniels & Keren Ladin, "Immigration and Access to Health Care" in John D Arras, Elizabeth Fenton & Rebecca Kukla, eds, *The Routledge Companion to Bioethics* (New York: Routledge, 2015) 56.

5 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 60.

6 *Ibid* at 64–65.

7 16 December 1966, 993 UNTS 3, art 12(1) (entered into force 3 January 1976).

8 *Ibid*, art 2(2).

9 *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UNESCROR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 34.

10 Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UNHRCOR, 23d Sess, UN Doc. A/HRC/23/41 (2013) at para 11.

11 *General Recommendation No. 26 on Women Migrant Workers*, UNCEDAWOR, 42nd Sess, UN Doc CEDAW/C/2009/WP.1/R (2008) at para 26.

12 *Ibid* at para 26(i).

Chen, Y.Y. Brandon, « The Future of Precarious Status Migrants' Right to Health Care in Canada », (2017) 54(3) Alberta Law Review 649

struggle to realize their right to health care in this country. More precisely, my attention will be directed to the legal and policy realities facing migrants with precarious immigration status in Canada as they encounter some of the greatest disadvantages when accessing health care. Among these migrants are temporary foreign workers, international students, undocumented migrants, and relatives of Canadians that are on visitor visas while awaiting sponsorship. My central thesis is that, over the last several decades, Canadian laws and public policies on immigration and health care have coalesced to manufacture a migrant underclass who, because of their *temporarized* or *illegalized* presence in the country, are either rendered undeserving of public health care coverage or deprived of any meaningful access to the health care that they are entitled to on paper. It follows that, to actualize these migrants' right to health care, the machinations of Canada's contemporary immigration system that condemn migrants to a state of perpetual precariousness must be exposed and rejected by decision-makers.

To make my case, I will first untangle the web of immigration laws and policies in Canada that have precipitated, often in a racialized and gendered fashion, the precarious presence of a rising number of migrants. Then, I will take stock of how these migrants' precarious legal status has impaired their health care entitlement and access. I will conclude by looking ahead and offering some suggestions for legal and policy reform with an eye to promote better alignment between migrants' right to health care in Canada and international human rights law.

Before proceeding, I must make one caveat regarding the scope of this article. While cognizant of the precariousness that typifies refugee claimants' lives in Canada,[13] my discussions here will mostly skirt migrants who are in, or have gone through, the asylum seeking process. This decision is primarily motivated by the fact that refugee claimants' health care in Canada is administered by a program separate from the general public health insurance scheme, and therefore warrants its own analysis that I unfortunately cannot do justice to within the confines of this article. All I wish to note on the subject is that, after experiencing significant cuts in 2012, public health care coverage for refugee claimants in Canada was restored in April 2016 to a level on par with citizens' entitlement, owing largely to the well-coordinated and determined advocacy led by health care professionals which included a successful constitutional challenge.[14] Although much work remains to ensure refugee claimants' reinstated health care entitlement actually translates into improved access on the ground, the success of this advocacy reveals what is possible when key actors work in concert and commit to advancing the agenda of health care for all.

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13 See e.g. Samantha Jackson, "'Citizenship Theatre': Refugee Claimants, Security, and Performing Citizenship at the Immigration and Refugee Board" (2014) 4:4 Queen's Policy Rev 1, online: <www.queensu.ca/sps/qpr/sites/webpublish.queensu.ca.qprwww/files/files/5%20citizenship%20theatre.pdf>; Priya Kissoon, "Precarious Immigration Status and Precarious Housing Pathways: Refugee Claimant Homelessness in Toronto and Vancouver" in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 195.

14 Nicholas Keung, "Ottawa to Restore Refugee Benefits," *Toronto Star* (19 February 2016) A1, online: <https://www.thestar.com/news/immigration/2016/02/18/ottawa-to-restore-and-expand-health-care-for-refugees.html>.

II. LEGAL AND POLICY CONSTRUCTION OF PRECARIOUS STATUS MIGRANTS

Immigration laws and policies operationalize the borders of a political community by defining who may be let in and under what conditions. This immigration control apparatus employs a constellation of oversimplified binaries — namely, citizens/aliens, legal/illegal migrants, permanent/temporary residents, and so on — to privilege certain newcomers by affording them the right to permanent residency and citizen-like entitlements, while marginalizing others by ascribing them less-than-full legal statuses that are "designed to hold people in a particular relationship of exploitation and social/political subordination in the country."[15] Specifically, migrants with less-than-full statuses are not always authorized to work, their lawful presence is sometimes contingent on the ongoing sponsorship of a third party, and, they are frequently denied the socioeconomic protection offered by the state.[16] In this section, I intend to make two claims. First, I suggest that in recent decades, a growing number of migrants have been admitted to Canada under entrant categories that are less secure, and this trend is expected to persist in the near future. Second, I contend that such funnelling of migrants through precarious migratory pathways is a deliberate policy choice that aims at achieving the twin objectives of maximizing the potential of migrants as flexible labourers and minimizing government's social expenditure.

Although Canada's immigration program is historically billed as one that embraces permanent settlement, of late, it has exhibited an increasing penchant for temporary migration. In the last two decades, whereas the number of individuals granted permanent residency each year rose modestly from about 213,000 to 260,000, the amount of migrants issued temporary permits annually more than doubled, jumping from roughly 253,000 to 600,000.[17] Among these temporary foreign residents, the number of those granted a student permit ballooned from approximately 31,000 per year during the early 1990s to 96,000 twenty years later.[18] The ranks of temporary foreign workers have shown a similar surge, particularly since the 2000s. Between 2006 and 2010, the number of temporary employment authorizations issued to foreign workers grew by an average of 9 percent yearly, which was almost twice the rate observed during the second half of the 1990s.[19] This proliferation of short-term migrant workers is underscored by the expansion of Canada's Temporary Foreign Worker Program (TFWP) into "lower-skilled" occupations. As ever more migrant workers take up jobs as cooks, wait staff, cleaners, construction labourers, and so forth, today's TFWP is marked by a pool of predominantly racialized participants from the Global South, with an increasing proportion of females.[20] While some restrictions to the TFWP were introduced in 2015 by the Canadian government to quell public outcry over the influx of

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15 Nandita Sharma, "Immigration Status and the Legalization of Inequality" in Harald Bauder & John Shields, eds, *Immigrant Experiences in North America: Understanding Settlement and Integration* (Toronto: Canadian Scholars' Press, 2015) 204 at 208.

16 Luin Goldring, Carolina Berinstein & Judith K Bernhard, "Institutionalizing Precarious Migratory Status in Canada" (2009) 13:3 Citizenship Studies 239 at 240–41.

17 Calculation performed by author using statistics provided by "Facts and Figures 2014 – Immigration Overview: Permanent and Temporary Residents," online: <www.cic.gc.ca/english/resources/statistics/facts2014/> ["Facts and Figures 2014"].

18 Statistics Canada, *International Students Who Become Permanent Residents in Canada*, by Yuqian Lu & Feng Hou, Catalogue No 75-006-x (Ottawa: Minister of Industry, 2015) at Table 1.

19 "Facts and Figures 2014," *supra* note 17.

20 Jason Foster, "Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program" (2012) 19 Just Labour 22 at 27–29.

migrant workers amid rising unemployment in the country, notable exemptions have been granted to certain regions and sectors, thus ensuring temporary foreign workers will remain a fixture in Canada's immigration system for the time being.[21]

Undoubtedly, a good portion of the temporary migrant population consists of individuals that are truly looking to pursue time limited projects in receiving countries. However, for many others, their designation as temporary foreign residents fails to capture the nuances of their lived realities. For a growing number of foreign nationals in Canada, particularly those deemed "high-skilled," temporary migration represents only an initial stage of their years-long path toward permanent residency. By way of example, between 2005 and 2014, the number of temporary foreign workers who transitioned to permanent residents in Canada more than quintupled, rising from 8,500 to 49,400 annually.[22] A contributing factor to this boom was the launch of the Canadian Experience Class in 2008, which allows select international students who have acquired Canadian work experience upon graduation to qualify for permanent residency.[23] Some of these migrant workers have the intention all along to immigrate to Canada on a permanent basis, and they see temporary migration as a steppingstone to their eventual goal as they are unable to meet the stringent immigration requirements straightaway.[24] For other temporary migrants, the decision to stay is only made once they are in the country. As studies on various guest worker programs around the world show, people commonly adjust their plans when they progress through different phases of life, when they develop relationships and become integrated with local communities, or when the socioeconomic conditions change back home.[25]

The distinction between temporary and permanent migration can be equally blurry for many "lower-skilled" migrants with time-limited permits that lack the option of transitioning to permanent residents. For instance, three-quarters of the Mexican migrant farm labourers that work in Canada seasonally have returned on an annual basis for over four years, and 22 percent of them over ten years.[26] Such extended presence, often accompanied by the development of close ties with the local population, challenges the appropriateness of classifying these migrants as temporary residents. In a similar manner, the migration of many lower-skilled, non-agricultural workers to Canada via the TFWP also used to defy the label of temporariness. For over a decade, lower-skilled migrants whose work authorizations had expired were generally able to apply for a new permit or to renew their existing permit for as many times as they desired, thus opening the door to their establishment of relatively prolonged residence in Canada.[27]

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21 "More Foreign Workers Welcomed," *The Chronicle Herald* (18 March 2016) B4.

22 "Facts and Figures 2014," *supra* note 17.

23 Ana M Ferrer, Garnett Picot & William Craig Riddell, "New Directions in Immigration Policy: Canada's Evolving Approach to the Selection of Economic Immigrants" (2014) 48:3 Intl Migration Rev 846 at 857.

24 Delphine Nakache & Leanne Dixon-Perera, "Temporary or Transitional? Migrant Workers' Experience with Permanent Residence in Canada" (2015) 55 IRPP Study 1 at 12–13 [Nakache & Dixon Perera, "Temporary or Transitional?"].

25 See e.g. Stephen Castles, "Guestworkers in Europe: A Resurrection?" (2006) 40:4 Intl Migration Rev 741; Siew-Ean Khoo, Graeme Hugo & Peter McDonald, "Which Skilled Temporary Migrants Become Permanent Residents and Why?" (2008) 42:1 Intl Migration Rev 193.

26 Jenna Hennebry, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada" (2012) 26 IRPP Study at 13.

27 Delphine Nakache & Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail Over Human Rights Concerns?" (2010) 5 IRPP Study 1 at 34.

However, in an attempt to emphasize the supposedly temporary nature of migrants' participation in the TFWP, a policy that took effect on 1 April 2015, now bars lower-skilled foreign workers who have been in Canada for over four years from being issued a new work permit until they spend at least four years outside the country.[28] It is widely believed that, of the many migrants who are caught by this rule and lack the ability to secure alternative legal statuses in Canada, a sizable segment would end up remaining in the country without permission rather than departing at the end of four years. Some of them may do so because their families back home rely on their remittances; others may be pressured to continue working in Canada in order to repay the money they owe to recruiters; still others may find it difficult to leave because they have put down roots here.[29] If this forecast comes to pass, the "four-in, four-out" policy would arguably do little to prevent the long-term presence of migrant workers and would simply drive it underground.

Given the extent of the mismatch between migrants' temporary designation and their real life circumstances, the expanding pool of foreign nationals admitted to Canada with less-than-full legal statuses is better understood as the product of a conscious policy decision. On one level, as instability associated with individuals' immigration process frequently carries over into their employment, the policy shift from permanent to temporary migration helps Canada "deliver a workforce more willing to accept the industry's working and living conditions and one less able to contest them."[30] That is, because many precarious status migrants depend on the goodwill of their employers to keep returning to, or residing in, Canada or to successfully transition into permanent residents, they are vulnerable to exploitation at work and are often unwilling or unable to seek recourse in the event of maltreatment.[31] The barriers to speaking out are even greater if migrant workers are issued a "closed" work permit that largely prohibits them from switching jobs.[32] Thus, by virtue of the conditionality associated with their precarious legal statuses, migrants are transformed into "flexible" workers coveted in the market economy who can be fully taken advantage of by employers when the demand for labour is high while remaining readily disposable when the demand sags.

On another level, the imposition of less-than-full legal statuses on migrants who for all intents and purposes have established protracted residence in Canada can be seen as part and parcel of the neo-liberal downward pressure on social citizenship rights.[33] In other words, by casting migrants that are ordinarily present as merely visitors or guests, the government insidiously excludes them from full membership and the attendant entitlements despite their ongoing contributions to society that arguably help sustain such communal provisions. One

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28 Nakache & Dixon-Perera, "Temporary or Transitional?" *supra* note 24 at 18.

29 Audrey Macklin, "Manufactured Illegality," *Nationals Post* (20 March 2015) A10.

30 Kerry Preibisch, "Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture" (2010) 44:2 Intl Migration Rev 404 at 413 [emphasis omitted].

31 See e.g. Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Toronto: Metcalf Foundation, 2012), online: <metcalffoundation.com/wp-content/uploads/2012/09/Maac-In-Canada-Full-Report.pdf>; Lilian Magalhaes, Christine Carrasco & Denise Gastaldo, "Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions" (2010) 12:1 J Immigrant & Minority Health 132; Salimah Valiani, "The Shifting Landscape of Contemporary Canadian Immigration Policy: The Rise of Temporary Migration and Employer-Driven Immigration" in Goldring & Landolt, *supra* note 13, 55.

32 Faraday, *ibid* at 76–77.

33 See generally Janine Brodie, "The Social in Social Citizenship" in Engin F Isin, ed, *Recasting the Social in Citizenship* (Toronto: University of Toronto Press, 2008) 20.

of the clearest examples of this rights curtailment by way of "status temporarization" concerns elderly migrants. Traditionally, the primary method for Canadians to bring their non-citizen parents and grandparents to the country for reunification was through family sponsorship, which, if successful, affords permanent residency to these elderly newcomers. Since late 2011, the Canadian government has consciously diverted elderly migrants away from this usual route of permanent settlement to a newly created "super visa" program. The super visa, which enables holders multiple entries into Canada over a period of up to ten years and a maximum stay of twenty-four months on each visit, gives parents and grandparents of Canadians the possibility of remaining in the country on a relatively long-term basis. But it provides them neither the right of permanent residency nor any associated socioeconomic benefits, including public health care coverage.[34] In effect, by fictitiously turning ordinary residents into temporary visitors, the government conveniently carves out a policy space for itself in which it enjoys enhanced freedom to offload the responsibility of health and social care onto migrants and their families.

In the upcoming section, I will pick up on this last point. In particular, I wish to elaborate on the ways that the rights reducing policy space gets generated and maintained in the domain of migrant health care, focusing especially on the role that the Canadian judiciary has played in this process.

III. EFFECTS OF PRECARIOUS MIGRATORY STATUS ON THE RIGHT TO HEALTH CARE

Generally speaking, migrants who have been granted permanent residency in Canada enjoy more or less the same publicly funded health care as Canadian citizens.[35] In contrast, many precarious status migrants lack either health care entitlement outright or the ability to exercise whatever right to health care they supposedly have. I will now address these two gaps in precarious status migrants' health care in turn.

A. DENIAL OF PUBLIC HEALTH CARE COVERAGE

Precarious status migrants' entitlement to publicly funded health care in Canada is best described as patchy. Among temporary foreign workers, those lacking an employment authorization that is at least six months long, or a year long in some provinces, are usually disqualified from coverage.[36] In Quebec, ironically, many migrants that hold an "open" work permit, which allows them to switch jobs and should in theory better protect them from exploitation, are left medically uninsured.[37] As for international students, they are completely

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34 Xiaobei Chen & Sherry Xiaohan Thorpe, "Temporary Families? The Parent and Grandparent Sponsorship Program and the Neoliberal Regime of Immigration Governance in Canada" (2015) 1:1 Migration, Mobility & Displacement 81, online: <https://journals.uvic.ca/index.php/mmd/article/download/13308/4418>.

35 However, several provinces require new residents to undergo a waiting period before they are eligible for public health care coverage, and this policy has disproportionately adverse effects on migrants, including permanent residents. See Ritika Goel, Gary Bloch & Paul Caulford, "Waiting for Care: Effects of Ontario's 3-Month Waiting Period for OHIP on Landed Immigrants" (2013) 59:6 Can Family Physician e269.

36 YY Brandon Chen, "Extending Health Care Entitlement to Lawful Non-Transient International Migrants: Untapped Potential of the Universality Principle in the *Canada Health Act*" (2015) 48:1 UBC L Rev 79 at 111–12 [Chen, "Extending Health Care Entitlement"].

37 *Ibid* at 113–14.

excluded from public health care plans in Ontario, New Brunswick, and Prince Edward Island. And most other Canadian jurisdictions restrict health care entitlement to only foreign students that meet certain criteria, including being issued a permit that is for twelve months or longer.[38] Non-citizen family members of Canadians that are in the country on visitor visas while waiting for the approval of their sponsorship applications are not eligible for health care benefits, nor are parents and grandparents on super visas.[39] The same is true of undocumented migrants.[40] Although some provinces do provide primary health care to medically uninsured migrants through community health centres and the like, such services are far from comprehensive, and access thereto is often impeded by long waiting lists and catchment area restrictions.[41]

The inequality between the health care entitlement of precarious status migrants and that of citizens and permanent residents is routinely justified by provincial governments as necessary prioritization in a context of limited public resources. As a case in point, when Ontario decided to restrict temporary migrants' access to its health insurance plan in 1994, the health minister defended the decision on the basis that the province needed "tighter controls on health care spending … to preserve the system for Ontario *residents*."[42] The government's stance displayed little appreciation for the contributions that precarious status migrants make to the public coffers through both direct and indirect taxations. Neither did it give proper weight to the extended presence of many precarious status migrants in the province that ought to qualify them as ordinary "residents" in virtually every sense of the word.

In an attempt to improve their health care security, precarious status migrants have repeatedly challenged their incomplete public health care coverage in court, but largely to no avail.[43] Most commonly, they have framed their lesser health care entitlement relative to that of citizens and permanent residents as a contravention of the equality rights guarantee under the *Canadian Charter of Rights and Freedoms*.[44] To date, however, courts in Canada have consistently dismissed this line of argument by finding that disparities in health care benefits arising from migratory status differences do not come within the purview of the *Charter* equality rights protection.

It is well-established in the *Charter* jurisprudence that the equality rights provision is not engaged unless a government action creates a discriminatory distinction based on one of the grounds enumerated in section 15 or one that is analogous thereto.[45] But according to a

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38 *Ibid* at 114–15.

39 *Ibid* at 117.

40 Magalhaes, Carrasco & Gastaldo, *supra* note 31.

41 Sandra Elgersma, *Immigration Status and Legal Entitlement to Insured Health Services*, Library of Parliament PRB 08-28E (Ottawa: Parliamentary Research and Information Service, 28 October 2008) at 7.

42 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Leg, 3rd Sess, No 106 (31 March 1994) at 5322 (Hon Ruth Grier) [emphasis added].

43 To the best of the author's knowledge, the only court challenge in Canada that has hitherto succeeded in expanding precarious status migrants' health care entitlement is the case against the federal government's cuts to refugee health care: *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, 28 Imm LR (4th) 1.

44 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

45 *Andrews v Law Society British Columbia*, [1989] 1 SCR 143.

growing number of courts that have examined this issue, unequal health care entitlements between precarious status migrants and their more privileged counterparts rests on neither an enumerated nor an analogous ground. In reaching this conclusion, courts have often relied on unrealistic assumptions about how precarious status migrants came to their predicament and what they can do to escape it. For example, in *Clarken et al. v. Ontario Health Insurance Plan*, Ontario's Divisional Court dismissed a section 15 *Charter* challenge launched by a group of foreign students whose entitlement to provincial health insurance was stripped following the above-mentioned policy change in 1994.[46] The Court ruled against recognizing immigration status as an analogous ground for *Charter* equality rights protection because it apparently lacked the requisite immutability. Justice Chilcott noted that international students were not prohibited from qualifying for public health care coverage per se, and all they had to do to become eligible was to acquire another immigration status.[47] The Court was technically correct in its observation. However, the degree of liberty that it assumed foreign students to boast when it came to changing their legal classification to one that was more permanent and embellished with greater entitlements was troublingly fanciful, especially considering that the case predated the introduction of the Canadian Experience Class. Scant attention was paid by the Court to the systemic forces within the Canadian immigration system mentioned earlier that were beginning, and have continued to this day, to narrow migrants' lawful access to permanent settlement in favour of temporary entry. Given the substantial political advantage that the government stands to gain by keeping migrants in a state of precariousness, suggestions that migrants can freely improve their health care situations by adopting a securer migratory status are arguably unreasonable.

Similar shortcomings also afflict the Ontario Court of Appeal decision in *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)*, which concerned another unsuccessful section 15 *Charter* challenge against the same benefit-cutting policy examined in *Clarken*.[48] The claimants in this case consisted of precarious status migrants whose legal standing in Canada ranged from having no status at all to being medically inadmissible dependent children of landed immigrants who were allowed entry on special permits. As in *Clarken*, the Court found that immigration status, particularly the distinction between permanent and non-permanent residents, could not constitute an analogous ground under section 15 because it was not immutable. As support for its ruling, the Court noted that four of the five applicants in this case transitioned into permanent residents in the course of the litigation, while options existed for the fifth to do the same in theory.[49] Effectively, by restricting its field of vision to the handful of claimants in this case, the Court cast out of sight many other precarious status migrants in Canada, particularly those labelled "lower-skilled," for whom the likelihood of acquiring permanent resident status is practically nonexistent by policy design.[50] Compounding the problem, the Court went on to observe that immigration status, instead of constituting a suspicious ground of discrimination, was in fact a relevant policy consideration in this case given the government's desire to limit health care

46 (1998), 109 OAC 363 [*Clarken*].
47 *Ibid* at para 50.
48 (2001), 55 OR (3d) 43 (CA) [*Irshad*].
49 *Ibid* at para 136.
50 Deepa Rajkumar et al, "At the Temporary-Permanent Divide: How Canada Produces Temporariness and Makes Citizens Through its Security, Work, and Settlement Policies" (2012) 16:3 & 4 Citizenship Studies 483 at 486.

coverage to only those who intended to make Ontario their permanent home.[51] The upshot of the Court's holding was that migrants' legal characterization as either permanent or non-permanent was an adequate proxy for the true nature of their residence in the province. But as I explained earlier, this is far from the reality. Despite the temporariness and conditionality associated with their legal status, many precarious status migrants not only intend to remain in Canada on a long-term basis but also do so as a matter of fact owing to their tremendous resilience. To discount migrants' ordinary residency solely because of their non-permanent legal designation therefore belies people's real life experiences.

The blindness of the Canadian judiciary to the plight of precarious status migrants and the purposive policy design that fuels such hardship reared its head again in *Toussaint v. Canada (Attorney General)*, in which the Federal Court of Appeal was tasked with determining the constitutionality of the federal government's denial of public health care benefits to an undocumented migrant woman.[52] In disposing of the applicant's *Charter* equality rights claim, the Court cited *Irshad* as authority and affirmed that immigration status did not meet the requirements of an analogous ground as it could not be characterized as "immutable or changeable only at unacceptable cost to personal identity."[53] This finding painted an overly rosy picture of undocumented migrants' legal quandary by implying that they were free to regularize their presence in the country without incurring much personal sacrifice. It trivialized the real possibility of deportation that undocumented migrants would face when presenting themselves to government officials. And to the extent that their lives had become intertwined with the sociocultural and economic fabric of the Canadian society, attempts by undocumented migrants to re-engage with the immigration system to change their legal status would run great risk of their losing these social attachments, and could hardly be said to cause no "unacceptable cost to personal identity."[54]

Notably, in *Toussaint*, the Court was also called upon to decide whether the exclusion of undocumented migrants from public health care violated the applicant's rights to life and personal security as enshrined in section 7 of the *Charter*. Once more, the Court was unsympathetic toward the applicant's claim, and its analysis exhibited stubborn ignorance of the systemic forces that shape and perpetuate precarious status migrants' realities. According to the Court, section 7 *Charter* protection was not triggered in this case because the government could not be held responsible for the harm suffered by the applicant. It reasoned that "the [applicant] by her own conduct … [had] endangered her life and health. [She] entered Canada as a visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the [provincial health insurance plan]."[55] There was no acknowledgment by the Court of the increasing reliance of the Canadian immigration regime on temporary migration, which aggravated migrants' vulnerability to falling out of status, as expected in the aftermath of the coming into effect of the "four-in, four-out" policy. Accordingly, the Court's analysis situated migrants within a fictional world in which they were presumed to

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51 *Irshad*, *supra* note 48 at para 133.
52 2011 FCA 213, [2013] 1 FCR 374 [*Toussaint*].
53 *Ibid* at para 99, citing *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13.
54 *Toussaint*, *ibid*.
55 *Ibid* at para 72.

exercise unencumbered choice. Undocumented migrants were viewed as *illegal* rather than *illegalized*, and their precariousness was considered purely a result of their failure to make the proper decisions during their migratory process. This single-minded focus on "choice," as Sheila McIntyre observes in the *Charter* equality rights context, "individuates a collective and systemic problem and operates much as crude forms of stereotyping do, by making difference — *i.e.*, individual inequality — an individual or group deficit, reasonably stigmatized or subject to moral blame."[56]

These legal precedents are unfortunate. Not only do they add to the hurdles that precarious status migrants must cross in the future when seeking to assert their right to health care in Canada, but they also legitimize a version of the anti-migrant narrative that portrays migrants who are excluded from public health care as rightly undeserving. Conveniently disappeared from the judicial discussion is the policymakers' deliberate efforts, on the one hand, to restrict certain migrants' access to permanent residency and force them to stay in the country by perpetually resorting to temporary or irregular immigration channels, and, on the other hand, use migrants' less-than-full status as justification for their health care exclusion. Such resistance to probe into the interworking between the immigration and the health care systems insulates migrant health care retrenchment from fulsome scrutiny, and renders the Canadian judiciary complicit in the government's neo-liberal agenda.

B. IMPEDIMENTS TO HEALTH CARE ACCESS

Even for the precarious status migrants that are afforded health care coverage in Canada, their ability to convert this legal entitlement into de facto access may be hampered by their insecure presence in the country. To be sure, studies have shown that newcomers to Canada as a group, and not just those without permanent resident status, experience considerably greater difficulties in obtaining health care services than their native-born counterparts do.[57] Factors that contribute to this disparity include, inter alia, the absence or geographical inaccessibility of culturally appropriate care, language barriers, migrants' unfamiliarity with the Canadian health care system or unawareness of the services available, and the worry that service utilization would jeopardize the outcome of one's immigration or refugee applications.[58] However, beyond these general barriers, precarious status migrants encounter additional challenges with health care access that uniquely stem from the conditional and uncertain nature of their legal standing. By way of illustration, I will now turn my attention to the problematic health care access that seasonal agricultural migrants face in Canada.

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56 Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2010) 129 at 177.

57 See e.g. Claudia Sanmartin & Nancy Ross, "Experiencing Difficulties Accessing First-Contact Health Services in Canada" (2006) 1:2 Healthcare Policy 103.

58 See e.g. Anita J Gagnon, "The Responsiveness of the Canadian Health Care Systems Towards Newcomers" in Pierre-Gerlier Forest, Gregory P Marchildon & Tom McIntosh, eds, *Changing Health Care in Canada: Romanow Papers, Vol. 2* (Toronto: University of Toronto Press, 2004) 349 at 356–57; Jennifer Asanin & Kathi Wilson, "'I Spent Nine Years Looking for a Doctor': Exploring Access to Health Care Among Immigrants in Mississauga, Ontario, Canada" (2008) 66:6 Social Science & Medicine 1271.

The vast majority of migrants that come to Canada through the Seasonal Agricultural Worker Program (SAWP) are employed in Ontario, Quebec, British Columbia, and Alberta.[59] Whereas all migrant farm workers in Ontario and Quebec are furnished with public health care coverage, those in British Columbia and Alberta are only entitled to public health care benefits if they possess a work permit that is for longer than six months.[60] SAWP participants in British Columbia must also undergo a three-month waiting period before their health care eligibility takes effect.[61] Irrespective of these differences, health care entitlement of seasonal agricultural migrants in Canada has been found to be largely illusory. Research indicates that SAWP participants usually must rely on their employers to get registered with the provincial health insurance plans, to obtain their health care cards (as some employers would hold onto the cards for "safekeeping"), and to arrange transportation to health care providers.[62] Such dependency on employers as facilitators of service utilization, from a logistical perspective, unnecessarily complicates migrants' timely access to health care. Moreover, it deters migrants from health care access for fear that doing so may vitiate employers' impression of them as "strong, healthy and resilient workers,"[63] which could in turn cause them to be repatriated before their work permit expires or negatively affect their chances of being invited back for work next year.[64] In Ontario alone, between 2001 and 2011, nearly 800 migrant farm workers had their employment terminated prematurely and were sent home against their will when they became ill, injured, or pregnant.[65] Such a practice not only denies migrant farm workers proper access to health care that they are legally entitled to, but also gives other similarly situated migrants pause for thought before seeking medical attention.

In sum, as the Canadian immigration and health care laws and policies interweave, they deprive migrants of their security in life while simultaneously stymieing the full realization of migrants' right to health care. For medically uninsured migrants looking to change their fortune, their "temporarized" or illegalized status is used by decision-makers to excuse their health care disentitlement. And for precarious status migrants that are supposedly covered by public health insurance, their conditional presence in Canada ensures that such legal entitlements would for the most part remain theoretical as their actual service utilization is kept in check by the threat of removal from the country. If this status quo persists, the future arguably does not bode well for the right to health care of the growing number of precarious-status migrants.

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59 Michael Pysklywec et al, "Doctors Within Borders: Meeting the Health Care Needs of Migrant Farm Workers in Canada" (2011) 183:9 CMAJ 1039 at 1039.

60 Chen, "Extending Health Care Entitlement," *supra* note 36 at 111–12. For information on migrant workers' health care coverage in Alberta, see Alberta Health, "Temporary Residents and AHCIP," online: <http://www.health.alberta.ca/AHCIP/temporary-residents.html>.

61 Gerardo Otero & Kerry Preibisch, *Citizenship and Precarious Labour in Canadian Agriculture* (Vancouver: Canadian Centre for Policy Alternatives, 2015) at 22, online: <www.policyalternatives.ca/publications/reports/citizenship-and-precarious-labour-canadian-agriculture>.

62 Janet McLaughlin, *Trouble in Our Fields: Health and Human Rights Among Mexican and Caribbean Migrant Farm Workers in Canada* (PhD Thesis, University of Toronto Department of Anthropology, 2009) [unpublished] at 430–33.

63 *Ibid* at 433.

64 Jenna L Hennebry & Kerry Preibisch, "A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program" (2012) 50:S1 Intl Migration e19 at e26, online: <onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2009.00598.x/epdf>.

65 Aaron M Orkin et al, "Medical Repatriation of Migrant Farm Workers in Ontario: A Descriptive Analysis" (2014) 2:3 Can Medical Assoc J Open E192.

IV. SUGGESTIONS FOR LEGAL AND POLICY REFORM

In my view, the key to improving precarious status migrants' health care security in Canada lies in unmasking and contesting the legal and policy forces that contribute to migrants' precarious presence in the first place. Whatever the original intention might have been when it was first conceived, Canada's temporary migration scheme has now clearly evolved into a policy stratagem that allows the government to roll back the rights and freedoms of non-citizen ordinary residents for its own economic and political gains. As illustrated, the designation of migrants as temporary or irregular despite their lived realities not only compromises these individuals' exercise of the right to health care, but also legitimizes this rights violation and shields it from proper judicial scrutiny. Therefore, to truly fulfill migrants' right to health care, the operating philosophy of Canada's contemporary immigration system must be revamped. The purposive channelling of immigration through programs that are designed to amplify and exploit migrants' precariousness must be stopped, and all migrants that have established ordinary residence in the country must be provided a genuine pathway to acquire legal permanent status.

Admittedly, this prescription puts me somewhat at odds with a popular strand of migrant rights advocacy that insists on separating questions about migrants' entitlement within the country from concerns over migrants' treatment at the borders. Supporters of this bifurcation often take the position that migrants' access to timely and appropriate health care can be effected by legislative and policy changes within the health care field alone, without any reforms being made to the immigration system.[66] A similar logic appears to undergird international legal instruments that aim at advancing migrants' human rights, with the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* being a perfect case in point.[67] On the one hand, the Convention requires countries to treat migrant workers and citizens equally in relation to health service access.[68] But on the other hand, it assures states that their right to control migrant workers' border entry will not be undermined by any of its provisions.[69] The problem with this bifurcated approach, as I have sought to demonstrate in this article, is that it underappreciates how insecurity underlying migrants' residency can hinder the actualization of their right to health care. Any attempts to advance migrants' rights without adequately policing how sovereign states exercise their authority over immigration control will, to borrow the words of Laurie Berg, risk having the latter "[infiltrate] the domain of [precarious status] migrants' substantive protections in other areas of domestic law, thus effectively defeating their enforceability."[70]

Against the backdrop of this proposed immigration reform, the Canadian public health care system must strive to extend coverage to all migrants who are de facto ordinarily resident in the country, irrespective of their legal classifications. In the event that such policy change is stalled by legislative inertia, the Canadian judiciary must be ready to serve as a

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66 See e.g. Andrew J Pollard & Julian Savulescu, "Ethics in Practice: Eligibility of Overseas Visitors and People of Uncertain Residential Status for NHS Treatment" (2004) 329:7461 British Medical J 346.

67 18 December 1990, 2220 UNTS 3 (entered into forces 1 July 2003).

68 *Ibid*, art 43(1)(e).

69 *Ibid*, art 79.

70 Laurie Berg, "At the Border and Between the Cracks: The Precarious Position of Irregular Migrant Workers Under International Human Rights Law" (2007) 8:1 Melbourne J Intl L 1 at 19.

catalyst for reform by engaging in a "*Charter* dialogue" with the legislature. This means that when another opportunity arises for courts to consider the government's constitutional duty toward medically uninsured migrants, they must be ready to pierce the veil of immigration statuses and consider the discriminatory effect of health care disentitlement based on migrants' real life circumstances. And they must also recognize the legal and policy architecture that constrains migrants' decision-making, and hold the government to account for the role that it plays in engendering the plight of medically indigent migrants. To hold the judiciary to such expectations is not unreasonable. In fact, courts in some other countries have expressed the willingness to engage in these very lines of analysis.

In *Larbi-Odam v. MEC for Education (North-West Province)*, for instance, the South African Constitutional Court was asked to assess whether a provincial regulation that prohibited non-citizen teachers from obtaining permanent employment contracts breached the anti-discrimination clause of the interim constitution.[71] In answering the question affirmatively, the Court rejected a request from the government to find only a partial constitutional infringement insofar as the impugned regulation offended the rights of permanent foreign residents. The Court held that the exclusion of temporary foreign residents from tenured teaching positions was just as discriminatory, considering that all the temporary migrants in this case had been in South Africa for a prolonged period of time by way of renewing their immigration permits annually.[72] In other words, by allowing itself to look beyond the legal categorization of individuals, the Court was able to lay bare the injustice of differential treatment of citizens, permanent residents and regularly returning temporary residents, whose residency in the country all shared a quality of endurance.

Likewise, in *Plyler v. Doe*, the US Supreme Court exhibited a certain degree of openness to confront a state government's inferior treatment of migrants that was motivated by considerations detached from migrants' lived realities.[73] The case dealt with the constitutionality of a Texan law that disallowed the enrolment of undocumented migrant children in public schools. Ruling against the government, the Court reasoned that whereas "[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct,"[74] such claims "do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants."[75] That is, as much as policy-makers might have had valid reasons to distinguish undocumented migrants from their lawful counterparts, to generalize this distinction to undocumented migrant children was unjust according to the Court, because children usually had little control over their immigration status. While the Court's conception of migrants' illegalized status as primarily a matter of personal choice, as in *Toussaint*, was disappointing, the exception that the Court made with respect to migrant children illustrated just how fragile this rhetoric of choice could be when migrants' real life experiences were properly accounted. Thus, this decision ought to give the Canadian judiciary some food for thought when the issue concerning the mutability of immigration status returns for another deliberation.

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71 [1997] ZACC 16, [1997] 12 BCLR 1655 (S Afr Const Ct).
72 *Ibid* at para 41.
73 457 US 202 (1982).
74 *Ibid* at 219.
75 *Ibid* at 219–20 [emphasis in original].

As this foreign jurisprudence shows, when judicial inquiries are able to move past the abstract legal categorizations imposed on migrants and become alive to people's factual circumstances, court challenges can serve as an important vehicle for the expansion of migrants' entitlements, including health care. However, as I have noted, even when migrants are granted public health care coverage, their access to timely and appropriate services can still be difficult in practice. To remedy this, commentators have put forth a range of recommendations for health care reform, including more routine usage of interpreters, enhancement of clinical cultural competence, employment of ethnocultural liaisons to help migrants navigate the health care system, and development of readily accessible information on migrants' health care eligibility as well as services available, among others.[76] These initiatives must also be complemented by measures to remove the unnecessary access barriers foisted upon migrants by those who exercise power over them. For example, pertinent rules must be put in place and vigorously enforced to prohibit employers from withholding migrant workers' health care cards or repatriating migrant workers for medical reasons absent their informed consent. Without such multi-pronged reform, the future of precarious status migrants' right to health care in Canada will likely be grim.

V. CONCLUSION

In an article titled "History and the Future of International Migration," Göran Rystad remarks that "[h]istory is the only key we have to understanding the present and to making at least tentative predictions concerning the future and regarding the possible effects of decisions and policies."[77] In this article, I adopted a similar approach to examining the past and future trajectory of precarious status migrants' right to health care in Canada. I began with a description of the growing preference of the Canadian immigration system for temporary migration over permanent settlement. I next showed how this shift in immigration policy resulted in migrants' precarious presence, and how this insecurity in turn constrained migrants' ability to fully realize their right to health care as guaranteed in international law. I highlighted the complicity of the Canadian judiciary in limiting migrants' health care entitlement, and I observed that even when migrants were made eligible for public health care, their access thereto could still be thwarted by the conditionality associated with their legal status. Looking toward the future, I suggested that the seemingly unrelenting appetite of Canada's immigration system for temporary migrants will continue to exert downward pressure on migrants' right to health care. If we are to hope for a more positive future, the immigration control assemblage that destabilizes foreign residents' ordinary presence in the country must be unravelled. Migrant rights advocates must resist the temptation to separate concerns about migrants' health care entitlement and access from those about their border entry and exclusion. The two fields are intimately connected. So long as migrants' lives remain precarious, whatever gains that may be made on paper regarding their right to health care will prove to be more symbolic than real.

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[76] See e.g. Gagnon, *supra* note 58 at 366–68.

[77] Göran Rystad, "History and the Future of International Migration" (1992) 26 Intl Migration Rev 1168 at 1168–69.

Onglet 2

Dixon, Rosalind, « The Supreme Court of Canada and Constitutional (Equality) Baselines », (2013) 50(3) Osgoode Hall Law Journal 637

The Supreme Court Of Canada And Constitutional (Equality) Baselines

ROSALIND DIXON *

In its approach to defining "analogous grounds" for the purposes of subsection 15(1) of the Charter of Rights and Freedoms, the Supreme Court of Canada has adopted an unusual mix of broad and generous interpretation, and high formalism. This article argues that one potential reason for this is the degree of heterogeneity among the nine distinct enumerated grounds in section 15. Heterogeneity of this kind can produce quite different interpretive consequences, depending on whether a court adopts a direct, "multi-pronged," or a more synthetic, "common denominator," approach to the question of analogical development. The Court, over time, has implicitly shifted from the first to the second of these approaches. For comparative constitutional scholars, a lesson of Canadian Charter jurisprudence is thus that the number and scope of the analogical baseline categories in a constitution—and how courts approach their relationship to each other—can matter a great deal for the subsequent recognition of new constitutional categories. For those seeking to design broad constitutional guarantees of equality, or other provisions containing express analogical baselines, the lesson is potentially even more specific: More may not always be better when it comes to encouraging judges to give effect to a preferred constitutional understanding.

Dans son approche visant à définir les « motifs analogues » aux fins du paragraphe 15(1) de la Charte des droits et libertés, la Cour suprême du Canada a opté pour un mélange inhabituel d'interprétation vaste et généreuse et de formalisme élevé. Cet article fait valoir qu'une raison potentielle en est le degré d'hétérogénéité parmi les neuf motifs distincts énumérés à l'article 15. Une telle hétérogénéité peut amener à des interprétations fort différentes selon

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qu'un tribunal adopte une approche directe « concertée » ou une approche plus synthétique de « dénominateur commun » quant à la question du développement analogique. Avec le temps, la Cour, a implicitement glissé de la première à la deuxième de ces approches. Pour les chercheurs en constitutions comparées, la jurisprudence de la Charte canadienne nous apprend donc que le nombre et la portée des catégories analogiques de départ dans une constitution – et la façon dont les tribunaux abordent leurs relations les uns avec les autres – peuvent s'avérer essentiels pour la reconnaissance ultérieure de nouvelles catégories constitutionnelles. Pour ceux qui cherchent à concevoir de larges garanties constitutionnelles d'égalité ou d'autres dispositions renfermant des bases analogiques expresses, la leçon peut se préciser davantage : plus n'est pas toujours mieux lorsqu'il s'agit d'inciter les juges à appliquer une manière privilégiée d'interpréter la constitution.

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IN INTERPRETING SUBSECTION 15(1) of the *Canadian Charter of Rights and Freedoms* over the last nearly thirty years,[1] the Supreme Court of Canada (SCC) has developed ideas about equality and non-discrimination that have attracted a remarkable global audience.[2] In contrast, the SCC's "analogous grounds" jurisprudence—that is, its approach to determining whether various grounds of discrimination are analogous to those explicitly enumerated in subsection 15(1) has received far less attention from comparative constitutional scholars.[3]

This article attempts to fill this gap in comparative constitutional scholarship by considering the broader lessons for comparative constitutional lawyers of the

1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Unlike other provisions of the *Charter* that came into effect in 1982, the implementation of s 15 was delayed until 1985.
2. See *e.g.* Adam Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007) 36 Sup Ct L Rev (2d) 309
3. The SCC's approach has had some influence on foreign courts. See *e.g. Larbi-Odam v Member of the Executive Council for Education (North-West Province) and another*, (1997) 12 B Const LR 1655 at para 19, [1998] 1 S Afr LR 745 (Const Ct). However, that influence has also clearly been far less significant than in the context of other aspects of the Court's approach to s 15. See *e.g.* Judge DM Davis, "Equality: The Majesty of Legoland Jurisprudence" (1999) 116 SALJ 398 at 404 (on the borrowing of the SCC's dignity-based approach). However, that influence has also clearly been far less significant than in the context of other aspects of the Court's approach to s 15: see *e.g.* Davis, (*ibid*) at 404 (on the borrowing of the SCC's dignity-based approach).

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SCC's analogous grounds jurisprudence and, in particular, the lessons it offers for ongoing debates in other countries about constitutional design, amendment, or both.

The SCC's analogous grounds jurisprudence has been characterized, this article suggests, by two general features: first, a broad and generous approach to recognizing various grounds as analogous; and second, a surprising degree of formalism at the level of constitutional reasoning. The SCC has consistently recognized citizenship, marital status, and sexual orientation as analogous grounds, despite significant disagreement among the framers of the *Charter* over these grounds, and despite the reluctance of other courts, such as the US Supreme Court, to apply heightened scrutiny under the Equal Protection Clause[4] in these contexts. The SCC has also recognized certain "embedded" or intersecting grounds (such as off-reserve Aboriginal status) as either within, or analogous to, those grounds enumerated in subsection 15(1). Additionally, the SCC has left open the possibility of recognizing certain other grounds on a more contextual, case-by-case basis.

Increasingly, however, the test endorsed by the SCC for determining whether a particular ground is analogous for the purpose of subsection 15(1) has been surprisingly formalistic, namely, a test of whether a particular personal characteristic is "immutable or changeable only at unacceptable cost to personal identity" (an immutability test).[5] In endorsing such a test, the SCC has largely failed to explain how either actual or "constructive" immutability[6] relates to three broad underlying notions of equality to which it seeks to give effect under subsection 15(1): a commitment to anti-stereotyping, anti-subordination, and human dignity. The criterion of actual immutability, this article argues, bears little obvious relationship to any of the three underlying conceptions of equality. The idea of constructive immutability is likewise largely a normative conclusion rather than an independent test for whether a particular distinction offends these values.[7]

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4. US Const amend XIV, § 1.
5. *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1, McLachlin & Bastarache JJ [*Corbière*].
6. The term "constructive immutability" is used here as shorthand for the SCC's notion that some personal characteristics are changeable "only at unacceptable personal cost." See *e.g. Corbière*, supra note 5 at para 60. The label is imperfect, because as Part II notes, the animating concern here is about human dignity, rather than the fixed or changeable nature of a characteristic. The language, however, tracks the SCC's own formulation in this context.
7. *Cf.* Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado about Next to Nothing" (1991) 29:4 Alta L Rev 772; Wojciech Sadurski, *Equality and Legitimacy* (Oxford: Oxford University Press, 2008).

Part of the aim of this article, therefore, is to attempt to explain this surprising combination of broad and generous interpretation with high formalism on the part of the SCC by linking it to the number and scope of enumerated analogical baselines in subsection 15(1). There is, the article suggests, significant heterogeneity of grounds in subsection 15(1).[8] Several enumerated grounds touch on characteristics that are almost never morally or practically relevant for governments except in a remedial context (*e.g.*, race, national and ethnic origin, and colour). Others involve characteristics that may be more frequently relevant, at least in the context of certain purportedly real physical differences (*e.g.*, sex and physical disability), or for the purposes of appropriate government support or accommodation (*e.g.*, sex, religion and disability). Others are based on characteristics that are more pervasively relevant (*e.g.*, age). Further, while most grounds are expressed in symmetric terms (*e.g.*, race, national and ethnic origin, colour, sex, and age), some (*i.e.*, mental and physical disability) are expressed in more asymmetric, disadvantage-focused terms.

In the face of such heterogeneity, it matters a great deal how courts seek to analogize from existing constitutional baselines. Courts, the article suggests, have a choice in this context between at least two general approaches: one that allows direct analogies to be drawn between a new constitutional claim and one or more existing constitutional categories or sub-groups of categories (a "direct" or "multi-pronged approach"); and another that, first, requires consideration of what the existing constitutional categories have in common, and only then considers whether a new constitutional category shares those features (a "synthetic" or "common denominator" approach). The two approaches will lead to quite different interpretive responses by courts to heterogeneous grounds.

Under a multi-pronged approach, the heterogeneous grounds will tend to lead to an expansive approach by courts to recognizing new constitutional claims as analogous; the greater the number of diverse categories recognized by a constitution, the greater the likelihood that a new category will share something in common with at least one of those categories. Under a more synthetic, common denominator approach, in contrast, the same heterogeneity is likely to lead to greater abstraction in the level at which courts construe the criteria for recognizing new constitutional categories as analogous. Abstract criteria of this kind will also often have little connection to underlying substantive constitutional concerns or commitments, and thus lead to a distinctly formalist approach.

8. Compare *e.g.* Robert Leckey, "Chosen Discrimination" (2002) 18 Sup Ct L Rev (2d) 445 at 446, 448-54.

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Support for this proposition can be found in a broader comparative context, but is also the central lesson of the SCC's analogous grounds jurisprudence under subsection 15(1). In almost all of the early cases recognizing new grounds as analogous, the SCC or lower courts adopted some version of a multi-pronged approach: They either employed tests that relied on an implicit analogy to only some of the enumerated grounds in subsection 15(1), or used a multi-factorial test that relied on shared characteristics of sub-groups of enumerated grounds. In more recent cases, however, the SCC has been more formalistic in its reasoning and has shifted towards a more synthetic, common denominator approach. This shift, the article suggests, has potentially important implications for debates in other jurisdictions about the relevance of amendments to a constitution's equality clause and for debates over the design of such clauses more generally.

The article proceeds in four parts. Part I sets out the major decisions of the SCC recognizing new grounds of discrimination as analogous for the purposes of section 15, and explains how such cases contributed to a pattern of broad and generous interpretation on the part of the SCC. Part II contrasts this interpretive approach with a pattern of increasingly formalist reasoning on the part of the SCC in this same context and with the increasingly narrow application of such formalist reasoning by provincial courts in cases involving certain kinds of economic- or poverty-based claims to substantive equality. Part III connects the patterns in Parts I and II to the two potential approaches by courts to the analogical baselines in a constitution, and shows how one approach (the multi-pronged approach) helps explain the SCC's generous approach, while the second (the synthetic approach) explains its formalism. Part IV concludes by considering the importance of these Canadian lessons for ongoing debates among American constitutional scholars about the relevance, or irrelevance, of proposed constitutional amendments such as the 1972 Equal Rights Amendment, and for the design and redesign of constitutional baselines more generally.[9]

I. A BROAD APPROACH TO ANALOGOUS GROUNDS

In interpreting the *Charter*'s guarantee of equality, the SCC has generally taken a broad approach to recognizing various grounds of discrimination as analogous to those enumerated in subsection 15(1).

Subsection 15(1) explicitly prohibits discrimination on the basis of nine listed, or "enumerated," grounds: race, national or ethnic origin, colour, religion,

9. HRJ Res 208, 92d Cong, 2d Sess, 86 Stat 1523 [ERA].

sex, age, and mental or physical disability.[10] By recognizing various grounds as analogous to these express grounds, the SCC has extended this list to include discrimination based on citizenship, marital status, sexual orientation, and off-reserve Aboriginal status.

In *Andrews v Law Society of British Columbia*,[11] for example, the SCC considered a challenge under subsection 15(1) to provisions of the British Columbia *Barristers and Solicitors Act* limiting admission as a solicitor in the province to Canadian citizens. While dividing on the issue of reasonableness under section 1 of the *Charter*, the SCC was unanimous in upholding the validity of the plaintiff's claim of discrimination based on an analogous ground. Non-citizens who were lawful permanent residents of Canada, Justice McIyntre held, were a "discrete and insular minority" of the kind within the protection of section 15.[12] Indeed, citizenship more generally was held, according to Justice La Forest, to be a ground "similar to those enumerated in s. 15."[13]

In *Miron v Trudel*,[14] the SCC considered an equality challenge by parties to a heterosexual common law relationship to provisions of the Ontario *Insurance Act* requiring insurers to provide benefits to the (legal) spouse of a person killed or injured in an auto accident. In upholding the challenge, the SCC explicitly recognized marital status, and in particular non-married status, as a ground analogous to those in subsection 15(1). Four justices in the majority held that "the characteristic of being unmarried—of not having contracted a marriage in a manner recognized by the state—constitutes a ground of discrimination within the ambit of s. 15(1)."[15] The remaining justices were also willing to recognize that distinctions based on marital status, or between marriage and "relationships analogous to marriage," may violate subsection 15(1) in at least some cases: Four dissenting justices held that marital status is an analogous ground at least in contexts where the particular laws under challenge did not seek to define marriage itself, or its rights and

10. The word "enumerated" is, of course, somewhat misleading in this context, given that the list of grounds is open-ended. The term, however, is the prevailing one used to describe the express grounds of prohibited discrimination in s 15(1).
11. [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR].
12. *Ibid* at para 31. The description of non-citizens in these terms is not necessarily descriptively accurate, given that non-citizens are often quite strongly integrated into the social and economic community of a country. However, the term is often used as shorthand for a concern about the political powerlessness of such groups, in terms of their inability to vote and their limited success in forming broader political coalitions.
13. *Ibid* at para 75.
14. [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron* cited to SCR].
15. *Ibid* at para 150, McLachlin J with Sopinka, Cory, & Iacobucci JJ concurring.

obligations;[16] and in her concurring judgment, Justice L'Heureux-Dubé suggested that such distinctions were frequently, though not always, a violation of section 15.[17]

In *Egan v Canada*,[18] the SCC considered a challenge to provisions of the *Old Age Security Act*[19] providing for the payment of a statutory allowance to the "spouse" of a person receiving a pension under the *Act* whose income fell below a certain level, but not the same-sex partner of a pensioner in the same position. While a majority of the SCC ultimately rejected the claim and found that the relevant discrimination was justified under section 1, the SCC was again unanimous in accepting the claim of prima facie discrimination under subsection 15(1). This, as Justice La Forest noted, also clearly meant accepting the concession by the Attorney General of Canada that sexual orientation is an analogous ground for the purposes of subsection 15(1).[20] In upholding a similar subsection 15(1) challenge to the scope of provincial human rights legislation in *Vriend v Alberta*,[21] the SCC again affirmed that sexual orientation is "analogous to the other personal characteristics enumerated in s. 15(1)" and thus the failure to protect the plaintiff against dismissal from employment based on his sexual orientation violated subsection 15(1).[22]

The "generosity" of this approach is particularly clear when viewed in a broader historical and comparative context. One of the key issues surrounding the drafting of subsection 15(1), for example, was whether it would include sexual orientation as an enumerated ground.[23] Feminist groups in particular argued for the inclusion of marital status as an enumerated ground, but were defeated by those who favoured a more limited equality guarantee.[24] In fact, the very concept

16. *Ibid* at para 26, Gonthier J with Lamer CJ, La Forest & Major JJ dissenting.
17. See *ibid* at para 91 (eschewing over-reliance on the idea of analogous grounds, but endorsing reasoning of a similar kind as part of a contextual analysis of the nature of the group affected by the law).
18. [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan* cited to SCR].
19. RSC 1985, c O-9.
20. *Ibid* at para 5.
21. [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend* cited to SCR].
22. *Ibid* at para 90, Cory and Iacobucci JJ.
23. See Mary Eberts, "Section 15: The Next Twenty Years" (2006) 5:1 JL & Equality 47 at 48; Douglas Elliott, "Secrets of the Lavender Mafia: Personal Reflections on Social Activism and the *Charter*" (2006) 5:1 JL & Equality 97 at 105.
24. See Doris Anderson, "The Adoption of Section 15: Origins and Aspirations" (2006) 5:1 JL & Equality 39 at 41. See generally Hon Claire L'Heureux-Dubé, "It Takes a Vision: The Constitutionalization of Equality in Canada" (2002) 14:2 Yale JL & Feminism 363 at 366-67 (regarding the influence of women's groups on the drafting of s 15).

of subsection 15(1) as an analogical baseline, or non-exhaustive list of prohibited grounds, emerged out of this controversy as a compromise between those who favoured an expansive definition of equality in the context of sexual orientation and family status and those who favoured a limited or conservative one.[25]

In the United States, courts have been far more reluctant to recognize grounds such as sexual orientation as "analogous" to race for the purpose of heightened scrutiny under the Equal Protection Clause. In *Romer v Evans*,[26] for example, the Supreme Court of the United States ultimately struck down an attempt by the state of Colorado (by popular initiative) to prevent the adoption of anti-discrimination laws designed to protect gay and lesbian individuals. However, in doing so, the Court relied almost entirely on the fact that the law in question showed clear animus toward gay and lesbian people and imposed a highly unusual restriction on access to the (benefits) of the political process. It did not suggest that distinctions based on sexual orientation were analogous to race or other quasi-suspect classifications in deserving heightened scrutiny. On the contrary, Justice Kennedy suggested, for the majority, that the Court was simply applying an ordinary form of rational basis review.[27]

In Canada, the SCC has also been willing to recognize certain "embedded," or intersectional, grounds of discrimination as analogous for the purposes of subsection 15(1). In *Corbière*,[28] for example, the SCC was asked to find discrimination contrary to subsection 15(1) in various provisions of the *Indian Act*[29] restricting the right to vote in Aboriginal band elections to those living on a reserve. In upholding the challenge, the SCC held that although the grounds of "Aboriginal residenc[y]" or "off-reserve status" could only apply to a "subset of the population," this was no bar to their recognition as analogous grounds. "Embedded analogous grounds," it held, were sometimes necessary to "permit meaningful consideration of intra-group discrimination."[30]

Likewise, in *Law v Canada (Minister of Employment and Immigration)*[31] the SCC considered a challenge to provisions of the *Canada Pension Plan* that denied a death benefit to individuals who, at the time of their spouse's death, were under

25. Elliott, *supra* note 23 at 105; Eberts, *supra* note 23 at 48.
26. 517 US 620 (1996), 116 S Ct 1620 [*Romer* cited to US].
27. *Ibid* at 631-32 (noting that the Court avoids unduly broad review on the Equal Protection Clause by applying rational basis review wherever a law "neither burdens a fundamental right nor targets a suspect class").
28. *Supra* note 5.
29. RSC 1985, c I-5.
30. *Ibid* at paras 14-15, McLachlin and Bastarache JJ.
31. [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR].

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thirty and did not have children or a relevant disability. Justice Iacobucci held that if the relevant pension plan did not discriminate on age alone, it could be seen as discriminating on a "combination," or "confluence," of grounds that was itself analogous to the distinct enumerated grounds in subsection 15(1).[32]

In rejecting such grounds as provincial residency and membership in the armed forces as analogous for the purposes of subsection 15(1), the SCC has nonetheless left open the possibility that these grounds might be treated as analogous in the future. In *R v Turpin*,[33] for example, the SCC rejected the status of persons charged with murder outside of Alberta as an analogous ground for the purposes of subsection 15(1). Writing for a unanimous Court, Justice Wilson clarified that she was not suggesting that "a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a[n analogous] ground of discrimination."[34] Similarly, in *R v Généreux*,[35] in rejecting the subsection 15(1) claim of a member of the armed services facing trial by court martial for possession of narcotics, the SCC held that it was not suggesting "that military personnel can *never* be the objects of disadvantage or discrimination in a manner that could bring them [as a class] within" the scope of subsection 15(1), or make them a class of persons analogous to those enumerated in subsection 15(1).[36]

This, of course, is not to say that the SCC could not have been *more* generous in its approach to subsection 15(1) in these or other contexts.[37] Justice

32. *Ibid* at paras 93-94.
33. [1989] 1 SCR 1296, 96 NR 115 [*Turpin* cited to SCR].
34. *Ibid* at para 53. See also *ibid* at para 52. Among the "indicia of discrimination," Justice Wilson cited "stereotyping, *historical disadvantage* or vulnerability to political and social prejudice"[emphasis added]. This in part reflects a concern about the need to ensure a forward- and backward-looking approach to disadvantage, but also introduces some analytic blurring of categories.
35. [1992] 1 SCR 259, 88 DLR (4th) 110 [*Généreux* cited to SCR].
36. *Ibid* at para 104, Lamer CJ [emphasis in original].
37. For criticisms of the SCC's approach to s 15(1) as overly focused on the comparator group requirement, see *e.g.* Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 Windsor YB Access Just 111; Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006) 5:1 JL & Equality 81. The SCC has also been criticized for placing too much weight on internal limitations under s 15(1), as opposed to a more general limitation approach under s 1. See *e.g.* Peter W Hogg, *Constitutional Law of Canada* 2d ed (Toronto: Carswell, 1985) at 800-801 (advocating the latter approach). See generally Leon E Trakman, "Section 15: Equality? Where?" (1995) 6:4 Constitutional Forum 112. Others suggest that the SCC has a mixed record in this context. See *e.g.* Bruce Ryder, Cidalia C Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 Sup Ct L R (2d) 103.

L'Heureux-Dubé, for example, undoubtedly took a more expansive approach to the analogous grounds requirement under subsection 15(1) than did most other justices, in that she adopted a more direct and contextualized focus on the nature of the group affected by a particular distinction.[38] In doing so, however, she clearly went beyond simply extending the analogous grounds requirement so as to give it a more generous, dignity-based reading, but explicitly abandoned the analogous grounds requirement as part of the subsection 15(1) analysis.[39]

In general, therefore, it seems fair to say that the SCC's approach to the recognition of analogous grounds has accorded with its more general commitment under subsection 15(1) to "a broad and generous approach" to enforcing the *Charter*'s guarantee of equality.[40]

II. SURPRISING FORMALISM

Yet, over time, in its reasoning on the scope of analogous grounds, the SCC has shifted towards a surprisingly formalist approach that has little clear connection to questions of substance or to any underlying substantive theory, or understanding, of equality endorsed by the SCC itself.[41]

Three broad underlying understandings of equality emerge in the SCC's case law on subsection 15(1): (i) the idea of equality as treatment based on individual merit and characteristics, rather than stereotypical assumptions or prejudices (anti-stereotyping); (ii) the idea of equality as equal standing and access to political and economic resources and opportunities for all groups, thus giving rise to a situation in which no group is systematically disadvantaged or subordinated by, or when compared to, another (anti-subordination); and (iii) the idea of equality as a commitment to equal concern and respect for all citizens (equal dignity).[42]

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38. See *e.g. Miron*, *supra* note 14; *Corbière*, *supra* note 5. For praise of this approach as better realizing the ideal of substantive equality, see Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48:4 McGill LJ 627; Daphne Gilbert, "Unequalled: Justice Claire L'Heureux-Dubé's Vision of Equality and Section 15 of the *Charter*" (2003) 15:1 CJWL 1.
39. See *e.g.* Gibson, *supra* note 7.
40. See *e.g. Andrews*, *supra* note 11 at para 64, Wilson J.
41. My criticism of the SCC as "formalist" in this context is thus largely in the mode, or spirit, of immanent critique, rather than any independent idea about the most desirable level of abstraction versus specificity, or generality versus attention to context, in constitutional reasoning.
42. In addition to these three understandings, scholars have also advanced a number of further distinctive approaches to the scope of s 15(1). See *e.g.* Hugh Collins, "Discrimination, Equality and Social Inclusion" (2003) 66 Mod L Rev 16 (for a theory based on social exclusion); Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6:2

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When he endorsed a three-stage approach to discrimination under subsection 15(1) in *Andrews*, Justice McIntyre recognized the centrality of questions of "stereotyping" and "historical disadvantage" or "prejudice."[43] Justice Wilson, in her concurring judgment, gave even greater emphasis to concerns about historical disadvantage, or subordination, suggesting that a key purpose of section 15 was to ensure that in drawing distinctions between individuals, governments did not "bring about or reinforce the disadvantage of certain groups."[44]

When it affirmed and refined this three-stage approach in *Law*,[45] the SCC explicitly emphasized concerns about both stereotyping and subordination.[46] An "important, but not exclusive" purpose of subsection 15(1), the SCC suggested, is "the protection of individuals and groups who are vulnerable, disadvantaged, or members of 'discrete and insular minorities,'" or "a guarantee against the evil of [group-based] oppression."[47] The SCC also emphasized, however, that subsection 15(1) protects individuals, not just groups, from "stereotyping, or political or social prejudice."[48] Human dignity, it suggested, is a value that underpins both these commitments, as well as the *Charter* guarantee of equality more generally. The idea of human dignity entails a society in which "all persons enjoy equal recognition ... as members of Canadian society, equally capable and equally deserving of concern, respect and consideration"; Section 15 prohibits both "unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits" of individuals, and also prohibits distinctions that mean that individuals or groups are "marginalized, ignored, or devalued."[49]

Rev Const Stud 291 (for a theory based on social diversity); Rahool Parkash Agarwal, "An Autonomy-based Approach to Subsection 15(1) of the *Charter*" (2006) 12:1 Rev Const Stud 83 (for a theory based on autonomy); Moreau, *supra* note 37 (for a theory based on norms of fair treatment).

43. *Supra* note 11 at paras 41-43, citing *Smith, Kline & French Laboratories Ltd v Canada (Attorney General)*, 34 DLR (4th) 584 at para 16, 78 NR 30 (FCA).
44. *Andrews*, *ibid* at para 5.
45. See *e.g.* Emily Grabham, "*Law* v *Canada*: New Directions for Equality under the Canadian Charter?" (2002) 22:4 Oxford J Legal Stud 641.
46. *Supra* note 31 at para 64, Iacobucci J.
47. *Ibid* at paras 68, 42, Iacobucci J.
48. *Ibid* at para 51, Iacobucci J.
49. *Ibid* at para 53, Iacobucci J. See *e.g.* L'Heureux-Dubé, *supra* note 24 (for further development of the dignity-based vision of s 15(1)).

In *R v Kapp*, the SCC once again refined this test so as to reduce the role played by the four-stage contextual analysis developed in *Law*, and *Law*'s emphasis on human dignity as a freestanding test for discrimination.[50] However, in doing so, the SCC again affirmed the idea of discrimination as involving either the perpetuation of "disadvantage" or "stereotyping" and the relevance of human dignity as a value underpinning these commitments.[51]

Increasingly, however, the SCC has moved towards a test of immutability or constructive immutability for determining whether particular grounds are analogous for subsection 15(1) purposes—a test that has little clear connection to any of these three underlying understandings of equality.

Initially, in *Andrews*, the question of immutability was only one of several factors considered by Justice La Forest in determining whether citizenship, or non-citizen status, was analogous for the purposes of subsection 15(1).[52] His reasons also evinced a concern with equality as anti-subordination: "Non-citizens," he suggested, are "an example without parallel of a group who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions," and further, against whom there is a long history of discrimination, including in the employment context.[53] Justice Wilson in particular went even further in stressing a concern about anti-subordination, suggesting that what was relevant to the status of citizenship as an analogous ground was that non-citizens "are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[54]

Likewise, in *Miron*, in recognizing marital status as an analogous ground, Justice McLachlin (as she then was) gave limited weight to immutability as a relevant criterion, simply noting that it had been suggested that "distinctions based on personal and immutable characteristics" are discriminatory "by extension" of the logic that "[d]istinctions based on personal characteristics, attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination."[55] Far more central to her reasoning was a focus on a concern for human dignity in general, and anti-stereotyping in

50. 2008 SCC 41, [2008] 2 SCR 483 [*Kapp* cited to SCC]. For a discussion, see Sophia Moreau, "*R v Kapp*: New Directions for Section 15" (2008-2009) 40:2 Ottawa L Rev 283.
51. *Ibid* at paras 16-25, McLachlin CJ & Abella J.
52. *Supra* note 11 at paras 67-68.
53. *Ibid.*
54. *Ibid* at para 5.
55. *Supra* note 14 at para 148, citing *Andrews*, Sopinka, Cory & Iacobucci JJ concurring.

particular. Namely, the "unifying principle" behind all prior analogous grounds jurisprudence was

> the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.[56]

In *Egan*, however, several members of the SCC began to shift towards a much more exclusive reliance on an immutability test.[57] Justice La Forest suggested (on behalf of four justices) that the concession by the Attorney General that sexual orientation is an analogous ground for the purposes of subsection 15(1) was proper because sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs." He gave no further explanation for why this test was determinative, or for why it took precedence over other factors.[58]

In *Corbière*, in 1999, the SCC moved even more clearly to endorse immutability—or constructive immutability—as more or less the sole determinant of whether a ground is analogous for the purposes of subsection 15(1). This paralleled a broader shift by the SCC in *Law* toward a more tightly structured, unified approach to subsection 15(1).[59] Thus, the SCC suggested in *Corbière* that what the enumerated grounds have in common is that they "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity;" on this basis, the SCC held that "the thrust of identification of analogous grounds" is that they are "based on characteristics that we cannot change or that the government

56. *Ibid* at para 149, 496–97 McLachlin J (Sopinka, Cory & Iacobucci JJ concurring).
57. But see *Egan*, *supra* note 18 at paras 150-59, 171, Cory & Iacobucci JJ (continuing to apply a more multi-factor, substantive test, with a clear focus on the underlying question of whether a group claiming analogous ground status had "suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice").
58. *Ibid* at para 5. See also *Vriend*, *supra* note 21 at para 90, Cory & Iacobucci JJ (citing *Egan* and affirming this finding, the SCC again gave prominence to immutability as one of the key factors to be considered).
59. For the connection between a synthetic approach and a more structured, analytic approach in this context, see *e.g.* Martha C Nussbaum, "Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism" (2007) 121:1 Harvard L Rev 4 (criticizing certain aspects of the US Supreme Court's approach as "lofty" and formalist). See also Majury, *supra* note 37 (criticizing certain aspects of the SCC's early equality jurisprudence for insufficient attention to context and substantive notions of equality).

has no legitimate interest in expecting us to change to receive equal treatment under the law."[60].

The SCC, however, did not explain what, if any, connection it saw between this criterion of immutability, or constructive immutability, and the more substantive values underpinning subsection 15(1).[61] There is, this article argues, at best only a very weak, indirect connection between such a test and the three understandings of equality endorsed by the SCC in the application of the other limbs of subsection 15(1).[62]

From an anti-stereotyping perspective, for example, the most reliable indicator of suspect decision making will be the reliance on individual characteristics that have no (presumptive) moral or practical relevance. This was the vision of analogous grounds endorsed by Justice Gonthier, on behalf of four justices, in *Miron*; the key purpose of subsection 15(1), Justice Gonthier suggested, was to prevent stereotyping, or reliance on irrelevant distinctions, by the government.[63] This, for Justice Gonthier, meant that "[r]elevancy is also at the heart of the identification of an analogous ground."[64]

In most cases, immutability will also be a poor proxy for moral or practical relevance of this kind. Age, for example, while always changing, is also a morally relevant or legitimate basis on which the government may draw certain distinctions, including distinctions about the degree to which individuals can exercise informed

60. *Supra* note 5 at para 13, McLachlin and Bastarache JJ.
61. See *e.g. ibid* at para 13, McLachlin and Bastarache JJ (suggesting some connection between the immutability test and all three understandings of equality, or that immutable personal characteristics are often the basis of "stereotypical" or "illegitimate and demeaning proxies for merit-based decision making," or that concerns about historical disadvantage, or political powerlessness "could also be seen to flow from the central concept of immutability," but providing no further explanation for how, or why, this is the case).
62. Perhaps the most promising defence of such a criterion is that it helps to direct attention to individual choice or autonomy as important values underpinning the *Charter*. See *e.g.* Leckey, *supra* note 8; Agarwal, *supra* note 42 (on the connection between autonomy and an immutability test and on the importance of autonomy to the interpretation of s 15(1) in general). Autonomy, however, has not been the explicit focus of the SCC's own account of s 15(1), and has an uneasy fit with the SCC's approach to ideas of constructive immutability. See Leckey, *supra* note 8 at 450-51. Autonomy is also a value that may not necessarily always be best enforced via a commitment to non-discrimination, rather than to liberty of the person more directly. See Avigail Eisenberg, "Rights in the Age of Identity Politics" (2013) 50:3 Osgoode Hall LJ 609 (another potential justification is that immutability can help focus attention on the relationship between individual and group identity); Richard Moon, "Government Support for Religious Practice" in Richard Moon, ed, *Law and Religious Pluralism* (Vancouver: UBC Press, 2008) 217.
63. *Supra* note 14 at paras 23-32.
64. *Ibid* at para 25.

consent, make informed personal or public decisions, or be required to engage in certain compulsory activities (such as compulsory education or vision and hearing testing). Likewise, a criminal record is something that is generally impossible to change, once obtained, but a legitimate basis on which governments may make certain distinctions, such as those relating to access to certain kinds of jobs or information. Marital status or citizenship, on the other hand, are often at least somewhat "mutable" or open to change, or control, by individuals.[65] Yet they are also morally irrelevant for most government purposes, outside the context of immigration law or the regulation of the rights and obligations of marriage itself.[66]

The immutability of a characteristic will tend to be closely linked to questions of moral and practical relevance in only a relatively small subset of cases, where it is presumptively legitimate for the government to draw certain distinctions in order to regulate individual conduct. Yet the distinction in question is in fact illegitimate because of an individual's lack of control over that conduct. In the United States, the canonical example of this kind of case is *Plyler v Doe*,[67] which concerned the rights of undocumented immigrant children. The fact that the relevant alien children could affect "neither their parents' conduct nor their own status" was a central reason for the Court's decision that it violated the Equal Protection Clause for Texas to exclude them from access to its public schools, notwithstanding the Court's finding that it was legitimate for the state to attempt to deter illegal immigration by denying certain benefits to undocumented aliens.[68]

From an anti-subordination perspective, in turn, the most important indicator of suspect decision making by the government will be that it targets a group subject to historical prejudice, exclusion, or disadvantage. In most cases, identifying such disadvantage is best done directly, by focusing on the actual history of disadvantage experienced by a particular group or sub-group of citizens, and not on abstract criteria (whether immutability, or some other criterion) about the defining characteristics of the group. While there are certainly structural factors that contribute to systemic disadvantage, including political powerlessness,[69] there is

65. *Ibid* at para 25 (significant emphasis was placed on this argument by the defendants).
66. *Cf. ibid* at paras 26-27, Gonthier J.
67. 457 US 202, 102 S Ct 2382 (1982) [*Plyler* cited to US].
68. *Ibid* at 238. The US Supreme Court also stressed the danger of excluding children from schooling, and thereby creating a "discrete underclass" of future citizens (*ibid* at 234). The plurality also raised some questions about the extent to which it was legitimate to deter entry, while also encouraging and tolerating the presence of undocumented aliens in certain respects as a source of cheap labour (*ibid* at 218-19).
69. See *Andrews*, supra note 11 at para 68.

often little logic to the particular groups in a society who experience the most acute disadvantage.

Where such a backward-looking approach is not possible because, for example, the concern is about creating newly disadvantaged groups, it is also far from clear how, or why, immutability (as opposed to, say, the centrality or visibility of a characteristic) is a good predictor of subordination. Where a government treats a particular group adversely, the most critical question, from an anti-subordination perspective, will be whether the relevant form of adverse treatment is either likely to lead to, or be correlated with, further adverse treatment by other government actors or private individuals.

One factor that will affect the answer to this question will be whether the particular adverse treatment relates to a person's status, rather than conduct, and thus sends a clear message of disrespect or disregard for a particular group as less worthy of full human dignity. Another factor, as Justice Wilson noted in *Andrews* and *Turpin*, will be whether the relevant group lacks effective legal and political power, and thus cannot obtain effective protection against such adverse treatment.[70] Beyond this, when it comes to individual characteristics, the most relevant question would seem to be whether a particular ground of adverse treatment is visible to others, either as an individual characteristic or group identity, and thus easily targeted as a basis of adverse treatment. If so, the ground is so "central," or defining, for individuals as part of their individual or group identity that they are likely to interact frequently with others on the same basis that has attracted disadvantage.[71]

Consider, for instance, the adverse government treatment of three groups: waitresses, sex workers, and women generally. Waitresses, in most contexts, seem unlikely to be systematically disadvantaged, whereas women, as a class, have experienced a long history of social, economic, and political disadvantage. Sex workers, in turn, arguably fall somewhere in the middle. The most compelling explanation for this, however, is not that it is relatively easy to stop being a waitress (and become, say, a sales assistant), significantly harder to leave the sex industry (because of a lack of relevant marketable skills and coercion within the sex industry), and almost impossible to stop being female for those who identify as such (except at "unacceptable personal cost"). In a society committed to

70. *Andrews*, *supra* note 11 at para 5; *Turpin*, *supra* note 33 at para 47. This, as Justice Wilson notes, is also one reason why in the United States, even though the label is not wholly accurate, suspect or quasi-suspect classes are often referred to as "discrete and insular minorities." See *Andrews*, *supra* note 11 at para 6.

71. *Cf.* Sadurski, *supra* note 7.

equality, we do not generally think that the victims of adverse treatment should be told to "escape" such treatment by changing their attributes, or status, as opposed to conduct. Rather, it is that when the government treats waitresses poorly (by, for example, allowing them to be paid a lower wage or providing them with fewer workplace protections), we do not generally think that this will lead to, or be correlated with, systematic mistreatment of waitresses outside the workplace.

Waitresses are not generally identified by others, or themselves, by their occupation in non-work related contexts. As voters, they have a real chance of obtaining support from others with similar workplace conditions and experiences (for example via "Unite Here!," the umbrella trade union for hospitality, airport, laundry, food service, gaming, manufacturing, and textile workers).[72] Sex workers, in contrast, are often labelled or defined by others in a range of other contexts by reference to their working identity; and, depending on the legal status of their work, may have much greater difficulty forming a successful political coalition. It is more likely still that if waitresses or sex workers experience adverse treatment as women (or more specifically, poor women, immigrant women, or women of colour), this adverse treatment will turn out to carry over into all aspects of their life. This treatment will be truly systemic, by tracking a highly visible and for many, defining, individual characteristic and by relying far more strongly on individual status, rather than conduct, as the basis of adverse treatment.

The actual or constructive immutability of an individual characteristic will, at best, be only tangentially relevant to these criteria of political power, visibility, or centrality. Distinctions based on truly immutable characteristics may be more likely to track a person's status, rather than conduct, or to be based on visible personal characteristics. The immutability test, however, also encompasses a range of "constructively immutable" characteristics (such as citizenship, marital status, and sexual orientation) where there is a much blurrier line between conduct, choice, and status, and where there is little real connection to visibility.[73] Similarly, truly immutable characteristics may or may not be "central" or defining for particular individuals. Often, it is the *choice* to identify oneself in terms of particular personal characteristics (such as sex, religion, or sexual orientation) that makes the particular characteristic defining, and not the fact that the characteristic is unalterable or given.[74]

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72. Online: <http://www.uniteherecanada.org>.
73. Compare Leckey, *supra* note 8.
74. *Cf.* Sadurski, *supra* note 7 (for statements of leading women and African-Americans downplaying gender or race as defining characteristics).

From a human dignity perspective, there is again a limited connection between those grounds of distinction that are most fraught and those characteristics of an individual that are truly immutable. Government action based on individual characteristics that are generally morally or practically irrelevant will certainly raise concerns from a dignity-based perspective. Distinctions that track characteristics of a highly personal, or defining, nature will also tend to be more problematic than those based on less central or defining aspects of individual identity, particularly where those distinctions involve adverse treatment. True immutability, however, is neither a necessary nor a sufficient condition for either the irrelevancy or personal nature of a characteristic. "Constructive immutability" is also a test that has little factual connection in this context to ideas about irrelevance or centrality: its connection depends on ideas about fairness and individual autonomy and dignity, which are in no way advanced or made easier to apply by invocation of the idea of immutability itself.[75]

The historical disadvantage of particular groups may also be relevant, in some cases, under a human dignity-based approach. Where particular characteristics have attracted systematic adverse treatment in the past, distinctions based on them are certainly more likely to feel threatening to individuals and their sense of being afforded equal concern and respect in the present. Likewise, previous adverse treatment may give certain groups a special claim to respect and accommodation as part of true respect for their collective human dignity.[76] Again, however, such concerns will have little to do with the immutability of the characteristics that define a particular group, since it is the sense of insult or psychological injury that is critical to the violation of human dignity in both contexts, not the inability to flee from past or ongoing disadvantage because of lack of control over, or the immutability of, characteristics.

In several cases, this gap between the substantive equality values identified by the SCC in the context of subsection 15(1) and the criterion of immutability has led lower courts to take a surprisingly narrow approach to claims of inequality based on concepts of economic disadvantage or subordination.[77] Prior to *Corbière*,

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75. See *ibid* (for an extremely eloquent and more extensive version of this argument in a more general context).

76. *Cf. e.g. Holocaust Denial Case*, 90 BVerfGE 241, 1994 NJW 1779 (Fed Const Ct) (Germany) (noting that for German Jews "[i]t is part of their personal self-image that they are seen as attached to a group of persons marked out by their fate, against which group there exists a special moral responsibility on the part of everyone else and which is a part of their dignity").

77. For scholarly arguments in favour of the importance of structural, or systemic, disadvantage as a touchstone for the scope of s 15(1), see *e.g.* Hart Schwartz, "Making Sense of Section 15 of the Charter" (2011) 29:2 NJCL 201; Ian Savage, "Systemic Discrimination and

in *Sparks v Dartmouth/Halifax County Regional Housing Authority*,[78] for example, provincial courts took a broad approach to claims of discrimination based on poverty or income, as at least one intersecting ground of discrimination under subsection 15(1). In *Sparks*, a public housing tenant who was a black, poor, single mother challenged provisions denying her the same protections for security of tenure available to tenants in privately owned housing. In upholding this claim, the Nova Scotia Court of Appeal gave extensive attention to historical disadvantage suffered both by public housing tenants generally and by particular subgroups of public housing tenants. Poverty for single mothers, it suggested, was "no less a personal characteristic ... than non-citizenship was in *Andrews*."[79] On this basis, the court concluded that public housing tenants were a group analogous to those identified in subsection 15(1).

Since *Corbière*, in contrast, provincial courts have applied a far more mechanical test, asking whether the poor are "a discrete and insular group defined by *a common personal characteristic*,"[80] whether poverty as a condition is in any way alterable by individuals, whether "financial circumstances may change" such that "individuals may enter and leave poverty," and whether the government has a legitimate interest in encouraging individuals to exit from poverty.[81] By answering these questions in the negative, provincial courts have given little meaningful scrutiny to the potential for various laws to draw distinctions that both track and entrench pre-existing economic disadvantage (for example, laws prohibiting certain forms of public solicitation of money or laws imposing uniform tariffs for energy consumption).[82]

Section 15 of the Charter" (1985-1986) 50:1 Sask L Rev 141. For this kind of argument in the context of socioeconomic disadvantage specifically, see Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectation" (2005) 23:1 Windsor YB of Access Just 145.

78. (1993), 119 NSR (2d) 91, 101 DLR (4th) 224 (CA) [*Sparks* cited to NSR].
79. *Ibid* at para 32.
80. See *e.g. R v Banks* (2007) 84 OR (3d) 1 at para 104, 275 DLR (4th) 640 (CA) [*Banks*] [emphasis added].
81. See *e.g. Boulter v Nova Scotia Power Inc* (2009), 275 NSR (2d) 214 at para 42 [*Boulter*] (noting that "a clinging web" is "not an indelible trait like race, national or ethnic origin, color, gender or age" because "financial circumstances may change, and individuals may enter and leave poverty or gain or lose resources").
82. See the facts in *Banks*, *supra* note 80; *ibid.* There is, of course, an important question as to whether, in a market economy, courts are well-equipped to distinguish "legitimate" from illegitimate discrimination based on poverty, or whether poverty is an analogous ground that "fits" with the general absence of socioeconomic rights in the *Charter*. There does, however, seem to be at least some potential scope for the SCC and lower courts to have gone further in applying scrutiny to such distinctions. See *e.g.* Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669 (expressing similar concerns).

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III. WHY THE COMBINATION? THE IMPORTANCE OF CONSTITUTIONAL BASELINES

What, then, accounts for this surprising combination of generous interpretation and increasing formalism on the part of the SCC within the same body of equality jurisprudence? One potential answer, this Part suggests, can be found in the number and scope of the analogical baselines in subsection 15(1), and how the SCC has approached their relationship to each other.[83]

A. SUBSECTION 15(1) AND HETEROGENEOUS GROUNDS

From the perspective of different theories of equality, subsection 15(1) contains a great deal of heterogeneity in the grounds it lists as enumerated grounds of discrimination.

From an anti-stereotyping perspective, for example, many of the grounds listed in subsection 15(1) touch on personal characteristics that are almost never morally or practically relevant for government action, except possibly in a remedial context. Others involve characteristics that may sometimes be relevant, from a practical perspective, but which in general society regards as having limited moral relevance for the opportunities and rewards open to individuals. Others, however, involve characteristics with a far closer relationship to individuals' actual needs and capacities,[84] and thus with a far less natural relationship to a theory of "moral and practical irrelevance."[85]

One way in which courts might have done so would have been to focus, as the Court of Appeal did in *Sparks*, on the intersection between poverty and other prohibited grounds of discrimination. See *supra* note 78. I am indebted to Jennifer Nedelsky for this suggestion.

83. Another explanation, of course, is that the analogous grounds requirement under s 15(1) actually does no work in the SCC's analysis, and is simply equivalent to a conclusion that the SCC does, or does not, regard particular discrimination as justified. See *e.g.* Gibson, *supra* note 7. This would also explain why the SCC has been somewhat inconsistent over time in its approach to the analogous grounds question, though not necessarily why there has been convergence toward a more consistently formalist test, even in the face of a quite generous application of that test, as in *Corbière*. Another potential explanation might be changes in the composition of the SCC. See *e.g.* Rosalind Dixon, "Weak-form Judicial Review and American Exceptionalism"(2012) 32:2 Oxford J Legal Stud 487. Such changes, however, do not seem to offer a sufficient explanation in the circumstances, given the presence of at least five of the same justices in cases such as *Miron* and *Corbière*.

84. See *e.g.* Rosalind Dixon & Martha C Nussbaum, "Children's Rights and a Capabilities Approach: The Question of Special Priority" (2012) 97:3 Cornell L Rev 549 [Dixon & Nussbaum, "Children's Rights"].

85. This precise issue was in fact raised by feminist groups at the time s 15(1) was drafted in the form of a concern that age, as an enumerated ground, could potentially dilute the

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Consider the differences between race, gender, disability, and age as enumerated grounds of discrimination in this context. Race, most Canadians agree, is almost never morally or practically relevant to government action, except to the extent it is part of an attempt to "ameliorate the predicament of a group more disadvantaged."[86] Gender is similarly morally and practically irrelevant for most purposes, though not necessarily in the context of "real" differences between the sexes in terms of physical strength, vulnerability to certain forms of sexual violence[87] or certain consequences associated with such violence,[88] and medical and other needs associated with pregnancy.[89]

Disability, on the other hand, will be far more frequently relevant to government policy. As the SCC noted in *Eaton v Brant County Board of Education*,[90] it is both empirically true and practically relevant for certain purposes (such as who may obtain a driver's license, for example, or be a fire captain) that "[t]he blind person cannot see and the person in a wheelchair needs a ramp."[91] Thus, in most cases, it is not "the attribution of stereotypical characteristics" to persons with disabilities that is the source of discrimination based on disability. Rather, it is the failure to provide appropriate accommodation and support for persons with disabilities, based on their "actual characteristics" and needs, that causes restrictions on their opportunity for full social and economic inclusion and participation.[92]

A person's age will be similarly relevant to a range of legitimate government interests, or objectives,[93] particularly at the very early and later stages of life when

guarantee of equal opportunity, or anti-stereotyping, for women. See *e.g.* BL Strayer, "In the Beginning…: The Origins of Section 15 of the *Charter*" (2006) 5:1 JL & Equality 13 at 22. The response of the drafters of s 15(1), however, was simply to reverse the order of sex and age in the list of enumerated grounds found in s 15(1). See Mary Dawson, "The Making of Section 15 of the *Charter*" (2006) 5:1 JL & Equality 25 at 30-31. This response, however, has had no discernible effect on the subsequent interpretation of the provision.

86. *Lavoie v Canada*, 2002 SCC 23 at para 45, 1 SCR 769, Bastarache J; *Kapp*, *supra* note 50 at 508, McLachlin CJ & Abella J (discussing the scope and purpose of s 15(2)). See also discussion in Leckey, *supra* note 8 at 460-61.
87. See *e.g. Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872, 105 DLR (4th) 210 (upholding differences in male-to-female, versus female-to-male, searches by prison guards on this basis).
88. See *e.g. R v Nguyen; R v Hess*, [1990] 2 SCR 906, [1990] SCJ No 91 (QL) (upholding a sex-specific prohibition on statutory rape).
89. See *e.g.* discussion in *Miron*, *supra* note 14 at para 30, Gonthier J.
90. [1997] 1 SCR 241, 31 OR (3d) 574 [*Eaton* cited to SCR].
91. *Ibid* at para 67, Sopinka J.
92. *Ibid.*
93. See *e.g. McKinney v University of Guelph*, [1990] 3 SCR 229 at para 88, 2 OR (3d) 319 [*McKinney*]. La Forest J notes that

the government has a legitimate interest in protecting individuals from exploitation and mistreatment, and, in the case of children, protecting and fostering the capacity for later autonomous and informed adult choice.[94]

Likewise, from an anti-subordination perspective, subsection 15(1) contains grounds that are both completely neutral as regards the experience of historical disadvantage, and that are far more asymmetric or specifically focused on a history of subordination.[95] The clearest example of such an asymmetric guarantee is the prohibition in subsection 15(1) on discrimination based on mental or physical disability. As the SCC noted in *Eldridge v British Columbia (Attorney General)*, persons with disabilities have been subjected to a long and unfortunate history of "exclusion and marginalization" in the workplace and in various other contexts, resulting in persistent social and economic disadvantage compared to those conforming to "able-bodied norms."[96] Most other enumerated grounds, in contrast, encompass groups that clearly have experienced historical prejudice and disadvantage, and groups that have not.[97]

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there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g:, race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age.

94. Dixon & Nussbaum, "Children's Rights," *supra* note 84.

95. *Cf. Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 31, 4 SCR 429, McLachlin CJ [Gosselin] (suggesting that "[m]any of the enumerated grounds correspond to historically disadvantaged groups").

96. [1997] 3 SCR 624 at para 56, 151 DLR (4th) 577, La Forest J (citing M David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?" (1997) 7:2 NJCL 263); Statistics Canada, *A Portrait of Persons with Disabilities* (Minister of Industry, Science and Technology, 1995) at 46-49; Sandra A Goundry & Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (Winnipeg: Canadian Disabilities Rights Council, 1994) at 5-6. See also CGK Atkins, "A Cripple at a Rich Man's Gate: A Comparison of Disability, Employment and Anti-discrimination Law in the United States and Canada" (2006) 21:2 Canadian J L & Society 87.

97. There is, of course, always the potential for this to change, or for old hierarchies to not simply disappear, but to actually be reversed. This, for example, is a concern implicit in some affirmative action jurisprudence in the US. See *e.g. Adarand Constructors Inc v Pena*, 515 US 200 at 239, 115 S Ct 2097 (1995), Scalia J (emphasizing the danger of ideas about "debtor" and "creditor" races). This potential also often underpins courts' approaches to equality guarantees more generally. See *e.g. Pretoria (City of) v Walker*, [1998] 3 B Const LR 257 at para 47, 2 S Afr LR 363 (Const Ct). There is, nonetheless, an important distinction between the symmetry and asymmetry of grounds from a backward-looking perspective. I am indebted to Mark Tushnet for pressing me on this point.

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Whiteness, for example, has not, by itself, been a marker of historical disadvantage in Canada, whereas being black,[98] or Aboriginal,[99] has frequently been associated with such disadvantage.[100] Being male has generally been associated with social, political, and economic privilege, rather than disadvantage,[101] whereas being female has meant the systematic denial of access to political and economic power and opportunity,[102] disproportionate vulnerability to physical and sexual violence,[103] and economic deprivation.[104] Whereas being young (at least for adults) has often meant access to social and economic opportunity,[105] old age has often been associated with social stigma, and social and economic marginalization.[106] Similarly, dominant faith groups within mainstream Christian churches have tended to enjoy significant social and government support, whereas various religious minorities, such as Jehovah's Witnesses[107] and Jewish Canadians, have been the object of widespread societal prejudice and, in some cases, legally sanctioned disadvantage and marginalization.[108] Roman Catholics have also experienced significant social prejudice and hatred (while enjoying certain constitutionally sanctioned forms of support in other contexts),[109] as have

98. See *e.g. Sparks*, *supra* note 78.
99. See *Corbière*, *supra* note 5 at paras 18-19, McLachlin and Bastarache JJ.
100. See *e.g.* J Helen Beck, Jeffrey G Reitz & Nan Weiner, "Addressing Systemic Racial Discrimination in Employment: The Health Canada Case and Implications of Legislative Change" (2002) 28:3 Can Pub Pol'y 373. See also Julie Jai & Joseph Cheng, "The Invisibility of Race in Section 15: Why Section 15 of the *Charter* Has Not Done More to Promote Racial Equality" (2006) 5:1 JL & Equality 125.
101. *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34 at para 20, 1 SCR 835.
102. See *e.g. Edwards v Canada (Attorney General)*, [1928] SCR 276, 4 DLR 98.
103. See *e.g. R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 4 OR (3d) 383, L'Heureux-Dubé & Gonthier JJ (dissenting).
104. See *e.g. Sparks*, *supra* note 78; Anderson, *supra* note 24 at 43. See more generally Statistics Canada, *Women in Canada: A Gender-Based Statistical Report*, 5th ed (Ottawa: Minister of Industry, 2006).
105. See *e.g. Law*, *supra* note 31 at para 101, Iacobucci J; *Gosselin*, *supra* note 95 at paras 32-33, McLachlin CJ ("[y]oung people do not have a similar history of being undervalued ... as a general matter ... young adults as a class simply do not seem especially vulnerable or undervalued").
106. See *e.g. McKinney*, *supra* note 93 at 431-32, L'Heureux-Dubé J (discussion of the potentially marginalizing effect of retirement).
107. See *e.g. Saumur v Quebec (City)*, [1953] 2 SCR 299, 4 DLR 641 [*Saumar* cited to SCR]; *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli* cited to SCR], as discussed in *Adler v Ontario*, [1996] 3 SCR 609 at 661, 30 OR (3d) 642, L'Heureux-Dubé J (dissenting).
108. See *e.g. Saumar*, *supra* note 107; *Roncarelli*, *supra* note 107.
109. See *e.g.* David Matas, "*Waldman v Canada*: Religious Discrimination in the Constitution" (2000) 11:3 Const Forum Const 99.

members of certain South Asian religions, who have likewise experienced significant social prejudice and hatred.[110]

B. MULTI-PRONGED VS. SYNTHETIC APPROACHES TO CONSTITUTIONAL BASELINES

Heterogeneity of this kind in a constitution's baseline categories can prompt courts to respond quite differently to new constitutional claims, depending on how judges approach the task of comparing new and existing constitutional categories.

One approach is to ask whether the new category has any similarity with one or more of the existing baseline constitutional categories. Under this "direct" or "multi-pronged" approach, the greater the number and heterogeneity of baseline categories, the more likely that a court will find such similarity. The greater the diversity of features that can be identified among constitutional baselines, the more likely it is that any new constitutional category will share one or more of those features.

A good example of this, from a comparative perspective, is the approach of the Delhi High Court and the legal committee of the House of Lords to the recognition of sexual orientation as an "analogous" ground for the purposes of Articles 15 and 16 of the Indian *Constitution*,[111] and Article 14 of the *European Convention on Human Rights*,[112] respectively. In both India and the UK, the constitutional guarantee of equality, or non-discrimination, contains a number of (at least somewhat) diverse enumerated grounds, but is otherwise much narrower than in Canada.[113] Yet it has been relatively easy for plaintiffs in both countries to persuade the relevant courts to apply heightened scrutiny to distinctions based

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110. Canada, House of Commons, Special Committee on Visible Minorities in Canadian Society, *Equality Now!* (March 1984) at 69 (Chair: Bob Daudlin), as discussed in *R v Keegstra*, [1990] 3 SCR 697 at para 59, 3 CRR (2d) 193.

111. *India Const*, 1950.

112. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [*Convention*].

113. In contrast to the four distinct guarantees of equality under s 15(1) of the *Charter*, s 15(1) of the Indian *Constitution* prohibits discrimination on the basis of "religion, race, caste, sex, [and] place of birth." Section 16(1) guarantees equality of opportunity and prohibits discrimination on those grounds; s 16(2) prohibits discrimination on the basis of "descent" and "residence," but only in respect of public employment. In the UK, art 14 of the *European Convention* simply provides a guarantee of non-discrimination in respect of the enjoyment of other rights, and not an independent guarantee of equality. For discussion, see *e.g.* Rory O'Connell, "Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR" (2009) 29:2 LS 211.

on sexual orientation by relying on a multi-pronged approach to the question of analogous grounds.

In *Naz Foundation v Government of DCT of Delhi*,[114] for example, the Delhi High Court held that certain provisions of the Indian *Criminal Code*[115] prohibiting "unnatural sexual acts," such as anal intercourse between men violated the guarantee of equality in Article 15 of the *Constitution*. In reaching this conclusion, the Court relied strongly on an analogy between sex and sexual orientation, first noting cases that found discrimination based on sexual orientation to be equivalent to sex-based discrimination,[116] and then concluding (without further analysis) that "sexual orientation is a ground analogous to sex."[117]

Similarly, in *Ghaidan v Godin-Mendoza*,[118] the House of Lords held that it was incompatible with Article 8 (the right to family life) and Article 14 of the *Convention* for the UK Parliament to extend certain statutory tenancy rights to opposite but not to same-sex couples on the death of a partner. Lord Nicholls, in reaching this decision, reasoned simply that laws "must not draw a distinction on grounds *such as sex or sexual orientation* without good reason."[119] Baroness Hale, in turn, drew a direct analogy between discrimination based on sexual orientation and discrimination based on sex or race. In her view, these two express grounds of discrimination were united by "stereotypical assumptions ... which had nothing to do with the qualities of the individual involved," and which were equally applicable to discrimination against gay and lesbian people, or same-sex relationships.[120]

An alternative approach, however, is for courts to attempt *first* to identify a common thread or denominator behind existing constitutional categories and only then to proceed to compare new (claimed) constitutional categories with a constitution's existing baselines. Such an approach has the attraction for courts

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114. (2009) 160 DLT 277 at para 1, [2009] WP(C) No.7455/2001 (H Ct Delhi) [*Naz Foundation*] (currently subject to an appeal to the Supreme Court of India). For commentary, see Pritam Baruah, "Logic and Coherence in *Naz Foundation*: The Arguments of Non-Discrimination, Privacy and Dignity" (2009) 2:3 NUJS L Rev 505; Vikram Raghavan, "Navigating the Noteworthy and Nebulous in *Naz Foundation*" (2009) 2 NUJS L Rev 397.
115. RSC 1985, c C-46.
116. *Naz Foundation, supra* note 114 at para 100, citing *Selected Decisions of the Human Rights Committee Under the Optional Protocol*, HRC Dec 488/1992, UNHRCOR, 50th Sess, UN Doc CCPR/C/50/D/488/1992, (1994) 133 at 139-40 (referring to *Toonen v Australia*).
117. *Naz Foundation, supra* note 114 at para 104.
118. [2004] UKHL 30, [2004] 2 AC 557, (UK) [*Ghaidan* cited to UKHL].
119. *Ibid* at para 6 [emphasis added] (the opinion was joined by Lord Steyn, Lord Rodger & Baroness Hale).
120. *Ibid* at paras 130-32.

of being more systematic and consistent in its formal application than a direct or multi-pronged approach. It thus appeals understandably to judges as part of an attempt to develop an analytically rigorous and predictable body of equality jurisprudence.[121]

Such an approach, however, produces a different response by courts to the heterogeneous grounds. Rather than leading to a broader, more permissive approach to the recognition of new constitutional grounds as analogous, it tends to lead to more abstract reasoning by courts about the test for analogous grounds.

The more numerous and diverse the existing constitutional categories, the more difficult it will be for courts, under such an approach, to find commonality among those grounds in their scope, significance, or underlying purpose. And thus the more likely it will be that courts will need to resort to high levels of abstraction in order to identify even some form of internal coherence or common denominator amongst them. Some degree of abstraction in constitutional reasoning may be desirable (and unavoidable), to generate greater judicial impartiality or neutrality.[122] Abstraction of this kind is, however, likely to lead courts significantly beyond that level, instead involving a form of "lofty" reasoning with little or no connection to underlying constitutional commitments or concerns.[123]

Support for this understanding can be found in the approach of the Constitutional Court of South Africa to the test for analogousness under section 8(2) of the 1993 *South African Constitution*[124] and under section 9(3) of the 1996 *Constitution*.[125] Section 8(2) of the 1993 *Constitution* contained a prohibition against unfair discrimination on 13 distinct enumerated grounds: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, and language. Like subsection 15(1) of the *Charter*, this list also included characteristics, or grounds, with quite different attributes, relevance, and degrees of symmetry.[126] In developing a test for analogousness

121. See Leckey, *supra* note 8 (for the potential relevance of this in the Canadian context).
122. Compare *e.g.* John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) (on the relationship between abstraction and values of impartiality in constitutional decision making); Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007) (providing similar arguments about the relationship between "veil rules" and impartiality values). I am indebted to Wojciech Sadurski for this point.
123. See the sources cited at *supra* note 59.
124. *Constitution of the Republic of South Africa, 1993*, No 200 of 1993.
125. *Constitution of the Republic of South Africa, 1996*, No 108 of 1996.
126. See *e.g. Harksen v Lane NO and Others* (1997), [1998] 1 SA 300 at para 49, (CCT9/97) [1997] ZACC 12, Goldstone J (S Afr Const Ct) [*Harksen*] ("[i]n some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some

Dixon, Rosalind, « The Supreme Court of Canada and Constitutional (Equality) Baselines », (2013) 50(3) Osgoode Hall Law Journal 637

under section 8(2), the Constitutional Court also ultimately attempted to develop a common denominator approach to "unfairness," similar to that of the SCC in *Corbière*.[127]

In *Prinsloo*, for example, the Constitutional Court suggested that what underpinned unfair discrimination, and thus the definition of an analogous ground for the purposes of section 8(2), was "treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[128] Similarly, in *Harksen*, it held that the key test was whether discrimination was based on "attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."[129] On their own, such criteria are so broad and abstract[130] as to provide almost no guidance to subsequent judges regarding whether particular grounds are analogous[131] for the purposes either of

cases to a combination of one or more of these features").

127. *Prinsloo v Van der Linde*, [1997] ZACC 5 at para 31, (6) B Const LR 759 (S Afr Const Ct) [*Prinsloo*] ("[a]lthough one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination ... [and thus unfair discrimination] *in the context of section 8 as a whole*" [emphasis added]).

128. *Ibid* at para 31.

129. *Harksen*, *supra* note 126 at para 49. At the same time, the Constitutional Court also noted that "the temptation to force [the different enumerated grounds] into neatly self-contained categories should be resisted" (at para 47).

130. It should be noted that the Constitutional Court has not necessarily closely followed this test in subsequent cases involving the question of analogous grounds, but rather engaged in a far more wide-ranging inquiry, involving greater focus on more substantive understandings of equality. See *e.g. Hoffman v South African Airways*, [2000] ZACC 17 at para 28, (11) B Const LR 1235, (S Afr Const Ct) (identifying HIV status as an analogous ground for the purposes of section 9(3), after considering the history of "systemic disadvantage and discrimination," "stigm[a]" and "marginali[zation]" experienced by those living with HIV, and their social and political "vulnerability"); *Khosa v Minister of Social Development*, [2004] ZACC 11 at para 71, (6) B Const LR 569, (S Afr Const Ct) [*Khosa*] (holding that permanent resident status was an analogous ground in large part because of permanent residents' lack of "political muscle," and the fact that "in the South African context individuals were deprived of rights or benefits ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race").

131. The idea of human dignity certainly has the potential to provide valuable guidance to a court in determining the scope of a constitutional guarantee of equality but to do so, it requires a great deal more elaboration and development. See *e.g.* Rory O'Connell, "The Role of Dignity in Equality Law: Lessons from Canada and South Africa" (2008) 6:2 Intl J Const L 267. One such approach to its elaboration or development can be found in the "capabilities approach" of Martha Nussbaum. See *e.g.* Rosalind Dixon & Martha C Nussbaum, "Abortion, Dignity, and a Capabilities Approach" in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds,

section 8(2), or of the largely equivalent provisions in section 9(3) of the 1996 *Constitution*.[132]

Moreover, this difference between the multi-pronged and common denominator approaches provides at least one plausible explanation for the surprising combination of broad and generous interpretation with high formalism on the part of the SCC in its analogous grounds jurisprudence because, over time, there has been a subtle shift by the SCC in this context from a multi-pronged to a more synthetic approach.

In some early cases, the SCC and lower courts were quite explicit in their willingness to apply a multi-pronged approach to the analogous grounds question. Take the decision of the Federal Court of Appeal in *Egan*[133] in which it held, on the basis of a concession by the parties, that sexual orientation is "a ground analogous to discrimination based on 'sex.'"[134] In justifying its conclusion, the court relied strongly on the connection between discrimination based on sexual orientation and sex in the particular case, noting that one of the plaintiffs had "been denied a benefit under the law equal to that to which an opposite sex common law spouse is entitled."[135]

Similarly, in *Miron*, Justice McLachlin (as she then was) found that marital status is an analogous ground in part by relying on a direct analogy to religion as an enumerated ground. Discrimination on the basis of marital status, she suggested, could be analogized to discrimination on the ground of religion "to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by church and state."[136] Even more important, she suggested that the fact that marital status is at least partially chosen by individuals (even if unevenly so by different individuals) need not be a bar to its recognition as an analogous ground because "[r]eligion, an enumerated ground, is not immutable."[137]

In *Andrews*, in adopting a range of substantive criteria for analogousness in addition to a test of immutability, the SCC also gave implicit effect to a multi-pronged approach. The SCC's emphasis on the notion of a "discrete and insular

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Feminist Constitutionalism: Global Perspectives (Cambridge, UK: Cambridge University Press, 2012) 64.

132. The Constitutional Court has affirmed the same test under s 9(3) of the *Constitution*. See *e.g. Khosa*, *supra* note 130 at para 70.
133. *Supra* note 18.
134. *Ibid* at para 3.
135. *Ibid.*
136. *Miron*, *supra* note 14 at para 154.
137. *Ibid* at para 149.

minority," for example, clearly applies to only a subset of the enumerated grounds under subsection 15(1), such as certain racial, ethnic, or religious minorities, and some non-citizen groups, but not to women[138] or the aged.[139] The focus on historical disadvantage by Justice La Forest was also more relevant to certain clearly asymmetric, rather than symmetric, grounds.

In *Corbière*, in contrast, the SCC shifted quite explicitly toward a synthetic approach to the analogous grounds question, suggesting that

> what [the enumerated] grounds *have in common* is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[140]

IV. CONCLUSION: CANADIAN LESSONS FOR CONSTITUTIONAL DESIGN AND AMENDMENT

In the United States in the last decade, there has been a vibrant debate among constitutional scholars as to the relevance (or irrelevance) of formal amendments to the US *Constitution* and as to the failure of certain proposed amendments, such as the ERA. To date, however, this debate has tended to focus almost exclusively on the immediate jurisprudential consequences of the success or failure of particular amendments. Scholars such as David Strauss have argued that because the US Supreme Court has increasingly required "an exceedingly persuasive justification" for all classifications based on sex, even in the absence of the ERA,[141] "it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted."[142] Others, such as Adrian Vermeule, have responded by arguing that it is important to consider the degree to which amendments may alter the probability of particular legal outcomes.[143] Neither side in the debate has focused on the way in which formal constitutional amendments such as the ERA may have had the potential to expand the analogical baseline employed by the US Supreme Court in responding to new, unrelated claims to constitutional protection or recognition.

138. See Kathleen M Sullivan, "Constitutionalizing Women's Equality" (2002) 90:3 Cal L Rev 735.
139. See Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2010) at 55.18ff.
140. *Supra* note 5 at para 13, McLachlin and Bastarache JJ [emphasis added].
141. See *United States v Virginia*, [1996] 518 US 515 at 524, 116 S Ct 2264 (SC).
142. David A Strauss, "The Irrelevance of Constitutional Amendments" (2001) 114:5 Harv L Rev 1457 at 1476-77.
143. Adrian Vermeule, "Constitutional Amendments and the Constitutional Common Law" in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006) 229.

The lessons of the SCC's *Charter* jurisprudence for an American audience, in this context, are thus both important and quite simple, namely that the number and scope of analogical baselines in a constitution can matter a great deal, even if in unpredictable ways. This, in turn, suggests that had proposed amendments such as the ERA been enacted, they would very likely have had real, if also unpredictable, consequences for the US Supreme Court's approach to other equal protection cases, by making gender a distinct analogical baseline against which new claims to heightened scrutiny could be measured, rather than simply a category itself dependent on an analogy to race.

The most likely consequence of this, as I have argued elsewhere, would have been to encourage a greater willingness on the part of the US Supreme Court to recognize certain claims to heightened scrutiny, such as those based on age, disability, and sexual orientation.[144] Another possibility, however, is that the US Supreme Court could simply have moved to adopt a quite different, even if not necessarily more expansive, approach to the test for heightened scrutiny.[145]

In other countries, the SCC's approach offers potentially even more important and specific lessons for constitutional drafters and re-drafters who are debating the scope of constitutional rights to equality more generally. Many governments in recent years have ostensibly attempted to strengthen small "c" constitutional commitments to equality by adopting (or proposing) legislation that both expands and unifies pre-existing legislative prohibitions on discrimination.[146] The drafters of new constitutions in countries such as Kenya have been praised for progressively refining the draft of constitutional guarantees of equality so as to provide "additional protection" via the recognition of a larger and more diverse list of enumerated grounds of discrimination.[147]

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144. Rosalind Dixon, "Amending Constitutional Identity" (2012) 33:5 Cardozo L Rev 1847-58 (especially 1855) [Dixon, "Constitutional Identity"].

145. In the UK, for example, a synthetic approach to race and gender tended to produce a distinctive focus on notions of moral and practical irrelevance as the touchstone for analogousness or heightened scrutiny under art 14. See *e.g. Ghaidan*, *supra* note 118 at para 130, Baroness Hale. At present, the US Supreme Court focuses on a far greater range of factors it deems implicit in race-based discrimination. See Dixon, "Constitutional Identity," *supra* note 144.

146. See *e.g. Equality Act 2010* (UK), c 15. See also Law Council of Australia, submission to the Attorney General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (1 February 2012) (for similar proposals in Australia).

147. See *e.g.* Jim Fitzgerald, "The Road to Equality? The Right to Equality in Kenya's New Constitution" (2010) 5 Equal Rights Rev 55 at 58.

The lesson of *Corbière* in this context, however, is that more may not always be better—at least within the same constitutional instrument[148]—if the aim is to encourage judges to give broad effect to a particular preferred vision of equality. Given the kind of synthetic approach adopted by the SCC in *Corbière*, too much internal diversity in a constitution's baseline categories will tend to deflect attention away from drafters' substantive underlying understandings or purposes in favour of a more abstract, formalist account of what lies behind drafters' constitutional choices. This, in turn, can create a serious risk of both over- and under-enforcement from the perspective of a constitutional designer seeking to achieve a particular vision of equality or constitutionalism more generally.

Take a constitution drafter wishing to encourage courts to give broad effect to an anti-subordination principle under a constitutional equality guarantee. One approach for such a drafter would be to attempt to enumerate all those grounds of discrimination that could potentially be used by the government to undermine the equal standing of groups in society. Another would be to list only those grounds that, historically, had been the basis of actual systemic disadvantage for particular groups in the society. The first approach could be expected to produce a long and symmetric list of grounds common to all modern liberal constitutions, including race, ethnic origin, colour, tribe, place of origin, gender, sexual orientation, birth, primary language, social or economic status, age, disability, creed or religion, and political opinion.[149] In contrast, the second approach could be expected to produce a much shorter, more context-specific, asymmetric list (such as, in Canada, for instance, one focused on aboriginality; femaleness; new immigrant, religious or sexual minority status; poverty; old-age; and disability).

The first approach might thus also, intuitively, be seen as more consistent with a broad approach by courts to the enforcement of the drafter's vision of equality. This article argues, however, that the lesson of the SCC's equality jurisprudence in this context is that the opposite may in fact be the case: namely, that at least within the scope of a single guarantee, it is the second, narrower, and more parsimonious approach, rather than the first broader and more comprehensive

148. One question, which is beyond the scope of this paper to explore, is whether internally separating or dividing certain guarantees may help alleviate this problem (by, for example, grouping different express constitutional baselines by distinct underlying purpose). Subsection 15(1), of course, does not do this and it is clear that mere word ordering will be insufficient to achieve this. Separate guarantees, however, arguably adhere to the logic of constitutional design curves by showing that particular provisions cannot be too broad in coverage without creating dangers of interpretive formalism.

149. Compare *e.g.* Fiji Islands, *Constitution Amendment Act 1997*, s 39 (PacLII); *Constitution of the Republic of Uganda* 1995, s 21, online: <www.statehouse.go.ug>.

approach, that will produce the more consistent enforcement of anti-subordination principles by a court. It will do so by reasoning that, in all cases, pays attention to those principles, rather than more abstract notions of equality.[150] This approach also seems to conform to a more general principle of constitutional design: after some tipping point, increasing breadth or specificity in constitutional language may not always increase long-term control over constitutional outcomes.[151] The reasons for this may vary from one context to the next, and be quite different in the context of constitutional analogical baselines than in most other contexts. The phenomenon, however, seems quite widespread, and thus, what seems like an anomaly in the SCC's analogical grounds jurisprudence may in fact be part of a much broader pattern of a distinctly non-linear, inverted "U-shaped" relationship between specific constitutional design choices and courts' approach to constitutional interpretation.[152]

For this reason alone, if no other, the SCC's analogous grounds jurisprudence also seems worthy of further attention and study by comparative constitutional lawyers in the years to come.

150. One possibility, for example, is that a constitutional equality clause could be internally divided to reflect commitments to anti-subordination, anti-stereotyping, and rule of law or formal individual equality values. See *e.g.* s 9(1) of the *Constitution of South Africa* (clearly delineating formal rule of law and more substantive equality concerns). Such a vision might also in some ways help relieve pressure on a court, under an anti-subordination guarantee, to dilute the substantive focus of that guarantee in order to accommodate meritorious claims of this latter kind.

151. One of the contexts in which this seems true is in the allocation of general, versus specific, grants of power to one or other level of government in a federal system. See *e.g.* Rosalind Dixon, "Constitutional Design Curves" (2012) [working paper, on file with author] [Dixon, "Constitutional Design"] (discussing Art I of the US *Constitution* versus s 51 of the Australian *Constitution* in this context). I also thank Jamie Cameron for the suggestion that ss 29 and 91 of the *Constitution Act (British North America Act)* of 1867 may follow this same pattern.

152. See Dixon, "Constitutional Design," *ibid.*

Onglet 3

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On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*

Jessica Eisen*

Introduction

Martha Jackman, among others, has posited that "notwithstanding the frequent intersection of poverty and other forms of disadvantage…. The poor also comprise a discrete and identifiable group that is subject to its own particular and distinct forms of discrimination and disadvantage."[1] It seems intuitive that by any reasonable definition of 'discrimination', poor people are its frequent victims.[2] Canadian courts, however, have exhibited an increasing resistance to the possibility that claims of discrimination on the basis of grounds related to economic disadvantage might found valid discrimination claims under s. 15 of the *Canadian Charter of Rights and Freedoms*.[3]

This article takes the increasing hesitation to recognize the viability of poverty-based discrimination claims as an urgent example of shortcomings inherent in the Supreme Court's current approach to 'grounds' of discrimination. In particular, this article will trace the Supreme Court's articulation of an increasingly formalist approach to determining which grounds of discrimination warrant constitutional protection, and trace these doctrinal directions onto the lower courts' treatment of claims grounded in economic disadvantage. This article will then explore some of the rhetorical and doctrinal dimensions of the Supreme Court's treatment of grounds of discrimination, calling for an approach

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[1] Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law" (1994) 2(1) Rev. Const. Stud. 76 [Jackman, "Disparities"].

[2] This intuition is borne out in the evidence. Justice Gerard La Forest's Canadian Human Rights Act Review Panel, for example, concluded that there was "ample evidence of widespread discrimination based on characteristics related to conditions such as poverty, low education, homelessness and illiteracy". Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000). See also the various essays in Margot Young, Susan B. Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) [Young, et al., *Poverty*]; and Jean Swanson, *Poor-Bashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001).

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15 [*Charter*].

that is more attentive to the inherently social and relational nature of discrimination and inequality.

Part I of this article will set out the scope of the present project in the context of existing scholarship addressing poverty-related *Charter* claims and critiquing the Court's constitutional equality jurisprudence. Part 2 will set out the Supreme Court's evolving approach to the role and definition of grounds of discrimination, culminating in the current abstracted, threshold inquiry into (constructively) immutable personal characteristics. This Part will conclude that the analogous grounds inquiry has been left behind in the Court's stated attempts to depart from the formalist methodology that characterized equality jurisprudence under *Law v. Canada*.[4] Part 3 will provide a general outline of the lower courts' increasing resistance to the viability of discrimination claims grounded in economic disadvantage, and will map this resistance onto the doctrinal evolution of the Supreme Court's approach to analogous grounds, as set out in Part 2. Having traced the doctrinal evolution of the Supreme Court's approach to grounds, and explored the consequences of that shift in the context of lower court decisions on claims grounded in economic disadvantage, the balance of this article will comment on the implications of the current approach. Part 4 will argue that, contrary to the demands of substantive equality, the Court's current approach locates the source of discrimination within its victims rather than in unequal or oppressive social relationships. Part 5 will engage with scholarly debate as to the proper focus of the grounds inquiry, concluding that the terms of this debate reinforce the need for attention to social relationships in order to achieve meaningful substantive equality analysis.

Part 1 – At the Tips of Two Icebergs: Poverty Law and Constitutional Equality Law

The primary focus of this article is the dynamic by which the Court's changing approach to grounds of discrimination has worked to frustrate discrimination claims based on economic disadvantage. This focus emerges from two substantial and interrelated lines of scholarship: 1) if and how the *Charter* can be used to effect meaningful improvements to the lives of economically disadvantaged Canadians; and 2) if and how the Supreme Court's approach to s. 15 can be transformed (or rehabilitated) to better serve the ends of substantive equality. Before proceeding, I will set out some of the basic contours of these bodies of scholarship in order to better situate and clarify my own project.

[4] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 22 [*Kapp*].

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Anti-poverty advocates have often understandably taken the advancements of the interests of economically disadvantaged Canadians as a starting point, and viewed the *Charter*'s equality guarantees as just one of many tools by which concrete and material gains might be realized.[5] Because of this pragmatic focus, calls for recognition of poverty as a viable ground of discrimination are often made alongside calls for recognition of positive rights to goods and benefits that would alleviate the substantial hardships facing those in poverty.[6] The analysis I present here does not address the special obstacles facing claims that the court perceives to be 'positive rights claims'.[7] In fact, my aim here is to set out a critique of the Court's approach to *who* may benefit from s. 15,[8] which might be embraced even in the face of persistent reluctance to take up other critiques relating to *what* Canada's equality protection should guarantee.[9] Even within this more narrow question of 'who', moreover, my doctrinal focus is necessarily unable to address pressing questions emerging from poverty law scholarship as to whether and how potential litigants are even able to bring their claims before the courts in light of serious institutional and financial barriers to litigation.[10]

[5] In the same vein, the *Charter* has been criticized as a red herring that may only serve to divert scarce energy and resources that would be better employed in other arenas. For discussion of this tension between '*Charter* optimists' and '*Charter* skeptics' in the anti-poverty context, see Margot Young, "Why Rights Now? Law and Desperation" in Young et al., *Poverty*, *supra* note 2 at 317-336; and Yavar Hameed and Nitti Simmonds "The *Charter*, Poverty Rights and the Space Between: Exploring Social Movements as a Forum for Advancing Social and Economic Rights in Canada" (2007) 23 Nat'l J. Const. L. 181.

[6] See, for example, Hameed and Simmonds, *ibid.*; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 S.C.L.R. (2d) 297 [Jackman, "Constitutional Castaways"]; and Murray Wesson, "Social Condition and Social Rights" (2006), 69 Sask. L. Rev. 101.

[7] For critiques of the viability of the distinction between positive and negative rights claims, and arguments that the Court should expand *Charter* protections to expressly encompass so-called positive rights, see Margot Young, "Unequal to the Task: 'Kapp'ing the Substantial Potential of Section 15" (2010) 50 S.C.L.R. (2d) 183 at 214-216 [Young, "Unequal"]; and Jackman, "Constitutional Castaways," *Ibid.*, at 311-312.

[8] As Sébastien Grammond has explained the inquiry into enumerated and analogous grounds: "In fact, at this stage the court is defining the categories of persons who will benefit from equality rights." Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal & Kingston: McGill-Queen's University Press, 2009) at 54.

[9] The courts' refusals to acknowledge poverty as an analogous ground of discrimination under the *Charter* persist even in the face of negative rights claims such as the freedom to pahhandle. See, for example, *R. v. Banks* (2007), 84 O.R. (3d) 1 (C.A.), leave ref'd [2007] S.C.C.A. No. 139. For a discussion of the limitations of recognition of grounds relating to economic disadvantage in the absence of recognition of social rights, see Wesson, *supra* note 6.

[10] See Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queen's L.J. 139; Sandra Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 S.C.L.R. (2d) 1 [Rodgers, "Getting Heard"]; Jackman "Constitutional Castaways," *supra* note 6; Hameed and Simmonds, *supra* note 5.

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As to the second line of inquiry—how to better align s. 15 jurisprudence with the aims of substantive equality—the present critique of the Court's approach to analogous grounds follows a barrage of criticism of the Supreme Court's jurisprudence, particularly following *Law v. Canada*. My observation that the Supreme Court has adopted an increasingly formalist conception of grounds echoes trends towards formalism that have been criticized in the Court's approach to s. 15 more generally.[11] Although my criticism is ultimately situated in the context of the s. 15 test as a whole, I do not speak directly to deficiencies in the analysis facing claimants who do succeed at the threshold grounds analysis. In particular, allegations of troubling judicial attitudes towards poor claimants[12] and excessive judicial deference to government[13] would almost certainly persist even if the Court were to transform its grounds jurisprudence along the lines proposed here.

This project therefore, sits just at the tips of these two icebergs – two deep and enduring problematics of s. 15 jurisprudence: the challenges arising from litigation as a means to address the needs of economically disadvantaged Canadians, and the Court's apparent retreat from the demands of substantive equality. With this broader context in mind, I am of the view that judicial recognition of discrimination on the basis of economic disadvantage would constitute a significant step forward in respect of each of the problematics identified. I am encouraged in this view by Martha Jackman's assertion that, "the first and most significant step the McLachlin Court must take to change poor people's status as constitutional castaways would be to recognize the social

[11] See, for example Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" (2010) 50 S.C.L.R. (2d) 129. [McIntyre, "Equality Jurisprudence"]; Young, "Unequal," *supra* note 7; the essays in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) [Faraday et al., *Making Equality Rights Real*]; and the essays in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006) [McIntyre and Rodgers, eds, *Diminishing Returns*].

[12] See for example, Jennie Abell's discussion of the Supreme Court of Canada's notorious decision in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 [*Gosselin* (SCC)]: "My concern is the deeply disturbing reliance, explicit and implicit, by the majority on age-old stereotypes about poor people in preference to the realities of poverty. In effect it is stereotypes that drive a convoluted legal analysis, not bad law, that defeated Louise Gosselin's claim." Jennie Abell, "Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away" 50 S.C.L.R. (2d) 257 at 288 [Abell, "Poverty"]. Martha Jackman similarly adduces evidence discriminatory attitudes towards the poor within the legal profession, including on the part of judges. Jackman, "Disparities," *supra* note 1 at 91-94. See also Patricia Cochran, "Taking Notice: Judicial Notice and the 'Community Sense' in Anti-Poverty Litigation" (2007) U.B.C. L. Rev. 559.

[13] For an argument that the Court has shown excessive deference to governments' stated justifications, see Sheila McIntyre, "Deference and Domination: Equality without Substance" in McIntyre and Rodgers, eds., *Diminishing Returns supra* note 11. See also McIntyre, "Equality Jurisprudence," *supra* note 11 at 167-172.

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condition of poverty as an analogous ground of prohibited discrimination".[14] As Bruce Porter has argued, "[e]xclusions from constitutional meanings and from the scope of constitutional rights are of more than technical or instrumental importance to low-income claimants… Such exclusions deny those living in poverty equal status as rights-holders and are intricately linked to the assaults on social programs and entitlements that are frequently the subject of legal challenges."[15]

Part 2 – The Supreme Court's Approach to Analogous Grounds: How We Got Here

> Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides:
> 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.[16]

In *Andrews*, the Supreme Court's first s. 15 decision, Justice McIntyre's prescribed an "enumerated and analogous grounds" approach to s. 15, which was endorsed by all members of the Court.[17] Under this approach, the grounds listed in the *Charter* were taken to warrant particular attention since they reflect "the most common and probably the most socially destructive and historically practised bases of discrimination".[18] The Court established, further that the list was not closed: other grounds might warrant similar attention if they were found to be "analogous" to those listed in the constitutional text.

The framework set out by Justice McIntyre in *Andrews* was admittedly a skeleton that had yet to be fleshed out.[19] In those "early days of interpreting s. 15", the Supreme Court expressly resisted the creation of such a test, explaining that "it would be unwise, if not foolhardy, to attempt to provide exhaustive definitions of phrases which by their nature are not susceptible of easy

[14] Jackman, "Constitutional Castaways," *supra* note 6, at 323-324. See also Jackman, "Disparities," *supra* note 1, at 79.
[15] Bruce Porter, "Claiming Adjudicative Space" in Young et al., *Poverty*, *supra* note 2 at p. 88.
[16] *Charter*, *supra* note 3, s. 15. Emphasis added.
[17] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*]. Although Justice McIntyre dissented in the result, Justice Wilson—writing for herself, Chief Justice Dickson, and Justice L'Heureux-Dubé—asserted her "complete agreement" with Justice McIntyre's approach to the interpretation and application of s. 15 (at 151). Justice La Forest declined to enter into an "extensive examination of the law regarding the meaning of s. 15(1), because in so far as it is relevant to this appeal I am in substantial agreement with the views of my colleague [Justice McIntyre]" (at 193).
[18] *Andrews*, *ibid.* at 175.
[19] Margot Young notes that the *Andrews* decision is "as a whole, rather flawed and murky, particularly about what substantive equality analysis generally—and an analysis of discrimination in particular—requires." Young, "Unequal," *supra* note 7 at 186.

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definition and which are intended to provide a framework for the 'unremitting protection' of equality rights in the years to come."[20] Nonetheless, several interrelated points relevant to the role of 'analogous grounds' appeared to be substantially agreed upon by the Court. First, the 'ground' on which a claimant has been subjected to differential treatment should be specific to the context of the claim, with the result that a proposed ground might be 'analogous' in some cases, but not in others.[21] Second, the inquiry into analogous grounds was seen as an "analytic trend", not a free-standing test or requirement for a successful claim.[22]

Finally, and perhaps most importantly, the analogous grounds inquiry was squarely and expressly focused on whether the claimant was a member of a disadvantaged group. The purpose of s. 15 was described by the unanimous court in *Turpin* as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society". With reference to that remedial purpose, the grounds inquiry was aimed at "determining whether the interest advanced by a particular claimant is the kind of interest s. 15 of the *Charter* is designed to protect."[23] Borrowing a term from American equal protection jurisprudence, the Court posited that the analogous grounds analysis should aim to identify whether the claimant group constituted a "discrete and insular minority," defined as a group lacking political and social power, such that the legislature would have little interest in attending to their needs.[24] Notably,

[20] *R. v. Turpin*, [1989] 1 S.C.R. 1296 [*Turpin*]. See also *Symes v. Canada,* [1993] 4 S.C.R. 695 at para. 177 (Q.L.) [*Symes*]: "I must mention that by repeating points set out in other cases, I am not proposing that those points now constitute a 'test' for s. 15(1)."

[21] *Turpin*, *ibid.* at 1333: "I would not wish to suggest that a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination. I simply say that it is not so here. Persons resident outside Alberta and charged with s. 427 offences outside Alberta do not constitute a disadvantaged group in Canadian society within the contemplation of s. 15". See also *R. v. Généreux*, [1992] 1 S.C.R. 259 at 311 [*Généreux*]: "I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the Charter".

[22] *Symes*, *supra* note 20 at para. 116 (Q.L.).

[23] *Turpin*, *supra* note 20 at 1333. See also at *R. v. Swain*, [1991] 1 S.C.R. 933 at 941 [*Swain*]: [T]he court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15 -- namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."

[24] The phrase "discrete and insular minority" was drawn from the "famous footnote" in the American case *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at pp. 152-53, n. 4. Justice Wilson elaborated on this term in the context of the analogous ground of citizenship in *Andrews*, *supra* note 17 at 152: "Relative to citizens, non-citizens are a group lacking in political

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this emphasis on disadvantage in determining whether a proposed ground was analogous persisted even where other factors such as the "immutability" were mentioned.[25] The protection offered by analogous grounds, therefore, was not symmetrical: the inquiry was focused on the group's relational status, and the analogous grounds inquiry generally operated to exclude claims by groups who were relatively advantaged, or at least not 'disadvantaged' socially, politically, or economically.[26]

Within a few years, however, deep divisions emerged within the Court, revealing disagreement as to the applied meaning of the broad strokes agreed upon in the *Andrews* era. In 1995, the Supreme Court released a trilogy of concurrent decisions, *Egan*,[27] *Thibeaudeau*,[28] and *Miron*,[29] each of which showed the members of the Court divided between three distinct approaches: an approach focused on the *relevancy* of impugned distinctions;[30] an approach focused on the

power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending': see J. H. Ely, Democracy and Distrust (1980), at p. 151."

[25] See, for example, the reasons of Justice La Forest in *Andrews*, *ibid*. at 330. Despite the Court's focus on disadvantage, the early s. 15 cases made reference to various indicators of 'analogousness'. These presence of these various factors in the midst of a clear judicial focus on disadvantage are set out in Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing" (1991) 29 Alberta L. Rev. 772 [Gibson, "Analogous Grounds"].

[26] For example, the majority in *Swain*, *supra* note 23 at 991, summarized the ratio in *Turpin*, *supra* note 20, as follows: "this Court held in *Turpin*, *supra*, that a law which differentiated for mode of trial purposes between those persons accused of certain offences in Alberta and those accused of the same offences elsewhere in Canada, did not infringe s. 15(1) because the group which had invoked s. 15 did not constitute a disadvantaged group in Canadian society, in the sense that it suffered from social, political and legal disadvantage in our society."

[27] *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*].

[28] *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.

[29] *Miron v. Trudel*, [1995] 2 S.C.R. 418 [*Miron*].

[30] The 'relevancy test' endorsed by Justices La Forest, Lamer, Major and Gonthier required that a claimant prove 1) that the law had drawn a distinction between the claimant and others, 2) that the distinction had imposed a disadvantage upon, or denied a benefit to, a group of persons to which the claimant belongs, and 3) that the distinction was based on an "irrelevant personal characteristic" enumerated in s. 15 or analogous to the enumerated grounds. This last step had two distinct "aspects" or requirements: an enumerated or analogous grounds requirement, and a separate relevancy inquiry once the analogousness of the ground had been established. *Miron*, *ibid.* at paras. 13-15 (QL).

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presence or absence of *stereotyping*;[31] and an approach focused on *group disadvantage*, endorsed only by Justice L'Heureux-Dubé.[32]

With the notable exception of Justice L'Heureux-Dubé, all members of the Court recast the 'analogous grounds' inquiry as a 'test' rather than a 'tool'. Justices aligned with the relevancy approach viewed the enumerated grounds as examples of the sorts of bases on which 'irrelevant' distinctions are often made, with relevancy determined in relation to the legislative objective.[33] Under the stereotyping test, the listed grounds were seen as examples of the sorts of distinctions that had historically served as bases for stereotypical decision-making. When an analogous ground was proposed, the inquiry under this framework would focus on whether the ground in question was a likely basis of stereotypical decision-making.[34] Several 'indicators' were posited as relevant to determining whether a proposed analogous ground was likely to attract stereotypical decision-making, including historical disadvantage independent of the challenged distinction; whether the group constitutes a "discrete and insular minority"; whether the distinction is made on the basis of a "personal characteristic" and "by extension" whether the distinction is based on "personal and immutable characteristics"; whether the ground in issue is comparable to any particular listed ground; and whether the ground had been recognized by other judges or in human rights legislation.[35]

Note that both the relevancy and stereoptyping approaches represented a step away from the focus on disadvantage that characterized the grounds inquiry under *Andrews* and *Turpin*. Both 'relevance' and 'stereotype' inquire into the nature of the distinction more than (or *rather than*, in the case of relevancy) the

[31] The first step under this approach (endorsed by Justices McLachlin, Sopinka, Cory, and Iacobucci) required claimants to establish a denial of 'equal protection' or 'equal benefit' of the law with reference to a comparator. Second, the claimant was required to show that this denial constituted 'discrimination', meaning that the denial was based on an enumerated or analogous ground and was based on prejudice or stereotyping. Under this approach, Justice McLachlin advised, it will only be in 'rare' instances that distinctions on the basis of enumerated or analogous grounds will escape a charge of discrimination. *Miron*, *ibid.*, at para. 132 (QL).

[32] Under this approach, claimants were required to: 1) establish a legislative distinction, 2) establish that the distinction results in a denial of one of the four equality rights [ie. equality before the law, equality under the law, equal protection of the law, and equal benefit of the law] on the basis of the claimants membership in an identifiable group, and 3) that that distinction is 'discriminatory'. *Egan*, *supra* note 27, at 552. Justice L'Heureux-Dubé defined discrimination as encompassing distinctions which are "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration." *Egan*, *supra* note 27, at 553. In order to test whether a distinction is likely to fall within this definition, Justice L'Heureux-Dubé prescribed in a two-part analysis, from a subjective-objective perspective, into 1) the nature of the group affected, and 2) the nature of the interest affected. *Egan*, *supra* note 27, at 553.

[33] *Miron*, *supra* note 29 at paras. 12-13 (QL).

[34] *Miron*, *ibid.*, at para. 132 (QL).

[35] *Miron*, *ibid.*, at para. 148-149 (QL).

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circumstances of the claimant. Although the stereotyping framework included historical disadvantage as a factor in determining analogousness, such disadvantage was relevant only insofar as it related to the likelihood of stereotypical decision-making. It was not an analytical end in itself.

Justice L'Heureux-Dubé was a lone voice on the court resisting her colleagues' shift towards increased focus on grounds, and decreased focus on disadvantage. She proposed an approach that inquired into (1) the nature of that actual group(s) of which the claimant was a member, and (2) the nature of the interest affected by the impugned differential treatment. Justice L'Heureux-Dubé characterized her own approach as one that "looks to groups rather than grounds, and discriminatory impact rather than discriminatory potential."[36] Justice L'Heureux-Dubé was concerned that the grounds-focused approaches adopted by the majority of the Court might improperly narrow the scope of s. 15. In her view, "[t]he enumerated or analogous nature of a given ground should not be a necessary precondition to a finding of discrimination".[37] Most significantly, Justice L'Heureux-Dubé's analysis of the affected group was expressly focused on disadvantage on the understanding that "groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable".[38]

The Court attempted to reconcile the deep divisions evident in the *Miron*/*Egan*/*Thibaudeau* trilogy in its unanimous 1999 *Law* decision.[39] The *Law* synthesis incorporated aspects of the various approaches articulated in the Trilogy cases, presenting a (perhaps superficially[40]) unified approach as to the s. 15 test. The now well-rehearsed *Law* formulation instructed courts to make three broad inquiries to determine a constitutional equality violation: 1) does the impugned distinction create a disadvantage on the basis of one or more personal characteristics; 2) is the claimant subject to differential treatment based on one or more enumerated or analogous grounds; 3) does the impugned differential treatment undermine the claimant's dignity by promoting the view that the individual is less worthy of concern and respect.[41] At this final step, the "dignity" stage, the Supreme Court directed inquiry into four "contextual factors": (1) Pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group in issue; (2) the correspondence between the ground(s) on

[36] *Egan supra* note 27 at para. 54 (QL).
[37] *Egan*, *ibid.* at para. 52 (QL)
[38] *Egan*, *ibid.* at para. 58 (QL)
[39] *Law, supra* note 4.
[40] Daphne Gilbert, for example, has argued that, "*Law's* tentative cohesion only superficially addresses the divergent views." Daphne Gilbert, "Unequaled: Justice Claire L'Heureux-Dubé's Vision of Equality and Section 15 of the Charter" (2003) 15 CJWL 1 at 18 [Gilbert, "Unequaled"].
[41] *Law*, *supra* note 4 at para. 88.

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which the claim is based and the actual needs, capacities or circumstances of the claimant; (3) the ameliorative purpose or effect of the law; and (4) the nature and scope of the interest affected.[42]

While the *Law* decision itself does not discuss analogousness at length, it does establish that the inquiry into whether the ground at issue is 'enumerated or analogous' will constitute a discrete, threshold step in discrimination analysis. While the Court emphasized that "it is open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds", the Court was emphatic that where claims are based on such "newly postulated analogous ground, or on the basis of a combination of different grounds", the second step of the *Law* test "must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s. 15(1)."[43] Under *Law*, then, the 'enumerated or analogous grounds' question would stand alone, after the finding of a distinction, but before—and in isolation from—the question of whether the impugned distinction amounted to a discriminatory violation of the claimant's dignity.

The Court's subsequent *Corbiere* decision confirmed the *Law* approach, and set out the analysis for determining analogousness that still governs. The majority of the Court established that the grounds inquiry should never depend on the context of given distinction, holding that grounds are "a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case."[44] The Court emphasized the threshold nature of the grounds inquiry, positing that this abstract, generalized analogous grounds inquiry should have a "screening out" function, to dispose of claims which do not properly fall within the ambit of s. 15.[45] The grounds inquiry was thus definitively transformed from a non-determinative "analytical trend"[46] into an additional hurdle that claimants must overcome to establish a valid claim on the basis of a non-enumerated ground.

The *Corbiere* majority went on to provide the following discussion of the purpose of the analogous grounds inquiry, culminating in a new 'test' hinging on the establishment of a (constructively) immutable personal characteristic:[47]

[42] *Ibid.* at para. 88.
[43] *Ibid*, at para. 93.
[44] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 8. The Court elaborated in the same paragraph that "we should not speak of analogous grounds existing in one circumstance and not another." Justice L'Heureux-Dubé's concurring decision rejected the majority's affirmation that the grounds inquiry should be generalized such that the analogousness inquiry in one case would be determinative in future cases (at para. 61).
[45] *Ibid*, at para. 11.
[46] *Symes*, *supra* note 20 at para. 116 (Q.L.).
[47] Justice L'Heureux-Dubé, writing a concurring judgment for herself, and Justices Gonthier, Iacobucci and Binnie, did not explicitly reject the majority's emphasis on immutability, but did contest the proposition that immutability could tell the whole story. In her view, while immutability

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> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.[48]

Emerging from this restatement of the analogous grounds analysis are three strands of inquiry, none of which require express consideration of disadvantage: actual impossibility of change; legitimate state interest in requiring change to access the benefit; or personal cost associated with change.

The Court's suggestion that there is no need for separate inquiry into group disadvantage since that factor "flows from the central concept of immutable or constructively immutable personal characteristics", does not withstand scrutiny. As Rosalind Dixon explains, "[t]he actual or constructive immutability of an individual characteristic will, at best, be only tangentially relevant to…criteria of political power."[49] Even if we were to accept the premise that the listed grounds (sex, race, etc.) delimit immutable categories of persons,[50]

"may…lead to…recognition as an analogous ground…it is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked." *Corbiere*, *supra* note 44 at para. 60.

[48] *Corbiere*, *supra* note 44 at para. 13. Emphasis added.

[49] Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50 Osgoode Hall L. J. 637 at 653.

[50] The idea that "immutability" accurately describes any of the listed characteristics is complicated by the fact that the groups delimited are often the product of social rather than natural or inherent

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the grounds as listed are inherently symmetrical: 'whiteness' is as immutable as 'blackness' and 'femaleness' is as immutable as 'maleness'.[51] There is nothing about immutability that requires a finding of disadvantage. The same is true of personal characteristics that are changeable only at great personal cost, or which the government has no interest in changing to provide equal treatment. A focus on personal characteristics, or on the legitimacy of a government interest in requiring change, makes no distinction between heterosexuality and homosexuality, or between Christianity and Islam, regardless of the differences in disadvantage faced by the groups identified with these categories.

Moreover, as the claims based on economic disadvantage—surveyed below—make clear, courts have had no difficulty under this framework in finding that, although a claimant group is severely disadvantaged, there is no (constructively) immutable personal characteristic attracting s. 15 protection. As discussed further below, one court has even suggested that the remote possibility that a person might be lifted out of poverty at no personal 'cost' by receiving a gift should weigh against a finding of constructive immutability.[52] The claimants' subordinated position is thus used *against* them on the basis that escaping the confines of that subordination would improve their lives. The focus on the cost to "personal identity" has a similar effect: a group must be sufficiently advantaged to seek out and build community and identity around the proposed 'ground' in order to benefit from s. 15. Under this logic, closeted gay people whose capacity for pride, community, or identity are stifled by community constraints would be less 'eligible' for s. 15 protection than gay persons who have benefited from a less hostile community which facilitated community and identity-building. The proposed analysis is therefore both under- and over-inclusive with reference to the disadvantage 'factor' which the Court says 'flows from' the requirement that claimants must ground their claim in a (constructively) immutable personal characteristic. As Sebastién Grammond described the reasoning in *Corbiere*: "the focus is on the ground of distinction, rather than on

categories. See for example, Grammond, *supra* note 8 at 6: "Most scientists today believe that the concept of race is seriously flawed and should be abandoned. They now see race as a socially constructed category".

[51] The oft-cited exception to the symmetry of the grounds as listed is 'mental or physical disability'. See Colleen Sheppard, "Grounds of Discrimination: Toward an Inclusive and Contextual Approach" (2001) 80 Can Bar Rev (3d) 893 at 908 [*Sheppard*, "Grounds"]: "[I[n terms of the formal language of anti-discrimination law, discrimination on the basis of sex extends parallel, symmetrical protection to both men and women. Discrimination on the basis of race protects both minority and majority racial groups. It is only in the case of disability that one finds an asymmetrical, more contextual and historicized articulation of the protection." See also Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 33-34 and 40.

[52] *Affordable Energy Coalition (Re)*, [2008] N.S.U.R.B.D. No. 11 at para. 181 [*Affordable Energy Coalition*].

the vulnerable group delineated by that ground."[53]

Notably, the Court did have occasion following *Law* and *Corbiere* to consider a claim that raised the relationship between economic disadvantage and the establishment of new analogous grounds. In *Dunmore*, the Supreme Court considered a challenge to the exclusion of agricultural workers from Ontario's labour relations regime on the basis that the exclusion violated the *Charter* rights to equality and freedom of association.[54] There was significant evidence before the Court of the economic and political vulnerability of agricultural workers.[55] The majority decision found a freedom of association violation, and expressly declined to consider the equality issue. Justice L'Heureux-Dubé and Justice Major each considered the equality claim, arriving at conflicting results. Justice Major found that despite their "low wages" and "disadvantaged position" the group was too heterogeneous to give rise to an analogous ground defined by "identifying personal characteristics".[56] Justice L'Heureux-Dubé, on the other hand, reiterated her preference for a group-based approach, and held that, even under the *Corbiere* immutability analysis, agricultural workers should be constitute an analogous ground. She expressly incorporated attention to disadvantage into her assessment of immutability: "I believe that agricultural workers, in light of their relative status, low levels of skill and education, and limited employment mobility, can change their occupational status 'only at great cost, if at all.'"[57]

As noted above, the *Law* era jurisprudence has been roundly criticized as frustrating and distorting the aims of substantive equality.[58] In *R. v. Kapp*, the Court expressly responded to these scholarly critiques of *Law*, acknowledging that the complex four-factor dignity test could be "confusing and difficult to apply", and that it has proven to be "an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be".[59] The Court

[53] Grammond, *supra* note 8 at 103.
[54] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [*Dunmore* (SCC)]. For a discussion of aspects of this decision beyond the analogous grounds question, see Jackman, "Constitutional Castaways," *supra* note 6 at 309-312.
[55] *Dunmore* (SCC), *ibid.*, at para. 168.
[56] *Ibid.* at para. 215.
[57] *Ibid.* at para. 169.
[58] See the essays in Faraday et al., *Making Equality Rights Real*, *supra* note 11; and McIntyre and Rodgers, *Diminishing Returns*, *supra* note 11.
[59] In *R. v. Kapp*, *supra* note 4, the Supreme Court of Canada acknowledges the "critics" of *Law*, *supra* note 4 citing 19 academic articles in two lengthy footnotes. Dianne Pothier has noted that there is reason to doubt the extent to which the vast body of criticism contained in these footnotes has really been adopted by the Court: "These are trenchant criticisms indeed, which are apparently embraced and then left hanging. There is no suggestion that any particular case is wrongly decided…. It is hard to know how seriously this self-criticism should be taken, when it is not really acknowledged as self-criticism." Dianne Pothier, "*Kapp* gives affirmative action

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proposed what it characterized as a return to *Andrews*, establishing the following test: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[60]

The Court in *Kapp* maintained that the *Law* decision had only elaborated upon, not transformed, the analysis set out in *Andrews*.[61] As I hope the survey above has made clear, and as the survey of claims grounded in economic disadvantage will confirm, the role that 'analogous grounds' have played in cases founded on a non-enumerated ground was explicitly transformed by the (constructively) immutable personal characteristic test set out in *Corbiere*. The test posited by the *Kapp* Court maintains the *Law* era's discrete, threshold grounds requirement. In the Court's decisions since *Kapp*, the *Corbiere* definition of analogous grounds as (constructively) immutable personal characteristics has been affirmed as the governing test.[62]

Since *Kapp*, only Justice Deschamps, who has now retired from the Court, has expressed misgivings about the Court's approach to analogous grounds—most directly in her reasons in *Fraser*.[63] In *Fraser*, the Court heard another challenge to differential labour protections for agricultural workers, wherein significant evidence of the economic disadvantage facing the affected group was again placed before the court.[64] The Justices who addressed the s. 15 claim took three separate approaches.[65] Chief Justice McLachlin and Justice LeBel

programs wide margin," *The Lawyers Weekly*, September 19, 2008, online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=762>.

[60] *Kapp*, *ibid.* at para. 17.

[61] *Ibid*. *Ibid*.

[62] See the unanimous decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para. 33 [*Withler*]; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 at para. 295 (per Rothstein J.) [*Fraser*]; and *Quebec (Attorney General) v. A.*, 2013 SCC 5 at para. 190 and 194 (per LeBel J.), and 334-335 and 416 (per Abella J. with McLachlin C.J. concurring) [*Quebec v. A.*].

[63] Note also Justice Deschamps reasons in *Quebec v. A.*, *ibid.* at para. 385, where she emphasizes the role of historical disadvantage in establishing the precedent by which marital status is now considered an analogous ground: "The Court has recognized the fact of being unmarried as an analogous ground because, historically, unmarried persons were considered to have adopted a lifestyle less worthy of respect than that of married persons. For this reason, they were excluded from the social protections.… [T]he denial of the benefits in question perpetuates the disadvantage such people have historically experienced." Each of the other reasons relied squarely on the *Corbiere* (constructively) immutable personal characteristics test in confirming marital status as an analogous ground: see para. 190 and 194 (per LeBel J.), and 334-335 and 416 (per Abella J. with McLachlin C.J. concurring).

[64] The impugned legislation, the *Agricultural Employees Protection Act* (*AEPA*) had been created in response to decision in *Dunmore* (SCC), *supra* note 54, wherein the complete exclusion of agricultural workers from Ontario's labour relations regime was found to violate the claimants' freedom of association. The *AEPA* provided lesser protections than those afforded to employees governed by the more general *Ontario Labour Relations Act*.

[65] Justice Abella found that the impugned legislation violated s. 2(d) of the *Charter*, and consequently did not address the s. 15 claim.

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remarked on the "vulnerable position" of farm workers, but found the claim to be "premature" on the basis of inadequate evidence of the effects of the scheme.[66] Justice Rothstein agreed with Chief Justice McLachlin and Justice LeBel's disposition of the s. 15 issue, but did so by finding that the *Corbiere* test had not been met: "[o]n the record before this Court, the category of 'agricultural worker' does not rise to the level of an immutable (or constructively immutable) personal characteristic of the sort that would merit protection against discrimination under s. 15".[67] While Justice Deschamps conceded that employment status is, "at least not at this time," regarded as an analogous ground,[68] she challenged the Court's restrictive approach to defining analogousness.[69] Justice Deschamps insisted that, "[t]o redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15, as L'Heureux-Dubé J. proposed in *Dunmore*."[70] As the now-retired Justice expressed these concerns, however, she acknowledged that, "[t]his, of course, would entail a sea change in the interpretation of s. 15 of the *Charter*."[71]

Part 3—Grounding Claims in Economic Disadvantage: Analogousness Applied

Throughout the various permutations of the Supreme Court's approach to s. 15 analysis, claimants and advocates have approached the courts with discrimination claims arising from various grounds related to the social and economic disadvantage, including receipt of social assistance, homelessness, social housing tenancy, social condition, low-wage employment (i.e. farm workers) and others.[72] Over the years, the courts have shown increasing

[66] *Fraser*, *supra* note 62 at para. 116.
[67] *Ibid.* at para. 295.
[68] *Ibid.* at para. 315.
[69] *Ibid.* at para. 318 (emphasis added): "*Dunmore* was concerned with economic inequality. It was based on the notion that the *Charter* does not ordinarily oblige the government to take action to facilitate the exercise of a fundamental freedom. Recognition was given to the dichotomy between positive and negative rights. To get around the general rule, a somewhat convoluted framework was established for cases in which the vulnerability of a group justified resorting to government support. I agree with B. Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009), 54 *McGill L.J.* 177, that this detour appears to have been an artifice designed to sidestep the limits placed on the recognition of analogous grounds for the purposes of s. 15."
[70] *Ibid.* at para. 317.
[71] *Ibid.* at para. 317.
[72] I have analyzed these various proposed grounds together because I perceive important similarities in the foundation of these proposed grounds (i.e. that they can generally be said to arise from or correspond to economic disadvantage); the arguments advanced in support of these claims; and the court's logic in rejecting them. It is very likely that the differences among these claimants' experiences, and the courts' attitudes towards these varying types of claims, warrant deeper consideration and comparative analysis. My focus, however, will be on the broad trends in the courts' treatment of grounds related to economic disadvantage, and the ways that the lower courts have responded to the changing Supreme Court jurisprudence on analogous grounds.

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resistance towards these claims, and an increasing tendency to dispose of them on the basis of an abstracted 'analogous grounds' inquiry.[73] The following survey aims to track this shift, and connect it to the Supreme Court's changing approach to analogous grounds.[74] In doing so, I hope to illustrate the applied significance of changes in the Court's approach, while illuminating some of the implications and distortions that arise from the increased formalism of the Supreme Court test. In particular, I hope to explore the dynamics by which the lower court judgments in these cases respond to the top Court's directives to pay less attention to social relations of disadvantage, and to instead locate analogousness within the perceived characteristics of the claimant group.

Since my aim is to track the influence of the Supreme Court's approach, this survey begins with the lower courts' decisions following the Supreme Court's first s. 15 decisions: *Andrews* and *Turpin*. Under *Andrews* and *Turpin*, courts generally concluded that the Supreme Court's disadvantage-based approach required that claims grounded in economic disadvantage were within the ambit of s. 15.[75] In *Federated Anti-Poverty Groups v. British Columbia (Attorney General)*, the British Columbia Supreme Court concluded that, "it is clear that persons receiving income assistance constitute a discrete and insular minority

[73] Rosalind Dixon has also observed this trend. See Dixon, *supra* note 49.

[74] There are of course, other ways of reading these cases and explaining their results. Wayne McKay and Natasha Kim, for example, survey essentially the same body of cases reviewed in this section and arrive at another way of explaining the outcomes: "even in the cases where the claimants succeeded the judges stopped short of finding that social condition or poverty was a stand alone analogous ground of discrimination. They relied instead on intersectionality in the particular cases." Wayne McKay and Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009) at 67.

[75] There were exceptions to this trend. In *R. v. Robinson*, [1989] A.J. No. 950 (C.A.), the Alberta Court of Appeal rejected 'indigency' (and the alternative ground, 'disposable income') as analogous grounds under s. 15. The applicant in *Robinson* alleged that the courts' discretion to deny legal aid to convicted persons seeking an appeal was unconstitutionally discriminatory on the basis of 'indigency'. Justice McLung, writing for the Alberta Court of Appeal, adopted a far more restrictive approach than the language of *Andrews* or *Turpin* could reasonably be seen to allow, positing that, "if indigency can fell legislation under the Charter, the Charter should say so" (at para. 94). This is clearly out of step with the Court's holding in *Andrews* that the listed grounds were not to be treated as exhaustive. Justice McClung was openly hostile to the applicant's claim, remarking that the impugned legislation "may discriminate against the proven guilty much as the Ten Commandments discriminate against sinners or limitation periods discriminate against the careless, but that hardly consigns it to the scrapheap of legislation that offends section 15(1) of the *Charter*" (at para. 92).

Note also *Clark v. Peterborough Utilities Commission*, [1995] O.J. No. 1743 (Div. Ct.), leave to appeal refused for mootness (40 O.R. (3d) 409), wherein the Court expressly declined to decide whether economically disadvantaged groups might engage analogous grounds (para. 70); and the Quebec Superior Court's decision in *Gosselin v. Québec (Procureur Général)*, [1992] R.J.Q. 1647, wherein the Court remarked in *obiter* (in a case advanced on the basis of the enumerated ground of age) that "[l]a pauvreté n'est pas une caractéristique discriminatoire conféreant un droit a l'égalité" (at 1674). (This was the trial court decision that was ultimately affirmed in *Gosselin* (SCC), *supra* note 12.)

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within the meaning of s. 15."[76] In *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, the Nova Scotia Court of Appeal similarly held that "public housing tenants…are a disadvantaged group analogous to the historically recognized groups enumerated in s. 15(1)."[77] Following *Sparks*, the Nova Scotia Supreme Court in *R. v. Rehberg* found that, on the facts of that case, "poverty is analogous to the listed grounds in s. 15".[78] Even in cases where the discrimination claim ultimately failed,[79] or in cases where discrimination was found to be justifiable,[80] the courts almost always accepted that economic disadvantage could give rise to an analogous ground that might found a successful claim in other circumstances.[81] Remarkably, even judges with more conservative views of the proper scope of s. 15 stated that the Supreme Court's decision in *Andrews* practically demanded that claims grounded in economic disadvantage were within the purview of s. 15.[82]

During the 'trilogy era' following the Court's split in *Egan*, *Thibaudeau* and *Miron*, the decisions in discrimination claims based on poverty were unsurprisingly inconsistent.[83] As noted above, both the stereotyping approach

[76] *Federated Anti-Poverty Groups v. British Columbia (Attorney General)* (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.). The Court further observed that, "Because recipients of public assistance generally lack substantial political influence, they are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending.'"

[77] *Sparks v. Dartmouth/Halifax County Regional Housing Authority* (1993), 119 N.S.R. (2d) 91 (C.A.). The Court expressly noted the connection between analogousness and disadvantage: "the [Supreme] Court gives direction as to the types of groups to be protected by s. 15; the shelter of s. 15 is not limited to persons and groups falling within the listed grounds of prohibited discrimination in s. 15(1), but extends to those which can establish that their condition is analogous to the listed ones. In particular, such analogy is made out where the evidence discloses the group complaining of discrimination is historically disadvantaged."

[78] *R. v. Rehberg* (1993), 127 N.S.R. (2d) 331 (N.S.S.C.).

[79] *Schaff v. Canada*, [1993] T.C.J. No. 389 (T.C.C.).

[80] *Alcoholism Foundation of Manitoba v. Winnipeg (City)*, [1990] M.J. No. 212 (C.A.) [*Alcoholism Foundation*].

[81] The exceptional cases where Courts found or suggested that grounds arising from economic disadvantage were not analogous are set out at note 75.

[82] In assessing a by-law requiring additional zoning permissions for group homes housing low-income people, the Manitoba Court of Appeal reluctantly found that the residents fell within the protection of s. 15: "prior to *Andrews*, *supra*, I would not have been inclined to think that a relatively small number of non-citizen lawyers in British Columbia formed a disadvantaged group warranting or needing protection under s. 15(1). That is now the law and I am bound to follow it…. I realize that the consequences of this ruling are serious and will give rise to enormous difficulties for the City of Winnipeg." *Alcoholism Foundation of Manitoba*, *supra* note 80.

[83] In *Masse v. Ontario (Minister of Social and Community Services)*, [1996] O.J. No. 363 (Div. Ct.), leave ref'd [1996] O.J. No. 1526 (C.A.); [1996] S.C.C.A. No. 373; the Ontario Court of Justice considered a claim of discrimination arising from massive provincial funding cuts that disproportionately affected social assistance recipients. Although united in finding that there was no equality violation, the justices took different approaches to the analogous grounds question. Justice Corbett found that the impugned legislation did not create a distinction, but noted that "In another context, social assistance recipients may well constitute an analogous group or a discrete and insular minority, as a historically vulnerable, disadvantaged, and marginalized group" (at para. 52). In the same decision, however, Justice O'Driscoll and Justice O'Brein both found that

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and the relevancy approach elaborated in the trilogy cases were united in their movement away from the disadvantage-focused approach to analogous grounds endorsed in *Andrews* and *Turpin*. In keeping with this shift away from a focus on disadvantage, lower courts considering claims grounded in economic disadvantage began to reinterpret the phrase 'discrete and insular minority' so as to require some kind of actual close-knit community or similarity among the members of the group. Although the Supreme Court explained in the *Andrews* and *Turpin* decisions that the phrase was meant to evoke political exclusion,[84] lower courts following the trilogy began to use this language *against* politically and socially marginalized claimants. In *Masse*, for example, two of three justices of the Ontario Court of Justice rejected receipt of social assistance as a viable ground of discrimination because of the diversity within the claimant group: "Section 15 of the Charter protects discreet [sic] and insular minorities. It does not protect disparate and heterogeneous groups."[85] Similar logic was employed by Justice Sharpe, writing for the Ontario Court of Justice in *Dunmore*, in finding that agricultural workers, although "a disadvantaged group", were too "disparate and heterogeneous" to warrant protection under s. 15.[86]

In addition to departing from the disadvantage-focused analysis of the *Andrews* and *Turpin* era jurisprudence, this insistence that heterogeneity should act as a bar to analogousness strains against the proposition that new grounds are defined by "analogy" to the listed grounds. The listed grounds themselves each delineate "disparate and heterogeneous" groups, such as women or the elderly; the same can be said of the analogous grounds recognized by the Supreme Court, which include citizenship, sexual orientation, and marital status. In fact, none of these grounds delineate uniform or cohesive social groups.

social assistance recipients did not warrant constitutional equality protection, because they constituted a disparate and heterogeneous group (at paras. 234-236 and 372-376).

In *Falkiner v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 3737 [*Falkiner COJ*], Justice Rosenberg expressed the view that the purpose of the analogousness inquiry was to "prevent or remedy discrimination against groups suffering social, political and legal disadvantage", and found that the impugned provision discriminated on the basis of receipt of social assistance. (The balance of the justices resolved the case on procedural grounds and did not address the substance of the s. 15 claim.) Conversely, in *Dunmore v. Ontario (Attorney General)*, [1997] O.J. No. 4947, aff'd [1999] O.J. No. 1104 (C.A.); [2001] S.C.J. No. 87; Justice Sharp wrote for the Ontario Court of Justice, acknowledging that "I have no hesitation in finding on the evidence that agricultural workers are a disadvantaged group" (at para. 45), but held that the analogous grounds requirement was not met: "the absence of evidence of any traits or characteristics analogous to those enumerated in s. 15 and which serve to identify those who make up the group of agricultural workers is fatal to their s. 15 claim" (at para. 48).

[84] See *supra* note 24.

[85] *Masse v. Ontario (Minister of Social and Community Services)*, [1996] O.J. No. 363 at 373.

[86] *Dunmore* (SCJ), *supra* note 83, at para. 45. The Ontario Court of Appeal, also writing during the trilogy era, briefly affirmed Justice Sharpe's decision, approving both "the result at which he arrived and his reasons". *Dunmore* (CA), *supra* note 83, at para. 1 (C.A.).

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Following the Supreme Court's decisions in *Law* and *Corbiere*, the establishment of an analogous ground, defined by a (constructively) immutable personal characteristic, was confirmed as a threshold requirement. Under this approach, claims grounded in economic disadvantage began to fail consistently at the analogous grounds stage. It bears mention at the outset that the primary exception to this rule is a major one.[87] In *Falkiner*, the Divisional Court found (and the Court of Appeal affirmed) that Ontario's spouse-in-the-house-rule violated s. 15 of the *Charter*.[88] The Court of Appeal decision, wherein receipt of social assistance was recognized as a distinct ground operating alongside sex and race, still stands as a high-water-mark in contextual, disadvantage-focused analysis of discrimination claims.[89] Daphne Gilbert has observed that the approach employed by the Court of Appeal in *Falkiner* is in fact closest in substance to the approach advocated by Justice L'Heureux-Dubé in the trilogy cases.[90] The Court of Appeal's explicit decision in *Falkiner* to recognize receipt of social assistance as an analogous ground, however, was not followed in subsequent cases. Instead, the courts have relied on the (constructively) immutable personal characteristics test to reject equality claims grounded in economic disadvantage.[91]

The *Corbiere* focus on the personal costs associated with changing a characteristic solidified the trend emergent under the trilogy towards requiring that analogous grounds be based on communities associated with positive identity-formation. In *R. v. Banks*, the Ontario Superior Court and the Ontario Court of Appeal concluded that various proposed grounds relating to economic disadvantage—including homelessness, "beggars" and extreme poverty—did not

[87] As noted below (note 111), motions to strike on the basis that economic disadvantage cannot give rise to an analogous ground also failed given that the issue remains unsettled by the Supreme Court.

[88] The majority in *Falkiner* (COJ), *supra* note 83, decided the matter on procedural grounds, remitting the case to the Social Assistance Review Board. The decisions here referenced considered the Board's subsequent decision on the merits.

[89] *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 59 O.R. (3d) 481 (C.A.). The Court of Appeal decision in *Falkiner* is described by Jennie Abell as "one of the strongest *Charter* decisions ever issued on the impact of poverty and receipt of social assistance on equality and dignity." Abell, "Poverty," *supra* note 12.

[90] Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L. J. 627 at 647 [Gilbert, "Time to Regroup"]: "*Falkiner* is perhaps the best example of a case applying L'Heureux-Dubé J.'s group-based approach…. Although [Justice Laskin] went through the technical steps of finding [receipt of social assistance] it to be analogous, it is evident that his focus was on identifying the group to which the appellants subjectively felt they belonged. He acknowledged their argument that they did not fit easily within one or another specific ground, as their claim intersected gender and civil status. Laskin J.A.'s focus on groups, even if phrased as grounds, is reminiscent of L'Heureux-Dubé J.'s wish to concentrate on a claimant's subjective identification with a group that has suffered historic oppression."

[91] In addition to the cases discussed below, see *Bailey v. The Queen*, 2004 TCC 98 at paras. 24 and 27, aff'd 2005 FCA 25 (see especially para. 12).

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constitute analogous grounds.[92] The Court of Appeal invoked the Supreme Court of Canada's reference to "great personal cost" in *Corbiere*, observing that: "The appellants have not put forward their lack of fixed addresses and the fact that they beg as components of a culture that is important to their identity".[93] The Court elaborated in *obiter*, in reference to the broader question (not raised by the claimants) as to whether 'poverty' could ground an equality claim, that, "while the 'poor' undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The 'poor' are not a discrete and insular group defined by a common personal characteristic."[94]

The *Corbiere* immutability requirement also gave rise to corollary inquiries into claimants' perceived choices and opportunities. In the result, courts considering the analogousness of economic disadvantage began to focus on imagined, hypothetical future improvements in claimants' circumstances, at the expense of inquiry into these claimants' actual disadvantaged positions. For example, in *Federated Anti-Poverty Groups (II)*,[95] the British Columbia Supreme Court rejected a s. 15 challenge to a by-law that restricted panhandling, holding that panhandlers "are not without other options", and that "[t]hus, the choice to panhandle is not an immutable trait".[96] In *Guzman v. Canada (Minister of Citizenship and Immigration)*, the Federal Court similarly relied on imagined opportunities instead of actual disadvantage, rejecting the asserted immutability of receipt of social assistance on the basis that "all indicators point to the fact that [the claimant] will become self-sufficient as soon as her English improves."[97] Similarly, in *Affordable Energy Coalition (Re)*, the Nova Scotia Utilities Review Board concluded that poverty failed to meet the (constructive) immutability

[92] The trial judge, Justice Babe, decided that s. 15 was not violated without deciding the analogous grounds question; he noted that the balance of the authority supported the position that poverty was not an analogous ground, but that the matter was not settled. *R. v. Banks*, 55 O.R. (3d) 374 (O.N.C.J.) On appeal, Justice Drambot considered the authorities and posited: "As a result of these decisions, I reach the conclusion that Babe J. did not reach: that the appellants have also not succeeded in the second inquiry that the court is called upon to determine in a claim under s.15 of the Charter." *R. v. Banks*, [2005] O.J. No. 98 (Ont. S.C.J.) at para. 70.
[93] *R. v. Banks* (2007), 84 O.R. (3d) 1 (C.A) at para. 101.
[94] *Ibid.* at para. 104. See also *Polewsky v. Home Hardware Stores Ltd.,* [1999] O.J. No. 4151, which sets out various reasons for refusing to accept poverty as an analogous ground, including: "The poor in Canadian society are not a group in which the members are linked by shared personal or group characteristics. The absence of common or shared characteristics means, in my view, that poverty is not an analogous grounds to those enumerated" (para. 54).
[95] *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493 (B.C.S.C.).
[96] *Ibid*, at 273.
[97] *Guzman v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 411 at para. 27, appeal dismissed as moot, 2007 FCA 358.

requirement since, "[i]f a person obtains employment, or receives a gift, they would escape from poverty at no great difficulty or cost."[98]

Following *Kapp*, the Court's stated return to *Andrews* led one lower court judge to conclude, under a disadvantage-based approach, that the economically vulnerable group of homecare workers constituted an analogous ground of discrimination warranting protection under the *Charter*.[99] The weight of the authority after *Kapp*, however, supports a continued application of *Corbiere* to defeat claims of discrimination rooted in economic disadvantage. The Nova Scotia Court of Appeal in *Boulter* upheld the Nova Scotia Utilities Review Board decision in *Affordable Energy Coalition (Re)*.[100] The Court of Appeal held that the (constructive) immutability test set out by the Supreme Court in *Corbiere* had overtaken the disadvantage-focused analyses that led the courts to recognize claims rooted in economic disadvantage in *Sparks* and *Rehberg*.[101] Again emphasizing the admittedly-unlikely possibility of change rather than the claimants' very real disadvantages, the Court concluded that, "[p]overty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources."[102]

The Court of Appeal in *Boulter* even went so far as to turn the claimants' disadvantaged status against them, relying on a distortion of the Supreme Court's condition, set out in *Corbiere*, that the state have no legitimate interest in changing an analogous characteristic in order to give the claimant access to the benefit claimed: "the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an immutable characteristic, but to eradicate that mutable characteristic of poverty itself".[103] This interpretation is like a bad game of 'broken telephone.' The Supreme Court's directive that the state have no legitimate interest in requiring that the claimant change *in order to access the benefit* (i.e. a form of relevancy), has a completely different meaning from the *Boulter* Court's abstract inquiry into whether the government has an interest in alleviating the conditions that defines

[98] *Affordable Energy Coalition*, *supra* note 52 at para. 181. McKay and Kim, *supra* note 74 at 72, have remarked on this problematic comment: "It has been shown through countless empirical studies and the application of common sense that poverty, though mutable, is something that is changed oftentimes at impossible costs and for many is virtually unchangeable. It is at the very least constructively immutable and should not be ruled out on that basis. Poverty is a long-term condition that does not easily admit of drastic change. A comment so wilfully blind to the plight of such a significant spectrum of the Canadian population (approximately 10%) shows the great disparity between the case law against adding social and economic disadvantage as a ground for discrimination under the *Charter* and the reality of the poor."

[99] *Confédération des syndicats nationaux c. Québec (Procureur general)*, [2008] J.Q. no 10735 at paras. 153, 329-330, and 365-366.

[100] *Boulter v. Nova Scotia Power Incorporated* , 2009 NSCA 17.

[101] *Ibid*. at para. 44.

[102] *Ibid.* at para. 42.

[103] *Ibid.* at para. 42.

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the group. By this logic, no disability would pass the test if the government had an interest in finding a cure or treatment. Perhaps most importantly for our purposes, however, this interpretation confirms the disjuncture between a focus on immutability and a focus on disadvantage, with the counter-intuitive result that disadvantage should weigh against access to s. 15 protection.

Recently, in *Toussaint*, the Federal Court of Appeal affirmed a Federal Court decision to reject a claim that the refusal of a fee waiver in a humanitarian and compassionate application under the *Immigration and Refugee Protection Act* discriminated on the basis of poverty.[104] The Federal Court viewed *Corbiere*'s (constructively) immutable personal characteristic test as barring claims based on economic disadvantage. After surveying the jurisprudence, the Court concluded that, "but for the *Falkiner* decision, there is no post-*Corbiere* jurisprudence supporting the position of the applicant and interveners", and found that *Falkiner* was distinguishable due to the intersection of enumerated grounds (sex and race).[105]

I note in concluding this review of lower court judgments that, despite the persistence of litigation raising economically-grounded discrimination claims, the Supreme Court has yet to offer direct guidance on these questions. I also note that the Court's failure to address this issue cannot be explained away by lack of an appropriate case. Bruce Ryder and Taufiq Hashmani have observed that the Court has chosen time and again not to deal with cases "raising the issue of whether poverty or receipt of social assistance is an analogous ground of discrimination".[106] Ryder and Hashmani note that leave to the Supreme Court was sought and denied in *Boulter*, *Masse*, and *Banks*.[107] Since the time of Ryder

[104] *Toussaint v. Canada (Minister of Citizenship and Immigration*), 2009 FC 873, aff'd 2011 FCA 146.
[105] *Ibid.* at para. 89. As noted above, this is another way in which this body of cases has been framed. See note 74.
[106] Bruce Ryder and Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 S.C.L.R. (2d) 505 at 527. Martha Jackman makes the even more striking observation that the Court has denied leave to appeal in "every…significant poverty case it has been asked to consider since" *Gosselin* (SCC)*, supra* note 12, was decided in 2002. In Jackman's view, this trend "can arguably be taken as a more telling expression of the Court's antipathy to poor people's Charter claims." Jackman, "Constitutional Castaways," *supra* note 6 at 322. In Sandra Rodgers' view, the Court's approach to leave applications, together with increasing hostility to the participation of interveners, "imply a self-referential arrogance that suggests that the Court fails to understand that it has much to learn from those who aspire to appear before it, does not fully appreciate itself as a democratic institution, funded by and on behalf of the Canadian polity, and has yet to embrace its responsibility for insuring that all Canadians have access to social justice". Sandra Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 S.C.L.R. (2d) 1 at 40.
[107] Ryder and Hashmani, *ibid.* at 527. Leave was granted to appeal the Ontario Court of Appeal's decision in *Falkiner*, but the Ontario government abandoned the appeal following a change in government. See Abell, "Poverty," *supra* note 12 at p. 284.

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and Hashmani's article, we may now add *Toussaint* to the list of leave applications refused by the Supreme Court.[108] Ryder and Hashmani note that the decision not to grant leave in *Boulter* was "disconcerting to say the least" in light of the excellent record before the Nova Scotia Court of Appeal. I would note the same about the *Toussaint* case.[109] As Jennie Abell has noted, there is further reason for concern over the Supreme Court's exercise of control over its docket in light of the high cost of litigation, and the attendant difficulties in bringing cases addressing the rights of poor people.[110] The result, as Ryder and Hashmani observe, is that "a quarter-century after section 15 came into force, litigants will have no authoritative ruling from the top court on whether the poor can benefit from Charter equality rights".[111]

Part 4—Reimagining Difference and Relocating Discrimination

I have stated at the outset that I view the developments canvassed above, in particular the receding significance of disadvantage and social exclusion in the analogous grounds analysis, as inconsistent with the demands of substantive equality. Margot Young has observed that the principle of "substantive equality" is often "invoked" without being "described".[112] Young seeks to remedy this definition gap by providing a more precise definition of "substantive equality", in contradistinction to "formal equality".[113] Young posits that in order to fall within the definition of substantive equality, an analytic framework must 1) account for power differentials; 2) be sensitive to the effects of law; 3) employ a deeply contextual analysis; and 4) recognize broad and positive state duties. The above survey has traced the evolution of a grounds analysis that increasingly fails at the doctrinal level to account for power differentials – the first of Young's requirement, and a factor that permeates her discussion of the other three.[114]

As Young explains, "terminology appropriate to such power differentials includes the notions of oppression and subordination – these are the problems

[108] *Toussaint v. Minister of Citizenship and Immigration*, 2011 CanLII 69660 (SCC).
[109] See the *Memorandum of Argument of the Intervener the Charter Committee on Poverty Issues* (June 29, 2010) available online at http://www.socialrights.ca/litigation/toussaint/ccpi%20toussaint%20moa%20fca.pdf (accessed September 20, 2012).
[110] Abell, "Poverty," *supra* note 12 at 267-268.
[111] Ryder and Hashmani, *supra* note 106 at 528. This lack of "authoritative ruling" is evident in the fact that motions to strike claims on the basis that poverty-related grounds fail the generalized analogousness inquiry have not succeeded, even after *Corbiere*, *supra* note 44. See, for example, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2000] B.C.J. No. 1536 (B.C.S.C.); and *Tupper v. Nova Scotia (Attorney General)*, [2007] N.S.J. No. 341 (N.S.S.C.), aff'd [2008] N.S.J. No. 187 (C.A.), leave ref'd [2008] S.C.C.A. No. 351.
[112] Young, "Unequal," *supra* note 7 at 190.
[113] Young, *ibid.* at 193-199. For an alternative elaboration of the definitions of formal and substantive equality, see Grammond, *supra* note 8 at 16-23.
[114] Young, *ibid.* at 193-199.

that a substantive equality analysis names and seeks to remedy".[115] Young argument that substantive equality analysis must acknowledge and respond to power imbalances is echoed in the Court's own early explanations of the purposes of s. 15.[116] In fact, it was this precise demand of substantive equality – attention to power differentials – which led to the adoption of the so-called "enumerated and analogous grounds" approach in *Andrews*. The Court viewed the function of the analogous grounds inquiry as "ensur[ing] that the claim fits within the overall purpose of s. 15—namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society".[117] The (constructively) immutable personal characteristic standard that currently defines the analogous grounds inquiry obfuscates rather than illuminates the relations of power and exclusion that are the proper concerns of substantive equality. This problem is compounded by the uncertain role that attention to disadvantage now plays in the balance of the s. 15 inquiry following *Kapp*.[118]

The Court's current approach suggests that what matters about the listed grounds—and by extension the key to defining new grounds—is that they are 'personal characteristics' that are impossible or difficult to change. What matters about these grounds, according to this approach, resides within the persons who comprise the group. The differences are real, and the Court can find them by looking closely at the claimant in isolation: her choices, her sense of identity, her 'characteristics'. The real social relationships that shape and constrain these factors have little force in an analysis that instead focuses on abstract, theoretical constructions of choice and immutability. The unlikely possibility of receiving a gift matters more than the very real constraints of poverty. The Court thus falls into the snare, identified by Martha Minow, of categorizing persons in ways that "deposit the problem of difference on the person identified by others as different", obscuring the possibility that "difference expresses patterns of relationships, social perceptions, and the design of institutions made by some without others in mind."[119]

I propose that the listed grounds, understood with reference to the requirements of substantive equality, in fact remind us to attend to the ways that

[115] Young, *ibid.* at 196.
[116] The unanimous Court in *Turpin*, *supra* note 20 at 1333, described the purpose of s. 15 as: "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."
[117] *Swain*, *supra* note 23 at 941.
[118] See the competing approaches set out in *Quebec v. A.*, *supra* note 62, and the criticisms in Sophia Moreau, "*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 *Ottawa L. Rev.* 283; and Jennifer Koshan and J. Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011), 16 *Rev. Const. Stud.* 31.
[119] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 79.

social categories have been constructed to produce and reproduce oppressive power relationships. These grounds denote specific, historicized social divisions that are unified by the fact that they have become fault lines of advantage and disadvantage, power and subordination. Discrimination does not, as the *Corbiere* approach suggests, inhabit the 'characteristic' around which discriminatory power dynamics arise: discrimination against people of colour does not exist in the skin pigment; discrimination against religious minorities does not exist in the mode of prayer or belief; discrimination against women does not exist in the double X chromosome. It is the social meaning that has been attributed to these characteristics which gives them the power to exclude, to limit opportunities, and to constrain autonomy. Yet this focus on pigment, on prayer, and on chromosome, is where the (constructively) immutable personal characteristics approach, stripped of attention to group disadvantage, directs our attention. It asks us not to look at real people in their nested relations of power, constraint, and autonomy.[120] It asks us not to look at the groups defined by socially constructed lines, but to look at the lines themselves, and treat those lines as if they have meaning and existence independent of the collective choices to transform them into barriers. It assumes that what is wrong with discrimination relates to *where* social barriers are constructed, not the fact that those barriers work to perpetuate dynamics of oppression and exclusion.

In the cases surveyed above, moreover, the grounds inquiry articulated in *Corbiere* does more than simply overlook the centrality of disadvantage and oppression. It creates a discrete threshold inquiry that works to defeat claims *because* of the claimant group's position of disadvantage. Abstract inquiries into the 'immutability' prompt courts to look for individual 'choice' instead of inquiring into the dynamics of oppression that constrain choice. It is only by analyzing choice as an on/off proposition, unmediated by social constraint, that the British Columbia Supreme Court could conclude that "the choice to panhandle is not an immutable trait."[121]

Sheila McIntyre has elaborated on the Court's use of "illusory choices" to obscure power relationships in equality claims:

> When choice is invoked to defeat a discrimination claim, it individuates a collective and systemic problem and operates much as crude forms of stereotyping do, by making difference—i.e., individual inequality—an individual or group deficit, reasonably stigmatized or subject to moral blame…. [T]he stern judicial response to what it treats as bad choices on

[120] See generally Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011).
[121] *Federated Anti-Poverty Groups (II)*, *supra* note 95 at 273.

> the part of claimants allows the Court to focus off the harms of unequal treatment of historically disempowered and stigmatized communities….[122]

As noted above, the interpretation of (constructively) immutable personal characteristics as requiring the presence of a 'desirable' trait—either in respect of the claimant's proud self-identity, or the government's lack of legitimate interest in changing the trait—are similarly invoked to frustrate rather than encourage a focus on confronting and remedying oppressive power relationships.

Thus the current approach not only 'misses the mark' in pinning down discrimination, it works to screen out the cases of the most marginalized: those whose choices are constrained in ways the Court can't or won't understand; those who cannot take pride or identity from their oppressed position; and those whose disadvantage arise from factors which the state has expressed legitimate interest in changing. In short, the grounds inquiry misses the point of substantive equality, and the social meaning that actually unites the listed grounds: the history of socially constructed power relationships along these lines.

Part 5 – Why Look at Groups or Grounds?

I return now to the core interpretive question that the Court originally attempted to answer in *Andrews* with the 'discrete and insular minority' inquiry: what do the listed grounds tell us about the purpose of Canada's constitutional equality protection? What is it about race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, that makes these differences matter for constitutional equality claims? And how can we know when the things that matter about those differences are also present in discrimination claims based on grounds other than those listed? In this section, I will consider these questions with reference to existing scholarly debate about the proper role of groups and grounds in Canadian discrimination analysis.

Equality scholars have debated whether it would be preferable for the Court to focus on 'groups', as Justice L'Heureux-Dubé proposed, or on 'grounds', as the balance of the Court has done. For added clarity, I will be faithful in this section to the semantic distinction between 'groups' of people affected by discrimination, and 'grounds' of discrimination. (It is not easy to do this in discussing the case law since the courts often use the terms interchangeably.) 'Grounds' describe the lines by which 'groups' of people are demarcated. For

[122] McIntyre, "Equality Jurisprudence", *supra* note 11 at 176-177. For further discussion of the Supreme Court's problematic approach to claimant's perceived choices in s. 15 cases, see Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law* 2002" (2003) 20 S.C.L.R. (2d) 93; Sonia Lawrence "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in McIntyre and Rodgers , eds., *Diminishing Returns*, *supra* note 11; and Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Faraday et al., eds., *Making Equality Rights Real*, *supra* note 11.

example, religion is a ground that delineates groups such as Hindus, Jews, or Sikhs. Similarly, age is a ground that defines delineates groups such as children or the elderly.

Diane Pothier casts the 'groups or grounds' debate as follows: "The essence of the critique of grounds is the claim that they are an artificial compartmentalization which obscures the complex reality of real life. In contrast, the defense of grounds is based on the contention that they serve to focus attention on the real sources of discrimination."[123] For her part, Pothier argues that, "abandoning grounds would weaken, rather than strengthen equality analysis… As long as discrimination continues to be practiced following historic patterns marked by grounds of discrimination, anti-discrimination law must pay close attention to those historic markers of the dynamics of power relationships."[124] Her primary concern is that when grounds are left out, so is attention to the specific, historical dynamics that give rise to particular oppressive power relationships; in her view, a more contextual approach to grounds, attentive to "real peoples' real experiences", would best bridge the competing demands of analytical flexibility and attention to the dynamics of power relationships.[125] Sheila McIntyre similarly declines to endorse departure from a grounds-based focus since "We need the grounds to illuminate who oppresses whom systematically."[126]

Daphne Gilbert, conversely, posits that Justice L'Heureux-Dubé's group-based focus on disadvantage is better able to account for conditions of group disadvantage, address intersectional claims, and allow the claimant to self-identify (which she sees as having an independent dignitary value). In her view, "Looking at the group does not require contextual abandonment. Looking at the ground, however, may require just that".[127] Colleen Sheppard, in her call for expansive definitions of grounds, nicely casts the debate between group-based and grounds-based approaches to equality as a "feminist post-modern dilemma" since "[i]t may be politically, strategically or rhetorically important to name a social phenomenon sexism, classism or racism, while acknowledging the limits of such categories in the same breath."[128]

[123] Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 44-45.
[124] *Ibid.* at 72.
[125] Pothier worries, for example, that asking simply whether a law disadvantages "domestic workers" as a group will relegate "the fact that they are predominantly immigrant women of colour" to mere "background social context", when in fact "[t]he grounds of gender and race are a crucial part of the explanation of why domestic workers have such poor working conditions and such weak legislative protection." *Ibid.* at 43.
[126] McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination," in Faraday, et al., eds., *Making Equality Rights Real*, *supra* note 11 at 113.
[127] Gilbert, "Time to Regroup," *supra* note 90 at 648.
[128] Sheppard, "Grounds," *supra* note 51 at 915.

I don't believe that there is any essential disagreement between these camps as to the necessity of including attention to the context of oppressive power relationships in s. 15 analysis. Indeed, Pothier casts her disagreement with Justice L'Heureux-Dubé as one of "focus and emphasis", not one of "polar opposites".[129] Gilbert suggests that Justice L'Heureux-Dubé's group-based framework may "in fact address the very limitations that Pothier identifies."[130] The concerns and priorities animating Gilbert and Pothier's discussions in particular are in perfect chorus: the importance of adequately addressing intersectional claims, attention to the claimant's perspective, and attention to power dynamics. The same might be said of Colleen Sheppard's call for expansive definitions of grounds,[131] or Denise Reaume's proposal to revise human rights statutes to transcend the current reliance on enumerated grounds ("prefabricated categories" or "pigeonholes"). In Reaume's view, a more principled approach would better respond to the reality that "the human phenomenon of discrimination—of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage—is not capable of being codified in precise terms of the sort that have characterized past legislative efforts".[132] Certainly McIntyre's desire to retain grounds in order to better expose "who oppresses whom systematically" is a direct expression of this demand to attend to power dynamics.

The jurisprudential trend identified in this article constitutes a turn away from the shared goals of McIntyre, Young, Sheppard, Pothier, Gilbert, Reaume, and Justice L'Heureux-Dubé (among many others). It is a turn away from a substantive equality analysis that attends to context and oppressive power dynamics. My primary concern here is not the optimal means of attending to power dynamics, but rather the more fundamental problem that the Court has excised attention to power dynamics from the doctrinal requirements of the analogous grounds analysis altogether.[133]

[129] Pothier, *supra* note 123 at 44.
[130] Gilbert, "Unequaled" *supra* note 40 at 14.
[131] Sheppard's analysis is expressly attentive to asymmetry. Sheppard refers to "the underlying larger purpose of equality rights in terms of redressing the historical disadvantage and prejudices experienced by certain groups in society". Sheppard, "Grounds", *supra* note 51 at 910.
[132] Denise Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall L.J. 113 at 130 and 143.
[133] The Court can (and sometimes does) attend to disadvantage when assessing novel grounds, but there is no longer any doctrinal directive to do so. See for example, the unanimous Court's decision, after *Corbiere*, in *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at para. 48, declining to recognize the residents of the town of Winkler as an 'analogous ground': "Although the Court in *Haig* left it open for residence to be established as an analogous ground in the appropriate case, I share the trial judge's view here that this is not such a case. Nothing suggests that Winkler residents are historically disadvantaged or that they suffer from any sort of prejudice." As the above survey of claims grounded in economic disadvantage reveals, however,

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The true counterpoint to the argument I present here is the view that attention to power differentials should not be essential to s. 15 grounds analysis. I have argued that the Court has adopted an approach to analogous grounds that reflects such a position. Others have expressly advocated such a view. Dale Gibson argued strenuously in the early days of s. 15 that the Court's focus in *Andrews* on disadvantage and power differentials was a mistake. In Gibson's view, the 'analogous grounds' inquiry added nothing to the s. 15 analysis, and *Charter* equality outcomes should be determined with reference to relevancy alone.[134] Aside from his semantic objection to the term "discrete and insular minorities" (which he termed an "linguistic abomination"),[135] he argued that Court's focus on group disadvantage was improper since the text of s. 15(1) made no reference to groups; the focus on disadvantaged groups improperly narrowed the scope of s. 15; and the terms "disadvantage" and "powerlessness" are challenging to define and apply.[136]

These criticisms cannot hold water once substantive equality is accepted as the core value animating s. 15. If, as the Court has stated, Canada's equality protection is substantive not formal, and "remedial" not neutral, broader power relationships must play a role in s. 15 analysis.[137] Further, the language of the 'ameliorative programs' exception in s. 15(2) contradicts any argument that the text of s. 15 is inattentive to groups, or that we can avoid the challenge of confronting the meaning of "disadvantage" when construing s. 15: "Subsection 15(1) does not preclude any law, program or activity that has as its object the amelioration of *conditions of disadvantaged individuals or groups* including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"[138] If the phrase "disadvantaged individuals or groups" appears in the *Charter*, it cannot be that the proper interpretive approach is to turn away from a purposive construction of the provision on the basis that "disadvantage" is a challenging concept, or "groups" are not contemplated as meaningful in the constitutional text.

Gibson himself admits that "Historically, there can be no doubt that the most frequent victims of discrimination have been members of disadvantaged minorities… and others who, though not [numerical] minorities, lack effective

the Supreme Court's express doctrinal directives form the analytic framework followed by lower courts deciding novel claims.

[134] Gibson, "Analogous Grounds" *supra* note 25; Dale Gibson, "Equality for Some" (1991) 40 U.N.B.L.J. 2 at 5-6 [Gibson, "Equality for Some"].

[135] Gibson, "Analogous Grounds", *ibid*., at 785.

[136] Gibson, "Equality for Some", *supra* note 134 at 6-8.

[137] The equality provision was cast in *Andrews*, *supra* note 17 at 171 as having a "large remedial component".

[138] *Charter*, *supra* note 3, s. 15(2). Emphasis added.

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influence in the community".[139] In his view, however, the symmetrical language in which the grounds are expressed in s. 15(1) is determinative, and certainly more important than the realities of discrimination that he has just identified.[140] He acknowledges the language of s. 15(2) (noted above), but emphasizes that this provision is an 'exception' that should emphasize rather than detract from what he views as a more expansive vision of equality: "apart from the special exception [s. 15(2)] creates, governmental discrimination against *anyone*, high or low, majority or minority, influential or voiceless, is proscribed by section 15 of the *Charter*."[141] This vision of equality is neither substantive nor remedial, and it ignores Justice L'Heureux-Dubé's insight (mirroring Gibson's own observation) that "it is merely admitting reality to acknowledge that members of advantaged groups are generally less sensitive to, and less likely to experience, discrimination than members of disadvantaged, socially vulnerable or marginalized groups".[142]

The groups/grounds stage of Canadian equality analysis offers a doctrinal opening for considering context—a space where the Court might invite inquiry into the ways that oppressive power relationships operate in synergistic fashion with the distinctions that emerge in a given claim. For this reason, I would not advocate, as Gibson does, scrapping this important opportunity to consider the broader social context which gives rise to a discrimination claim. Where the Court chooses to search for kernels of meaningful difference within claimants themselves, however, this valuable opportunity is lost: instead of attending to the way meaning is assigned to difference, the Court necessarily participates in shoring up and naturalizing established categories of difference.

Because the relevant power relationships giving rise to a discrimination claim are often multiple, and will always be situated in complex social relationships, a group-based approach seems somewhat better suited to the task of attending to context. An inquiry into group disadvantage reduces the conceptual space for focus on chimeric questions about 'traits' or 'characteristics.' I don't believe, however, that much hinges on the semantic distinction between groups and grounds as long as the focus remains on power differentials and construction of oppressive categories of difference as understood through the lens of disadvantage or oppression.[143]

[139] Gibson, "Equality for Some", *supra* note 134 at 7.
[140] *Ibid.* at 7: "To interpret 'discrimination based on…sex' as meaning 'discrimination against women' would require a gross distortion of the words used".
[141] *Ibid. Ibid*.
[142] *Egan*, *supra* note 27 at 554.
[143] Sheila McIntyre has argued that more forceful words than "disadvantage" are needed to effectively and accurately communicate about substantive equality: "There are stronger and more politically accurate umbrella terms than 'disadvantaged' for the situation of the groups in question: dispossessed, disempowered, demonized, dehumanized, degraded, debased, demeaned,

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In fact, the distinction between groups and grounds did not have much meaning in the *Andrews* era jurisprudence. When the inquiry into grounds was focused on disadvantage, as the 'discrete and insular minorities' approach was under *Andrews* and *Turpin*, the grounds inquiry was necessarily in fact an inquiry into the social realities facing a group of real persons. Groups like 'women' may be disadvantaged minorities in this sense while grounds like 'sex' cannot. By definition, a 'ground' symmetrically defines groups that may be in relative positions of advantage or disadvantage. This is also why it was plausible under *Andrews* to acknowledge, for example, that veterans may be 'analogous' under certain social conditions and not others: the 'analogousness' had nothing to do with the 'line' between veterans and others, and everything to do with the contingent social and material implications of actual or perceived membership in one group or another.[144]

But the attention to disadvantage that characterized the 'enumerated and analogous grounds approach' in *Andrews* has since been written out. We are now left with a focus on 'grounds' that is *actually* a focus on grounds-as-grounds rather than grounds-as-groups. The grounds-as-grounds inquiry directs our attention to the lines we draw, not the impact of these lines on human beings and human communities.

Conclusion

I expect that many readers will be skeptical that judicial outcomes, particularly in claims grounded in economic disadvantage, would be changed by revision to the Court's approach to analogous grounds. In fact I share some of this skepticism. Others who have conducted close readings of certain judgments surveyed in this article have exposed deeply entrenched and problematic judicial attitudes towards economically disadvantaged Canadians—a factor that would persist regardless of the doctrinal formulation of the analogous grounds test.[145] In fact, many of the decisions canvassed expressly state that, even if the grounds test were satisfied, the claim would fail at some later stage in the analysis.

In answer to this criticism, I echo Margot Young's cogent defence of her own inquiry into s. 15 doctrine:

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discredited. If a single generic is required, I propose 'oppressed'. These more starkly violative verbs evoke an active subject and invite critical judgment, not pious abstractions about concern, respect and dignity, far less condescending pity about 'the disadvantaged'". McIntyre, "Answering the Siren Call", *supra* note 126 at 103. I have continued to employ the term 'disadvantage' in this article, against McIntyre's urgings, in part because (as discussed above), the word appears in the text of s. 15. Since my focus is on the need to re-introduce attention to power relationships in Court's doctrinal expression of the requirements of s. 15, I view this textual connection as important.

[144] *Généreux*, supra note 21.

[145] See the essays in Young, et al., *Poverty*, *supra* note 2.

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> It is not my intention to place much faith in the nuances and intricacies of doctrinal formulation as the answers to section 15's troubles. Experience shows that doctrinal shadings are poor bulwarks against dominant ideologies and frames. But what we say section 15 asks us to do, and how we formulate the questions and perspectives a section 15 enquiry requires, matters. It matters because such detail offers some chance of moving judges to challenge their own ideological comfort zones, to be introspective about their own privilege, to reach beyond their own experiences to attempt comprehension of a litigant's unfamiliar story, and to look critically at who, at the end of the day, ends up with what.[146]

Substantive equality requires attention to disadvantage. Yet under the current doctrinal articulation of analogous grounds, this core concern literally has no place. The enumerated and analogous grounds analysis, initially established as a means of inquiring into disadvantage, has been reconceptualized as a symmetrical and abstracted inquiry. Now, where a claim is brought by a group that is not delineated by a listed ground, the Court is invited to dispose of the claim on the basis of criteria which have nothing to do with disadvantage, and very little to do with claimants or the groups they may be part of. Difference is located within the person marked different, not in the social relationships that construct and enforce difference.

One repercussion of this approach is that some of the most marginalized, oppressed, and vulnerable Canadians—including those living in poverty—are turned away at the courthouse door. In addition to blocking the substance of these claims, the current approach has a powerful signaling function. By excluding discrimination claims grounded in economic disadvantage on the basis of an abstracted, threshold inquiry, the Court's message is clear: it simply does not matter whether poor people are treated as lesser than others; it does not matter if they are shut out from important social, legal and political institutions, even in cases where that exclusion is based on hate, stereotype, or disgust. No matter the seriousness of the denial, the hatefulness of its motivation, or the extent to which it perpetuates and exacerbates oppressive power relationships: it is simply not the concern of Canada's constitutional equality protections. In addition to insulting and demeaning poor Canadians, this approach represents a striking repudiation of the attention to disadvantage demanded by substantive equality.

Doctrinal questions will certainly not answer all of the problems with Canada's fraught equality jurisprudence, or our courts' fraught relationship to claims brought by poor people. It matters, however, what the Supreme Court

[146] Young, "Unequal," *supra* note 7 at 219.

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instructs Canadian courts to ask when they hear an equality claim. If the Supreme Court is truly interested in a substantive and remedial equality provision, it is imperative that the Court sets out an equality analysis that asks a very different kind of question about equality claimants. The right questions about equality claimants are not questions about the claimants' perceived choices, or about the community and identification they may or may not feel with others in similar circumstances. The relevant answers cannot be about the remote possibility of getting a gift; the state's oblique and unfulfilled 'interest' in eradicating poverty; or the court's perception that the claimant takes no 'pride' or 'identity' from their oppressed position. When courts look at equality claimants, their purpose must rather be to illuminate dynamics of oppression and exclusion, and ask how and why categories of difference emerge as salient in a given context.

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Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory

Jessica Eisen*

Across and within jurisdictions, debates persist as to whether and why particular grounds of discrimination warrant special constitutional protection. This article explores the contributions that relational insights might make to these debates. Relational theory calls for greater attention to relationships and constant interrogation of the categories by which people are defined—imperatives that seem to sit uneasily with the demands of legal doctrine. Exploring both the United States' "suspect classification" doctrine and Canada's "enumerated and analogous grounds" doctrine, the author proposes that relational jurisprudential strands have in fact emerged in both jurisdictions. The author further argues that doctrinal approaches to grounds and classifications can be productively understood as either relational or categorical, and that this distinction is helpful in organizing and evaluating the diverse doctrinal options that have emerged in US and Canadian case law and scholarship. As the Supreme Court of Canada's recent decision in Kahkewistahaw First Nation v Taypotat *signals a willingness to revisit this foundational element of equality doctrine, this cross-country study argues that Canada's professed commitment to substantive equality requires the continuing development of relational doctrine, including in its grounds jurisprudence.*

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Introduction

In her broad thematic study of equality laws across a range of jurisdictions, Sandra Fredman identifies questions of "which characteristics . . . ought to be protected against discrimination and why?" as central scope-limiting inquiries in laws seeking to combat discrimination.[1] Equality laws may textually prescribe a set list of protected grounds;[2] provide an "open" list, inviting judicial extension;[3] or extend a broad equality guarantee with no mention of specific grounds, with courts creating their own judicially determined lists of protected grounds.[4] Lists of constitutionally protected grounds of discrimination vary in their scope and content, from the United States' relatively narrow list of judicially determined grounds warranting "heightened scrutiny" (race, national origin, alienage, sex and non-marital parentage)[5] to South Africa's lengthy, textually prescribed list of seventeen distinct grounds of discrimination—to which the South African Constitutional Court has made further judicial

1. Sandra Fredman, *Discrimination Law*, 2nd ed (Oxford: Oxford University Press, 2011) at 109. Fredman identifies the "reach" of equality law (i.e., spheres of social life to which anti-discrimination laws apply) and "who is bound by such laws" (i.e., vertical versus horizontal application) as other core scope-limiting inquiries. *Ibid* at 109–52. See also Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) (explaining, in his multi-country survey of discrimination doctrine, that "[w]ho is entitled to the protection of discrimination law is perhaps the most vexed question in this area of law" at 47).

2. Examples include United Kingdom and European Union discrimination law. See Fredman, *supra* note 1 at 113–18.

3. Examples include equality provisions in the Canadian and South African Constitutions and the European Convention on Human Rights. See *ibid* at 125–30.

4. The United States equal protection clause is an example. See *ibid* at 118–25.

5. I will use the term "heightened scrutiny" to refer to both "suspect" and "quasi-suspect" classifications. See *infra* notes 118–22 and accompanying text.

additions.[6] In some jurisdictions, protected grounds serve to trigger a higher justificatory standard, while in others, grounds act as a threshold requirement for successful discrimination claims.[7] Across and within jurisdictions, debates arise as to whether particular grounds warrant special protections and as to the broader question of what types of questions equality analysis should ask about equality claimants. The most commonly cited factors relate to the mutability or relevancy of a defining trait, or the social history and status of the claimant group.[8]

Judicial processes of building and interpreting lists of protected grounds of discrimination have often been fraught. In the US context, for example, Kenji Yoshino has observed a tacit judicial retreat from "suspect classification" analysis, arguing that this retreat is symptomatic of "pluralism anxiety"—a judicial fear of the social consequences of endlessly proliferating groups clamouring for special protection.[9] In Canada, an early judicial focus on group disadvantage and contextual analysis in defining "grounds of discrimination" gave way for some time to a more abstract and decontextualized inquiry into whether the personal characteristics that define potential claimant groups are impossible or difficult to change.[10] As in the US, this Canadian shift was accompanied by a hesitation to name new protected grounds, or even

6. See *Constitution of the Republic of South Africa*, No 108 of 1996 ("[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth", s 9(3)). See also *Hoffmann v South African Airways*, [2000] 2 SA 628 (S Afr CC) (establishing HIV status as a protected ground).

7. Compare US tiered scrutiny (where grounds serve as a spotlight for grounds warranting heightened scrutiny) with the current Canadian approach (where grounds serve as a screen, filtering out claims where no enumerated or analogous ground is established). See Parts II.B, II.C, *below*.

8. See Fredman, *supra* note 1 (observing that the "remarkably similar tests" that have emerged across jurisdictions have included inquiries into "[i]mmutability, choice and autonomy"; "[a]ccess to the political process"; "[d]ignity" violated by "treating individuals as less valuable members of society"; and "history of disadvantage" at 130–39 [emphasis omitted]). To this list, I add the perceived "relevancy" of the trait. See Canadian and US examples, *infra* notes 129 and 193–95 and accompanying text. *Cf* Khaitan, *supra* note 1 at 56–60 (arguing that judges relying on immutability and choice in defining grounds are in fact using these criteria to identify traits that are "normatively irrelevant").

9. Kenji Yoshino, "The New Equal Protection" (2011) 124:3 Harv L Rev 747 [Yoshino, "Equal Protection"].

10. See Part II.C, *below*.

consider legal claims that new grounds ought to be recognized.[11] The Supreme Court of Canada's most recent restatement of their approach to grounds of discrimination seems to signal a willingness to return to aspects of its early focus on group disadvantage, though it is not yet clear how deep or how permanent this shift will be.[12]

In both Canada and the US, individual justices have consistently resisted the often-prevailing tendency to view the grounds and classification inquiries as decontextualized list-making exercises. In this article, I consider a range of judicial approaches that have sought to attend to the oppressive relationships that give discrimination its bite, while avoiding the spectre of a "Pandora's Box"[13] of variously labelled "groups" clamouring for inclusion on an ossified and stereotypical "list". These approaches are consistent with a broader legal theoretical paradigm that has been developed under the banner of "relational theory", a body of scholarship that will be fleshed out below. Its solutions are both simple and paradigm shifting: attend to relationships in all their complexity, interrogate the categories with which people are described and listen across difference. But, as will also be elaborated below, these relational directives have often faltered on the shoals of legal doctrine. The turn away from categorical thinking, in particular, seems to challenge traditional understandings of legal reasoning.[14] Now, as the SCC seems prepared to reconsider the focus of its grounds inquiry, the time is ripe to take stock of the doctrinal options available and the theoretical framings that might offer guidance.

In this article, I seek to explore the contributions that relational insights might make to this pervasive and persistent set of doctrinal problems: what is equality law to do with all these groups, and how is equality law to assess which grounds of distinction should also be seen as grounds of discrimination? In pursuing these questions, I will focus in particular on the application of relational theory to constitutional equality law in Canada and the US—two jurisdictions which share many common features, but whose jurisprudence is

11. See *infra* notes 225–26 and accompanying text.

12. See *infra* notes 228–40 and accompanying text.

13. See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U Chicago Legal F 139 at 142 (for a critical discussion of one US judge's invocation of Pandora's myth in order to defeat intersectional discrimination claims brought by Black women).

14. See *infra* notes 56–58 and accompanying text.

characterized by significant differences in hospitability to relational insights.[15] While I will suggest that relational approaches to equality are possible and desirable in both jurisdictions, I will also propose that aspects of Canada's legal context make it particularly well-suited to relational analyses. I will further argue that Canada has departed from this relational potential in its grounds jurisprudence and that the SCC ought to follow through on recent signals that it may be returning to a more relational approach.

In Part I, I will set out the fundamentals of relational theory, with a particular focus on relational approaches to difference, equality, rights and legal doctrine. I will argue here for the value of relational consideration of doctrinal questions, and offer a brief sketch of the ways in which relational theory might illuminate trends and arguments surrounding grounds of discrimination. In Part II, I will begin by setting the stage for a Canada-US comparison of grounds analysis by elaborating relevant differences in the broader legal context. I will go on to describe the US "suspect classification" doctrine and the Canadian "enumerated and analogous grounds" doctrine, offering a relational analysis of prevailing and recent doctrine, along with dissenting approaches within each jurisdiction. In Part III, I will consider scholarly debates within each jurisdiction as to whether doctrinal inquiries should focus on groups/classes or grounds/classifications. I will suggest here that relational theory might help to reframe and resolve aspects of this problem as it emerges in both jurisdictions. Finally, in the Conclusion, I will propose that relational theory can be (and has been) productively employed to improve legal reasoning in both jurisdictions, and that Canada offers particularly fertile legal terrain for a more robust adoption of relational doctrine. In fact, Canada's professed commitment to substantive equality requires it.

15. On the utility of Canada-US comparison more generally, see Ran Hirschl & Christopher L Eisgruber, "Prologue: North American Constitutionalism?" (2006) 4:2 Intl J Constitutional L 203; Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010) at 234–43. On the differential hospitability of Canadian and US law to relational approaches, see Part II.A, *below*.

I. Relational Rights

Robert Leckey rightly notes that "[r]elational theory is not an officially constituted school, and its boundaries are contestable."[16] Yet common threads are discernible among relational theorists—threads comprised of common cosmological and epistemological claims, methodological prescriptions and normative commitments. Pared down to its most basic premise, relational theory calls for a "shift in emphasis"—moving relationships "from the periphery to the centre of legal and political thought and practice".[17] Importantly, this call for a "shift" acknowledges that relational theory is in important ways a *reaction* to extant framings, rather than a "grand theory" purporting to be spun from whole cloth.[18] In particular, social relations theorists take to task traditional liberal assumptions about persons as autonomous, rational and independent political actors.[19] Instead, relational theorists posit that relationships are constitutive of persons and institutions—a position which in turn gives rise to a normative demand that problems be reconceived and addressed in ways that honour this core truth. To this end, social relations theorists have worked to build up new metaphorical, rhetorical, political and legal alternatives to the paradigmatic liberal account, in order to correct this perceived failure and to adequately account for the centrality of relationships to political and legal questions.

This Part will elaborate the basic form of analysis advanced by relational theorists, as well as certain relevant points of contestation, with an eye to exhuming relational theorists' critiques and prescriptions for revising liberal theory, equality law and rights. I will emphasize two core elements of relational theory. The first is a portrait of human persons as embodied, affective and

16. Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008) at 7 [Leckey, *Contextual Subjects*]. Leckey describes relational theory as consisting of three interrelated schools: one which emphasizes differences between men and women, and the ethics of care relationships; another which analyzes rights as relational; and a third which focuses on elaborating relational conceptions of autonomy. *Ibid.* The relational theory I discuss here is primarily focused on the strand Leckey identifies with relational rights analysis.

17. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 3. See also Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 15.

18. See e.g. Minow, *supra* note 17 at 15.

19. For a summary of arguments that relational theorists have oversimplified or mischaracterized liberalism, see Leckey, *Contextual Subjects*, *supra* note 16 at 9.

essentially constituted by social relationships. The second is an emphasis on the socially constructed and contested deployment of categories, and an attendant wariness of categorical thinking that may rely on apparently natural social groupings. This discussion will conclude that relational theorists have posed important critiques relevant to constitutional equality law, but will also observe that prescriptive links between these criticisms and legal equality doctrine pose special challenges. I will conclude by arguing that the application of relational theory to doctrinal questions is nonetheless possible and valuable, setting the stage for the comparative analysis that follows.

A. From Liberal Individuals to Relational Selves

Relational theorists share a common concern that traditional liberal legal theory rests on an erroneous assumption that human persons should be understood as independent, atomistic, rational units.[20] This atomistic individual of liberal theory, Martha Minow explains, "is thought to have wants, desires, and needs independent of social context, relationships with others, or historical setting".[21] Relational theorists argue that this vision of the autonomous, independent, self-actualizing rights-bearer is a fiction, and a dangerous fiction at that.[22] The critique has cosmological, political and discursive dimensions. At the level of cosmology, relational theorists hold that social relationships are constitutive of human personhood.[23] Everything about who we are, what we need, what we are capable of and what we aspire to emerges from the dense networks of social relationships in which we are not just embedded, but also generated and regenerated through ongoing and iterative interactions. These relationships are "shaped by a complex of intersecting social determinants,

20. See e.g. *ibid*; Martha Minow & Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 11:1 Hypatia 4 at 12; Lorraine Code, *What Can She Know?: Feminist Theory and the Construction of Knowledge* (New York: Cornell University Press, 1991) at 78; Catriona Mackenzie & Natalie Stoljar, "Introduction: Autonomy Refigured" in Catriona Mackenzie & Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 1999) 3 at 6; Minow, *supra* note 17 at 124.

21. Minow, *supra* note 17 at 151–52.

22. See notes 23–34 and accompanying text, *below*.

23. For an extended relational account of the self, see Nedelsky, *supra* note 17 at 158–94. See also Leckey, *Contextual Subjects*, *supra* note 16 at 106; Anne Donchin, "Autonomy and Interdependence: Quandaries in Genetic Decision Making" in Mackenzie & Stoljar, *supra* note 20, 236 at 239–40.

such as race, class, gender, and ethnicity".[24] They range from the intimate and interpersonal—such as those with parents, friends or lovers—to the systemic—such as the relationship between citizen and state, or the relations entailed by "being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming".[25] These various levels of relationship operate concurrently and interactively to constitute human subjects[26] who, in turn, contribute to the structure and content of those same relationships.[27]

The essence of the political critique is that the atomistic liberal self is not truly ahistoric at all, but is rather a caricature of masculine and historically contingent ideals, masked by a claim to abstraction.

> The very human being who could be imagined as abstracted from context is a particular sort of person with a specific history and identity. It is a person living some time after the seventeenth century in western Europe or the United States, a person who avoided feudal bonds and lived away from any religious, ethnic, or family group whose members defined themselves through such a group.[28]

The abstract and atomistic liberal individual is charged with being particularly ill-suited to describing the lives of women, children and disabled persons,[29] while also providing the foundation for a vision of rights that excludes those who do not fit the mould.[30] The fictitious liberal rights-bearer is thus seen to replicate, perpetuate and mask oppressive power structures that marginalize those who least accord with a wealthy-white-male norm—a norm for which he serves as both guardian and exemplar.

At the level of discourse, relational theorists urge that the constrained vision of the liberal self leaves us unable to adequately describe and debate

24. Mackenzie & Stoljar, *supra* note 20 at 4.

25. Nedelsky, *supra* note 17 at 19.

26. Some relational theorists have extended the relational account to include legal approaches to non-human animals. See e.g. Maneesha Deckha, "Non-Human Animals and Human Health: A Relational Approach to the Use of Animals in Medical Research" in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) 287; Nedelsky, *supra* note 17 at 194–99.

27. See Nedelsky, *supra* note 17 at 21.

28. Minow, *supra* note 17 at 152–53.

29. See e.g. *ibid*; Christine M Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lanham, Md: Rowman & Littlefield, 1997) at 105, 113.

30. See e.g. Minow, *supra* note 17 at 105–07, 125–45 (describing the "abnormal persons" approach to law and rights).

legal questions. By ignoring the significance of relationships in defining legal and political problems, liberalism constructs a vision of rights that relies excessively on metaphors of boundary—protecting the individual from intrusions, rather than building relationships that foster values.[31] Jennifer Nedelsky explains that the "perverse quality" of political and legal projects cast in terms of protecting autonomous individuals from community intrusions "is clearest when taken to its extreme: the most perfectly autonomous man is the most perfectly isolated".[32] When political and legal problems are framed in individualistic terms, without adequate attention to the social relationships undergirding a conflict, we are left without discursive space for attending to "the true sources and consequences of the patterns of power",[33] or the extent to which "people have unequal access to resources and . . . power to control or value their own lives".[34] The discursive promise of relational theory is thus that greater attention to context, particularity and relationship will yield more constructive legal and political conversations that better illuminate the values and interests at stake.[35]

B. Categorically Different: Relational Conceptions of Difference and Identity

The relational contention that the paradigmatic, isolated individual of liberal theory is in fact particular and historical destabilizes a host of related assumptions. Once we accept the relational premise that there is no possibility of adopting an un-situated perspective, all sorts of liberal intuitions about the

31. Nedelsky, *supra* note 17 ("[a] distorted picture of the self is likely to generate a distorted understanding of autonomy [and other values], and a system of rights designed to promote and protect that vision of self and autonomy is unlikely to optimally foster and protect human capacities, needs and entitlements" at 159).

32. *Ibid* at 97.

33. *Ibid* at 108.

34. Cathi Albertyn & Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14:2 SAJHR 248 at 251.

35. *Cf* Leckey, *Contextual Subjects*, *supra* note 16 (arguing that relational theorists imply that "merely undertaking a relational inquiry is likelier than not to lead to policy outcomes congenial to feminist missions" at 14). While I think this argument has some merit as it applies to the presentation of certain relational arguments, it is more helpful to think of the relationship between politics and method in relational theory as running in the opposite direction; instead of wrongly suggesting that a methodological attention to relationships will necessarily yield politically desirable results, relational theorists rightly suggest that certain emancipatory political projects cannot be adequately advanced through methods which are inattentive to relationship.

meaning of difference, the concerns relevant to adjudicating disputes and *who* exactly has produced and perpetuated these intuitions—and who has been harmed by them—are opened up to debate.

Martha Minow has explored these questions with reference to the role that categories play in legal analysis—particularly categories that describe people.[36] In Minow's view, legal analysis often seeks to "break complicated perceptions into discrete items or traits" and then sort those traits or items into categories—often without interrogating the provenance of those categories.[37] Minow's core claim is that "we make a mistake when we assume that the categories we use for analysis just exist and simply sort our experiences, perceptions, and problems through them".[38] Acts of categorization are in fact social choices that ascribe and perpetuate meanings and consequences for those traits that we choose to make significant.[39] Minow does not thereby deny that there are real differences between people, but rather emphasizes that the categories by which we describe and assign meaning to such differences are social choices that reflect and maintain power relationships.[40] When we ignore the chosen and situated nature of categories like race, sex or disability, we run the risk that "[t]he labels point to conclusions about where an item, or an individual, belongs without opening for debate the purposes for which the label will be used."[41]

In response to this problem, Minow advocates a "social relations approach", which requires "a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions".[42] Thus, under a relational approach, questions about who has the power to describe are of central importance to understanding and overcoming the oppressive potential of categories.[43] For Minow, claims to knowledge of who or what counts as different should be "assessed in light of the power

36. Minow, *supra* note 17 (noting that the impact of legal categories like "competent" and "incompetent", which elide the reality that people "exhibit a range of capacities and abilities", and ignore "the possibility that certain kinds of incapacity could be remedied by different social practices; certain kinds, indeed, were created by them" at 8).

37. *Ibid* at 3.

38. *Ibid.*

39. See *ibid.* See also Koggel, *supra* note 29 at 27 (drawing on Wittgensteinian theory in elaborating a relational approach to language use, urging a focus on category as an *activity* rather than a structure with independent existence).

40. Minow, *supra* note 17 at 3. See also Koggel, *supra* note 29 at 28.

41. Minow, *supra* note 17 at 4.

42. *Ibid* at 15. See also Albertyn & Goldblatt, *supra* note 34 at 253.

43. See e.g. Koggel, *supra* note 29 at 37.

relationships between those assigning the labels and those receiving them" so that "the meaning of the differences may become a subject of debate rather than an observable 'fact'".[44] The political project of opening discursive space for voices traditionally marginalized from the construction of difference thus becomes crucial to relational approaches.[45]

C. Relational Values: Reconceiving Equality and Rights

The relational project is undeniably a law project—perhaps even primarily an equality law project. Despite a more sustained theoretical focus on the value of autonomy as opposed to equality,[46] relational texts consistently take up examples from constitutional equality law to elaborate their frameworks.[47] Relational theorists often share a wariness of traditional liberal constructions of rights as trumps, but also seem to share a desire to rehabilitate, rather than discard, rights as a legal mechanism. The trouble with rights, on relational accounts, is their potential to support status hierarchies, leaving open only the question of who belongs on top;[48] their potential to recast conflicts in a manner that obscures important relationships and the true nature of the interests at stake;[49] and their potential to ossify into rigid categories that disguise the social choices they represent.[50] But despite these concerns, relational theorists have generally sought to reorient rather than reject rights language. Often their concerns are pragmatic: rights are a pervasive and entrenched aspect of legal and social life,[51] they have been instrumental to successful justice movements[52] and they have a unique expressive force in asserting needs and constraining

44. Minow, *supra* note 17 at 171.

45. See e.g. Koggel, *supra* note 29 at 67–68; Minow, *supra* note 17 at 112–13.

46. For an introduction to relational autonomy, see the essays in Mackenzie & Stoljar, eds, *supra* note 20.

47. See e.g. Minow, *supra* note 17 at 114–20 (US equal protection law); Nedelsky, *supra* note 17 at 258–64 (US and Canadian equality law); Albertyn & Goldblatt, *supra* note 34 (South African equality law).

48. See e.g. Minow, *supra* note 17 (arguing that rights discourse assumes that "the status quo is natural and good, except where it has mistakenly treated people who are really the same as though they were different" at 109).

49. See e.g. Nedelsky, *supra* note 17 at 250.

50. See *ibid* at 233.

51. See *ibid* at 73.

52. See Minow, *supra* note 17 at 307.

power.[53] Perhaps most significantly, rights require that certain types of harms have a claim to attention and response—a function that well serves the relational imperative to increase consideration of the voices and perspectives of marginalized groups and individuals.[54] On relational accounts, the salutary aspects of rights can be preserved, and their dangers minimized, by recasting rights as contingent, debatable social choices and by rejecting formalist analysis in favour of approaches that focus on the actual, lived relationships engaged by rights claims.[55]

When it comes to how best to understand and reform legal reasoning, however, a divergence appears among relational theorists as to whether reforming legal doctrine is a useful enterprise. Given the abstract and categorical qualities of traditional doctrinal inquiry, Minow has argued that "the very language of legal 'tests' and 'levels of scrutiny' converts significant social choices into mechanical and conclusory rhetoric".[56] For Minow, a consciousness of the power dynamics expressed through categorization requires a preference for particularity and context over abstraction and category.[57] Minow is conscious of the radical implications of such a proposition for legal analysis, conceding that, if taken seriously, relational thinking may "threaten the very idea of law as authoritative and commanding".[58] Nonetheless, Minow is interested in pursuing the ways that legal reasoning might be transformed by relational thinking—but not through attention to doctrine. Thus, one of Minow's most fully elaborated examples in *Making All the Difference* includes a close reading of the judicial reasons in the US Supreme Court's decision in *City of Cleburne v Cleburne Living Center, Inc*,[59] wherein she expressly declines to wade into the doctrinal debates (which we will return to below); instead, Minow focuses on the "clash in world views that occurs *behind* the justices' arguments over legal doctrine".[60] Minow does not go so far as to say that the Court can do without doctrine altogether,

53. See *ibid*. *Cf* Patricia J Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv CR-CLL Rev 401.

54. See e.g. Koggel, *supra* note 29 at 204; Minow, *supra* note 17 at 207.

55. See e.g. Koggel, *supra* note 29 at 202–03; Nedelsky, *supra* note 17 at 249; Minow, *supra* note 17 at 307–09.

56. Minow, *supra* note 17 at 105.

57. *Ibid* (urging that a relational approach "resists solution by category" at 215).

58. *Ibid* at 224.

59. 473 US 432 (1985) [*Cleburne*].

60. Minow, *supra* note 17 at 105 [emphasis added].

but she does seem to suggest that, when it comes to relational reconstruction of equality rights, doctrine is not the best place to focus.[61]

On the other hand, relational scholars including Nedelsky,[62] Colleen Sheppard[63] and Nitya Duclos (now Iyer)[64] have pursued projects that actively explore doctrinal solutions to relational critiques of legal rights analysis. All three are clearly influenced by Minow's theoretical propositions but take on doctrinal reconstruction as a core dimension of their relational analyses. Notably, Nedelsky, Sheppard and Iyer focus in whole or in part on Canadian law, while Minow's more skeptical take on doctrine as a site of relational engagement emerged in the context of a study of US law. The divergence in approach may be explained in part by the fact that Canada's equality jurisprudence is more amenable to relational insights than the US' equal protection law, as will be discussed below.[65]

There is much to what Minow says about doctrinal analysis masking or deflecting attention from deeper debates about underlying social choices. These deeper debates, however, exist not just *behind* doctrinal forms as Minow intimates, but also *within* them. This article will consider doctrine as its own site of power, meaning-making and expression of values, and therefore as a potentially constructive site of relational reform. Alongside the many factors that give law its shape and meaning, doctrine persists as part of the language and form of legal reasoning. The present inquiry is not doctrinal in the conventional sense of seeking to discern the true or proper form of legal reasoning; it instead treats doctrine as discourse and seeks to examine the way the law talks about justice.

Another reason to focus on the doctrinal dimensions of equality law is the advancement of concrete and workable applications of relational theory. Many of the works expounding the relational dimensions of equality operate in broad strokes, focusing on general approaches to defining equality,[66] understanding

61. See e.g. Minow, *supra* note 17 at 112, 119 (offering prescriptions for infusing relational considerations into judicial reasons, none of which relate to doctrinal form).

62. Nedelsky, *supra* note 17.

63. Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queens University Press, 2010) [Sheppard, *Inclusive Equality*].

64. Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6:1 CJWL 25; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19:1 Queen's LJ 179.

65. See Part II.A, *below*.

66. See e.g. Koggel, *supra* note 29.

relational approaches to difference and diversity,[67] or exploring doctrinal problems as brief examples in elaborating the many complex "puzzles" that a relational habit of thought provokes across a range of political, social and legal contexts.[68] Perhaps because of a desire to complicate the very sort of categorical and mechanical reasoning that often dominates doctrinal debate, relational theorists have often chosen to engage in projects that do not require sustained doctrinal study.[69]

I propose that relational theory offers important insights into how we might better conceptualize persistent debates arising from competing legal approaches to equality. Many of these debates, however, take place in the language of doctrine and in the fora of legal argument and decision. A key challenge for relational theory, if it is to make itself relevant to these debates, is to translate its insights into these languages. The process of building relational habits of thought must include engagement with the languages that law speaks *now*.[70]

The puzzles surrounding doctrinal approaches to grounds of discrimination and suspect classifications are a fruitful starting point for such engagement. These particular doctrinal problems are necessarily inscribed with relational and doctrinal meanings at once: the need to identify grounds of discrimination has persistently arisen as a core question for equality doctrine,[71] and the drawing of social lines that this need has provoked practically demands attention to relationship. The doctrinal formulations seem to spill inevitably, if awkwardly, into decidedly relational territory when they ask which groups or grounds matter and why. I hope here to take this doctrinal question, as it appears in Canadian and US constitutional equality jurisprudence, as a starting point for thinking through the ways that relational framings might productively shift the terms of doctrinal debate.

67. See e.g. Minow, *supra* note 17.
68. See e.g. Nedelsky, *supra* note 17 at 4–5.
69. See e.g. text accompanying notes 56–61, *above*. But see Duclos, *supra* note 64.
70. Nedelsky, *supra* note 17 at 4.
71. See text accompanying notes 1–8, *above*.

II. Suspect Classification and Analogous Grounds: Relational Approaches to Doctrine

Having set out the general contours of relational theory and argued in support of relational consideration of doctrinal questions, we may now return to the central question of this article: what do relational insights tell us about doctrinal inquiries into grounds of discrimination? The short answer might look something like this: we should use grounds and classes in our doctrinal analyses in ways that acknowledge the social provenance and contestability of these terms, invite diverse perspectives into judicial discussions over their contestable meanings, and keep our use of these analytic frames firmly anchored in social purposes (which must themselves be contestable and solicitous of diverse perspectives); and we should not allow the drive to find and apply simple categories to prevent us from seeking out these relational dimensions of equality claims. The longer answer requires us to delve into questions about how courts have actually deployed groups and grounds, and the extent to which various doctrinal approaches have succeeded or failed in achieving the ambitions telegraphed in the short answer. In this Part, I will survey the contested and evolving doctrines of suspect classification in the US and grounds of discrimination in Canada, with special attention to the extent to which these doctrines have succeeded in relational terms.

In the preceding Part, I offered a survey of some key elements of relational theory, with a focus on the relational claims that persons are embodied, affective and constituted by their relationships, and that the categories by which people are organized are socially constructed and always contestable. I have also noted that these claims have been advanced in contrast to perceived failings of a liberal approach that tends towards deployment of abstract and naturalized notions of persons and categories. Some scholars have argued that relational theorists have wrongly caricaturized liberalism, and that liberal theory is in fact quite capable of acknowledging and responding to the particularized, social persons described by relational theory.[72]

It is not my aim here to adjudicate this dispute as it concerns any particular liberal theorists, but rather to show that the relational critique of liberalism illuminates a very real split in legal thinking, and that this split offers a useful way of conceptualizing the doctrinal choices that have been made in the law

72. See Leckey, *Contextual Subjects*, *supra* note 16 at 9.

and scholarship on US suspect classification and Canadian analogous grounds. On the one side, there is a clear drive to naturalized, abstract categorization and list-making, most evident in the narrowest versions of the claim that the focus of discrimination analysis should be on immutable traits which are personal to the claimant and apply symmetrically, regardless of realities of social advantage or disadvantage that may attach to the trait.[73] On the other side, there is a drive to take up suspect classification and analogous grounds as a doctrinal opening to consider the ways in which claimants' lives have been shaped by broader social relationships, and the mechanisms by which conceptual lines drawn around groups of people express and confirm contestable power relationships. It is these poles—the relational and the categorical—which I will rely upon in organizing the account of suspect classification and analogous grounds that follows.

A. Canada-United States Comparison

Relational scholars of Canadian and US equality law have generally observed that Canadian equality law is more receptive to relational insights.[74] As a general matter, I think that this characterization is accurate and that Canada's stated commitment to "substantive" rather than "formal" equality seems to practically demand relational analysis. In this Part, though, I hope to complicate this general account by tracing approaches and retreats from relational insights in the grounds jurisprudence of each jurisdiction, and by highlighting a common relational counter-current that has been pressed by particular justices in both jurisdictions.[75] In a related vein, I hope to complicate accounts of the Canadian jurisprudence that have cast the analogous grounds inquiry as constant or uncontested.[76] But before zooming in to grounds and

73. See Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 (for a typology running from "narrow immutability" to "multivariable" approaches to analogous grounds).

74. See e.g. Nedelsky, *supra* note 17 at 262; Sheppard, *Inclusive Equality*, *supra* note 63 at 30–31.

75. *Cf* Vicki C Jackson & Jamal Greene, "Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?" in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law* (Cheltenham, UK: Edward Elgar, 2011) 599 ("[i]n those countries that permit separate opinions and thereby facilitate the development of competing interpretive approaches within a single system, differences among individual judges may be as striking as differences across courts" at 599).

76. *Cf* Hon Lynn Smith & William Black, "The Equality Rights" (2013) 62 SCLR (2d) 301 (maintaining that, "[i]n contrast with dramatic variations in equality analysis in other respects,

classifications, I want to first zoom out to suggest two more general and interrelated features of Canadian law that make it relatively more hospitable to relational analysis: proportionality analysis and dialogic constitutionalism.

First, Canada's constitutional text and jurisprudence have embraced proportionality analysis—an analytic form that prompts courts to consider the extent to which rights infringements may be justifiable by governments pursuing reasonable means of achieving compelling interests.[77] In Canada, proportionality analysis is invited by the *Canadian Charter of Rights and Freedoms*' Limitations Clause, which provides that rights—including equality rights—are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[78] Proportionality analysis requires, *inter alia*, that the governments seeking to justify rights infringements adduce "legislative facts" relating to an impugned law's purpose and impact, and that courts balance the law's salutary effects and deleterious consequences.[79] While proportionality-like considerations have arguably been included in US constitutional interpretation as well, proportionality has not

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the requirement for a section 15 claim to be based on an enumerated or analogous ground has remained constant" at 335–36 [footnote omitted]); Lillianne Cadieux-Shaw, "A Web of Instinct: Kahkewistahaw First Nation v Taypotat" *TheCourt.ca* (7 September 2015), online: <www.thecourt.ca/a-web-of-instinct-kahkewistahaw-first-nation-v-taypotat/> (asserting that the *Taypotat* decision "does not alter the law of section 15 of the *Charter* in any substantial way").

77. For a detailed introduction to proportionality analysis, drawing on Canadian examples and considering the application of proportionality principles in the US context, see Vicki C Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124:8 Yale LJ 3094 [Jackson, "Proportionality"].

78. *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

79. Generally, limitations analysis has followed the test set out in *R v Oakes*, [1986] 1 SCR 103 at 104, 26 DLR (4th) 200. The *Oakes* test holds that laws infringing *Charter* rights are justifiable only where the government proves that they are sufficiently precise and clear as to be "prescribed by law"; pursue a pressing and substantial governmental objective; use means rationally connected to that purpose; minimally impair *Charter* rights; and, overall, have salutary effects which outweigh their deleterious consequences. Although the Court has generally followed this framework fairly consistently, there have been significant differences within the Court and between cases as to the nature of the burden on government at each stage and as to which factors are properly considered in defining the scope of a right as opposed to permissible limitations on a right. See e.g. Sujit Choudhry, "So What is the Real Legacy of *Oakes*?: Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 [Choudhry, "Decades"]; Claire Truesdale, "Section 15 and the *Oakes* Test: The Slippery Slope of Contextual Analysis" (2012) 43:3 Ottawa L Rev 511. Note also that in some areas of *Charter* jurisprudence, the Court has

been embraced in the US as a foundational principle of constitutional analysis as it has been in Canada.[80] Instead, US law and scholarship has often been characterized by a suspicion of judicial balancing and a preference for "bright line rules".[81]

Second, Canada's Constitution includes an "override" provision, section 33, which allows the legislature to enact laws that would otherwise be found to violate certain *Charter* rights, including equality rights, by expressly declaring that the laws operate "notwithstanding" those rights.[82] Laws created pursuant to the Notwithstanding Clause expire after five years, but are renewable by the legislature.[83] The Notwithstanding Clause has not been frequently invoked[84] but, together with the Limitations Clause, contributes to the overall structure of Canada's legal rights framework as one of "dialogic judicial review", rather than judicial supremacy.[85] As with proportionality analysis, dialogue between courts and legislatures is, of course, represented in the US tradition as well;[86]

adopted alternatives to the *Oakes* framework for proportionality analysis. See e.g. *R v Clayton*, 2007 SCC 32, [2007] 2 SCR 725 (common law police powers); *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129 (private common law); *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 (administrative law).

80. For a discussion of the role proportionality analysis has in fact played in US law and a more nuanced treatment of the supposed US preference for bright line rules, see Jackson, "Proportionality", *supra* note 77.

81. *Ibid.*

82. *Supra* note 78, s 33(1) ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter", s 33(1)).

83. See *ibid*, ("[a] declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration," but "Parliament or the legislature of a province may re-enact a declaration made under subsection (1)", ss 33(3)–(4)).

84. For a history of the Notwithstanding Clause, tracing a brief period of high invocation in Quebec prior to 1985 to its rare use in subsequent years, see Canada, Library of Parliament, *The Notwithstanding Clause of the Charter*, by David Johansen & Philip Rosen, Publication No BP-194-E (Ottawa: Library of Parliament, 2008), online: <www.parl.gc.ca/content/lop/researchpublications/bp194-e.pdf>.

85. For a review of literature on Canadian *Charter* dialogue, see Kent Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4:2 Intl J Constitutional L 347 (arguing also that "the Canadian Constitution can facilitate dialogue between courts and legislatures more easily than can the U.S. Constitution" at 369).

86. See generally Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven, Conn: Yale University Press, 1986).

but, also as with proportionality, legislative-judicial dialogue does not play the same foundational role in US constitutional theory, interpretation or practice as it does in Canada.[87]

Both proportionality analysis and constitutional dialogue presuppose that courts interpreting constitutional rights are engaged in tasks that share important similarities with legislative choices. These frameworks eschew a vision of law as detached or distinct from social and political life, and embrace a vision of law as a field of action that affects lives and includes social negotiation. By asking questions about the gravity of felt harms (deleterious consequences) and the magnitude of material benefits (salutary effects), proportionality analysis directs our attention to actual relationships. And by formulating constitutional interpretation in a manner that invites legislative fact evidence, government justification and legislative response up to the point of democratic "override", constitutional dialogue comports with the relational premise that rights are social choices that should invite deliberation.[88]

At the level of equality law, these gestalt-like differences in embrace of proportionality and dialogue are evident. A recent Canadian expression of the test for equality violations, now embraced by a unanimous Court, asks whether the claimant has shown that "the government has made a distinction [in purpose or effect] based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage".[89]

87. See Roach, *supra* note 85.

88. Although my purpose here is to show the ways in which Canada's constitutional structure invites relational dialogue, it must also be noted that proportionality analysis and the Court's stance towards government justification have both been harshly criticized for failing to adequately hold governments to account, particularly in the equality law context. See Choudhry, "Decades" *supra* note 79; Truesdale, *supra* note 79.

89. *Quebec (AG) v A*, 2013 SCC 5 at para 323, [2013] 1 SCR 61 [*Quebec v A*]. Justice Abella dissented in the result, but her section 15 analysis was endorsed by a majority of the Court. See *ibid* at para 385, Deschamps, Cromwell and Karakatsanis JJ, 416, McLachlin CJ. In *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16, [2015] 2 SCR 548 [*Taypotat*], the unanimous Court endorses this test, but seems also to layer in a focus on whether the impugned distinction is "arbitrary". The focus of the present inquiry is grounds of discrimination, so I will not dwell on this shift except to say that a relational approach ought to recognize that arbitrariness evokes a sense of randomness that does not well describe the persistent, concerted and power-laden relationships that characterize discrimination and inequality experienced by disadvantaged groups. *Cf* Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const Stud 191 at 230–31.

From there, the burden of justification falls to the government under the Limitations Clause—which, as addressed above, includes inquiry into the law's relational impact. Under this approach, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[90] Setting aside the question of how grounds are defined (a point which will be addressed more extensively below), we see that Canadian constitutional equality analysis asks about social relationships at several key doctrinal moments, including directives to attend to disadvantage, history, groups and social gaps, even prior to any formal proportionality analysis and its attendant inquiry into ameliorative impact and deleterious effects. And the distinct proportionality inquiry (and background availability of the legislative override) allows the legislature to meaningfully engage with the Court's process and its ultimate decision.

The SCC has, moreover, consistently affirmed a commitment to substantive equality, which it describes as "an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages".[91] Many scholars have endeavoured to flesh out the precise requirements of substantive equality, including such elements as focus on outcomes and the effects of law and government action; concern with power differentials and socially disadvantaged groups; adoption of the claimant's perspective; a nuanced understanding of choice and constraint; attention to context, including institutional and structural inequalities; and a commitment to positive state obligations and distributive justice.[92] Generally, though, it is agreed that the SCC has not always met these standards, either in its disposition of particular cases or in its development of doctrine, and the extent to which the Court actually endorses the broadest forms of these definitions is debatable.[93]

90. *Quebec v A*, *supra* note 89 at para 332, Abella J, dissenting.

91. *Taypotat*, *supra* note 89 at para 17.

92. See e.g. Margot Young, "Unequal to the Task: '*Kapp'ing* the Substantive Potential of Section 15" (2010) 50 SCLR (2d) 183 at 193–99 [Young, "Unequal"]; Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009) at 16–23; Robin Elliot & Michael Elliot, "The Addition of an Interest-Based Route into Section 15 of the Charter: Why It's Necessary and How It Can Be Justified" (2014) 64 SCLR (2d) 461 at para 119.

93. See e.g. Young, "Unequal", *supra* note 92; Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Rev Const Stud 31; Jennifer

The Court has, however, been clear that substantive equality stands in contrast to formal approaches which treat equality as an abstract commitment to treat "likes alike", and that it requires some degree of attention to social positions of advantage and disadvantage (i.e., hierarchy) and the effects of law with reference to these hierarchies.[94] While the Court's elaboration of these commitments has been sketchy and occasionally contradictory, I think that it is evident that even these most minimal requirements of substantive equality cannot be adequately analyzed without some examination of the ways in which persons and their experiences are constituted by dense networks of social relationships, or the ways in which law and other social processes organize people into categories that express the power relationships that inhere in those relationships. In other words, substantive equality not only invites relational analysis—it requires it.

By contrast, the US equal protection inquiry does not readily invite consideration of a law's relational consequences. Without regard to actual harm experienced or the social position of the group harmed, equal protection analysis begins by asking whether the law draws an explicit or intentional distinction[95] which implicates a "fundamental right" or which distinguishes on the basis of a "suspect classification".[96] As will be detailed below, the suspect classification inquiry is symmetrical, protecting both privileged and disadvantaged groups

Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19 ("[A]lthough the Court continually describes its goal as one of substantive equality, it has yet to develop an approach that truly embraces that notion" at 21). The Court's practical commitment to positive state obligation and distributive justice are perhaps the most dubious. *Cf* Hester A Lessard, "'Dollars Versus [Equality] Rights': Money and the Limits on Distributive Justice" (2012) 58 SCLR (2d) 299.

94. See Elliot & Elliot, *supra* note 92 at 521–22. *Cf* Catharine A MacKinnon, "Substantive Equality Revisited: A Reply to Sandra Fredman" (2016) 14:3 Intl J Constitutional L 739.

95. See *Washington v Davis*, 426 US 229 (1976) (holding that laws which do not draw an explicit distinction on the basis of a suspect classification will only be found to violate the US equal protection guarantee in cases of intentional discrimination).

96. While the focus of this article is the suspect classification strand of equal protection analysis, the "fundamental rights" strand is equally susceptible of varying degrees of relational interpretation. *Cf* Kenji Yoshino, "A New Birth of Freedom?: *Obergefell v. Hodges*" (2015) 129:1 Harv L Rev 147. Canada's constitutional equality provision has not been interpreted to include an analogue to the fundamental rights branch of the American Equal Protection Clause. For an argument that Canada ought to adopt a fundamental rights branch in its equality jurisprudence, see Elliot & Elliot, *supra* note 92.

and individuals.[97] The extent to which a suspect classification or fundamental right is engaged provokes varying stringency of rationality review—inquiring into the gravity of the government purpose and the extent to which the measure is likely to advance its objective.[98] While this framework may allow for some relational analysis of the purposes and effectiveness of the law, there is no doctrinal directive requiring relational inquiry into the nature of the law's harms or the social position of the groups and individuals that may suffer those harms.[99] (Again, the extent to which the suspect classification inquiry can or does provide such space is bracketed here and addressed more fully below.)

Of course, these are highly schematic descriptions of US and Canadian equality doctrine and of the divergences between these jurisdictions' more general approaches to constitutional analysis. I maintain that prevailing US doctrine does not *require* relational analysis, but this does not mean that US justices have refused relational approaches; as Minow's analysis makes clear, formal doctrine is not the only place where relational insights can thrive or falter.[100] In terms of the mythic boundary between the "letter" and "spirit" of law, both sides of the divide are better represented as waves than as objects: interrelated yet in possession of their own distinct force and comprised of innumerable particles seeking their own paths. Constraints of space and focus require that I keep this caveat general in respect of Canadian and US constitutionalism and equality law more generally. But the following accounts of suspect classification and grounds of discrimination offer a small glimpse into the nuances that inhabit these broader claims. In both jurisdictions, equality jurisprudence has been, and continues to be, contested, both in terms

97. See *infra* notes 145–53, 166–67 and accompanying text.

98. See *infra* notes 118–22 and accompanying text.

99. The development of "rational basis with bite"—wherein courts are doctrinally required to apply the rational basis standard but in practice seem to employ more stringent review—may in some cases be explained by judges' desires to account for relational context. *Cf* Raphael Holoszyc-Pimentel, "Reconciling Rational-Basis Review: When Does Rational Basis Bite?" (2015) 90:6 NYUL Rev 2070. But this is more fairly viewed as a relational work-around to a categorical doctrine than a feature of the doctrine itself. Similarly, inquiries into legislative "animus" (which is sufficient to vindicate an equal protection challenge even on a rational basis standard) may be taken up as an opportunity to infuse relational considerations into a decision, but the explicit doctrinal focus remains on the narrow question of intent, not broader consideration of the claimant's social position or the relationships underpinning the claim. *Cf* Susannah W Pollvogt, "Unconstitutional Animus" (2012) 81:2 Fordham L Rev 887.

100. See *supra* notes 60–61, 99 and accompanying text.

of doctrinal form and in terms of the "spiritual" inflection different judges bring to bear in their analyses.

B. US Suspect Classification

The US Equal Protection Clause[101] was born in a nation recovering from a bloody civil war and facing the very immediate and material concerns of a large population of newly emancipated slaves whose legal status was deeply contested and uncertain. By all accounts, the Equal Protection Clause was, at its inception, aimed primarily at protecting that particular social group. In its first case considering the Reconstruction Amendments—including the Equal Protection Clause of the Fourteenth Amendment—the US Supreme Court described the amendments as being united by "one pervading purpose": "[t]he freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him".[102] But beyond such rhetorical affirmations of the Fourteenth Amendment's historical and political purpose, the early years of judicial interpretation have generally been cast as embodying a retrenchment from the aspirations of the Reconstruction Amendments.[103] From the early equal protection cases through the *Lochner* era, the Equal Protection Clause was generally treated as a pure rationality test, often relied upon to strike economic regulation.[104] Though there were jurisprudential strands that appeared to reject the constitutionality of some racial classifications[105] and laws aimed at racial

101. US Const amend XIV, § 1.

102. *Slaughterhouse Cases*, 83 US 36 at 71 (1872).

103. See e.g. Joseph Tussman & Jacobus tenBroek, "The Equal Protection of the Laws" (1949) 37:3 Cal L Rev 341 at 381; Robert M Cover, "The Origins of Judicial Activisim in the Protection of Minorities" (1982) 91:7 Yale LJ 1287 at 1295; Frank J Scaturro, *The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence* (Westport, Conn: Greenwood Press, 2000) at 1–158. But see William M Wiecek, "Synoptic of United States Supreme Court Decisions Affecting the Rights of African-Americans, 1873–1940" (2003) 4:1 Barry L Rev 21 (arguing that the Court's early jurisprudence on the rights of African Americans was in fact more mixed than conventional accounts suggest).

104. See *Lochner v New York*, 198 US 45 (1905); Michael Klarman, "An Interpretive History of Modern Equal Protection" (1991) 90:2 Mich L Rev 213 at 216.

105. See *Strauder v West Virginia*, 100 US 303 at 306–07 (1879); *Virginia v Rives*, 100 US 313 (1880); *Ex parte Virginia*, 100 US 339 (1879); *Neal v Delaware*, 103 US 370 at 386 (1880); *Bush v Kentucky*, 107 US 110 at 116 (1883); *Gibson v Mississippi*, 162 US 565 (1896).

subordination,[106] the Equal Protection Clause was not generally interpreted to require judicial suspicion of racial or other similar classifications.[107] Michael Klarman describes the early equal protection cases as "reveal[ing] a Court intuiting that racial classifications were different from others, yet unable to articulate or fully comprehend why".[108]

In 1938, the Supreme Court issued a decision that would come to reawaken and transform the Court's equal protection jurisprudence—and point to one possible answer to the question of why racial classifications matter. Footnote four of the *Carolene Products* decision suggested that the rational basis standard upon which the case—a challenge to economic regulation—was decided may not apply in all circumstances; instead, the footnote reflected tentatively[109] that, "[t]here may be narrower scope for operation of the presumption of constitutionality" in certain cases, such as those engaging the fundamental rights set out in the first ten amendments.[110] The footnote went on even more cautiously, claiming that it was "unnecessary to consider" two other circumstances that might warrant special constitutional scrutiny: those that engage restrictions on the political process and those that engage the rights of certain minorities.[111] These two concerns were linked, with the protection of minorities being supported by a political-process rationale:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . .: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[112]

106. See e.g. *Yick Wo v Hopkins*, 118 US 356 at 374 (1886).

107. See e.g. *Plessy v Ferguson*, 163 US 537 (1896) (assessing a rule which racially classified and segregated rail passengers to be permissible on rational basis review). See also Klarman, *supra* note 104 at 226–45 (arguing that no doctrinal requirement of heightened justification for racial classifications was articulated until the late 1960s).

108. Klarman, *supra* note 104 at 231.

109. For a discussion of the tentative tone of footnote four, see Jack M Balkin, "The Footnote" (1989) 83:1 Nw UL Rev 275 at 284.

110. *United States v Carolene Products Co*, 304 US 144 at 152, n 4 (1938).

111. *Ibid.*

112. *Ibid* [citations omitted].

This footnote is widely credited as the opening salvo of "tiered scrutiny", a doctrine requiring that laws engaging certain kinds of rights, or targeting certain kinds of populations, be held to a higher justificatory standard.[113]

The process by which class-based scrutiny fitfully migrated from an *obiter* footnote to a controlling doctrinal rule in equal protection law is debated.[114] But there is no doubt that by the end of the 1970s, tiered scrutiny on the basis of variably suspect classifications had become the law of the land.[115] The 1970s were marked by a cluster of newly recognized suspect classifications[116] and, by the 1980s, the Court had expressly established three distinct "tiers" of classifications, with attendant levels of judicial scrutiny.[117]

The basic doctrinal structure and the recognized list of suspect classes have remained essentially unchanged since that time. Unless a petitioner can show that an impugned distinction discriminates against a "suspect" or "quasi-suspect" class, the Court will subject legislation to the lowest standard of "rational basis review", requiring only that the classification be "rationally related to furthering a legitimate state interest".[118] Distinctions on the basis of wealth, age and disability have all been determined to be non-suspect, warranting this lowest level of scrutiny.[119] The most rigorously scrutinized of all classifications, those which discriminate on the basis of a "suspect classification", are only upheld in cases where the state is able to satisfy the

113. See Yoshino, "Equal Protection", *supra* note 9 at 758; Leslie Friedman Goldstein, "Between the Tiers: The New[est] Equal Protection and *Bush v. Gore*" (2002) 4:2 U Pa J Const L 372 at 372–73. But see also Daniel A Farber & Philip P Frickey, "Is *Carolene Products* Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation" (1991) 79:3 Cal L Rev 685 (arguing that the narrow political-process rationale expressed in the footnote does not in fact capture the Court's reasoning in striking discriminatory legislation).

114. See e.g. Klarman, *supra* note 104 at 216.

115. See generally Suzanne B Goldberg, "Equality Without Tiers" (2004) 77:3 S Cal L Rev 481.

116. *Ibid* at 498–99 (linking the advocacy for recognition of new suspect classifications in this period to the "fertile period of social change in the 1960s and 1970s").

117. See e.g. *Clark v Jeter*, 486 US 456 (1988) (affirming that "[i]n considering whether state legislation violates the Equal Protection Clause . . . we apply different levels of scrutiny to different types of classifications" and summarizing the three tiers at 461).

118. *Massachusetts Board of Retirement v Murgia*, 427 US 307 at 312 (1976) [*Murgia*].

119. See *ibid*; *Cleburne*, *supra* note 59; *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973) [*Rodriguez*]. But see Henry Rose, "The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question" (2010) 34:2 Nova L Rev 407 (arguing that, contrary to received wisdom, "the issue of whether the poor are a suspect or quasi-suspect class under traditional Equal Protection jurisprudence has not been decided by the Supreme Court" at 408).

Court that the classification has been "drawn with 'precision', . . . 'tailored' to serve their legitimate objectives . . . [and is the] 'less drastic means'".[120] This highest degree of scrutiny is reserved for cases involving classifications on the basis of race and (in certain cases) alienage.[121] Between these extremes, classifications on the basis of gender and illegitimacy are "quasi-suspect", engaging an intermediate level of scrutiny, which requires the law to be "substantially related" to "important" or "significant" government objectives.[122] These classifications, and the attendant level of scrutiny assigned to them between the 1970s and the 1990s, continue to control equal protection doctrine today. And although the Court has occasionally been described as sporadically or covertly deploying "rational basis with bite",[123] or otherwise applying a level of scrutiny more or less demanding than it declares,[124] commentators have generally concluded that the assigned levels of scrutiny are strongly associated with outcomes.[125]

120. *Dunn v Blumstein*, 405 US 330 at 343 (1972).

121. See *Loving v Virginia*, 388 US 1 (1967); *Adarand Constructors, Inc v Peña*, 515 US 200 (1995) [*Adarand*]; *Graham v Richardson*, 403 US 365, at 371–72 (1971). For a summary of the restrictions on the scope of suspect classification in cases where discrimination is alleged on the basis of alienage, see Yoshino, "Equal Protection", *supra* note 9 at 756, n 65. See also *Oyama v California*, 332 US 633 at 645–46 (1948) (decided before the tiers of scrutiny had been clearly established, but seemingly applying heightened scrutiny on the basis of national origin).

122. See *Clark v Jeter*, *supra* note 117 at 461; *Craig v Boren*, 429 US 190 (1976); *Trimble v Gordon*, 430 US 762 (1977). Note that strands of earlier case law, since superseded, have suggested that gender classifications might be subject to strict rather than intermediate scrutiny (*Frontiero v Richardson*, 411 US 677 at 688 (1973)), and that some "benign" racial classifications might subject to intermediate rather than strict scrutiny (*Metro Broadcasting, Inc v FCC*, 497 US 547 at 564–65 (1990)).

123. See e.g. Gayle Lynn Pettinga, "Rational Basis with Bite: Intermediate Scrutiny by Any Other Name" (1987) 62:3 Ind LJ 779; Holoszyc-Pimentel, *supra* note 99.

124. See e.g. Jeremy B Smith, "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation" (2005) 73:6 Fordham L Rev 2769; Richard H Fallon, Jr, "Strict Judicial Scrutiny" (2007) 54:5 UCLA L Rev 1267 (arguing that "strict scrutiny" in fact embraces a range of justificatory standards and would best be articulated as a proportionality inquiry).

125. See e.g. Yoshino, "Equal Protection", *supra* note 9 at 756; Gerald Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86:1 Harv L Rev 1 at 8; Jed Rubenfeld, "Affirmative Action" (1997) 107:2 Yale LJ 427 at 433 [Rubenfeld, "Affirmative Action"]; Robert C Farrell, "Successful Rational Basis Claims in the Supreme Court from the 1971 Term through *Romer v. Evans*" (1999) 32:2 Ind L Rev 357.

Yet despite the analytic significance of the level of scrutiny applied, the Court's assignment of various classifications to the three tiers of scrutiny appears to have been piecemeal and unprincipled.[126] The Court initially emphasized the "discrete and insular minority" rationale set out in the *Carolene Products* footnote, extending special protection to groups likely to face difficulties expressing their will through ordinary democratic politics.[127] In such analyses, the Court has occasionally embraced a deeply relational assessment of political powerlessness. In *Frontiero v Richardson*, for example, the Court attributed heightened scrutiny to classifications disadvantaging women, grounding its decision in a broad canvass of social attitudes towards women, historical legal disabilities faced by women and the under-representation of women in professional and political elites.[128] At the other end of the spectrum, the Court has sometimes focused on less clearly relational factors such as the "mutability" or generalized "relevancy" of the characteristic forming the basis for a legislative distinction—although these factors have generally been considered alongside attention to the social position of the groups and individuals involved.[129] After attributing heightened scrutiny to classifications on the basis of race, alienage, sex and illegitimacy in the 1970s, the Court has not since declared any new suspect classifications, despite much clamouring

126. See e.g. Thomas W Simon, "Suspect Class Democracy: A Social Theory" (1990) 45:1 U Miami L Rev 107 at 141 (describing the Court's approach to defining heightened scrutiny as "haphazard" and "an analytical muddle"); J Harvie Wilkinson III, "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality" (1975) 61:5 Va L Rev 945 at 983; Gunther, *supra* note 125 at 16.

127. See e.g. *Graham v Richardson*, *supra* note 121 (finding that alienage is "like" race and that "[a]liens as a class are a prime example of a 'discrete and insular' minority" as described in *Carolene Products* at 372).

128. *Supra* note 122. Note that the Court subsequently clarified that gender classifications would be subject to intermediate, rather than strict, scrutiny. See also *Craig v Boren*, *supra* note 122.

129. See e.g. *Mathews v Lucas*, 427 US 495 (1976) (holding that distinctions on the basis of "illegitimacy" warrant heightened scrutiny because it is "a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society", but not the strictest scrutiny because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes" at 505–06); *Murgia*, *supra* note 118 (holding that distinctions on the basis of age do not warrant heightened scrutiny because "the aged" have not "been subjected to unique disabilities on the basis of stereotyped characteristics *not truly indicative of their abilities*", and because "unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment'" at 427 [emphasis added]).

at the gates.[130] And the Court has yet to make any clear or comprehensive statement on the test for "suspect-ness", beyond the sometimes vague and inconsistent reasons offered for extending or rejecting suspect classification in particular cases.[131]

Of particular significance are two cases in which the Court has rejected claims to suspect class status on the part of claimant groups who quite clearly suffered from political powerlessness and social marginalization: *San Antonio Independent School District v Rodriguez*[132] and *Cleburne*.[133] The majority judgments in these cases reveal a preoccupation with the ease of defining membership in proposed classes and a fear of proliferating claims to suspect classification—both of which evince a categorical mode of analysis that precludes attention to the relational dimensions of the claims.

In *Rodriguez*, the US Supreme Court upheld a property-tax-based public school funding scheme that resulted in substantially lower quality of education for students living in property-poor districts.[134] In his majority reasons, Powell J remarked that the petitioners' case lacked a "definitive description of the classifying facts or delineation of the disfavored class",[135] suggesting that this left the Court with "serious unanswered questions" about "whether a class of this size and diversity could ever claim the special protection accorded 'suspect' classes".[136] Justice Powell spent several pages of his reasons parsing the difficulties in defining with precision the circumstances of such possible suspect classes as "'poor' persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent'", "those who are relatively poorer than others", or "those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts".[137] He rejects the proposition that heightened scrutiny should be afforded to

130. See Yoshino, "Equal Protection", *supra* note 9 at 757, n 71 and accompanying text; Goldberg, *supra* note 115 at 485.

131. See Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence" [2003] 3 U Ill L Rev 615 at 636; Marcy Strauss, "Reevaluating Suspect Classifications" (2011) 35:1 Seattle UL Rev 135 at 138–39. See also Pettinga, *supra* note 123 and accompanying text.

132. *Supra* note 119.

133. *Supra* note 59.

134. *Supra* note 119.

135. *Ibid* at para 19.

136. *Ibid* at para 26.

137. *Ibid* at paras 19–20.

"a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts",[138] then offers a perfunctory and conclusory assessment that

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[139]

The Court's concentration on group definition in *Rodriguez* worked to crowd out consideration of the actual social circumstances of the claimants—children in underfunded school districts.[140] Moreover, Powell J's exacting scrutiny of who exactly "counts" in a suspect class—and the ease of drawing a precise border around who is "in" and who is "out"—betrays an underlying assumption that some social groupings *do* reflect precise and naturalized boundaries between groups of people. It further assumes the differences that are the most "obvious" or easily discernible from the vantage point of the judiciary are the differences that matter most for the purposes of equal protection analysis. Notably, even race, presumptively demarcating the paradigmatic "discrete and insular minority", does not always create the kind of clean lines that Powell J seems to require here: in the case that enshrined America's most notorious judicial approval of racial segregation, Mr. Plessy's first line of argument was that he was wrongly sent to the "colored" carriage—not because racial segregation was illegal, but because Mr. Plessy should have been considered white.[141]

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138. *Ibid* at para 28. In a concurring opinion, Stewart J endorsed this focus on the ease of delineating the proposed suspect class: "First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause." *Ibid* at para 62.

139. *Ibid* at para 28.

140. *Ibid* at paras 20–28.

141. Mr. Plessy's writ pled

> [t]hat petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws.

Plessy v Ferguson, *supra* note 107 at 538.

In the 1985 *Cleburne* decision, White J led a majority of the Court in practically announcing the closing of the list of suspect classes. In declining to extend heightened scrutiny to "mentally retarded" persons, White J cautioned:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[142]

Here, we see a *Rodriguez*-style concern with recognition of an "amorphous" class coupled with a fear of proliferating groups—a version of the "pluralism anxiety" Yoshino has observed.[143] Suzanne Goldberg has suggested that given the strong correlation between the ostensible indicia of suspect-ness, and the refusal of protection in cases like *Cleburne*, the Court has proceeded with a "first in time is first in right" approach: "it appears that a central reason for heightened scrutiny's restriction to five traits is temporal, in that those traits received the Court's protection before slippery slope-type fears about the potential reach of rigorous review set in".[144]

This combination of pluralism anxiety and desire for easy categorization is also evident in the Court's jurisprudence on affirmative action. In its 1978 decision in *Regents of the University of California v Bakke*, the Court found in favour of a white male medical school applicant who claimed that the use of affirmative action in the admissions process (an effective reservation of sixteen percent of seats for racial minority students) was unconstitutionally discriminatory on the basis of race.[145] Justice Powell's opinion, which has since been endorsed by a majority of the Court,[146] accepted the claimant's position that since the program drew distinctions on the basis of race, it should be subject to heightened scrutiny. In answer to the state's argument that heightened scrutiny "should be reserved for classifications that disadvantage 'discrete and insular minorities'",[147] Powell J held that discrete and insular minority status "may

142. *Cleburne*, *supra* note 59 at 445–46.
143. *Supra* note 9. See also note 137 and accompanying text.
144. Goldberg, *supra* note 115 at 503.
145. 438 US 265 (1978) [*Bakke*].
146. *Richmond (City of) v JA Croson Co*, 488 US 469 (1989); *Adarand*, *supra* note 121.
147. *Bakke*, *supra* note 145 at 288.

be relevant in deciding whether or not to add *new types of classifications* to the list of 'suspect' categories", but that "[r]acial and ethnic classifications . . . are subject to stringent examination *without regard to these additional characteristics*."[148] In Powell J's view, the equal protection clause's historical purpose of alleviating discrimination against African Americans must be reassessed in light of the fact that the United States had become a "nation of minorities" for which such targeted protection was no longer possible or desirable.[149] In the contemporary context, Powell J argued, it is "too late" to posit a form of equal protection that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others".[150] Given that even "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination", Powell J concluded that "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."[151] The task, he observes, would also require the Court to constantly re-evaluate which groups, in a given social and historical moment, achieve a "societal injury . . . thought to exceed some arbitrary level of tolerability" warranting "preferential classification".[152] Such "variable sociological and political analysis" was said to exceed the proper role of the Court, thus anchoring the Court's drive to easy categorization, and its pluralism anxiety, in a vision of judicial competence hostile to relational analyses.[153]

Notably, this drive to hive equality claims into a brief, clean list of categorically protected classifications has been resisted from within the Court. Justice Stevens, for example, rejected tiered scrutiny altogether, asserting that "there is only one Equal Protection Clause", and called on the Court to adopt a single standard of review.[154] Justice Stevens advocated a universal standard of rationality, while "[loosening] the phrase 'rational basis' from its diluted, technical use".[155] In particular, Stevens J cautioned that groups suffering a

148. *Ibid* at 290 [emphasis added].

149. *Ibid* (noting that, by the time the Equal Protection Clause came to take on "a genuine measure of vitality", after the fall of *Lochner*, "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority" at 292).

150. *Ibid* at 295.

151. *Ibid* at 295–96.

152. *Ibid* at 297.

153. *Ibid.*

154. *Craig v Boren*, *supra* note 122 at 211–12.

155. "Justice Stevens' Equal Protection Jurisprudence", Note, (1987) 100:5 Harv L Rev 1146 at 1146 ["Stevens Note"].

"tradition of disfavour" are likely to be subject to classification on the basis of "[h]abit, rather than analysis".[156] Justice Stevens thus anchored his brand of universally applicable rational basis analysis in relational history and context, proposing that

> [i]n every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases, the answer to these questions will tell us whether the statute has a "rational basis."[157]

Justice Stevens' version of relevance was thus "given direction through the incorporation of normative premises that reflect a social vision of equality".[158] The focus of this analysis is on the circumstances of disadvantaged groups, not on categorical assertions about whether or not particular kinds of classifications are irrational as a matter of abstract logic.[159]

Justice Marshall similarly objected to the Court's rigid approach to tiered scrutiny, but offered a different proposal: a sliding scale of review, which he referred to as a "spectrum of standards".[160] Justice Marshall charged the majority approach with "focusing obsessively on the appropriate label to give its standard of review" and questioned the validity of the bases relied upon to determine suspect classification.[161] He cautioned that a formalistic understanding of the political-process rationale may fail to account for the invidious nature of discrimination and that a decontextualized immutability analysis may improperly emphasize grounds such as height.[162] Rather than focus on any "single talisman", Marshall J called for a relational focus on the actual, lived experiences of groups, noting that "[t]he political powerlessness of a group and the immutability of its defining trait are relevant only insofar as they point to a *social and cultural isolation* that gives the majority little reason to

156. *Mathews v Lucas*, *supra* note 129 at 520–21. See also *New York Transit Authority v Beazer*, 440 US 568 at 593 (1979); *Cleburne*, *supra* note 59 at 438, n 6.

157. *Cleburne*, *supra* note 59 at 453.

158. "Stevens Note", *supra* note 155 at 1154. See also James E Fleming, "'There is Only One Equal Protection Clause': An Appreciation of Justice Stevens's Equal Protection Jurisprudence" (2006) 74:4 Fordham L Rev 2301 at 2301–302.

159. See "Stevens Note", *supra* note 155 at 1162.

160. *Rodriguez*, *supra* note 119 at para 99.

161. *Cleburne*, *supra* note 59 at 478.

162. *Ibid* at 472, n 24.

respect or be concerned with the group's interests and needs."[163] Rather than following a mechanical process of assigning scrutiny with reference to abstract classifications, Marshall J prescribed an open-textured balancing approach, in which "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification".[164] In this analysis, Marshall J directed, "experience, not abstract logic, must be the primary guide", and "a page of history is worth a volume of logic".[165]

A similar relationally inflected protest was advanced by justices resisting the Court's dominant affirmative action analysis in *Adarand Constructors, Inc v Peña (Adarand)*, a case where a majority of the Court endorsed Powell J's reasons in *Bakke*: that all racial classifications—by any government actor and regardless of purposes or effects—should be subjected to the highest scrutiny.[166] Justice Stevens charged that "[t]he consistency that the Court espouses" in treating all racial classifications with the same heightened suspicion, "would disregard the difference between a 'No Trespassing' sign and a welcome mat".[167]

The Court's prevailing approach to tiered scrutiny blends a symmetrical suspicion of certain classifications with an unwillingness to extend heightened protections to new suspect classes. Both trends are grounded in a categorical logic that rejects the possibility or desirability of judicial attention to the

163. *Ibid* [emphasis added].

164. *Dandridge v Williams*, 397 US 471 at 520–21 (1970).

165. *Cleburne*, *supra* note 59 at 472–73, n 24, citing *New York Trust Co v Eisner*, 256 US 345 at 349 (1921).

166. *Adarand*, *supra* note 121. Note that the US Supreme Court's hostility to affirmative government action designed to ameliorate conditions of disadvantage on the basis of suspect classes is also evident in its increasingly restrictive interpretation of the congressional power to enforce the Fourteenth Amendment. See e.g. *City of Boerne v Flores*, 521 US 507 (1997) [*Flores*].

167. *Adarand*, *supra* note 121 at 245. Now, all members of the Court seem to have acquiesced to symmetrical application of heightened scrutiny, and judicial debate in affirmative action cases hinges on the extent to which particular affirmative action plans have met the narrow tailoring requirement. See e.g. *Fisher v Texas University of Texas at Austin*, 133 S Ct 2411 (2013). A vast critical commentary has addressed the apparent inconsistency and injustice of the current approach. See e.g. Rubenfeld, "Affirmative Action", *supra* note 125; Jed Rubenfeld, "The Anti-Antidiscrimination Agenda" (2002) 111:5 Yale LJ 1141 [Rubenfeld, "Agenda"]; Reginald C Oh, "A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class" (2004) 13:2 Temp Pol & Civ Rts L Rev 583; Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" (1997) 49:5 Stan L Rev 1111.

broader social relationships animating particular claims—a logic which is consistent with the Court's wariness of standards over rules and hesitancy to embrace proportionality and dialogue as proper foundations for the judicial role. Nonetheless, we have also seen that this picture is not monolithic. There are moments in time where a majority of the Court has seemed to endorse a relational version of the discrete and insular minority inquiry,[168] and there are dissenting voices throughout the Court's history who have pressed for more relational doctrinal forms.[169]

In recent years, debates over the identification of suspect classes have stagnated in the US Supreme Court's jurisprudence. While some scholarly literature and lower court judgments continue to advance and consider proposed suspect classes, the Court has declined to engage with these claims. Most notably, the Court has consistently sidestepped suspect class analyses in its landmark gay rights and same-sex marriage cases, preferring instead to strike laws on a rational basis standard—such that the tiered scrutiny analysis became unnecessary—or to consider these cases primarily through the lens of liberty rather than equality rights.[170] For our purposes, this perhaps now stale US debate over suspect classification is useful in illuminating aspects of the Canadian analogous grounds inquiry, which remains a live doctrinal concern.[171] In the following subsection, we will see that Canada's analogous grounds jurisprudence, though generally more hospitable to relational analysis than its

168. See *Frontiero v Richardson*, *supra* note 122.

169. The present inquiry is focused on debates over doctrinal form, but it is notable that American justices have also placed more or less relational glosses on shared doctrinal formulae. See e.g. Nedelsky, *supra* note 17 at 262 (describing Ginsburg J's dissent in *Ricci v DeStefano*, 557 US 557 (2009) as "working within precedent" while embracing a more relational analysis than does Kennedy J's majority opinion). *Cf* Minow, *supra* note 17 at 101–19 (analyzing the differing relational emphases of the judicial opinions in *Cleburne*, *supra* note 59, without emphasizing doctrinal differences).

170. *Cf* Laurence H Tribe, "Equal Dignity: Speaking its Name" (2015) 129:1 Harvard L Rev Forum 16. Notably, there is evidence that the Canadian courts may similarly be preferring to decide claims on grounds other than equality when possible. *Cf* Maneesha Deckha, "A Missed Opportunity: Affirming the Section 15 Equality Argument against Physician-Assisted Death" (2016) 10:1 McGill JL & Health S69; Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) 22:1 Const Forum Const 31.

171. See e.g. *Taypotat*, *supra* note 89 (revising the test for analogous grounds and striking a claim on the basis of its failure to establish an analogous ground).

US suspect class counterpart, also has currents running in both relational and categorical directions.

C. Canadian Grounds of Discrimination

Canada's constitutional equality provision emerged in very different circumstances from those that gave rise to the US Equal Protection Clause. The *Charter* was adopted in the 1980s, crafted in consultation with independent advisory groups, following the solicitation and submission of briefs from members of the public and three months of hearings before a joint committee of the House of Commons and the Senate.[172] Women's groups and other social movement actors seized on the *Charter* drafting process as a focal point, engaging in "concerted and effective lobbying" that materially influenced the final constitutional text.[173] The resultant equality provision was therefore "shaped in large part by women, as well as by advocates for the disabled and other disadvantaged groups in Canadian society".[174] Canada's constitutional equality provision was also drafted and interpreted after much of the US constitutional history set out above had already unfurled—the famous footnote, the adoption of tiered scrutiny and the striking of affirmative action provisions under strict scrutiny. In text and interpretation, Canada's constitutional equality law has taken the US equal protection experience as both a model and a cautionary tale.[175]

172. See Doris Anderson, "The Adoption of Section 15: Origins and Aspirations" (2006) 5:1 JL & Equality 39 at 40.

173. See Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23:1 Windsor YB Access Just 145 at 149.

174. The Honorable Claire L'Heureux-Dubé, "It Takes a Vision: The Constitutionalization of Equality in Canada" (2002) 14:2 Yale JL & Feminism 363 at 366.

175. Contrast the Canadian Supreme Court's adoption of the US' "discrete and insular minority" standard with the repudiation of *Bakke* in the drafting of the Canadian *Charter* (both of which are addressed below). The US constitutional experience has affected Canadian constitutional drafting and jurisprudence in other areas as well. See e.g. Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2:1 Intl J Constitutional L 1; "Forty-Ninth Parallel Constitutionalism: How Canadians Invoke American Constitutional Traditions", Note, (2007) 120:7 Harv L Rev 1936. Alongside the US experience, the history of Canada's own pre-*Charter* Bill of Rights stood as an important aversive precedent in the *Charter*'s drafting. See Denise G Réaume, "Discrimination and Dignity" (2003) 63:3 La L Rev 645 at 647.

Section 15 of the *Charter* provides:

> (1) 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[176]

As with other rights enumerated in the *Charter*, section 15 equality rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", pursuant to the Limitations Clause set out in section 1 of the *Charter*.[177]

The textual differences between Canada's equality provision and the terse US guarantee of "equal protection of the laws" are apparent. First, the Canadian protection expressly provides a lengthy list of grounds, including grounds such as age and mental disability, which have been denied heightened scrutiny under US equal protection analysis.[178] The list of grounds is also prefaced by the phrase "and, in particular"—a grammatical invitation to consider claims that do not specifically engage any of the listed grounds. Second, the Limitations Clause opens up a possibility (arguably not adequately taken up by the courts)[179] of separating the identification of a rights violation from consideration of whether that violation was justifiable.[180]

176. *Supra* note 78, s 15.

177. See *supra* notes 77–79 and accompanying text.

178. See *Murgia*, *supra* note 118 at 312–13; *Cleburne*, *supra* note 59.

179. Courts and commentators have debated the extent to which justificatory concerns may properly be considered under section 15, as opposed to section 1. See e.g. competing judicial approaches adopted by the justices in *Quebec v A*, *supra* note 89; Truesdale, *supra* note 79.

180. See e.g. Raj Anand, "Ethnic Equality" in Anne F Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 81 (noting that in the absence of a limitations provision, "the US Supreme Court was forced to incorporate general welfare interests into the definition of the right itself and into the analysis of what constitutes an infringement of that right" at 108).

Finally, subsection 15(2), which provides express constitutional sanction to affirmative measures aimed at ameliorating conditions of group disadvantage, was included as a direct response to the US experience with judicial review of affirmative action programs.[181] In stark contrast to the US jurisprudence, subsection 15(2) has been interpreted to insulate from subsection 15(1) review any laws or programs that are rationally connected to the objective of ameliorating conditions of group disadvantage.[182]

In *Andrews v Law Society of British Columbia*, the SCC's first section 15 decision, all members of the Court endorsed the "enumerated and analogous grounds approach" as the basic interpretive framework for discrimination analysis.[183] Under this approach, the listed grounds, and grounds determined to be analogous thereto, would serve the function of "screening out . . . the obviously trivial and vexatious claim", while leaving "any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment" to be advanced by the government under section 1.[184] The Court was unambiguous that "[q]uestions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus" of the grounds analysis.[185]

In *Andrews*, the SCC adopted the US discrete and insular minority formulation in concluding that citizenship was sufficiently analogous to the listed grounds to warrant section 15 protection.[186] In the cases following *Andrews*, the Court continued to deploy the term "discrete and insular minority"

181. See M David Lepofsky & Jerome Birchenback, "Equality Rights and the Physically Handicapped" in Bayefsky & Eberts, *supra* note 180, 323 at 354; *Lovelace v Ontario* (1997), 33 OR (3d) 735 at para 51, 148 DLR (4th) 126 (CA).

182. See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483. For an argument that the SCC's prevailing approach may be too permissive of ameliorative schemes that harm or exclude disadvantaged groups, see Jess Eisen, "Rethinking Affirmative Action Analysis in the Wake of *Kapp*: A Limitations Interpretation Approach" (2008) 6:1 JL & Equality 1.

183. [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews* cited to SCR]. Although McIntyre J dissented in the result, the "enumerated and analogous grounds approach" set out in his reasons were endorsed by all members of the Court. *Ibid.*

184. *Ibid* at 182–83.

185. *Ibid* at 180, citing *Smith, Kline & French Laboratories v Canada (AG)* (1986), 2 FC 359 at 367–69, 34 DLR (4th) 584 (FCA).

186. *Supra* note 183 at 183, McIntyre J. Writing for the majority, Wilson J noted that "[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated." *Ibid* at 152.

in defining analogous grounds, emphasizing social and historical disadvantage when assessing proposed grounds of discrimination.[187] Disadvantage was the analytic cornerstone, even where factors like "immutability" were referred to by members of the Court.[188] The Court consistently urged and practiced consideration of "the larger social, political and legal context" in this "search for disadvantage",[189] and suggested that a rejected claim of analogousness would not foreclose future claims where stronger evidence of disadvantage on the basis of that ground may exist.[190]

In 1995, the Court released a trilogy of decisions that revealed the emergence of a tripartite split in the Court as to the proper interpretation of section 15. Each of the trilogy cases involved proposed analogous grounds,[191] and each of the judicial approaches advanced differed on the question of how these claims to analogousness should be assessed.[192] I will term the three distinct approaches to defining analogous grounds in these cases as the "Relevancy Approach", the "Stereotyping Approach" and the "Group Disadvantage Approach".

The Relevancy Approach, endorsed by Lamer CJC and La Forest, Major and Gonthier JJ, focused the analogous grounds inquiry on whether proposed grounds were "irrelevant personal characteristics".[193] The enumerated grounds, on this account, exemplified personal characteristics that have often formed

187. See e.g. *R v Turpin*, [1989] 1 SCR 1296 at 1331–333, 96 NR 115.

188. See e.g. *Andrews*, *supra* note 183 at 195, La Forest J. See also Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian *Charter:* Too Much Ado About Next to Nothing" (1991) 29:4 Alta L Rev 772 at 791 (surveying the various factors cited by the Court in its early grounds jurisprudence, and noting that group disadvantage was a core factor in all of the analogous grounds recognized by the Court up to the time of writing) [Gibson, "Analogous"].

189. *R v Turpin*, *supra* note 187 at 1331–332.

190. See e.g. *R v Généreux*, [1992] 1 SCR 259, 88 DLR (4th) 110 [cited to SCR] (holding that military personnel were not disadvantaged on the facts of the case, but if, "for instance . . . after a period of massive demobilization at the end of hostilities, returning military personnel . . . suffer from disadvantages and discrimination peculiar to their status . . . [they] might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances" at 311). See also *R v Turpin*, *supra* note 187 at 1333.

191. See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [cited to SCR] (sexual orientation); *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 [cited to SCR] (marital status); *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449 [cited to SCR] (divorced custodial parents).

192. For a more detailed survey of the differing judicial approaches to section 15 set out in the trilogy cases, see Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2:2 Can J Poverty L 1 [Eisen, "Poverty"].

193. See *Thibaudeau v Canada*, *supra* note 191 at 682; *Miron v Trudel*, *supra* note 191 at 435.

the basis of irrelevant distinctions. Analogous grounds would be defined on a case-by-case basis with reference to the relevancy of the proposed ground to particular legislative objectives.[194] Consideration of group disadvantage "may be useful" in this inquiry, but only insofar as it assists in illuminating the presence of an irrelevant distinction.[195] The Relevancy Approach coalition also emphasized that the irrelevant characteristic must be a "personal characteristic", holding that groups should not be "subdivided" by income level since income is not, in their view, a "characteristic attaching to the individual".[196] Thus, on this account, social context and group disadvantage were subordinate considerations, and constitutionally relevant differences were thought to inhere in the individual person rather than in social relationships. Moreover, since the analytic focus was anchored in the legislative objective rather than examination of broader social relationships and hierarchies, legislative objectives informed by discriminatory attitudes were effectively placed beyond review.[197]

The Stereotyping Approach, advanced by McLachlin J (as she then was), Sopinka, Cory and Iacobucci JJ, advocated a relatively more relational grounds doctrine. These Justices posited that the enumerated grounds represented historical bases for stereotypical decision making; analogous grounds should thus be determined with reference to their likelihood as a basis for stereotypical decision making.[198] Despite apparent similarities between a prescribed focus on "irrelevant" or "stereotypical" decision making,[199] advocates of the Stereotyping Approach defined stereotyping in decidedly more relational terms than the Relevancy Approach. Rather than considering relevancy in the abstract, the Stereotyping Approach called for consideration of an extensive list of factors in determining whether a proposed ground is likely to attract stereotypical decision making: whether the group suffers from historical disadvantage; whether the group constitutes a "discrete and insular minority" vulnerable to being overlooked by majoritarian politics; whether the distinction is made

194. See *Miron v Trudel*, *supra* note 191 at 435–36. See also *ibid* (stating that marital status may be sufficiently irrelevant to be analogous in some cases, but that it "cannot be so with respect to those attributes and effects which serve to define marriage itself" at 442).

195. *Ibid* at 455.

196. *Thibaudeau v Canada*, *supra* note 191 at 687.

197. Réaume, *supra* note 175 at 659–60.

198. See *Miron v Trudel*, *supra* note 191 at 487.

199. See *ibid* (Gonthier J's assessment that the two approaches share a common goal: "a criterion defined in terms of stereotype based on presumed group characteristics, rather than on the basis of merit, capacity or circumstances, is but an elaboration of the concept of relevance" at 443).

on the basis of a "personal characteristic" and "[b]y extension" whether the distinction is based on "personal and immutable characteristics"; whether the proposed ground is comparable to any particular listed ground; and whether the ground had been granted protected status by other judges or in human rights legislation.[200] These factors were to be understood as "analytical tools", and a proposed analogous ground need not prove the presence of every listed factor.[201] The Stereotyping coalition's "unifying principle" in the analogous grounds assessment was the desire to avoid distinctions "on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual".[202]

Both the Relevancy and the Stereotyping Approaches represented departures from the decidedly disadvantage-oriented focus of the *Andrews* era. The Relevancy Approach could be deployed without ever inquiring into the social and political power of the groups affected by impugned legislation. While the Stereotyping Approach did include some social contextual concerns (in particular, historical disadvantage and discrete and insular minority status), these stood on equal footing with more abstract considerations (personal characteristics, immutability and generalized analogy to other particular grounds). Attention to disadvantage did not, under this approach, operate with the same decisive force as it did under *Andrews*. This receding doctrinal focus on social context, moreover, was accompanied by another doctrinal shift—common to both the Relevancy and Stereotyping Approaches—that further insulated the grounds analysis from relational concerns: the grounds assessment shifted its shape from that of an analytical tool to that of a freestanding "test" that could defeat a discrimination claim at the outset.[203]

200. See *ibid* at 496 [emphasis omitted].

201. See *ibid*.

202. *Ibid* at 497. But see Réaume, *supra* note 175 at 661–62 (arguing that the link between these factors and their supposed "unifying principle" is not in fact made clear).

203. See *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470 [cited to SCR] (where the majority observed that under *Andrews*, the enumerated and analogous grounds inquiry "may be less a requirement of s. 15(1), and more of an analytical trend" at 756). Note that this shift solidified another important difference between Canadian analogous grounds and US suspect classifications; even non-suspect classes are protected against distinctions that fail the US rational basis test, whereas a Canadian equality claim cannot proceed at all where no enumerated or analogous ground is established.

Only L'Heureux-Dubé J advocated for a Group Disadvantage Approach, proposing that discrimination should be assessed in context, with reference to the circumstances of the actual group(s) affected and the nature of the interest impacted by the impugned differential treatment. She cast this inquiry as being concerned with "groups rather than grounds, and discriminatory impact rather than discriminatory potential".[204] Discrimination, under this approach, should be found more readily in cases where serious interests are engaged, or where a "socially vulnerable" group is disadvantaged by a legislative distinction.[205] Throughout the trilogy, L'Heureux-Dubé J concurred with the Stereotyping coalition's conclusions on the merits, but emphasized that she rejected a talismanic focus on grounds, which she saw as encouraging "too much analysis at the wrong level".[206] Justice L'Heureux-Dubé warned that by "looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences".[207] She cautioned that reliance on "appropriate categories" gave rise to a risk of "relying on conventions and stereotypes . . . [that] further entrench a discriminatory *status quo*".[208] Rejecting an approach that was overly focused on the characteristics of claimants, L'Heureux-Dubé J offered the distinctly relational insight that, "[m]ore often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals."[209]

The Court sought to resolve the conflicting trilogy approaches and offer its first unified "test" to be applied in constitutional equality claims in *Law v Canada (Minister of Employment and Immigration)*.[210] In *Law*, the Court directed a three-part test for section 15 analysis, incorporating elements from all three of the trilogy approaches. The *Law* inquiry directed courts to consider:

204. *Egan v Canada*, *supra* note 191 at 552.

205. *Ibid* at 520.

206. *Ibid* at 551.

207. *Ibid* at 552 [emphasis omitted].

208. *Ibid* [emphasis in original].

209. *Ibid*.

210. [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR]. The *Andrews* era Court was relatively unified, but expressly refused to pronounce "exhaustive definitions" of protected equality rights in those "early days" of section 15 interpretation. See *R v Turpin*, *supra* note 187 at 1326. The *Law* consensus was arguably illusory. See Daphne Gilbert, "Unequaled: Justice Claire L'Heureux-Dubé's Vision of Equality and Section 15 of the *Charter*" (2003) 15:1 CJWL 1 ("*Law*'s tentative cohesion only superficially addresses the divergent views" at 18) [Gilbert, "Unequaled"].

> (a) whether the impugned law produced differential treatment on the basis of one or more personal characteristics;
>
> (b) whether that differential treatment was based on one or more enumerated or analogous grounds; and
>
> (c) whether that differential treatment was discriminatory—an inquiry engaging a multi-part analysis of an open list of "contextual factors", including:
>
> (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group in issue;
>
> (2) the correspondence between the ground(s) on which the claim is based and the actual needs, capacities or circumstances of the claimant;
>
> (3) the ameliorative purpose or effect of the law; and
>
> (4) the nature and scope of the interest affected.[211]

Shortly after *Law*, the Court decided *Corbiere v Canada (Minister of Indian and Northern Affairs)*, a case concerning the equality rights of Aboriginal band members living off-reserve.[212] Together, *Law* and *Corbiere* conclusively reshaped the Court's approach to defining analogous grounds. First, the Court confirmed the trend towards a threshold grounds inquiry emergent in the approaches proposed by the Relevancy and Stereotyping cohorts under the trilogy. The Court in *Corbiere* held that the analogous grounds inquiry would now serve a "screening out" function, whereby claims that failed to make out a distinction on the basis of an approved ground would merit no further inquiry.[213]

Second, the Court in *Corbiere* emphasized that this threshold inquiry was to be conducted in the abstract, rather than in the particular context of the case before the Court. The grounds were found to represent "a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case".[214] Analogousness was no longer to be determined, as the *Andrews* Court had suggested, with reference to the particular social relationships giving rise to a given claim. According to the *Cobiere* majority, "we should not speak of analogous grounds existing in one circumstance and not another".[215]

211. *Supra* note 210 at 548–52.
212. [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere* cited to SCR].
213. *Ibid* at 218.
214. *Ibid* at 216.
215. *Ibid* at 217.

The Court further elaborated that this analogous grounds analysis—now an abstract, threshold test—should hinge on an inquiry into whether the proposed ground constituted an immutable or "constructively immutable" personal characteristic: "the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law".[216] The government has no legitimate interest, on this view, in requiring people to alter those personal characteristics that are "changeable only at unacceptable cost to personal identity".[217] The Court emphasized that this test was rooted in analogy to the listed grounds: race was offered as an example of a listed ground that is "actually immutable", and religion served as an example of a "constructively immutable personal [characteristic]".[218] Strikingly, the Court argued that the immutability inquiry displaced any need for distinct inquiry into social or political disadvantage:

> Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.[219]

There is no basis for the Court's assertion that attention to historical disadvantage "may be seen to flow from" (constructive) immutability and, in practice, the lower courts have often taken this doctrinal directive as an invitation to ignore disadvantage.[220] Whether or not (constructively) immutable personal characteristics such as race and religion in fact characterize disadvantaged groups, there is no question that such characteristics are symmetrical: if race is immutable, it is equally so for black and white; if religion is constructively immutable, it is equally so for Christianity and Islam. As Sebastién Grammond

216. *Ibid* at 219.

217. *Ibid.*

218. *Ibid.*

219. *Ibid* at 219–20.

220. See e.g. Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50:3 Osgoode Hall LJ 637 ("[t]he actual or constructive immutability of an individual characteristic will, at best, be only tangentially relevant to these criteria of political power" at 653); Eisen, "Poverty", *supra* note 192 at 111–13.

described the reasoning in *Corbiere*: "the focus is on the ground of distinction, rather than on the vulnerable group delineated by that ground".[221]

The *Corbiere* standard marked a retreat from the more relational doctrine that characterized the Court's *Andrews*-era grounds analysis, and the analyses proposed by the Group Disadvantage and Stereotyping coalitions in the trilogy era. First, the prescribed analytic focus is at the level of the defining trait, rather than on the social relationships that have made this trait socially relevant. By presuming a hard line may be drawn between what is chosen and what is unchosen,[222] and what is "conduct" and what is "status", the Court evokes a notion of inequality that is "grounded in biological and inherent differences . . . rather than a more pervasive social process in which the very notion of difference is created and regulated by systems of subordination".[223] Second, as Rosalind Dixon has observed, the *Corbiere* decision represents a shift in analogical reasoning towards a greater level of abstraction. Among the dangers Dixon associates with such abstraction, she observes that it is likely to prompt a "form of 'lofty' reasoning with little or no connection to underlying constitutional commitments or concerns".[224] This higher level of abstraction has also been associated with an increased resistance to recognition of new analogous grounds.[225] Under *Corbiere*, the Court repeatedly rejected

221. Grammond, *supra* note 92 at 103.

222. See Jennifer Koshan, "Inequality and Identity at Work" (2015) 38:2 Dal LJ 473 at 486; Robert Leckey, "Chosen Discrimination" (2002) 18 SCLR (2d) 445. On the role of choice in Canadian equality jurisprudence more generally, see Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law*, 2002" (2003) 20 SCLR (2d) 93; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sandra Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis Butterworths, 2006) 115; Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669.

223. Kerri Froc, "Immutability Hauntings: Socio-economic Status and Women's Right to Just Conditions of Work Under Section 15 of the *Charter*" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 187 at 215. See also Douglas Kropp, "'Categorial' Failure: Canada's Equality Jurisprudence: Changing Notions of Identity and the Legal Subject" (1997) 23:1 Queen's LJ 201.

224. Dixon, *supra* note 220 at 662. See also Eisen, "Poverty", *supra* note 192 at 24; Réaume, *supra* note 175 at 652 (describing an immutability-focused approach as a "purely conceptual analysis" that ill-fits the equality inquiry, "as the search for conceptual solutions to normative questions" often does).

225. See Dixon, *supra* note 220 at 646–55. See also Eisen, "Poverty", *supra* note 192 at 15–23.

leave applications relating to the most persistently proposed new grounds—particularly those related to economic disadvantage—and the lower courts continued to apply the restrictive and abstract (constructive) immutability standard directed by the SCC in *Corbiere*.[226]

The Court's recent decision in *Kahkawistahaw First Nation v Taypotat*[227] appears to articulate a substantially different approach to analogous grounds than that which was announced in *Corbiere*. Without fanfare, and purporting to simply apply the rule from *Corbiere*, this brief, unanimous SCC decision seems to have dropped the immutability standard in favour of a more relational, disadvantage-focused inquiry. The claimant in *Taypotat* challenged a provision of an election code adopted by the Kahkewistahaw First Nation requiring that the roles of Chief and Band Councillor may only be held by persons with a grade twelve education or equivalent. Among the proffered challenges to the election code, the claimant argued that the educational requirement was discriminatory on the ground of "educational attainment", which he argued was "analogous to race and age".[228] The claim was dismissed by the Federal Court for lack of evidence that "educational attainment" was an analogous ground, and on appeal the claimant instead argued that residential school survivors without a grade twelve education constituted an analogous ground.[229] The Federal Court of Appeal declined to rule explicitly on this proposed ground, but did find the impugned provision discriminatory on the basis of the enumerated ground of age and the analogous ground of "residence on a reserve".[230] Following the FCA's lead, in argument before the SCC, the claimant grounded his equality claim on the proposed analogous ground of "older community members who live on a reserve".[231] The SCC chided the FCA for raising a distinct theory of

226. See Bruce Ryder & Taufiq Hashmani, "Managing *Charter* Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989–2010" (2010) 51 SCLR (2d) 505 at 527. See also Eisen, "Poverty", *supra* note 192 at 22–23; Dixon, *supra* note 220 at 646–55. In the two cases during the *Corbiere* era where the SCC elected to hear cases in which a new analogous ground was advanced, the Court chose to sidestep the analogous grounds inquiry, deciding the cases on other grounds. See *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3; *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.

227. *Supra* note 89.

228. *Ibid* at para 10.

229. *Ibid* at para 12.

230. *Ibid* at para 13.

231. *Ibid* at para 14.

the appropriate analogous ground without sufficient evidence on the record, and ultimately rejected the constitutional claim on the basis that the record offered "virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation" to demonstrate that the provision burdened a disadvantaged group.[232]

The doctrinal approach to grounds sketched in *Taypotat* revealed a striking vacillation between relational and categorical thinking. On the relational side of the ledger, the Court made no mention of immutability, instead focussing its description of the purpose and focus of the analogous grounds inquiry squarely on social disadvantage:

> Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336.[233]

Those unfamiliar with *Corbiere*'s relegation of disadvantage to one of many "factors" flowing from the "central concept" of immutability might be forgiven for thinking that the second quotation in this paragraph (referencing disadvantage and context) came from *Corbiere* itself, rather than from Lynn Smith and William Black's law review article. Unlike in *R v Kapp*[234] and *Withler v Canada (Attorney General)*,[235] the Court in *Taypotat* did not offer extensive citations to scholarly criticism or announce a restatement of the law, but this articulation of the purpose of the grounds analysis nonetheless seems to promise a significant shift away from *Corbiere*'s immutability standard.

Of particular note, the Court was unwilling to simply infer from *Corbiere*'s finding that *off-reserve* band members constituted an analogous ground that *on-reserve* band members constituted an analogous ground as well. Instead, the Court required evidence that analogous disadvantages were suffered by on-reserve band members.

232. *Ibid* at para 24.
233. *Ibid* at para 19.
234. *Supra* note 182 at para 22.
235. 2011 SCC 12 at paras 55–60, [2011] 1 SCR 396 [*Withler*].

> The Court's recognition of off-reserve residence as an analogous ground in *Corbiere* relied in part on the argument that First Nations people living off-reserve have experienced unique disadvantages relative to community members living on a reserve and that, for many, the decision to live off-reserve was either forced or heavily constrained. With respect, I would be reluctant to impose a simple mirror inference without argument or evidence from the parties.[236]

While there is reason to be concerned about the evidentiary burden this may put on claimants advancing new analogous grounds, the Court's shift from requiring evidence of immutability or constructive immutability to requiring evidence of "unique disadvantages" and constrained choices moves the doctrine in a decidedly more relational direction.[237]

On the categorical side, the SCC appeared to be extremely preoccupied with the particulars of the ground advanced. Although the judges disapproved of the FCA's decision to revise the claimant's proposed ground without adequate evidence in support, the SCC did not address the claimant's own original proposed grounds of educational attainment or residential school survivors without grade twelve education. The SCC also focused a great deal on ensuring the evidence advanced in support of the proposed ground be pitched at the appropriate level of generality, saying that evidence of lower educational attainment in older Canadians more generally, or even of older Aboriginal Canadians, was insufficient to draw inferences about the relationship between age, educational attainment and disadvantage in the Kahkewistahaw First Nation.[238] This uncomfortable search for the precise group by which to define the claim raises many of the same concerns that animated criticism and the Court's ultimate retreat from, mirror comparators.[239] The Court's manoeuvering between various aspects of the proposed analogous ground is also reminiscent of the US Supreme Court in *Rodriguez*. By jumping between various proposed

236. *Taypotat*, *supra* note 89 at para 26.

237. While there may be some conceptual overlap between constructive immutability and constrained choice, the SCC's choice of the former language in *Corbiere* has been associated with inattention to disadvantage and relational context in the lower courts. *Cf* Eisen, "Poverty", *supra* note 192.

238. See *Taypotat*, *supra* note 89 at paras 30–32.

239. See e.g. Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 Windsor YB Access Just 111; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror on the Wall, What's the Fairest of Them All?" in McIntyre & Rodgers, *supra* note 222, 135 [Pothier, "Equality"]; *Withler*, *supra* note 235 at paras 55–60.

classes and concluding that it was simply too difficult to pin down a ground, the *Rodriguez* Court managed to reject the presence of a suspect class even though the group in issue—children in a poor school district—were quite obviously disadvantaged. Similarly, the SCC's focus in *Taypotat* on calibrating the evidence to particular levels of generality allows it to defeat the claim at the grounds stage without making the patently absurd contention that elderly residential school survivors without high school education are not a disadvantaged group. This is a particularly troubling use of grounds as a "screen", since the tone of the SCC's reasons suggest that the ruling may in fact have been motivated by considerations that ought properly to have been considered at other stages of the analysis.[240]

It remains to be seen in future cases whether the evidentiary threshold surrounding the advancement of new claims, and the precision with which new grounds are pleaded, will prove to be obstacles to future claims. Nonetheless, the grounds doctrine articulated in *Taypotat* brings the Canadian jurisprudence closer to its relational promise than the *Corbiere* immutability standard. As with the US jurisprudence, though, we can observe tensions over time and within the SCC at any given point, as between attention to relationship and ease of categorization. It is possible that the unanimity of *Taypotat* was bought at the expense of its ambivalence between categorical and relational doctrine.

III. Rethinking Class(ification): Relational Approaches to Doctrinal Scholarship

In the preceding Part, we have seen that both the Canadian and US courts have moved towards increasingly categorical approaches to "grounds of discrimination" and "suspect classification", respectively—though certain justices within each jurisdiction have pressed for more relational doctrinal forms, and the most recent Canadian equality jurisprudence suggests that a more relational tack may be underway. Conceptualizing equality doctrine as embracing more relational or categorical analytic forms offers us a lens through which to describe these shifts and tensions and a means of identifying

240. For example, the SCC emphasized that the claimant, who was Chief at the time, oversaw the process by which the election code was debated and adopted, and that the code was a product of many years of democratic deliberation within the Kahkewistahaw First Nation—the latter of which seems especially like a question of section 1 justification. See *Taypotat*, *supra* note 89.

thematically similar debates across jurisdictions with substantially different equality laws.[241] Relational theory also helps us to see what courts might miss when they follow more categorical doctrinal paths: attention to social context, the capacity to hear diverse perspectives and the ability to moor categories in their social purposes. In this Part, I will look more closely at a pair of conceptual distinctions telegraphed in the jurisdictional surveys above: US *classes* versus *classifications*, and Canadian *groups* versus *grounds*. In both jurisdictions these linguistic/conceptual distinctions have attracted scholarly debates that I propose can be more clearly articulated through the lens of relational analysis.

In US equal protection scholarship, the distinction between suspect classes and classifications has taken on a special significance. In his foundational 1976 article, "Groups and the Equal Protection Clause", Owen Fiss articulated two competing strands of equal protection theory: anti-subordination and anti-classification. Fiss argued that the US Supreme Court had been applying an anti-classification principle (originally termed by Fiss an "anti-discrimination principle") whose "foundational concept" was one of "means-ends rationality".[242] Fiss offered a relational-inflected critique of classification: "[t]he antidiscrimination principle does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group"—a special concern given then-nascent arguments that the clause might be deployed (as it since has been) to dismantle affirmative action programs.[243] Instead, Fiss urged an approach grounded in a "group disadvantaging principle", which recognizes the significance of "natural classes, or social groups, in American society".[244] For Fiss, the Equal Protection Clause was best understood as a safeguard for disadvantaged groups or classes who experience "perpetual subordination" and "severely circumscribed" political power—an analytic framework which would require the Court to examine

241. *Cf* Jackson & Greene, *supra* note 75.

242. Owen M Fiss, "Groups and the Equal Protection Clause" (1976) 5:2 Phil & Publ Aff 107 at 111–12 [Fiss, "Equal Protection Clause"].

243. *Ibid* at 129.

244. *Ibid* at 148. Fiss intended the phrase "natural classes" to describe groups with real social significance, as opposed to "artificial classes" that are created purely by legislative distinctions (for example tax brackets). *Ibid* at 156. For example, African Americans constitute a "natural class" because "Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group". *Ibid* at 148.

social realities rather than abstract classifications.[245] The distinction between doctrinal approaches grounded in *classes* versus *classifications* has since figured in other prominent equal protection analyses as well.[246]

But Fiss' solution to the problems of anti-classification—a focus on "natural classes"—has attracted criticism from those who share his ambition of a jurisprudence attentive to social history and vulnerability. Iris Marion Young, for example, agrees with Fiss' proposition that "[i]f we care about the ways that many individuals have restricted opportunities and suffer various forms of stigmatization and marginalization, we must pay attention to groups", but worries that the language of "natural classes" introduces "reifying language" that elides the reality that "[g]roups are entirely constituted by social norms and interaction."[247] Richard Thompson Ford has similarly cautioned that Fiss' term "natural classes" risks obscuring the role that law plays in constructing and reinforcing particular racial identities—for example, that "blacks were *produced* as a discrete social group so that they could be treated badly".[248]

Fiss has responded that he did not intend the phrase "natural groups" to import these essentializing connotations or to entrench particular social groupings. Fiss maintains that anti-subordination "does not create group identification", but rather "acknowledges this reality, and seeks to provide a legal principle capable of eradicating the injustice that arises when group identification is turned into a system of subjugation".[249] While labelling groups may cause problems on this account, the alternative is to ignore relational context.

245. *Ibid* at 155. Fiss specifically cites the jurisprudence of Marshall J, discussed above, as an example of such a socially responsive approach.

246. See e.g. Rubenfeld, "Agenda", *supra* note 167 (observing an "important doctrinal shift, finally realized in [*Adarand*] but insufficiently discussed in the literature, from *suspect classes* to *suspect classifications* as the linchpin of strict scrutiny in equal protection law" at 1167 [emphasis in original]); Oh, *supra* note 167 at 606; Siegel, *supra* note 167 (arguing that, "by abstracting the history of racial status regulation into a narrative of 'racial classifications,' the Court obscures the multiple and mutable forms of racial status regulation that have subordinated African-Americans since the Founding" at 1142).

247. Iris Marion Young, "Status Inequality and Social Groups" (2002) 2:1 Issues in Leg Scholarship 1019 at 4–5.

248. Richard Thompson Ford, "Unnatural Groups: A Reaction to Owen Fiss's 'Groups and the Equal Protection Clause'" (2003) 2:1 Issues in Leg Scholarship 1007 at 4 [emphasis in original].

249. Owen Fiss, "Another Equality" (2004) 2:1 Issues in Leg Scholarship 1051 at 9.

Canadian discussions of the demands of constitutional equality have relied on a distinction that is related, but not identical, to Fiss' distinction between anti-subordination and anti-classification. In Canada, approaches to constitutional equality law are generally assessed with reference to a distinction between *substantive* and *formal* equality. Substantive equality is associated with attention to power differentials, context and the effects of law, while formal equality is grounded in a principle of treating likes alike (i.e., the "similarly situated" test) as a matter of "process or procedure", rather than attending to "outcomes or distributional results".[250] Like anti-classification, formal equality is concerned with the perceived relevancy of the lines used to divide people; substantive equality, like anti-subordination, is directly concerned with actual conditions of social, political and material inequality. Substantive equality, however, does not necessarily import Fiss' anti-subordination concern with identifying particular *groups* in need of special protection. Instead, substantive equality casts the concern more broadly in terms of attending to power relations and deploying contextual analysis.[251]

Canadian equality scholars have debated whether *grounds* of discrimination or the identification of *groups* warranting protection offer the better doctrinal vehicle for promoting substantive equality. As we saw in our review of Canadian equality doctrine, this debate played out in the trilogy era jurisprudence, wherein the majority of the Court moved towards a grounds-based approach, while L'Heureux-Dubé J advocated for a focus on groups.[252] Dianne Pothier describes the Canadian debate as follows: "The essence of the critique of grounds is the claim that they are an artificial compartmentalization which obscures the complex reality of real life. In contrast, the defense of grounds is based on the contention that they serve to focus attention on the real sources of discrimination."[253] Colleen Sheppard, in her call for expansive definitions

250. Young, "Unequal", *supra* note 92 at 190–99. See also Grammond, *supra* note 92 at 16–23.

251. Compare Young, "Unequal", *supra* note 92 at 193–99, with Fiss, "Equal Protection Clause", *supra* note 242.

252. See *supra* notes 191–209 and accompanying text.

253. Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37 at 44–45 [Pothier, "Connecting Grounds"]. For examples of arguments for doctrines based on *groups* not *grounds*, see Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48:4 McGill LJ 627 (contending that "[l]ooking at the group does not require contextual abandonment. Looking at the ground, however, may require just that" at 648); Gilbert, "Unequaled", *supra* note 210; *Miron v Trudel*, *supra* note 191, L'Heureux-Dubé J. For arguments in favor of an equality analysis based on *grounds*, not *groups*, see

of grounds, nicely casts the contest between group-based and grounds-based approaches to equality as a "feminist post-modern dilemma" since "[i]t may be politically, strategically or rhetorically important to name a social phenomenon sexism, classism or racism, while acknowledging the limits of such categories in the same breath."[254]

In my view, there is no essential disagreement between the groups and grounds camps in this Canadian debate.[255] Just as Fiss, Young and Ford share an underlying concern with building a jurisprudence attentive to relational context, both sides of the Canadian groups/grounds debate argue that the proper purposes of the disputed doctrinal inquiry are the identification of oppressive power relationships, attention to the nuances of intersectional discrimination and illumination of the claimant's perspective. The ostensible choice between groups and grounds, or classes and classifications, does not adequately explain what is at stake in these US and Canadian scholarly debates. Neither side of either the Canadian or US debates described argues that attention to power differentials should be abandoned in favour of a formalist analysis that would produce the sorts of outcomes we have seen in the classification-focused US affirmative action cases,[256] or the decontextualized immutability analysis adopted by the SCC in *Corbiere*. This conceptual confusion—particularly stark in the Canadian debate over what attention to groups or grounds might entail—distracts from a more significant analytical division.[257] The analytic

Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 99 at 72 (endorsing an analytic focus on grounds as "historic markers of the dynamics of power relationships"); Pothier, "Connecting Grounds", *supra*.

254. Colleen Sheppard, "Grounds of Discrimination: Toward an Inclusive and Contextual Approach" (2001) 80:3 Can Bar Rev 893 at 915.

255. See Eisen, "Poverty", *supra* note 192 at 26–28.

256. For a rare Canadian argument that grounds should be abandoned for reasons along these lines, see Gibson, "Analagous", *supra* note 188; Dale Gibson, "Equality for Some" (1991) 40 UNBLJ 2 at 5–6.

257. This confusion is exacerbated by the fact that the SCC's use of the terms "groups" and "grounds" is not faithful to the meanings attributed to these words in the academic debate set out above. For example, the Court's jurisprudence in the *Andrews* era frequently deployed the language of "grounds" (in fact terming its framework the "enumerated and analogous grounds approach") while clearly attending to the relational concerns that L'Heureux-Dubé J would later associate with a focus on groups.

imperative, shared by all the US and Canadian authors surveyed here, is to build a jurisprudence attentive to relational concerns and to resist categorical analyses that may frustrate such efforts. As I will suggest in the conclusion, groups (classes) and grounds (classifications) may equally work to advance or obstruct attention to relationship and may equally fall into the sorts of categorical list-making exercises that obscure attention to relationship.

Conclusion: Comparative Reflections on Relational Promise

The groups/grounds and class(ification) inquiries serve in their respective jurisdictions as the first step in framing equality problems. This initial framing has the potential to embody the insights of relational theory by creating doctrinal space for attention to social relationships. This initial framing also, however, has the potential to produce categorical approaches to difference that ignore or mask those relationships. In sketching the grounds jurisprudence and scholarly debates of Canada and the US, we can begin to see the contours of two contrasting approaches—relational or categorical—to the doctrinal framing of equality problems.

A relational framing focuses on the social relationships relevant to assessing an equality claim. These may be multiple and may engage the social and legal significance of either particular classes *or* particular classifications. Such a focus considers the actual histories and solicits the diverse perspectives of the groups and individuals involved. The word "groups" in this description is to be understood not as connoting naturalized or necessary cohorts, but rather as embracing a more fluid conception of interpersonal and structural associations. On the broad account of relational context that I invoke here, any associational matrix relevant to a claim may constitute the kind of group relevant to this analysis. Children living in a particular San Antonio school district with a low property-tax base may be a relevant group.[258] The fact that these children are largely members of other relevant social groupings that we might refer to variously as "poor" or "minority" or "school children" may also

258. See *Rodriguez*, *supra* note 119.

be important elements of the relational context of a claim.[259] So too might be the significance that categories like "race" and "age" have played in structuring social hierarchies. It may also be relevant to identify the potential for complex or intersectional discrimination arising from these facts.[260] Judicial precedents may assist in these inquiries, but each claim must be assessed on its own merits, not with regard to its *fit* with established categories. The precise boundaries of groups, and the ease of identifying membership in groups, are not important to assessing relational context. Relational context, rather, is concerned with unearthing and understanding social relationships, which may or may not be easily described with reference to popularly or judicially recognized categories.

Conversely, a categorical framing zeroes in on the classes or classifications relevant to a claim, seeking to label and sort those groups or grounds. A categorical framing is inattentive to the social dynamics that define the individuals or groups involved, and focuses instead on whether these individuals and groups can be described with reference to categories which have been used before, or will be easy to use again. Because ease of defining and sorting the groups or grounds is essential, recourse to abstract reasoning is more important than examination of the unique social matrices that are engaged by a claim. What matters about the children living in a San Antonio school district with low property taxes is whether there is a label that can accurately and abstractly describe the group in a manner consistent with other abstract labels. Factors like "immutability" and abstract conceptions of "relevancy" are attractive to a categorical approach to the extent that they strip away particularities that are unique to the claim or claimants. A category, once recognized, is hardened; a label, once affixed, is permanent.

In both Canada and the US, the dominant grounds/classification jurisprudence has evolved into a list-making process that invites categorical framings, though the *Taypotat* case suggests the SCC may be shifting back

259. Justice Powell describes the children on whose behalf the *Rodriguez* claim was brought as "school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base". *Ibid* at 4–5.

260. See Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241; Iyer, *supra* note 64; Duclos, *supra* note 64 (arguing that "[f]or racial minority women and for others who straddle the current categories of difference, [relational grounds analysis] . . . is not one of several options for reform. It is the only way not to disappear" at 51).

toward a more relational approach.[261] The previous *Corbiere* analysis, hinging on an abstract grounds inquiry that will hold in all future cases, seemed to follow the US in creating an essentially fixed list of characteristics warranting special constitutional protection.[262] It is unclear whether and how *Taypotat*'s call to focus on the specific community in issue will play out in cases with stronger evidentiary records—and whether this attention to particularity will yield more nuanced relational assessments of disadvantage or devolve into an undue focus on defining clearly identifiable grounds of distinction. The pluralism anxiety Yoshino identifies is in part animated by a categorical stance towards the framing of equality claims. Concerns about proliferating groups, as expressed by the majority of the US Supreme Court in *Cleburne*, arise from the fact that the inquiry is focused on general rules for sorting and classification, not on analyzing the instant claim in light of its relational context.

The alternative approaches advocated by Canada's L'Heureux-Dubé J and the US' Marshall and Stevens JJ each offer possible means of introducing greater doctrinal space for relational framing. While their precise focuses differ, all three Justices eschewed the list-making qualities that dominated the prevailing approaches in their respective courts. In all three approaches, the initial framing of equality claims is not about naming groups or identifying grounds, but is rather on identifying a constellation of factors that illuminate the relationships at stake in a claim. Justice L'Heureux-Dubé's inquiry into the nature of the groups and interests affected attends to the social position of the claimant. Justice Marshall's focus on the character of the classification in question, and the relative importance of the benefit to those discriminated against, again requires attention to the actual relational context of the particular claim. Justice Stevens foregoes the initial "framing" moment evident in the other approaches discussed, but incorporates relational considerations into the substance of his analysis by introducing a proportionality-style rationality

261. Some scholars have observed a tendency for "standards" to develop into firm "rules" over time, as a logical consequence of proliferating case-by-case application of the standard to specific facts over time. See e.g. Mark D Rosen, "Modeling Constitutional Doctrine" (2005) 49:3 Saint Louis ULJ 691 at 696; Mark Tushnet, "The First Amendment and Political Risk" (2012) 4:1 J Leg Analysis 103 at 106; Frederick Schauer, "The Convergence of Rules and Standards" [2003] 3 NZLR 303. What I have suggested here is not just that the existing standards for suspect classification and analogous grounds have rulified, but that the standards themselves have been entirely displaced by rules which no longer effectively express the underlying standards.

262. See *supra* note 128 and accompanying text.

assessment, considering the severity of the impact on those affected in light of their relational circumstances. Under all three approaches, the more relational framing is unencumbered by fears of a growing "list" of classes or classifications that will have to be applied categorically in future cases regardless of the actual relational context of those cases. Similarly, all three approaches adopted a flexible approach to grounds and classification that focused on describing the relationships at play, rather than the ease with which a clear line might be drawn around the claimant group.

It may be objected that doctrinal approaches lacking clear lists and rules make equality jurisprudence unacceptably indeterminate. Versions of this criticism have frequently been associated with the *rules* side of the classic US debate over the relative utility of "rules" and "standards".[263] One might conclude that a relational approach will always align with the *standards* side of the debate, but I will not go so far here. I believe that there are contexts where a close look at the relationships produced by different statements of a legal rule would yield a conclusion that bright line rules actually produce the most desirable relationships.[264] Constitutional equality, however, represents a field of law that must engage in an ongoing basis with social norms and attitudes and must both *convince* and *respond* to public and legislative audiences.[265] In the

263. See e.g. Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175. For a classic articulation of the rules/standards debate, see Kathleen M Sullivan, "The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards" (1992) 106:1 Harv L Rev 22.

264. See e.g. Albert W Alschuler, "Bright Line Fever and the Fourth Amendment" (1984) 45:2 U Pitt L Rev 227 at 227–28. *Cf* Jackson, "Proportionality", *supra* note 77 at 3168–169; Michael Coenen, "Rules Against Rulification" (2014) 124:3 Yale LJ 644. My argument here is limited to the constitutional equality context. Even in respect of statutory anti-discrimination laws in the employment context, where laws are intended to govern the behaviour of diffuse private actors without ready access to legal counsel, the arguments for more categorical rules may be stronger. *Cf* Sujit Choudhry, "Distribution vs. Recognition: The Case of Antidiscrimination Laws" (2000) 9:1 Geo Mason L Rev 145 (describing reliance on defined "social groups" as "both indispensable and problematic" in anti-discrimination laws, since "[s]ocial policy is a world of imperfect solutions—a world of trade-offs and a world of double-edged swords" at 178).

265. See Fredman, *supra* note 1 (explaining that decisions as to which grounds of discrimination ought to be protected are not adequately described by either "unifying principle" or "political" choice: "In reality, the determination of protected grounds operates as a result of a creative tension between several different sources: constitutional instruments, statutes, judicial interpretation, and international or regional instruments" at 111).

US, a bare guarantee of "equal protection of the laws" must necessarily be infused with "mediating" principles and values informed by social facts and public debate.[266] In Canada, constitutional commitments to proportionality analysis and dialogic constitutionalism provide a particularly friendly juridical environment for these conversations—so much so that the categorical nature of the *Corbiere* immutability standard may be seen not only as inappropriate from a relational perspective, but also from the perspective of Canada's constitutional structure and self-image.[267] As the Court clarifies the shift away from *Corbiere*, tacitly announced in *Taypotat*, a focus on doctrinal forms that invite relational rather than categorical thinking should be a priority.

Writing in the South African context, Cathi Albertyn and Beth Goldblatt have explained that relational scholars have called for "an equality jurisprudence which places difference and disadvantage at the centre of the concept".[268] They point to the importance of the relationship of the individual to the group and the often complicated and intersectional nature of inequalities that are found in reality. They "insist on the remedial purpose of the right and the contextual nature of its determination".[269]

Among the greatest challenges facing relational theorists is the difficult work of translating these aspirations into prescriptions—a task which in many cases requires an initial act of translation between theory and doctrine. This article has been an effort towards such a project—untangling the linguistic and conceptual confusion surrounding groups and grounds, and the relational aspirations that might be expressed in a doctrinal moment that is common to many jurisdictions. It is one small piece of a relational project that must necessarily be comprised of small pieces: "to shift habits of thought so that people routinely attend to the relations of interconnection that shape human experience, create problems, and constitute solutions . . . in everyday conversation, in scholarship, in policy making, and in legal interpretation".[270]

266. Fiss, "Equal Protection Clause", *supra* note 242 at 107–08.

267. See Part II.C, *above*. See also Jackson, "Proportionality", *supra* note 77 at 3172–183, for an argument that US equality analysis might benefit from more express integration of proportionality considerations.

268. Albertyn & Goldblatt, *supra* note 34 at 253. Albertyn and Goldblatt refer to the same group of scholars that I have described as "relational" theorists, but use the term "critical" theorists. *Ibid* at 251.

269. *Ibid* at 253.

270. Nedelsky, *supra* note 17 at 4.

As the SCC considers and reconsiders its approach to analogous grounds and to constitutional equality more generally, it should take up the insights of relational theory as a valuable tool. And as both the US and Canadian courts increasingly turn to alternative doctrinal avenues through which to adjudicate problems of inequality,[271] questions about how to revise those doctrines in ways that attend to relationship should be taken as a crucial collective project for judges, advocates and commentators.

271. See *supra* note 168 and accompanying text.

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Donald Galloway*

Immigration, Xenophobia and Equality Rights

In two leading decisions, the Supreme Court of Canada has held that immigration laws that impose negative treatment on non-citizens but not on citizens are not, for that reason alone, discriminatory. Barring exceptional circumstances, or additional independent factors, such laws are considered to be insulated from constitutional challenge under section 15 of the Canadian Charter of Rights and Freedoms*. This article identifies and unpacks deficiencies in these judicial decisions, and argues that they do not sit comfortably with the Court's more general jurisprudence on section 15. In addition, by failing to acknowledge xenophobia as a form of discrimination that has long been prevalent in our society and is analogous to the grounds listed in section 15, the Court exposes non-citizens to unwarranted risks of oppressive treatment motivated by animus against them.*

Dans deux décisions phares, la Cour suprême du Canada a statué que les lois sur l'immigration qui imposent un traitement négatif aux non-citoyens mais non aux citoyens ne sont pas, pour cette seule raison, discriminatoires. Sauf circonstances exceptionnelles ou autres facteurs indépendants, ces lois sont considérées comme étant à l'abri d'une contestation constitutionnelle en vertu de l'article 15 de la Charte canadienne des droits et libertés*. Le présent article relève et comble les lacunes de ces décisions judiciaires et soutient qu'elles ne cadrent pas avec la jurisprudence plus générale de la Cour sur l'article 15. De plus, en ne reconnaissant pas la xénophobie comme une forme de discrimination qui prévaut depuis longtemps dans notre société et qui est analogue aux motifs énumérés à l'article 15, la Cour expose les non-citoyens à des risques injustifiés de traitement oppressif motivés par l'animosité à leur égard.*

* Professor Emeritus, University of Victoria. This paper benefited immensely from comments from two anonymous reviewers and perceptive observations and suggestions from Colin Grey and Sarah Marsden. In addition, Hester Lessard drew my attention to some constitutional cases and ideas that I would otherwise have overlooked. I appreciate all the assistance.

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Introduction

One can readily identify a number of factors that, over the last ten years or so, have combined to reduce and destabilize the legal status and social standing of non-citizens who are seeking to enter or remain in Canada. Particularly conspicuous are the amendments to our refugee and citizenship laws that were introduced by the government that held power from the 2006 election until 2015, especially those harsh measures that were introduced after the government obtained a majority in the legislature in 2011.[1] The changes in question were extensive and far-reaching. A shortlist of well-known examples indicates the scope. Prompted by concerns about fraud, families have been kept apart by provisions that, for example, redefined who could sponsor. [2] Prompted by economic reasons, older children were removed from the list of dependants who could be sponsored, even in circumstances where they were clearly dependent on their parent.[3] Various

1. The major legislative changes were introduced by *Protecting Canada's Immigration System Act,* SC 2012, c 17; a useful summary and critique of which is found in Amnesty International, Unbalanced Reforms: Recommendations with respect to Bill C-31 (Brief to the House of Commons Standing Committee on Citizenship and Immigration) (17 April 2012), online: <www.amnesty.ca/sites/amnesty/files/ai_brief_bill_c_31_to_parliamentary_committee_0.pdf>. In addition, the *Strengthening Canadian Citizenship Act,* SC 2014, c 22 rendered Canadian citizenship more inaccessible by imposing both substantive and procedural impediments.

2. See *Immigration and Refugee Protection Regulations,* SOR/2002-227, s 130(3) [*IRPA Regs*], originally introduced in 2012, which requires a person who has been sponsored as a spouse to be a permanent resident or citizen for five years before they can themselves sponsor a person as their spouse.

3. The government lowered the cut-off age from 22 to 19 in 2014 (SOR/2014-140, s 2(F)). This age was selected for the reason that children who came to Canada at an early age were likely to become wealthier than those who came later. While this age has since been increased once again to a cut-off of 22 (*Regulations Amending the Immigration and Refugee Protection Regulations (Age of Dependent Children)*, SOR/2017-60, s 1); the regulation nevertheless continues to deny the dependence of older children during post-secondary education.

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individuals seeking to remain in Canada have been barred from access to an independent tribunal in a number of contexts: for instance, those seeking to avoid deportation who have committed minor offences[4] and asylum seekers who on various grounds cannot appeal denials of their refugee claims.[5] Detention has become a more frequent response to irregular entry, and in some cases is a mandatory response applying even to children.[6] Health care benefits have been denied to many individuals with precarious status.[7] The list goes on much further. As has been widely noted, citizenship, permanent residence, temporary residence and refugee status have all become more difficult to obtain and easier to lose.[8]

The changes in question were not only far-reaching in substance, they also took a number of forms, including legislative amendments,[9] regulatory changes,[10] and a slew of ministerial instructions,[11] reviewed by neither cabinet nor legislature. They were also accompanied by explanatory backgrounders,[12] and government statements that presented the measures as a response to what was characterized as serious threats to the integrity of our immigration and refugee regime from queue jumpers, bogus refugees, fraudsters, as well as from immigrants who brought "non-Canadian values" with them.[13] Innuendo and insinuation also magnified

4. See *Immigration and Refugee Protection Act,* SC 2001, c 27, s 64(2) [*IRPA*], appeals to Immigration Appeal Division unavailable to individuals sentenced to 6 months imprisonment.

5. *Ibid*, s 110(2). Some rights of appeals have been restored through litigation: see, *YZ v Canada (Citizenship and Immigration),* 2015 FC 892 [*YZ*].

6. *Ibid,* s 55(3.1), mandatory detention for children aged 16 and over who are designated as "irregular arrivals" under *IRPA* s 20.1.

7. Although also restored as a result of litigation. See, *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 [*Canadian Doctors*].

8. See, for example, Brief of the Canadian Association of Refugee Lawyers (Brief to the Citizenship and Immigration Committee of the House of Commons) (5 May 2014), online: <carl-acaadr.ca/sites/default/files/CARL%20C-24%20Brief%20to%20CIMM.pdf>.

9. *Supra* note 1.

10. The various regulations are noted in the relevant Annual Reports to Parliament, online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals.html>.

11. A list of ministerial instructions is available online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions.html>.

12. Backgrounders are archived online: <www.canada.ca/en/immigration-refugees-citizenship/news/archives.html>.

13. Such statements were widely reported. For example, Sarah Boesveld, "Efforts to keep bogus Roma refugees out have failed: Jason Kenney," *National Post* (22 April 2012), online: <nationalpost.com/news/canada/efforts-to-keep-bogus-roma-refugees-out-have-failed-jason-kenney>. See generally, the *Zero Tolerance for Barbaric Cultural Practices* Act, SC 2015, c 29 and accompanying widely reported government comments**.** In addition, in her caustic judgment in *Canadian Doctors*, *supra* note 7, MacTavish J makes several references to remarks from the Minister's office prejudging refugee claims as "bogus."

links between immigrants and organized crime and terrorism.[14] In addition, front-line officials, unreviewed by superiors within their organization, were given a strong mandate to protect national security, and have adopted more aggressive, less facilitative approaches to those attempting to negotiate their way through the system.[15]

Simultaneously, we have witnessed an increase in public expressions of anti-immigrant sentiment.[16] Mainstream political debate has become infected and influenced in alarming ways by xenophobic invective as newcomers and temporary workers are misidentified as a primary source of various past and present social ills and as a likely source of potential future harms. Individual non-citizens are attacked because of characteristics they are deemed falsely to have, or because of characteristics they do have but that are deemed wrongly to be pernicious. Antagonism to newcomers may also focus variably and not necessarily consistently on race, religion, cultural practices, place of origin, language skills and other factors.

It is not unreasonable to talk about the rise of xenophobia and to suspect that the government's package of immigration and citizenship reforms has helped stoke the irrational fears of those who feel threatened by newcomers and has increased the confidence and strength of anti-immigrant groups and organizations. Moreover, it is not unreasonable to suspect that xenophobes' irrational fears may have reciprocally influenced the government's decision to develop and implement the relevant measures. It would not be outlandish to conclude that, although each measure of harsh treatment is directed at a discrete and narrowly defined category of non-citizen, each measure operates like a single pixel that, only in combination with many others, presents the viewer with a comprehensible image. In this case, the cumulative message from the government could be interpreted as the message that in our immigration processes the interests of the existing citizenry always come first and extreme measures may

14. See, for example, Canadian Press, "Kenney blasted for linking Toronto gun violence to 'foreign gangsters,'" *Vancouver Sun* (20 July 2012), online: <www.vancouversun.com/Kenney+blasted+linking+Toronto+violence+foreign+gangsters/6966596/story.html>.

15. See Tony Keller, "Canada Has Its Own Ways of Keeping Out Unwanted Immigrants," *The Atlantic* (12 July 2018), online: <www.theatlantic.com/international/archive/2018/07/canada-immigration-success/564944/>. See also Geoffrey York & Michelle Zilio, "Access Denied: Canada's Refusal Rate for Visitor Visas Soars," *Globe & Mail* (8 July 2018), online: <www.theglobeandmail.com/world/article-access-denied-canadas-refusal-rate-for-visitor-visas-soars/>; and Nicholas Keung, "Audit of immigration detention review system reveals culture that favours incarceration," *Toronto Star* (20 July 2018), online: <www.thestar.com/news/gta/2018/07/21/audit-of-immigration-detention-review-system-reveals-culture-that-favours-incarceration.html>.

16. See, for example, Craig S Smith & Dan Levin, "As Canada Transforms, an Anti-Immigrant Fringe Stirs," *New York Times* (21 January 2017), online: <www.nytimes.com/2017/01/31/world/americas/canada-quebec-nationalists.html>.

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be imposed where these interests might be in jeopardy. Each prominent example of oppressive treatment may be interpreted as aiming to assuage the general fears of anxious insiders and to respond to their demands.[17] A quick glance at the history of Canadian immigration law[18] reveals that this recent experience is hardly novel. Through the years, nativism, jingoism and xenophobia have emerged and re-emerged in the public sphere leading to harsher immigration laws.

In general terms, the recent package of reforms has raised four major concerns. First, are they gratuitously harsh? Is their serious impact on various groups necessary to achieve the purposes for which they were said to be introduced? Do they show adequate concern for the interests of those directly affected? Second, are they over-inclusive? Are they tailored sufficiently to target only those individuals whose behaviour is considered problematic, or do they have a negative impact on others who are caught innocently within the same net? Third, do they impose serious hardship on some individuals who have merely exercised their rights or who have failed to meet demanding conditions, solely to deter large numbers of others from engaging in similar conduct? In other words, are they imposing unreasonably high burdens on some individuals for reasons of the public good? Fourth, are they prompted by antagonism towards outsiders, or to pander to groups within the polity who bear such resentment? There is also an ancillary concern: whether there is adequate legal redress if a positive answer can be given to any of these questions.

In response to the package of reforms and the concerns they have raised, immigration lawyers have not been inactive. They have devised and maintained important, well-conceived challenges against various legal provisions. In doing so, they have relied on a familiar set of legal sources in their attempts to challenge the validity of the measures in question or to minimize their impact. They have placed significant reliance both on established administrative law doctrines and on section 7 of the *Canadian*

17. It should be acknowledged that since 2015, a significant number of the reforms have been annulled, both by the courts and by a new government that is more temperate in its rhetoric. However, while inflammatory language from officials may have subsided, many of the above-noted changes have been maintained.

18. The classic source is Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic*, 2nd ed (Toronto: University of Toronto Press, 2010): "…narrow (nativist) conceptions of community…and ideological hostility to collectivism in the organization of the economy seem largely to explain the exclusion of Asian and black immigrants, …the refusal to admit Jewish refugees before and during the Second World War, the internment of Japanese Canadians during the second World War, the screening out of alleged Communist sympathizers on national security grounds during the 1950's and 1960s…" at 464.

Charter of Rights and Freedoms,[19] which guarantees "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."[20]

However, lawyers have only rarely relied on other sections of the *Charter* when challenging the legal validity of government measures. Specifically, they have tended to shy away from relying on section 15, which provides that "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." Thus, *Charter* challenges have not been based on the claim that our laws or their application have been tainted by xenophobic impulses. The reluctance of lawyers to rely on this section is not at all mysterious. Authoritative decisions from the Supreme Court of Canada have, in no uncertain terms, asserted that laws governing the admission and removal of non-citizens are virtually immune from section 15 challenge,[21] except in the special case where they single out sub-groups of non-citizens for negative treatment on pernicious grounds, such as national origin.[22]

In the following pages, I argue that we should now reconsider these judicial decisions and promote the view that section 15 should play a more prominent role in litigation that challenges punitive or excessively repressive provisions in our regime of immigration laws. Only if we develop an egalitarian legal doctrine that is rooted in section 15, will we address all four of the general concerns noted above. Rather than disallow equality-based challenges to our immigration laws, we should welcome litigation that seeks to prove the suspicions that our immigration laws may have been shaped by the influence of xenophobic ideologies which may, in turn, have been fertilized autopoetically by government laws and policies. Even where oppressive immigration laws are applicable to all non-citizens and differentiate them as a class from citizens, we should welcome a forum for review in which we scrutinize their full impact

19. *Canadian Charter of Rights and Freedoms,* s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

20. It is interesting to note that on occasion, lawyers also continue to rely on the *Canadian Bill of Rights,* SC 1960, c 44. See, *Hassouna v Canada (Minister of Citizenship and Immigration),* 2017 FC 473.

21. The leading cases, discussed below, are *Charkaoui v Canada (Immigration and Citizenship),* 2007 SCC 9 *[Charkaoui]* and *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, 1 RCS 711 [*Chiarelli*]. See the text accompanying notes 28 and 29, below.

22. See, for example, *Canadian Doctors*, *supra* note 7; discussed *infra* note 75; *YZ*, *supra* note 5, discussed *infra* note 79; and *Tabingo v Canada (Citizenship and Immigration),* 2013 FC 377, (FCTD) [*Tabingo*]; discussed *infra* at note 72, aff'd 2014 FCA 191 [*Tabingo* Appeal] discussed *infra* at note 74.

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on non-citizens so that we can appraise accurately the actual harms and benefits and consider government reasons for imposing such rules under section 1 of the *Charter*.[23]

I do not argue that any specific legal provisions violate section 15. Such an argument would require more detailed attention to the wider social, historical and political milieu than space permits. Instead, I operate at a more general level, arguing that the reasons and premises underlying the decisions to immunize immigration law from equality challenges are deeply problematic. Not only are those reasons and premises insufficient to ground a comprehensive immunity, they are also inconsistent both with general doctrines of equality that were accepted at the time the decisions were made and those that have gained currency today. More specifically, they conflict with approaches to equality that demand a consideration of contextual factors, including an appraisal of historical experience, rather than mere formalistic categorization; they conflict with decisions that demand that we examine the actual impact that laws have rather than their purpose; they conflict with approaches that look beyond differential treatment to emphasize that a principle of equal concern and respect should be regarded as the fundamental principle of analysis; and they conflict with approaches that adopt the concept of substantive equality as the basic fulcrum for analysis.

In addition, recognition of the corrosive effects of xenophobia has developed and become more widespread since many of these decisions were made.[24] Our experience of anti-immigrant and anti-immigration polemic within mainstream political discourse and the wide-ranging ways in which xenophobia reveals itself should alert us to the dangers of immunization of particular areas of law from egalitarian challenge.[25] When nativist views gain currency, it is likelier that xenophobic laws will be enacted, particularly in the contentious field of immigration. It should also be noted that section 7 of the *Charter* has, in many ways, proved to be an ineffective and unreliable tool to challenge the constitutionality of

23. *Charter*, *supra* note 19, s 1; Where there is a heavy onus is on the government to show that any infringement of a right is demonstrably justifiable in a free and democratic society.

24. See, for example, recently signed *Global Compact for Safe, Orderly and Regular Migration,* 13 July 2018, online: <www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf.>; which makes multiple references to xenophobia and reveals high levels of concern about its rise.

25. As reported by Statistics Canada, "After steady but relatively small increases since 2014, police-reported hate crime in Canada rose sharply in 2017, up 47% over the previous year, and largely the result of an increase in hate-related property crimes, such as graffiti and vandalism. For the year, police reported 2,073 hate crimes, 664 more than in 2016. Higher numbers were seen across most types of hate crime, with incidents targeting the Muslim, Jewish, and Black populations accounting for most of the national increase." See, Statistics Canada, "Police-reported hate crime, 2017," *The Daily* (28 November 2018), online: <www150.statcan.gc.ca/n1/daily-quotidien/181129/dq181129a-eng.htm>.

immigration laws.[26] It is therefore appropriate to look for other devices that may offer additional legal protection.

In order to develop these points, I proceed as follows: First, I outline and analyse critically the decisive passages in the two leading Supreme Court cases that considered the interplay between section 15 and immigration law, and effectively closed off avenues for section 15 advocacy within the field. A major problem with these cases is that they make no helpful reference to leading equality decisions beyond the sphere of immigration. They also promote a concept of discrimination that is less nuanced than that found in these leading cases. While it is sometimes difficult to fathom how their terse analysis actually aligns with the decisions in which broader principles are articulated, it seems clear that the immigration cases are based on the weak premise that differential treatment between citizens and non-citizens in the realm of immigration law should not be characterized as discriminatory on a ground analogous to those enumerated in section 15 and should, as a result, be immune from section 15 challenge. I attempt to expose the weaknesses of this claim. I then examine other equality decisions from the same era. These decisions introduced some important doctrinal claims about the values that should underpin our concept of discrimination. I argue that these principles are still relevant and I use these cases to expose further the disingenuous artifice on which the immigration cases are based. Subsequently, I examine more recent decisions on equality in which the Supreme Court of Canada has raised doubts about the mandatory use of comparator groups when determining whether a person has been treated unequally and has promoted the pursuit of substantive equality. I suggest that these ideas clash with the approach taken in the decisions that immunize immigration law from section 15 challenges. I also examine some early decisions in which the Supreme Court suggests that a broad range of laws are insulated from *Charter* review and suggest that these cases have a narrow ambit that should not be extended to embrace immigration laws. Finally, I turn to some recent immigration cases in which current equality principles have been adopted —cases in which the question is whether differentiation between groups of non-citizens is discriminatory—to show how they too have failed to take seriously some key ideas that must be confronted if xenophobia is to be addressed adequately.

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26. See Catherine Dauvergne, "How The Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Jurisprudence" (2013) 58:3 McGill LJ 663; arguing that the principles of fundamental justice, having been analysed through a lens that places more importance on national security rather than on basic rights, have been unduly diluted.

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I. *Immunizing immigration decisions from section 15: Interpreting* Charkaoui

A helpful point of entry is the Supreme Court's decision in *Charkaoui*,[27] a decision that followed closely on the 2006 election and one that dashed hopes that section 15 of the *Charter* would provide a set of tools to protect the interests of non-citizens as they negotiate the immigration process. In unequivocal terms, the Court denied that the distinction between non-citizen and citizen as found in our immigration and citizenship laws can ground a section 15 challenge, barring very exceptional circumstances. The relevant passages should be parsed carefully.

McLachlin C.J. introduces the issue thus:

> The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme [which can lead to deportation on security grounds] discriminates against noncitizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and noncitizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to noncitizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter* : *Chiarelli*.[28]

On first sight, this is an accurate statement of the law. Section 6 does indeed allow for differential treatment[29] and indeed, it ensures it by guaranteeing a package of rights to citizens that is not granted to others. The fact that non-citizens are denied these rights by virtue of their status

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27. *Charkaoui, supra* note 21.

28. *Ibid* at para. 129. As explained below, the reference to *Chiarelli* is significant. See below, the text accompanying note 31.

29. Section 6 of the *Charter, supra* note 19, reads as follows:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> a) to move to and take up residence in any province; and
>
> b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

is, thus, not a matter that can be challenged constitutionally.[30] However, McLachlin C.J.'s words do seem to provide non-citizens with the possibility of a successful challenge in some circumstances. The inclusion of the phrase "for that reason alone" should give us pause. We should note its various possible meanings and from these, select one that fits best.

On the one hand, the phrase suggests that if non-citizens can identify an offensive aspect of the deportation scheme that has a profound impact on their interests then they might be able to successfully mount a challenge that the differential treatment that they are accorded, compared to that accorded to citizens, can amount to a violation of section 15. Under this reading, the Court would not be seeking to immunize the field from challenge. Instead, it would merely be adding a further demand to litigants: show us that there is something going on here that is more than the mere creation of a set of rules defining who has access to the country. In other words, a claimant who, for example, showed that rules about entry and residence imposed oppressive or unfair conditions, or who revealed that the rules were created by a political party that regularly engaged in the vilification of non-citizens might succeed. Within a specific context, the oppressiveness of a condition attached to a law that does not apply to citizens might provide the required additional reason that would permit a court to find that the scheme in question violated section 15.

However, a closer reading of the whole text reveals that this is not what is intended here. Ultimately, it becomes clear that, with one very small exception, non-citizens are always to be denied the opportunity to challenge immigration schemes if their claim pivots on differential treatment between non-citizens and citizens. The court is stating that, in such cases, there is sufficient reason to bar an equality challenge. For a non-citizen to successfully challenge a deportation scheme as discriminatory, that scheme would also have to differentiate on other grounds. For example, it would need to differentiate among non-citizens on grounds such as ethnic origin or religion or other analogous or enumerated grounds.

The reference to *Chiarelli* is the first indicator that this latter interpretation is the correct one. The relevant passage in Sopinka J.'s judgment reads as follows:

30. I do not consider here the argument that the Constitution, by guaranteeing rights to citizens, is not guaranteeing them exclusively to citizens. According to this argument, in special circumstances, various non-citizens may have a constitutional right to enter or remain in the country. Such an argument has not fared well in the courts. See *Solis v Canada (Citizenship and Immigration*), [2000] FCJ No 407, 186 DLR (4th) 512. Nevertheless, I believe that its full merit has been underappreciated.

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> While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). *There is therefore no discrimination* contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.[31] [emphasis added]

Sopinka J.'s categorical conclusion that there is no discrimination is based on the understanding that a differentiation will be discriminatory only if it is made on one of the grounds listed in section 15 or an analogous ground. He is not here cataloguing all the factors that are required to show that a distinction *is* discriminatory. Instead, he is identifying a preliminary finding that must be made before the inquiry can continue. He is asserting that one can decide that differentiation is *not* discriminatory merely by finding that the distinction is neither enumerated nor analogous. Because he is attempting to show that a deportation scheme is *not* discriminatory, Sopinka J. does not pursue an inquiry into any additional factors, presumably because he thinks that it is unnecessary to do so. Because the distinction between citizen and non-citizen is authorized in a specific context, the differentiation is not based on a proscribed ground. Citizenship status, if it relates to the immigration process, is neither enumerated nor analogous. This terminates the section 15 inquiry at an early point.

Not only does McLachlin C.J. adopt Sopinka J.'s explanation of discrimination, she also adds flesh to the skeleton by adding extra caveats:

> ….there are two ways in which the *IRPA* could, in some circumstances, result in discrimination. First, detention may become indefinite as deportation is put off or becomes impossible, for example because there is no country to which the person can be deported. Second, the government could conceivably use the *IRPA* not for the purpose of deportation, but to detain the person on security grounds. In both situations, the source of the problem is that the detention is no longer related, in effect or purpose, to the goal of deportation.
>
> In *Re A*, the legislation considered by the House of Lords expressly provided for indefinite detention; this was an important factor leading to the majority's holding that the legislation went beyond the concerns of immigration legislation and thus wrongfully discriminated between nationals and non-nationals…Even though the detention of some of the appellants has been long—indeed, Mr. Almrei's continues—*the record on which we must rely does not establish that the detentions at issue have become unhinged from the state's purpose of deportation*…. [emphasis added][32]

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31. *Chiarelli*, *supra* note 21 at para 32.
32. *Charkaoui, supra* note 21 at paras 130, 131. The Reference to *Re A* is a reference to *A v Secretary of State for the Home Department*, [2005] 3 All ER 169, [2004] UKHL 56.

The two points found in this excerpt should be considered in reverse order. In both cases, McLachlin C.J. is claiming that when we have left the realm of immigration, the possibility for a finding of discrimination re-emerges. In the second point, she is claiming that that where a court rules that a measure has not been introduced to achieve a purpose related to immigration but to achieve a quite different goal, it may then consider whether it is discriminatory. Where a person has been detained solely for national security reasons, we will not have entered the realm of deportation. Generally speaking, only where the government is pursuing a purpose that is related to immigration, will a disadvantage that is imposed only on a non-citizen be found not to be discriminatory. On the other hand, where treatment accorded to an individual is *unrelated* to the purposes of deportation, the immunization provided by the subject matter of the legislation will no longer apply and it may be found to be discriminatory.[33]

We should pause to note the full meaning of this analysis. Where the legislative purpose underlying a measure is that of regulating immigration, this will be sufficient to short circuit any further inquiry. In particular, it will circumvent the need to make inquiries into the actual effects that the measure has had or is likely to have on specific immigrants. This is problematic, because, as is noted below,[34] equality jurisprudence has placed increasing levels of emphasis on the need to conduct such effects-based inquiries. The general thrust of that jurisprudence is that we should look beyond formal distinctions to discover what the substantive impact of law is.

Now, turning to the first point made in the paragraph quoted above, it should be conceded that there is an attempt here to include an effects-based analysis of discrimination as part of the inquiry but it is, at most, half-hearted and does not provide a solid foundation for the conception of discrimination that is being promoted. When it becomes *impossible* for the government to achieve its stated immigration purpose through the measures in question, that purpose ceases to provide the required immunization from section 15 challenge. The measures in question, whatever their stated

33. The idea that the discriminatory nature of a law should depend on whether its purpose relates to the field of immigration raises a host of problems. Determining a law's purpose is of course notoriously difficult. But more important, deciding that a matter "relates to immigration" will be contentious. Does the imposition of a work permit relate to immigration or employment? Does denial of access to a profession to permanent residents relate to immigration. Even if the field of immigration is defined to embrace only the rights to enter into, remain in and depart from Canada, the imposition of restriction on work, housing, health, education may be seen as one that is defining the ambit to the right to remain. These are thorny problems that are noted but not discussed further.

34. *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 57 [*Law*].

purpose, cease to create the immunization because a court is justified in finding that they do not relate to deportation because of the absence of any effective way for it to contribute to that end.

The important point to note is that McLachlin C.J. is claiming that when an underlying immigration purpose may still be achieved, the seriousness of its impact on the individual is totally irrelevant to the determination that it is not discriminatory. Thus, while the impact of lengthy detention on Mr. Almrei was recognized to be severe, achieving the government's purpose of deportation was still characterized as within the realm of the possible. Since deportation has not become impossible, the detention could be characterized as part and parcel of the process of removal and therefore could not be considered to be discriminatory, no matter how repressive.

Although she does not cite it, it is likely that the Chief Justice had in mind the general approach to discrimination cases that had been developed by Iacobucci J. speaking for the Court in the case of *Law v. Canada* (*Minister of Employment & Immigration*)[35] a few years previously. Iacobucci J. summarized the approach as follows:

> Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[36]

The decision in *Charkaoui* is reached by addressing the second of these points. The deportation scheme in question imposes substantively differential treatment between the claimant and others, but the treatment

35. *Law, ibid.*
36. *Ibid* at para 88.

is not "based on one or more enumerated and analogous grounds." One's status as a non-citizen cannot count as an analogous ground when the differentiation in question relates to the immigration or removal process. The fact that the *Charter* itself permits such differentiation provides foundational support for this conclusion. In essence, the underlying argument seems to be that, if we were to recognize lack of citizenship status as a ground of discrimination, we would be unable to produce a body of immigration law. Indeed, we would be unable to develop a regime that treated citizens and non-citizens differently.[37]

II. *The Tension between* Charkaoui *and* Andrews[38]

On their face, the views expressed by McLachlin C.J. and Sopinka J. are perplexing. One should remember that in *Andrews v. Law Society of British Columbia*, the leading precedent at the time *Chiarelli* was decided, the Supreme Court had held that non-citizens fall into a category analogous to those specifically enumerated in s. 15. To distinguish between citizens and non-citizens is to differentiate on a prohibited ground. Wilson J. memorably offers the following explanation:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote….I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. *I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.*[39] [emphasis added]

The emphasized passage suggests that you cannot pick and choose contexts in which to make the determination that non-citizens are particularly vulnerable, lack political power and are therefore at risk of

37. In *Lavoie v Canada*, [2002] 1 SCR 769 [*Lavoie*], it was argued unsuccessfully that recognizing immigration status as a ground analogous to those listed in section 15 *in any field* would "negate or abolish the concept of citizenship." The majority noted at para 39, "As [the respondents] put it, "[b]y universal definition and by constitutional fiat, …citizens and non-citizens are *unequal* in status." This case is discussed *infra* in the text accompanying note 46.

38. *Andrews v Law Society of British Columbia,* [1989]1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

39. *Ibid* at para 5.

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suffering abuse. It is this general vulnerability in every social context (including the realm of immigration and deportation) that leads to the conclusion that non-citizen status is analogous to the grounds enumerated in section 15. The determination that non-citizens fall into an analogous category is not context dependent. If it is non-citizens' vulnerability that exposes them to the risk of abusive treatment and that therefore justifies a close scrutiny of their treatment comparative to how citizens are treated, then the field of immigration law should not be considered exceptional.

In response to this powerful explanation, the reasoning of McLachlin C.J. and Sopinka J. appears to be syllogistic in nature:

(1) Deportation schemes that differentiate only between citizens and non-citizens[40] are authorized by the Constitution.

(2) This is a deportation scheme that differentiates only between citizens and non-citizens.

(3) This scheme is authorized by the Constitution.

The fallacy in this logic can be exposed by noting that the guarantees found in section 6 of the *Charter* do not provide any logical answer to the question whether the distinction between citizens and non-citizens in this context is discriminatory. If, when considering the constitutional provision, one keeps in mind the three-part schema adopted in *Law*, one can readily identify that different interpretations of section 6 are possible. One option is, indeed, the one that is selected by McLachlin C.J.: it is not unconstitutional to provide different packages or rights to citizens and non-citizens in the immigration context because in that context it is not discriminatory to make such a differentiation.

However, a second option is to hold that, while sets of rules defining entry and removal that distinguish between citizen and non-citizen are not for that reason alone invidious, it is open to a litigant to show that the particular instance in question does discriminate. This option would bring into play the factors identified in the third part of the schema outlined in *Law*: since the burden placed upon non-citizens by deportation schemes, considered in the abstract, does not *per se* have the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition they are not presumptively discriminatory. However, it would be open to a non-citizen to show that any particular deportation scheme would have that effect. Such proof could rebut any presumption. A non-citizen could claim with justification that while they do not have a right not to be deported, they do have a right that the deportation process be conducted according to high standards of treatment and in a respectful

40. As opposed to schemes that distinguish among different categories of non-citizen.

manner. Under this interpretation, an abusive or needlessly oppressive immigration law that fails to give adequate weight to the interests of the non-citizen could be identified as discriminatory. While the distinction between citizen and non-citizen in a law that is part of an immigration scheme may not be suspect on its face, further inquiry may show that it is indeed so. The non-citizen litigant would note that the law in question is not merely a harsh law that applies to everyone. It is a harsh law that does not apply to citizens. It is the combination of the harshness and the recognized historical prejudice suffered by non-citizens that would permit us to label it discriminatory.[41]

Thus, if one reduces the reasoning to a syllogism the conclusion should not be the one attributed above to McLachlin C.J. and Sopinka J. Instead, it should be:

(4) This scheme is authorized *unless it is shown to be discriminatory.*

Syllogism alone cannot ground the immunization of an immigration scheme from a section 15 challenge.

One can tie these points directly to the excerpts from *Charkaoui* cited above. McLachlin C.J. connects the immunization within the sphere of immigration to the government's purpose. She omits to consider a case where there are multiple aims, one to establish an immigration regime as well as others that are more nefarious. For example, where there are two underlying purposes, the first of which is to define a deportation scheme and the second of which could be to ensure that the scheme will satisfy xenophobic zealots by showing high levels of disdain for non-citizens, an equality challenge will presumably not succeed. In McLachlin C.J.'s estimation because such a regime would not be "unhinged from the state's purpose of deportation," such ulterior purposes would not negate the immunization but they could reveal an unjustifiably negative attitude to non-citizens and have an undue impact on them.

Furthermore, where there is an immigration purpose behind a government regime but there are serious collateral and unintended impacts on the individual, McLachlin C.J.'s analysis posits that this should have

41. This point is made *in Quebec (Attorney General) v A,* 2013 SCC 5, [2013] 1 SCR 61 [*AG v A*] at para 347, where it is stated, "where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered": This analysis is explored in detail in *Canadian Doctors, supra* note 7 at paras 721-728.

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no bearing on the conclusion that the regime is not discriminatory.[42] Assuming that the government can achieve its purpose, it is that purpose rather than its impacts that determines that we are in the zone of immunity. Thus, as will be shown in further detail below, the approach is antithetical to approaches that advocate that inquiries into discrimination should be effects-based rather than merely purpose-based.[43]

In the remaining pages of this paper, I present three major reasons for rejecting the *Charkaoui/Chiarelli* approach.

First, the approach does not easily co-exist either with the general jurisprudence on equality that was current at the time *Charkaoui* was decided, or with the judicial doctrine that has developed since then. Second, it fails to recognize and address the full impact of xenophobia as a significant social problem. And third, it has had a negative impact on judicial reasoning in those few immigration cases where judges have concluded that the section 15 rights of various groups of noncitizens have been infringed.

I address each of these in turn.

III. *The tension between* Charkaoui *and early equality jurisprudence*

The oddness of the decisions in *Charkaoui* and *Chiarelli* becomes noticeable when one looks first at analyses of discrimination found in other cases of the same vintage. I can make my point by adverting to two such cases—*Law* and *Lavoie.*

In *Law*, the Court had insisted vigorously that equality analysis "is to be undertaken in a purposive and contextualized manner." Moreover, it revealed and traced out the basic purpose underlying section 15 as follows:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as

42. As Colin Grey pointed out to me, it is fruitful to distinguish McLachlin CJ's views on section 15 with those that she expresses on section 7. Here, she is making the claim that an immigration law is immunized from section 15 challenge no matter how serious the harm incurred. In relation to section 7, she notes, "*Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so." *Charkaoui*, *supra* note 21 at para 17.

43. In *Withler v Canada (Attorney General),* 2011 SCC 12 at para 39 [*Withler*]. This point is made clearly: "The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group."Also in *AG v A*, *supra* note 41 at para 319, Abella J. quotes McIntyre J. in *Andrews*: "[T]he main consideration must be the impact of the law on the individual or the group concerned."

> human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[44]

The *Charkaoui/Chiarelli* approach, by maintaining that any rational connection between the treatment and immigration goals is sufficient to halt a s. 15 challenge in its tracks before considering whether essential human dignity has been violated adopts a return to formalistic tendencies that are inconsistent with the general contextualizing approach advocated in *Law* and further emphasized in later cases. No matter how oppressive our immigration laws, no matter how much disdain they reveal for those seeking to enter and remain in Canada, they are immune from being considered discriminatory, on the ground that the distinction between citizen and non-citizen is a pre-requisite for any immigration process to get off the ground. These contextual factors are seemingly irrelevant when determining whether an immigration measure is discriminatory. While it may be accepted for the purpose of argument that drawing a distinction between citizen and non-citizen may not in itself interfere with the promotion of "a society in which all persons enjoy equal recognition at law as human beings" any specific iteration of that distinction even in the realm of immigration law may do so. A clear example would be where immigrants are mandatorily separated from their children at the border and deported without them (as they have recently been in the United States).

Also, in *Law,* the Court discusses how comparator groups should be selected;

> To locate the appropriate comparator, we must consider a variety of factors, including the subject-matter of the legislation. The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination. Both the purpose and the effect of the legislation must be considered in determining the appropriate comparison group or groups. Other contextual factors may also be relevant. The biological, historical, and sociological similarities or dissimilarities may be relevant in establishing the relevant comparator in particular, and whether the legislation effects discrimination in a substantive sense more generally….[45]

The decision to proscribe using citizens as a comparator group when immigration laws are at issue *without looking at the effects of a particular*

44. *Law, supra* note 34 at para 51.
45. *Ibid* at para 57.

law is incompatible with this analysis which emphasizes examining the effect of legislation when determining the relevant group.

In *Lavoie,* Bastarache J., for the majority, adverts to a tension between *Chiarelli* and *Andrews*:

> This case has much in common with both *Andrews* and *Chiarelli*. Like *Andrews*, it involves differential treatment in employment that is not explicitly authorized by the *Charter*; like *Chiarelli*, it involves a federal law that is part of a recognized package of privileges conferred on Canadian citizens. This combination of factors makes it difficult to decide whether, at the end of the day, the law conflicts with the purpose of s. 15(1) of the *Charter*. Based on this Court's recent s. 15(1) jurisprudence, I conclude that it does.[46]

Bastarache J. begins his analysis by noting that the case looks as if it is straightforward and calls for an uncontroversial application of *Andrews*:

> the impugned law draws a clear distinction between citizens and non-citizens, and the latter constitutes an analogous ground of discrimination under s. 15(1): see *Andrews*…[47]

However, an argument from the respondents gives him pause:

> Nevertheless, the respondents argue that the whole point of federal citizenship legislation is to treat citizens and non-citizens differently, and therefore that the two groups cannot validly be compared for s. 15(1) purposes. As they put it, "[b]y universal definition and by constitutional fiat, …citizens and non-citizens are *unequal* in status. To treat them equally would be to negate or abolish the concept of citizenship"….In their view, however, such a comparison is not appropriate in the case of "a citizenship defining law that draws a constitutionally permitted distinction between citizens and non-citizens." In such a case, the s. 15(1) analysis would undermine the fundamental difference between citizens and non-citizens…[48]

To address this concern, Bastarache J. focuses first on the use of citizenship as a comparator group and on the proper stage in the analysis that this should occur:

> Whether citizens are an appropriate comparator in this case is, in my view, better *dealt with as a contextual factor under the third branch of the* Law *analysis* than as a bar to recognizing a legislative distinction. Although Iacobucci J. stressed the importance of identifying an appropriate comparator group, there is nothing in *Law* to indicate that the

46. *Lavoie, supra* note 37 at para 37.
47. *Ibid* at para 39.
48. *Ibid.*

> first inquiry is anything but a threshold test. On the contrary, the precise inquiry at the first stage is whether the law draws a formal distinction "between the claimant and *others*."[49] [emphasis added]

He then proceeds to cast doubt on the ideas underpinning the respondents' claim:

> As citizenship was recognized as an analogous ground in *Andrews*, I can find no authority for qualifying this finding according to the context of a given case. The point of the analogous grounds, according to *Law* and subsequent cases, is that they are "suspect markers" of discrimination: the groups occupying them are vulnerable to having their interests overlooked no matter what the legislative context.[50]

In this paragraph, Bastarache J. shows clearly his unwillingness to recognize areas of immunity where the grounds of discrimination do not apply. While he does not explicitly overrule the decision in *Chiarelli*, he nevertheless casts grave doubts on the continuing authority of the reasoning on which it is based. McLachlin C.J.'s. somewhat casual reference to *Chiarelli* and her development of the approach found therein ignores this. She does not even cite the *Lavoie* decision in her judgment.

It should be added that in *Charkaoui,* McLachlin C.J. also ignores her own words in her dissenting opinion in *Lavoie* where she states:

> Parliament need not choose between legislating with respect to citizenship and discrimination. Rather, it is Parliament's task to draft laws in relation to citizenship that comply with s. 15(1). This leaves ample scope for the exercise of the citizenship power, so long as Parliament does not make distinctions that unjustifiably violate human dignity: *Law*, *supra*. We cannot agree that defining Canadian citizenship requires that Parliament be allowed to discriminate against non-citizens.[51]

Here, McLachlin C.J. offers no reasons why we should distinguish between laws that define how citizenship may be obtained and laws that define the rights that attach to citizenship. Her demand that Parliament draft citizenship laws that comply with section 15 should be regarded as categorical.

III. *The Tension between* Charkaoui *and later equality jurisprudence*

It should also be emphasized that the *Charkaoui/Chiarelli* approach does not fit smoothly with equality doctrine found in more recent cases. Post-*Charkaoui* decisions place weight on the factors that I have noted in

49. *Ibid* at para 40.
50. *Ibid* at para 41.
51. *Ibid* at para 3.

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my analysis of *Law* and *Lavoie*. While the court has dispensed with the tripartite schema developed in *Law* and has condensed it into a two-part test, this change does nothing to reduce the friction.[52] Emphasis on the centrality of a conception of substantive, as opposed to formal, equality has increased the difficulty of continuing to maintain a preliminary filter that permits laws dealing with immigration to be immune from section 15 challenge.

For example, in *Withler*[53] the court attempts to simplify the jurisprudence by stating:

> At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"[54]

The court offers an analysis of substantive equality that suggests that it would be quite appropriate to inquire whether xenophobic antipathy is reflected in our laws, including our immigration laws, and their impacts:

> The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances.[55]

In *Quebec (Attorney General) v. A*,[56] the Court goes on to unpack the concept of substantive equality as follows:

> substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable, which is most often the case if the disadvantage perpetuates prejudice or stereotypes.[57]

The Court then quotes Sophia Moreau:

> We think of discrimination not just as any sort of differential treatment but as a particular kind of differential treatment: to be discriminated against is not just to be denied something that others have but to be *denied it in a way that is objectionable or unfair.*[58] [emphasis added]

52. The jurisprudence establishes a two-part test for assessing a s 15(1) claim: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? See *R v Kapp*, 2008 SCC 41 at para 17.
53. *Withler, supra* note 43.
54. *Ibid* at para 2.
55. *Ibid* at para 65.
56. *AG v A*, *supra* note 41.
57. *Ibid* at para 180.
58. *Ibid.*

Transposing these remarks into a deportation context would allow us to say that removal itself may not be discriminatory but particular forms of removal may be objectionable or unfair. The inquiry into substantive equality cannot be pursued if inquiries into unfairness or objectionableness are proscribed in particular fields of law, which is the outcome of adopting the *Charkaoui* analysis. Moreover, where a disadvantage is placed on non-citizens in an "objectionable or unfair way" such as by penalizing all refugees on the basis of a stereotyping and generalized assumption that their claims are fraudulent, the laws in question can fairly be regarded as discriminatory under this account.

Moreover, in *Withler*, the Court also offers a strong explanation why the filtering process in the first part of the test should not be too rigid. It says:

The role of comparison at the first step is to establish a "distinction." Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination.…[59] [emphasis added]

The Court then picks up on the idea suggested in *Lavoie* that comparison between groups should occur at the second stage of the inquiry (which had been the third stage, under the *Law* framework) and should be highly context-dependent:

> The analysis at the second step is an inquiry into whether the law works substantive inequality, by perpetuating disadvantage or prejudice, or by stereotyping in a way that does not correspond to actual characteristics or circumstances. *At this step*, comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large, and thus help to determine whether the impugned law or decision perpetuates disadvantage or stereotyping. The probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.[60] [emphasis added]

59. *Withler, supra* note 43 at paras 62-63.
60. *Ibid* at para 65.

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In the immigration context, this might involve considering the differences between citizens and non-citizens when deciding that a particular part of the regime is substantively unjust.

IV. *Jurisprudence that supports* Charkaoui

Despite the friction between *Charkaoui* and *Chiarelli* on the one hand, and leading jurisprudence on the other, it must be noted and conceded that there is a strain of jurisprudence with which they are more compatible. The jurisprudence includes a case in which McLachlin J. (as she then was) dissents vigorously. The cases in question deal with the provincial funding of separate schools and decide that a particular sphere of legislation is insulated from *Charter* review. It should be noted at the outset that in these cases, unlike *Chiarelli* and *Charkaoui*, it is not held that the laws withstand Charter challenge because they are not discriminatory. The reasons for the decision are more basic. Nevertheless, these cases should remind us that *Charkaoui* and *Chiarelli* are not unique or extraordinary in their attempts to immunize laws from *Charter* review.

The first case is *Reference Re Bill C-30*[61] in which Wilson J. introduced the idea that a wide range of legislative measures may be insulated from *Charter* challenge. The case concerned legislation in Ontario that was to extend provincial funding to Roman Catholic Separate Schools. The Ontario Government argued that the Bill was a justifiable exercise of power under s. 93 of the *Constitution Act*.[62]

Amongst the arguments mounted against the legislation was the argument that, by providing Roman Catholic schools with financial benefits not made equally available to other taxpayers and other religious schools, Bill 30 violated the equality guarantee in s. 15(1) of the *Charter*. In response, the Ontario Government argued that such law was insulated from *Charter* challenge by section 29 of the *Charter*.[63]

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61. [1987] 1 SCR 1148, 40 DLR (4th) 18 [*Bill C-30*].

62. Section 93 reads: "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union….
> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen□s Subjects in relation to Education…" *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

63. Section 29 provides, "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." *Charter, supra*, note 19, s 29.

In her majority opinion, Wilson J. gave an extended account of how a law may be immune from *Charter* challenge. It includes the extraordinary claim that a provincial law that is created under a plenary Constitutional power is immune from *Charter* challenge because it is an exercise of a power granted to the province as a result of a constitutional comprise.[64] One could justifiably extrapolate from this analysis to the position that any immigration law enacted by the Federal legislature would also be immune on the ground that it too is a legitimate exercise of a constitutionally granted power gained by constitutional compromise.

Wilson J.'s analysis was quoted *verbatim* in *Adler v. Ontario*[65] where a declaration was sought that the non-funding of Jewish schools in Ontario was unconstitutional. One argument that was made was that by funding Roman Catholic separate schools while denying funding to independent religious schools, the province discriminated against the latter on the basis of religion contrary to s. 15(1). Iacobucci J. for the majority in *Adler* noted that Wilson J. had found that the proposed legislation

> was nonetheless "immune" from Charter review because it was "legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise." See *Reference Re Bill 30*, at p. 1198. This was true regardless of the fact that this unequal funding might, as I mentioned above, "sit uncomfortably with the concept of equality embodied in the Charter."[66]

Iacobucci J. concluded:

> Following the same line of reasoning used by Wilson J. in the *Reference Re Bill 30*, I find that public funding for the province's separate schools cannot form the basis for the appellants' *Charter* claim.[67]

McLachlin J. (as she then was) in her partial dissent rejected this analysis:

> Before considering the *Charter* issues, it is necessary to determine whether s. 93 of the *Constitution Act, 1867* constitutes a code which ousts the operation of the *Charter*. I agree with Sopinka J. that it does not. Section 93 requires Ontario to fund schools for the Roman Catholic minority in Ontario and requires Quebec to fund schools for the Protestant minority in Quebec. Neither its language nor its purpose suggests that it was intended to do more than guarantee school support for the Roman Catholic or Protestant minorities in the two provinces respectively.

64. *Bill C-30, supra,* note 61 at paras 63-64.
65. *Adler v Ontario*, [1996] 3 SCR 609 [*Adler*].
66. *Ibid* at para 38.
67. *Ibid* at para 39.

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> Provinces exercising their plenary powers to provide education services must, subject to this restriction, comply with the *Charter*.[68]

There is good reason to believe that Wilson J.'s analysis is no longer good law although it has never been formally repudiated. First, in *Lavoie,* Bastarache J. explicitly rejected an argument that jurisdictional considerations are relevant when determining whether the *Charter* applies.[69] Moreover, in *EGALE Canada v. Canada*,[70] the British Columbia Court of Appeal refused to apply Wilson J.'s analysis in a context other than the funding of separate schools, and emphasized the unique position that that issue held in constitutional history.[71]

The school funding cases are helpful because they indicate that there may be laws that are insulated from *Charter* review because they are merely recognizing rights, as the Constitution demands. A challenge that demanded that citizens should not enjoy rights—like the right to enter or stay in Canada—that non-citizens do not enjoy would likewise fail. But in *Adler,* McLachlin J. makes a strong case that this does not entail that we should establish excessively broad areas of immunity where the *Charter* would not apply. Nevertheless, this seems to be the upshot of the decision in *Charkaoui.* In *Adler,* McLachlin J. proposes that claimants be permitted to make arguments in accord with the criteria set out in the equality jurisprudence. Their permitted challenge would nevertheless fail both where it is found that the law does not discriminate against them but also where the government shows that the discrimination is demonstrably justifiable in a free and democratic society. In *Adler,* McLachlin J. found that Ontario had done just that.

V. *Xenophobia and immigration law*

My critique of the *Charkaoui/Chiarelli* analysis goes beyond the mere existence of friction created when one tries to fit it within the more general doctrines of equality established elsewhere. By denying a section 15 challenge to non-citizens where the law imposes an unfair disadvantage on them that is not imposed on citizens, the *Charkaoui/Chiarelli* doctrine

68. *Ibid* at para 194.
69. *Lavoie, supra* note 37 at para 40.
70. 2003 BCCA 251.
71. *Ibid*. The Court stated, at para 109: "What is apparent from these passages, and from the judgment of Wilson J. as a whole, is that the reason s. 93 was immune from Charter review was because of a pre-confederation compromise ("bargain") designed to protect the Roman Catholic minority in Ontario and the Protestant minority in Quebec. This compromise, which carried with it certain built-in rights (and inequalities), was entrenched in the Constitution Act, 1867. Section 29 of the Charter did not grant the right to immunity from Charter review under s. 15 or otherwise; it simply recognized and preserved the rights conferred by s. 93 in their historical context."

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leaves few other options to the claimants. One option is to attempt to subsume the claim under another section of the *Charter*. However, there will be many cases of comparative disadvantage that will not meet the tight requirements of other sections. For example, the strict criteria that define cruel and unusual treatment will exclude many forms of abusive behaviour that reveal that the individual is not considered as an equal. In addition, as noted above, non-citizens have had only limited success in getting courts to recognize that the immigration process engages the right to life liberty and security of the person and even where they have been successful in this regard the challenge of showing that the principles of fundamental justice have been infringed has been a difficult one. Moreover, the harm recognized by section 15—that it is an assault on one's personality or identity to suffer the ignominy of treatment that indicates that one is less worthy as a human being as others who are under the law's authority—is quite different from those recognized in the other sections.

A second option is to argue one's case as an equality case but to compare one's treatment with that accorded to other groups of non-citizen. This option is premised on the idea that the law lives up to our equality principles within the realm of immigration by allowing a successful claim only when different rules are applied to different groups who must also negotiate their way through them. It is only where one can show that one is treated as a less valuable human being than other non-citizens that one's equality rights will have been infringed. This idea should be met head on. By accepting it, one is implicitly denying that xenophobia is and throughout our history has been a social problem that surfaces regularly and that demands legal recognition. My primary critique of *Charkaoui* hinges on the idea is that it fails to acknowledge the existence of xenophobia and its possible influence on our laws and misrepresents the nature of the harm suffered. The proposition that our laws have treated some non-citizens unequally because it has failed to accord them the same benefits accorded to other non-citizens is quite different from the proposition that the law has treated some non-citizens unequally because it has treated them as less worthy of respect than the citizenry.

The important point to note is that xenophobic measures need not uniformly oppress all non-citizens in the same way. Although some groups of non-citizen may be able to escape the application of a particular rule, this does not show that the rule is not an instantiation of a xenophobic body of law. As is emphasized in judicial statements about substantive equality, the discovery of formal differences in treatment amongst subgroups need not lead to the conclusion that the measure should not be identified as an instantiation of a more general assault on the whole group. It is for this

reason that is both misleading and unsatisfactory to require non-citizens within the immigration regime to show that differential treatment is being imposed on different groups of non-citizen in specific situations. Their complaint is not that some other non-citizens have escaped the unfair disadvantagement. Excessively harsh rules and over-inclusive rules may be created and implemented *haphazardly* with little concern about the effect. Laws that impose hardship on only one subgroup of non-citizens may be passed by a populist government anxious to curry favour with xenophobic groups. By ill-treating non-citizens in such a fragmented and possibly arbitrary way the government may be able to show its disdain for non-citizens as a whole. Where a legal regime variably imposes burdens on non-citizens from different countries, it does not engage in multiple acts of discrimination against different subgroups. It engages in a more profound act of discrimination against the whole.

Once we have entered a realm in which the distinction between citizen and non-citizen has been made, and once we acknowledge that non-citizens are subject to intermittent, sporadic forms of ill treatment, our inquiry should cease to focus on finding comparator groups. The primary issue is *whether the individual has been treated more harshly than he or she should have been.* We can use the criteria of substantive equality and the criteria from section 1 when making this inquiry. We should not impose any further comparative element. We distort the nature of the claim when we require litigants to show that they are worse off than other non-citizens.

The case of *Tabingo*[72] may cast light on the idea that requiring non-citizens to show that they are treated differently from other non-citizens ignores an important egalitarian concern. This case focused on discrimination *among* immigrants. It concerned a statutory measure which provided that applications for permanent residence as a member of the federal skilled worker class made before 27 February 2008 were to be terminated unless an officer had made a selection decision before 29 March 2012. The applicants had applied for permanent resident visas before 27 February 2008. They had been waiting many years for their applications to be processed but they were in fact cancelled, and noted that the processing was slower in some visa offices. They argued that the measure in question violated their s.15 rights. A large part of the decision focused on the issue whether *Charter* rights vest in non-citizens outside Canada, but this should not concern us here (although it should concern us).

In the Federal Court, the applicants framed their challenge in terms that alleged that the measure discriminated against them on grounds of either

72. *Tabingo, supra* note 22.

country of residence or national origin. Thus, the court was not asked to consider whether the measure in question is a manifestation of a general xenophobic antipathy that surfaces from time to time. While Rennie J. is happy to concede that national origin is an analogous ground for the claim, he finds that country of residence is not. He sums up his reasons thus:

> When determining whether grounds of discrimination are analogous to those listed in section 15, courts should consider whether the characteristics at issue have historically served as "illegitimate and demeaning proxies for merit-based decision making" and whether the distinction being drawn affects a "discrete and insular minority or a group that has been historically discriminated against"….
>
> It is doubtful that country of residence could be an analogous ground. Country of residence is not an immutable characteristic, nor is it vital to identity, given the applicants' willingness to immigrate. Nor are the applicants a discrete and insular minority, and certainly not such a group within Canadian society. Country of residence, in contrast to race and religion, does not have the same historical antecedence of being a basis for discrimination, nor is there sufficient evidence that would establish that residence is an illegitimate or demeaning proxy for merit-based decision making. Accordingly, I find that country of residence is not an analogous ground of discrimination under section 15 of the *Charter* and turn to the applicants' argument based on national origin.[73]

The passages reveal the difficulty that non-citizens face if we remove the opportunity to rely on their mere status of non-citizens. Any ground that they may select as analogous will likely be based on a distinction found in the law or created by the application of the law, in this case, country of residence. But such a distinction may lack the historical pedigree to convince the judge that it can give rise to a discrimination claim. When we have no historical experience with this type of distinction we do not even reach the stage of determining the substance of the claim.

Ultimately Rennie J. found that the measure in question did not discriminate on the basis of national origin. This decision was upheld in the Federal Court of Appeal[74] which dealt with the equality issue quite cursorily noting that that there was a rational explanation for slow processing in some visa offices that had nothing to do with discrimination. At neither level of court was the obvious question addressed: *Given that waiting times are different in different parts of the world (for valid reasons), does it show equal concern and respect to all applicants when one uniformly uses the same cut-off date for cancellation?*

73. *Ibid* at paras 112-114.
74. *Ibid.*

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It is also useful to examine a second recent case, *Canadian Doctors*,[75] where MacTavish J offers a perceptive account of recent section 15 jurisprudence. The case concerned the constitutional validity of two Orders in Council that denied basic health care coverage to refugee claimants from designated countries. MacTavish J.'s careful analysis leads her to conclude that the orders discriminated on the grounds of national origin. However, she baulks at finding that the laws are discriminatory on more general grounds. She considers the argument that the laws discriminate on the basis of "immigration status" and concludes that she is bound by an earlier Federal Court of Appeal decision that immigration status is not analogous to the grounds identified in section 15.[76] In *Toussaint v Canada*[77] Stratas J.A. had stated:

> In my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation. …The primary distinction is said to be between foreign nationals possessing certain immigration status who are covered under the Order in Council, and other foreign nationals who possess another immigration status who are not covered….Further, I do not accept that "immigration status" qualifies as an analogous ground under section 15 of the Charter, for many of the reasons set out in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203 at paragraph 13, recently approved by the Supreme Court in *Withler*, *supra* at paragraph 33. "Immigration status" is not a "[characteristic] that we cannot change." It is not "immutable or changeable only at unacceptable cost to personal identity." Finally "immigration status"—in this case, presence in Canada illegally—is a characteristic that the government has a "legitimate interest in expecting [the person] to change." Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada.[78]

While it is beyond the scope of this paper to consider the merits of the conclusion that differentiations among foreign nationals cannot be discriminatory, the more general conclusion that "immigration status" is not an analogous ground because it is not immutable must be questioned. It should first be noted that neither *Corbière* nor *Withler* addresses the question of immigration status. They merely re-iterate the need to show that the relevant characteristic is "immutable or changeable only at unacceptable cost to personal identity." Stratas J.A.'s account of

75. *Canadian Doctors*, *supra* note 7.
76. *Ibid* at para 870.
77. *Toussaint v Canada (Attorney General)*, 2011 FCA 213.
78. *Ibid* at para 99.

immigration status as mutable runs counter to common experience—it is notoriously difficult for the bulk of the world's population to change its immigration status. It also runs counter to the more lax analysis of immutability found in *Andrews*, where status as a non-citizen is identified as an analogous ground. It is unfortunate that MacTavish J.'s location in the judicial hierarchy precluded her from addressing this point or from extrapolating further from her analysis of the more general jurisprudence.

Yet another recent decision reveals some negative effects of requiring non-citizens to use more specific grounds of discrimination than their non-citizen status. In *YZ*,[79] the applicants alleged that denying an appeal to the Refugee Appeal Division of the IRB to refugee claimants from designated countries of origin (DCOs) violated section 15. Refugee claimants from other countries had access to the appeal process.

Referring to the first part of the *Withler* two-part test, Boswell J. decided that a differentiation had been made on the ground of national origin. Turning to the second part of the test, he argued:

> The distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants under paragraph 110(2)(d.1) of the *IRPA* is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing." *Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or "bogus" claimants who only come here to take advantage of Canada's refugee system and its generosity*…
>
> The introduction of paragraph 110(2)(d.1) of the *IRPA* has deprived refugee claimants from DCO countries of substantive equality vis-à-vis those from non-DCO countries. Expressly imposing a disadvantage on the basis of national origin alone constitutes discrimination (*Andrews* at 174; *Withler* at paragraph 29), and this distinction perpetuates the historical disadvantage of undesirable refugee claimants and the stereotype that their fears of persecution or discrimination are less worthy of attention.[80] [emphasis added]

In order to find that there has been discrimination in this case, Boswell J, is forced to maintain that claimants from a DCO alone are subject to the stereotype of being queue jumpers. But in actuality, this stereotype was being launched more generally at all arrivals who were not waiting overseas to be resettled. When the measures designating countries of origin were introduced, other over-inclusive measures to discourage

79. *YZ, supra* note 5.
80. *Ibid* at para 124.

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fraudulent refugees were also introduced. These measures had an impact on *all* refugee claimants, reducing the times to prepare for hearing and access to humanitarian and compassionate process and the Pre-Removal Risk Assessment. The justification offered by Boswell J. while laudable in effect, offers a partial account of the contextual evidence and wrongly implies that refugee claimants from non-designated countries were not being slighted nor subject to the same abusive stereotypes.

This artificial analysis could have been avoided had Boswell J. conceded that the imposition of restrictive conditions on refugees from DCOs was but one assault amongst many that were targeting refugee claimants in general. We should not look for distinctions amongst the victims who have been violated by different attacks. We should instead recognize that it because they were part of the larger group of non-citizens that they were treated with disdain and disrespect.[81]

Conclusion

Cases such as *Tabingo* and *YZ* should not be read in isolation. Their direct precursors are *Charkaoui* and *Chiarelli*—cases that refuse to acknowledge that a vein of poison may have penetrated our immigration laws and may continue to do so in the future. This failure ensures that harsh and oppressive forms of treatment will likely be viewed as unique or isolated and directed towards discrete groups of non-citizens rather than as indicative of a more general and entrenched antagonism towards non-citizens as a whole. The requirement that non-citizens first show that they are treated unfavourably in comparison with other non-citizens, and then show that the ground of differentiation is analogous to those listed in section 15, and *then* show that the difference reveals that they are being presented as less valuable persons than those others is a requirement that is not only difficult to meet but also one that fails to address the underlying problem—that we live in a culture in which currently there is large-scale distrust of newcomers, and anxiety about the changes that non-members will bring. As a consequence, demands are made that the government treat these anxieties seriously. In various ways and at various times, governments have revealed their willingness to comply to such demands and in doing so, have shown insufficient concern about the collateral impacts of our immigration laws on the individuals whose lives they shape. Since *Andrews,* we have recognized this may surface as a problem outside the field of immigration

81. It should be noted that, on 17 May 2019, the Government removed all countries from the list of those designated as safe. See Government of Canada, "Canada Ends the Designated Country of Origin Practice," (News Release, 17 May 2019), online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/canada-ends-the-designated-country-of-origin-practice.html>.

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and have addressed the issue. It is but a small step to recognize it within that field as well.

Onglet 6

Koshan, Jennifer, « Inequality and Identity at Work », (2015) 38(2) Dalhousie Law Journal 473

Jennifer Koshan*

Inequality and Identity at Work

A clinic at the University of Calgary law school in 2014 worked with unions and workers' rights groups to develop constitutional challenges to the historic exclusion of farm workers from labour and employment legislation in Alberta. After exploring arguments under sections 2(d), 7 and 15 of the Canadian Charter of Rights and Freedoms, *we concluded that, based on the existing jurisprudence, the equality rights arguments under section 15 were the weakest. This article explores what is lost when we fail to recognize the identity-based harms that flow from government violations of equality rights. It considers the nature of these harms, why they may be minimized or ignored, and the consequences of ignoring those harms. These issues are examined in the context of workers' rights, and in particular those of farm workers, but the analysis is also relevant to broader contexts. The article concludes with thoughts on how the Supreme Court of Canada's approach to section 15 of the* Charter *should be modified in order to better capture identity-based harms.*

En 2014, une clinique de la faculté de droit de l'Université de Calgary a travaillé en collaboration avec des syndicats et des groupes de défense des droits des travailleurs pour élaborer des contestations constitutionnelles à l'exclusion historique, en Alberta, des travailleurs agricoles des lois sur le travail et l'emploi. Après avoir étudié les arguments fondés sur le paragraphe 2(d) et sur les articles 7 et 15 de la Charte canadienne des droits et libertés, *l'auteure conclut qu'en vertu de la jurisprudence actuelle, les arguments de droits à l'égalité invoquant l'article 15 sont les plus faibles. L'article pose la question de savoir ce qui est perdu lorsque ne sont pas reconnus les préjudices fondés sur l'identité qui résultent de violations par le gouvernement de droits à l'égalité. Il étudie la nature des préjudices, demande pourquoi ils peuvent être minimisés ou laissés de côté, et les conséquences qui en découlent. Ces questions sont examinées dans le contexte des droits des travailleurs, en particulier des droits des travailleurs agricoles, mais l'analyse est tout aussi pertinente dans de plus vastes contextes. L'auteure conclut avec des réflexions sur la façon dont la Cour suprême du Canada applique l'article 15 de la* Charte *devrait être modifiée pour mieux cerner les préjudices fondés sur l'identité.*

* Professor, Faculty of Law, University of Calgary. I wish to thank the constitutional clinical students for their diligent and passionate commitment to this project, and the clients for their tireless efforts to support the rights of farm workers. Thanks also to Kim Brooks for bringing together scholars interested in questions related to identity, and to the anonymous peer reviewers for their very helpful comments on an earlier version of this article.

Introduction
I. *Discrimination against workers and section 15 of the* Charter
1. *The approach to discrimination generally*
2. *Discrimination against workers*
3. *Discrimination against farm workers*
II. *What is lost when work based inequalities and identities are not recognized?*
Conclusion

Introduction

At a constitutional clinical course at the University of Calgary Faculty of Law in the winter of 2014, I worked with a group of students, unions and workers' rights groups to develop constitutional challenges to the historic exclusion of farm workers from labour and employment legislation in Alberta.[1] After exploring arguments under sections 2(d), 7 and 15 of the *Charter*, we concluded that, based on the existing jurisprudence, the section 15 arguments were the weakest.[2]

1. *Employment Standards Code*, RSA 2000, c E-9; *Labour Relations Code*, RSA 2000, c L-1; *Occupational Health and Safety Act*, RSA 2000, c O-2 [*OHSA*]; *Workers' Compensation Act*, RSA 2000, c W-15.

2. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The students' work is summarized in the following ABlawg posts: Kay Turner, Gianna Argento & Heidi Rolfe, "Alberta Farm and Ranch Workers: The Last Frontier of Workplace Protection" (28 April 2014), online: ABlawg <ablawg.ca/2014/04/28/alberta-farm-and-ranch-workers-the-last-frontier-of-workplace-protection/>; Brynna Takasugi, Delna Contractor & Paul Kennett, "The Statutory Exclusion of Farm Workers from the Alberta Labour Relations Code" (2 May 2014), online: ABlawg, <ablawg.ca/2014/05/02/the-statutory-exclusion-of-farm-workers-from-the-alberta-labour-relations-code/>; Nelson Medeiros & Robin McIntyre, "The Constitutionality of the Exclusion of Farm Industries under the Alberta Workers' Compensation Act" (14 May 2014), online: ABlawg, <ablawg.ca/2014/05/14/the-constitutionality-of-the-exclusion-of-farm-industries-under-the-alberta-workers-compensation-act/>; Graham Martinelli & Andrew Lau, "Challenging the Farm Work Exclusions in the Employment Standards Code" (27 May 2014), online: ABlawg, <ablawg.ca/2014/05/27/challenging-the-farm-work-exclusions-in-the-employment-standards-code/>. See also Jennifer Koshan et al, "Farming the Constitution: The Illegality of Excluding Alberta Farm Workers from Labour and Employment Legislation" in Shirley McDonald & Bob Barnetson, eds, *Farm Workers i Western Canada: Injustices and Activism*, University of Alberta Press [forthcoming].

This conclusion dovetails with other research exploring the transcendence of section 7 of the *Charter* over section 15 in actions challenging the harms of government (in)action.[3] Issues involving the scope of grounds, assumptions about causation and choice, and the test for discrimination have presented barriers to claims under section 15, while broad understandings of security of the person and the principles of fundamental justice have paved the way for successful section 7 claims.[4] The *Bedford* decision from late 2013 suggests a significant amount of overlap between section 15 and section 7, particularly in cases involving gross disproportionality, which focus on the adverse effects of government actions on certain individuals.[5] Yet equality arguments were not made in *Bedford* or in other recent section 7 successes such as *PHS Community Services*.[6] In other cases, such as *Carter*, section 7 arguments have been prioritized over those made under section 15.[7] Relatively broad interpretations of section 2(d) of the *Charter* have also tended

3. Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) 22:1 Const Forum Const 31. See also Peter Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR (2d) 195; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can Bar Rev 299 at 329-330; Marie-Eve Sylvestre, "The Redistributive Potential of Section 7 of the *Charter:* Incorporating Socioeconomic Context in Criminal Law and in the Adjudication of Rights" (2012) 42 Ottawa L Rev 389; Margot Young, "Context, Choice and Rights: *PHS Community Services Society v Canada (Attorney General)*" (2011) 44 UBC L Rev 221.

4. Compare, e.g., the section 15 cases *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*] (denying a claim of age discrimination in the context of pension benefits), *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 (applying section 15(2) of the *Charter* to save the exclusion of some Métis persons from the receipt of benefits), and *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 (denying a claim of religious discrimination) to the section 7 cases *Victoria (City) v Adams*, 2008 BCSC 1363, 299 DLR (4th) 193 aff'd 2009 BCCA 563, 313 DLR (4th) 29 [*Adams*] (finding that a bylaw violated the right to security of the person for failing to permit homeless persons to sleep with overhead shelters in city parks), *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community Services*] (finding that the state violated security of the person for failing to extend an exemption from the criminal law for a safe injection site), *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*] (finding that criminal prohibitions on prostitution violate security of the person), and *Carter v Canada (AG)*, 2015 SCC 5 [*Carter*] (finding that the criminal prohibition against assisted suicide violated s 7 of the *Charter* and that a decision on s 15 was unnecessary).

5. *Bedford*, *supra* note 4.

6. *PHS Community Services*, *supra* note 4. See also *Adams, supra* note 4.

7. In *Carter*, the appellants prioritized their s 7 claim because it included the larger group of persons desiring physician assistance even if they were not unable to take their lives because of physical disability, whereas the s 15 claim focused on persons unable to take their lives because of physical disability. See *Carter*, *supra* note 4 (Oral argument, Appellant), online: Supreme Court of Canada <www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=35591>. The Court also prioritized s 7 in its reasons for decision (*Carter*, *supra* note 4 at para 93).

to overshadow discrimination claims in the context of constitutional challenges involving collective bargaining and other labour rights.[8]

This article explores what is lost when we fail to recognize identity-based harms that flow from government action or inaction. Identity-based harms can be defined as those stemming from, or failing to give due regard to, personal characteristics related to membership in historically disadvantaged groups, the sorts of harms that the guarantee of equality in section 15 of the *Charter* ought to protect against. It is important to consider the nature of these harms, why they may be minimized or ignored, especially when compared with those protected by other rights and freedoms, and the consequences of ignoring such harms. This article examines these questions in the context of workers' rights, and in particular those of farm workers. Although the recently elected New Democratic Party government in Alberta has now passed amendments to include farm workers in the relevant legislation, my analysis is nevertheless germane to the challenges with identity-based claims under section 15 of the *Charter* more broadly.[9]

I begin by discussing cases involving the equality rights of workers decided by the Supreme Court of Canada, and consider these decisions in the context of the historic exclusion of farm workers from labour and employment legislation in Alberta. I then examine the underlying identity-based harms that section 15 is intended to protect against relative to the harms underlying other *Charter* rights and freedoms. I suggest reasons why the recognition of identity-based harms has been so difficult for the Court in the context of workers' rights and argue that the failure to protect against these harms is significant. I conclude with some thoughts on how the Court's section 15 analysis should be modified in order to better capture identity-based harms.

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8. *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*] (finding that the exclusion of farm workers from Ontario's labour code violated s 2(d); the majority did not address s 15); *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 [*Health Services*] (finding that the denial of collective bargaining rights to health care workers violated s 2(d) but not s 15); *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1 [*Mounted Police Association of Ontario*] (finding that a labour regime that denied a meaningful process of collective bargaining for RCMP members violated s 2(d) of the *Charter*); *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*Saskatchewan Federation of Labour*] (finding that denial of the right to strike for essential services workers violated s 2(d) of the *Charter)*; but see *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*] (finding that a specialized labour regime for Ontario farm workers post-*Dunmore* did not violate s 2(d) or s 15); *Meredith v Canada (AG)*, 2015 SCC 2 [*Meredith*] (finding that wage rollbacks for RCMP members without consultation did not violate s 2(d)).

9. Bill 6, *Enhanced Protection for Farm and Ranch Workers Act*, 1st Sess, 29th Leg, Alberta, 2015 (assented to 11 Dec 2015).

I. *Discrimination against workers and section 15 of the* Charter

1. *The approach to discrimination generally*

Although the Supreme Court of Canada's approach to section 15 of the *Charter* has evolved over time,[10] it has consistently required proof of a distinction between the claimant and others based on an enumerated or analogous ground that is discriminatory in either its purpose or effect. Analogous grounds were identified in *Corbiere* as those which are based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" and "characteristics… that the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[11] Discrimination has been defined as variously involving the imposition of burdens or deprivation of benefits;[12] the violation of essential human dignity;[13] and the perpetuation of disadvantage, prejudice or imposition of stereotyping.[14] It invariably involves comparative analysis, though the Court has been more flexible in its approach to comparison in recent years.[15]

2. *Discrimination against workers*

In the more specific context of workers' rights, the Supreme Court has recognized that work is a crucial component of personal identity. In the *Alberta Reference*, Chief Justice Dickson stated:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. *A person's employment is an essential component of his or her sense of identity, selfworth and emotional wellbeing*. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.[16]

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10. For a discussion of the Court's evolving approach to s 15 see Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19 [Koshan & Watson Hamilton, "Continual Reinvention"].
11. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbiere*].
12. *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 at 174-175, 56 DLR (4th) 1 [*Andrews*].
13. *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at para 88, 170 DLR (4th) 1 [*Law*].
14. *R v Kapp,* 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*]; *Withler, supra* note 4 at paras 37-39; *Quebec (AG) v A,* 2013 SCC 5 at para 323, [2013] 1 SCR 61 [*Quebec v A*]; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [*Taypotat*].
15. *Andrews, supra* note 12 at 164; *Law, supra* note 13 at para 56; *Withler, supra* note 4 at para 63.
16. *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 368, 38 DLR (4th) 161, Dickson CJC, dissenting [*Alberta Reference*] [emphasis added].

This passage has been cited by the Court numerous times in cases involving labour and employment matters such as mandatory retirement,[17] damages for wrongful dismissal,[18] and unions' freedom of expression.[19] However, a majority of the Court has never ruled in favour of a section 15 claim framed around the ground of occupational status. While there are claims of discrimination on other grounds that have been at least partially successful in the employment context,[20] those tied to occupational status speak most closely to identity as a worker, and will be my focus here.

The protection of occupational status under section 15 of the *Charter* was first considered in *Reference re Workers' Compensation Act 1983 (Nfld)*.[21] In one short paragraph, the Supreme Court unanimously dismissed the argument that mandatory coverage under workers' compensation legislation, with a corresponding inability to sue one's employer for damages related to workplace injuries, violated the *Charter*. According to the Court, "[t]he situation of the workers and dependents here is in no way analogous to those listed in s. 15(1)…[as] required to permit recourse to s. 15(1)."[22]

The next case, *Delisle v Canada (Deputy AG)*, was a challenge to the statutory inability of RCMP officers to form labour unions with the full range of rights extended to other groups of workers.[23] A majority of the Court dismissed the claimant's arguments under sections 2(b), 2(d) and 15 of the *Charter*. On the section 15 claim, the majority recognized that the impugned statute imposed differential treatment on Delisle, as it deprived RCMP members of a benefit available to most other public service employees. However, "professional status or employment of RCMP members" were not seen as analogous grounds under section 15,

17. *McKinney v University of Guelph*, [1990] 3 SCR 229 at 300, 76 DLR (4th) 545, LaForest J.
18. *Wallace v United Grain Growers Ltd,* [1997] 3 SCR 701 at para 93, 152 DLR (4th) 1, Iacobucci J; *McKinley v BC Tel*, 2001 SCC 38 at para 53, [2001] 2 SCR 161, Iacobucci J [*McKinley*].
19. *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 31, [2013] 3 SCR 733, Abella and Cromwell JJ [*United Food*].
20. See, e.g., *Lavoie v Canada*, 2002 SCC 23, [2002] 1 SCR 769 (with a majority finding discrimination on the basis of citizenship status in the context of requirements for employment with the federal public service, but upholding the requirements under s 1); *Nova Scotia (Workers Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504 (finding discrimination on the basis of disability in the context of workers compensation benefits); *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 (finding discrimination on the basis of sex in the context of the government reneging on a pay equity agreement in "fiscal crisis" legislation, but upholding the law under s 1).
21. [1989] 1 SCR 922, 56 DLR (4th) 765.
22. *Ibid* at para 2.
23. *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 176 DLR (4th) 513 [*Delisle*]. Although *Delisle* was overruled in *Mounted Police Association of Ontario*, *supra* note 8, the Court's decision was based on s 2(d) rather than s 15. I discuss this decision below.

as these were not "functionally immutable characteristics in a context of labour market flexibility."[24] Furthermore, the distinction was not "suspect" as it was not of the kind that "often leads to discrimination and denial of substantive equality…in view in particular of the status of police officers in society."[25] Nor was the distinction discriminatory, since it did not "adversely affect the appellant's dignity" and it was not "based on a characteristic attributed stereotypically to police officers as a group."[26] In a concurring judgment, Justice L'Heureux-Dubé agreed that the law did not violate section 15, although she framed discrimination more broadly when she stated that the law did not perpetuate the idea that "RCMP members are less worthy, valuable, or deserving of consideration than other public servants…[or] devalue or marginalize them within Canadian society."[27]

Delisle was followed two years later by *Dunmore*, where a majority of the Supreme Court found that the exclusion of farm workers from labour relations legislation in Ontario violated section 2(d) of the *Charter*.[28] Section 2(d) was interpreted to include the right not to be excluded from a protective labour relations regime where the exclusion would substantially interfere with the effective exercise of freedom of association.[29] Under section 2(d), the majority recognized the unique vulnerability of farm workers as an economically disadvantaged group, often working in isolated settings close to their employers, which meant that they could not form trade associations or have meaningful negotiations with their employers unless they had legislative protection.[30]

The majority did not find it necessary to consider the section 15 claim in *Dunmore*, although Justice L'Heureux-Dubé did so in a concurring judgment. She found that "there is no reason why an occupational status cannot, in the right circumstances, identify a protected group," citing the *Alberta Reference*, subsequent case law, and the opinions of scholars to support the notion that "employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity,

24. *Delisle*, *supra* note 23 at para 44, Bastarache J. The Court had earlier decided that members of the Canadian Armed Forces were not a protected group under s 15 of the *Charter*, but this finding was not framed on the basis of occupational status: *R v Généreux*, [1992] 1 SCR 259, 88 DLR (4th) 100.
25. *Delisle, supra* note 23 at para 44.
26. *Ibid* at para 45.
27. *Ibid* at para 8.
28. *Dunmore, supra* note 8.
29. *Ibid* at paras 25, 30. Note however that the Court was careful not to extend the scope of section 2(d) to protect collective bargaining or the right to strike—these matters were left for another day (*ibid* at para 68).
30. *Ibid* at para 41.

self-worth and emotional well-being."[31] The right circumstances were present in the case of agricultural workers, whose status was found to constitute an analogous ground for the purposes of section 15.[32] Justice L'Heureux-Dubé noted that immutability of personal characteristics is not the only approach to analogous grounds under section 15 and that grounds should be protected when they relate to aspects of identity that "government has no legitimate interest in expecting claimants to change to receive equal treatment under the law."[33] Agricultural workers face historic disadvantage and lack political power and the government could not legitimately expect them to change their employment status to obtain equal treatment. The poor socioeconomic circumstances of agricultural workers supported the finding that they could change their occupation only at great cost and that this was not simply a matter of choice.[34] In contrast, Justice Major, writing in dissent, found that occupational status as a farm worker was not a protected ground because farm workers were seen as a "disparate and heterogenous group" and any harm they sustained as a result of being excluded was no more than economic disadvantage.[35]

In *Baier*, the Supreme Court considered Alberta legislation that restricted school employees from running for election as school trustees unless they took a leave of absence and resigned if elected.[36] The claimants argued that the legislation violated sections 2(b) and 15. A majority of the Court held that there was no infringement of section 2(b), necessitating consideration of the section 15 argument, which was framed around occupational status as the relevant ground. This argument was rejected, with the majority indicating that there was no basis on the evidence presented to identify occupational status as an analogous ground. It noted that "[n]either the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics," and that neither of these groups was "a discrete and

31. *Ibid* at para 167, citing the *Alberta Reference*, *supra* note 16; *McKinley, supra* note 18; Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) at 257; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 57. The majority cited the same passage from the *Alberta Reference* at para 37.
32. *Dunmore, supra* note 8 at para 166.
33. *Ibid.*
34. *Ibid* at paras 168-169.
35. *Ibid* at para 215, adopting the reasons of Sharpe J in the Ontario Supreme Court (*Dunmore v Ontario (AG)* (1997), 155 DLR (4th) 193 at 216-217, 48 CRR (2nd) 211).
36. *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 [*Baier*].

insular minority," nor was the occupational status of school employee "a constant marker of suspect decision making or potential discrimination."[37]

Health Services involved British Columbia legislation that interfered with the collective bargaining rights of health care workers.[38] A majority of the Supreme Court extended its ruling in *Dunmore*, finding that procedural collective bargaining rights are protected under section 2(d). The Court based this decision on the history of collective bargaining in Canada, protection of collective bargaining in the international context, and *Charter* values.[39] In considering *Charter* values, the Court noted that collective bargaining "enhances the *Charter* value of equality" as it "palliate[s] the historical inequality between employers and employees."[40] In light of the Court's approach to section 2(d), a number of provisions in the legislation were found to substantially interfere with collective bargaining rights, and could not be justified under section 1.[41] It was therefore unnecessary to consider section 15, but the majority did so anyway, dismissing the claim in one paragraph. The claimants' argument was that the legislation directly discriminated against health care workers based on the analogous grounds of employment in the health care sector and status as non-clinical workers, and that it adversely impacted the workers on the enumerated ground of sex, since non-clinical health care workers was a group composed predominantly of women. The majority held that "the differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are" and that the statute in question did not reflect "the stereotypical application of group or personal characteristics."[42] *Health Services* is the only case in which the Supreme Court considered a claim of workers' rights under section 15 that included an adverse effects discrimination argument in

37. *Ibid* at para 65, Rothstein J. In a concurring judgment, LeBel, Bastarache and Abella JJ dismissed the s 2(b) argument on other grounds and gave no additional reasons on s 15. Fish J dissented on s 2(b) and did not consider s 15.
38. *Health Services, supra* note 8.
39. *Ibid* at para 39, McLachlin CJ and LeBel J.
40. *Ibid* at para 84.
41. *Ibid* at para 100.
42. *Ibid* at para 165. Deschamps J wrote a judgment dissenting in part on s 2(d), but agreeing with the majority's disposition of the s 15 claim (*ibid* at para 170).

addition to an argument of direct discrimination based on occupational status.[43] The Court rejected both lines of argument.[44]

Fraser was the follow up case to *Dunmore*, where agricultural workers challenged the statutory regime enacted by Ontario in response to the Supreme Court's ruling.[45] This regime was targeted at agricultural workers and provided a less robust slate of protections than that in Ontario's general labour relations legislation.[46] Farm workers were granted the rights to form and belong to employees' associations, to participate in their activities, to make representations to their employers through their associations, and to be protected against interference in the exercise of their rights. A majority of the Court dismissed the challenge under both sections 2(d) and 15. Although the Court had extended section 2(d) to protect collective bargaining rights in *Health Services*, the majority in *Fraser* found that the evidence did not establish that the new law had the effect of making it "impossible to act collectively to achieve workplace goals."[47] Under section 15, the majority believed the claim was premature because, on the evidentiary record before the Court, "it [had] not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage."[48] In a concurring judgment that is very brief on this point, Justices Rothstein and Charron rejected the equality argument on the basis that occupational status as an agricultural worker had not been established as a protected characteristic on the evidence.[49] In a different concurring judgment, Justice Deschamps suggested that the majority "conflat[ed]

43. For a discussion of how *Health Services* illustrates the problems with adverse effects claims more broadly, see Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effect Discrimination" (2015) 19:2 Rev Const Stud 191 at 210-211 [Watson Hamilton & Koshan, "Adverse Impact"]. In *Dunmore* and *Fraser*, the fact that a large number of farm workers are migrant workers was built in to the claimants' argument that occupational status as a farm worker is an analogous ground, rather than presented as adverse impact discrimination on the basis of race, national origin or immigration status. See *Fraser*, *supra* note 8 (Factum of the Respondents at paras 139-158 [*Fraser*, FOR]), online: Supreme Court of Canada < http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/32968/FM030_Respondents_Michael-J-Fraser-et-al.pdf>.

44. The Women's Legal Education and Action Fund (LEAF) was denied leave to intervene on the sex discrimination arguments in *Health Services*. See Melina Buckley & Fiona Sampson, "LEAF and the Supreme Court of Canada Appeal of *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*" (2005) 17 CJWL 473. The author was a member of the LEAF subcommittee in this case.

45. *Fraser*, *supra* note 8.

46. *Agricultural Employees Protection Act, 2002*, SO 2002, c 16.

47. *Fraser, supra* note 8 at para 46. Abella J dissented, and would have found a violation of s 2(d). She did not consider the s 15 claim, though she did note in her s 1 reasons that every province except Alberta provides farm workers the same collective bargaining rights as other employees, comparing workers on the basis of their occupational status (at para 364).

48. *Ibid* at para 116.

49. *Ibid* at para 295.

freedom of association with the right to equality," and indicated that "[t]o redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15, as L'Heureux-Dubé J. proposed in *Dunmore*."[50] Her judgment is not particularly clear on why she was unwilling to take this approach in *Fraser*, though she did indicate that such a move would amount to a "sea change" in the interpretation of equality rights.[51]

These six decisions suggest that the Supreme Court may be open to finding that occupational status or a narrower subcategory such as agricultural workers constitutes an analogous ground of discrimination, but there are some serious hurdles. The Court's rejections of the analogous grounds argument to date have focused on the lack of immutability of occupational status, the disparate and heterogeneous nature of the category (as opposed to a claim involving a discrete and insular minority), and the privileged status of some claimants as workers. The idea that the law may target the type of work performed rather than workers' identity has also led to the dismissal of claims, which appears to involve the attribution of choice to the workers and the denial of a causal link between the law and the harms they sustained.[52]

Section 15 claims based on the equality rights of workers have also failed because of the reluctance of some members of the Court to see the treatment of workers as discriminatory. Depending on the prevailing test for discrimination at the time, the treatment of workers has been seen as compliant with section 15 for not adversely impacting their dignity, not relying on stereotyping, not devaluing or marginalizing workers, or only imposing economic harms.

The cases also suggest that the Court sees the section 15 identity-based arguments as secondary to the claims based on other *Charter* rights. In every case where it had the option, the Court looked at the other *Charter* arguments first, and if it was able to avoid the section 15 claim and decide the case on other grounds, that was the Court's preference.[53] This tendency

50. *Ibid* at para 319.

51. *Ibid*. For critiques of *Fraser* from multiple angles, see Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the* Fraser *Case* (Toronto: Irwin Law, 2012).

52. See Watson Hamilton & Koshan, "Adverse Impact," *supra* note 43 at 211.

53. For a critique of the Court's tendency to conflate rights and freedoms in labour cases, see Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians" (2011) 34 Dal LJ 143. But see Judy Fudge, "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 Dal LJ 601 at 614 n 56, arguing that Langille's approach uses "a very formal (and thin) conception of equality." The Court's prioritization of other *Charter* arguments over equality arguments is a broader issue in section 15 claims outside the context of workers' rights. See Watson Hamilton & Koshan, "Adverse Impact," *supra* note 43 at 218.

may be based on the way the parties presented their claims, but that strategy may itself have been influenced by the Court's reticence around discrimination claims. It is telling that in the Court's most recent labour rights decisions, the parties relied on section 2(d) alone, even though section 15 arguments based on occupational status were available.[54]

The section 15 outcomes in the cases discussed in this section do not seem to turn on whether the legislation at issue dealt with labour and employment rights or other rights denied to particular groups of workers. They also do not depend on whether the claim is solely one of direct discrimination based on the analogous ground of occupational status or also includes an element of adverse effects discrimination based on an enumerated ground such as sex. On the other hand, the Court's finding in *Health Services* that the government targeted health care workers because of the nature of their work rather than personal attributes suggests an unwillingness to recognize identity-based treatment that is unintentional or effects-based.[55]

3. *Discrimination against farm workers*

Based on this case law, it is not surprising that our clinic concluded that a challenge under section 15 of the *Charter* to the exclusion of Alberta farm workers from the relevant legislation was a difficult claim.[56] We explored arguments of direct discrimination based on the analogous ground of occupational status as a farm worker and adverse effects arguments based on the grounds of immigration status (because many farm workers are migrant workers and may suffer heightened and unique harms based on that status)[57] and sex (because farm workers

54. See *Mounted Police Association of Ontario*, *supra* note 8 and *Meredith*, *supra* note 8 (forgoing the claim that RCMP officers were an occupational group protected by s 15); *Saskatchewan Federation of Labour*, *supra* note 8 (forgoing the claim that essential services workers were an occupational group protected by s 15). This is not to say that I believe such claims would necessarily be meritorious; the relative privilege of RCMP members and essential services workers places them further from the key purposes of s 15 than, for example, farm workers.

55. This is a widespread problem in adverse effects discrimination cases. See Watson Hamilton & Koshan, "Adverse Impact," *supra* note 43.

56. The analysis in this section is based on the clinical project (see *supra* note 2) as well as further research and analysis conducted by the author.

57. See, e.g., Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Faraday, Fudge & Tucker, *supra* note 51, 109 at 117-118; Kerry Preibisch, "Development as Remittances or Development as Freedom? Exploring Canada's Temporary Migration Programs from a Rights-Based Approach," in Faraday, Fudge & Tucker, *supra* note 51, 81; Kerry Preibisch & Gerardo Otero, "Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers" (2014) 79:2 Rural Sociology 174.

are disproportionately male and because farm work and its inherent dangers may be stereotyped as work that men should be able to endure without complaint).[58]

The case law presents several challenges to these arguments. *Fraser* may leave open an equality claim based on the analogous ground of occupational status as a farm worker, if a strong evidentiary foundation could be laid about the historic and longstanding vulnerability of farm workers and the cumulative impact of their exclusion from labour and employment protections. The argument here is that section 15 should protect as analogous grounds the kinds of occupational status that have been the basis for mistreatment and devaluation of particular groups of workers historically and protect against the perpetuation of identity-based harms in those contexts.[59] There are some cases where certain kinds of occupational status have been recognized as protected grounds under the *Charter* and human rights legislation based on this sort of reasoning.[60] Moreover, the Supreme Court has accepted the notion of "embedded" analogous grounds, such as Aboriginality-residence,[61] suggesting that some kinds of occupational status could be protected even if that category is not more broadly recognized as an analogous ground. However, as Fay Faraday documents, the Court ignored these sorts of arguments and the strong evidentiary record of agricultural workers' disadvantage and marginalization in *Fraser* in dismissing the section 15 claim.[62]

One basis for denying analogous grounds status to farm workers that flows from the cases discussed above is perceptions about their choice of

58. Arguments could also be made based on disability discrimination under the *Workers' Compensation Act*, *supra* note 1 (see Medeiros & McIntyre, *supra* note 2), as well as class or social condition for all the statutes. However, class and social condition are not protected grounds under the *Charter* and so an analogous grounds analysis would be required.

59. See Faraday, *supra* note 57 at 131; Pothier, *supra* note 31.

60. Faraday, *supra* note 57 at 133, citing *Confédération des syndicat nationaux c Québec (PG)*, 2008 QCCS 5076, 177 ACWS (3d) 956 (finding status as a home child care worker to be an analogous ground). See also *NWT (WCB) v Mercer*, 2014 NWTCA 1, 4 WWR 301 (finding that seasonal workers were protected against discrimination on the ground of social condition in human rights legislation).

61. *Corbiere, supra* note 11 at para 15.

62. Faraday, *supra* note 57 at 113-114. Faraday was co-counsel for Fraser and the other respondents at the Supreme Court. Judy Fudge notes a similar invisibility of the evidence of discrimination against women health care workers in *Health Services*. See Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond" (2008) 37 Indus LJ 25 at 29, n 18.

occupation.[63] While the Supreme Court has recently called into question the extent to which "choice" should be a relevant factor in *Charter* claims,[64] the fact that immutability remains a key lens for examining analogous grounds means that assumptions about choice may continue to be influential at that stage, as the Court recently confirmed in *Quebec v A*.[65] However, the analysis should look more broadly at whether the aspect of identity in question is one the government has no legitimate interest in expecting the claimants to change, or has historically served as the basis for "illegitimate and demeaning" decision making.[66] In addition to the argument that choice should not be relevant as a matter of law, many farm workers may not have a real choice of occupation in fact, due to multiple layers of vulnerability and lack of labour mobility—a condition created, in part, by the state.[67] Yet these arguments were made in *Fraser*, and did not persuade the Court to recognize occupational status as a farm worker as a protected ground.[68]

Another possible basis from the case law for rejecting the analogous ground of occupational status as a farm worker is the perceived heterogeneity of the group.[69] Courts have considered diversity within particular groups as an obstacle to finding analogous grounds in the area of occupational status, as noted above, but also in the context of

63. See *supra* notes 23-44 and accompanying text. Assumptions about choice are also evident in discrimination claims more broadly. See, e.g., Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) 115 [McIntyre & Rodgers, *Diminishing Returns*]; Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 209.

64. See *Bedford*, *supra* note 4 at paras 86-92; *Quebec v A*, *supra* note 14 at paras 336-343, Abella J for the s 15 majority.

65. *Quebec v A*, *supra* note 14 at para 343, Abella J (noting that choice "may be an important factor in determining whether a ground of discrimination qualifies as an analogous ground.") See also the judgment of LeBel J, where choice was a key consideration in denying the equality claim.

66. *Corbiere*, *supra* note 11 at para 13. See also Robert Leckey, "Chosen Discrimination" (2002) 18 SCLR (2d) 445 at 447 (arguing that analogous grounds analysis should focus on "what sorts of choices governments in a plural society may legitimately influence"); Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 (arguing for a "multi-variable" approach to assessing grounds that conceives of immutability broadly).

67. *Dunmore*, *supra* note 8 at paras 43-45, Bastarache J, for the majority; *ibid* at para 169, L'Heureux-Dubé J, concurring. See also *Quebec v A*, *supra* note 14 at paras 317, 335 (noting that marital status was recognized as a protected ground because of the absence of choice in fact in many cases).

68. *Fraser*, FOR, *supra* note 43 at paras 140-158.

69. See the discussion of *Dunmore* (Major J, dissenting) and *Baier*, *supra* notes 31-37 and accompanying text.

other grounds such as poverty and homelessness.[70] In other cases, more narrowly framed groups living in poverty—such as "the poor who beg"—have been denied analogous grounds status, as their claims have been seen to relate to *activities* rather than aspects of their identity.[71] This line of reasoning aligns with the Supreme Court's decision in *Health Services*, where discrimination against health care workers was attributed to the work they do rather than their identity as particular kinds of workers. Farm workers could also be characterized as a heterogeneous group given that they include domestic and migrant workers, those working on small farms and large industrial operations, and so on. However, these considerations should not undermine their claim to recognition as a group deserving of analogous grounds protection. Other grounds which include elements of heterogeneity, activity, or "choice" have been protected under section 15, such as marital and citizenship status.[72] Nevertheless, it must be recognized that barriers remain to recognizing occupational status as a farm worker as an analogous ground.

Moving beyond the issue of grounds, establishing a distinction on the basis of occupational status as a farm worker would face other hurdles in the context of some of the relevant Alberta statutes. For example, the *Workers' Compensation Act* excludes many other industries from mandatory coverage, making the comparative element of the discrimination test difficult to overcome.[73] Similarly, the *Occupational Health and Safety Act* has only excluded some farm and ranch workers from its scope.[74] While

70. See, e.g., *Tanudjaja v Canada (AG)*, 2013 ONSC 5410, 116 OR (3d) 574 [*Tanudjaja* (ONSC)], aff'd 2014 ONCA 852, 123 OR (3d) 161, leave to appeal to SCC refused, 36283 (25 June 2015), [2015] SCCA No 39 (striking a claim related to lack of adequate housing brought under ss 7, 15). On the s 15 claim, the ONSC found that the homeless were too heterogeneous a group to qualify for analogous grounds protection, distinguishing *Falkiner v Ontario (Minister of Community and Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (CA), because receipt of social assistance was said to be more objective and easier to identify than lack of adequate housing (*Tanudjaja* (ONSC) at paras 129-137). The ONCA found both the s 7 and s 15 claims to be non-justiciable. For analysis supporting poverty as an analogous ground, see, e.g., Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994) 2:1 Rev Const Stud 76.

71. See, e.g., *R v Banks*, 2007 ONCA 19 at paras 98-99, 84 OR (3d) 1, leave to appeal to SCC refused, 31929 (23 August 2007) (denying a s 15 challenge to a law prohibiting "squeegeeing" and related activities). See also *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17 at paras 42-43, 307 DLR (4th) 293, leave to appeal to SCC refused, 33124 (10 September 2009) (finding that poverty did not meet the test for analogous grounds under s 15); *R v PC*, 2014 ONCA 577, 121 OR (3d) 401 (rejecting a s 15 challenge of an accused person based on being indigent).

72. See Leckey, *supra* note 66 at 459.

73. *Workers' Compensation Act*, *supra* note 1, s 14(1); *Workers' Compensation Regulation*, Alta Reg 325/2002, Schedule A.

74. *OHSA*, *supra* note 1, s 1(s), *Farming and Ranching Exemption Regulation,* Alta Reg 27/1995 (including operations involving the processing of food, greenhouses, mushroom and sod farms, nurseries, landscapers, and pet breeders and boarders within the scope of the *OHSA*).

this kind of "separate but equal" comparative analysis has been rejected recently by the Court in other contexts,[75] it would still present a potential hurdle.

There is also case law denying claims of adverse effects discrimination by farm workers on the basis of race and immigration status. In *Peart*, the Ontario Human Rights Tribunal examined a complaint by farm workers about their exclusion from provincial legislation requiring a coroner's inquest following fatal workplace accidents in the mining and construction industries.[76] The tribunal found that while the exclusion drew an adverse distinction against migrant farm workers on the basis of their race and immigration status,[77] it was not discriminatory in light of the government's purpose for singling out mining and construction workers. The evidence showed that workers in those industries face a greater risk of workplace fatalities from a greater range of sources than migrant farm workers, and the tribunal held that the government's targeted approach to inquests did not perpetuate stereotyping or indicate that the lives of migrant farm workers were less worthy of protection when viewed in that context.[78]

Peart reflects the difficulty that the current test for discrimination creates, particularly when the focus is on prejudice and stereotyping. These harms of discrimination are normally intentional in nature, and place the focus of analysis on the purpose of the challenged law rather than its effects.[79] Even within this narrow focus, however, there are some persuasive arguments that the exclusion of farm workers from labour and employment legislation does engage these harms. For example, any rationale for the exclusions based on minimizing costs for family-run farms and maintaining their unique character is arguably grounded in stereotypical assumptions about the nature of agricultural operations that do not correspond to the actual needs and circumstances of farm

75. See, e.g., *Withler, supra* note 4 at paras 55-60 (rejecting a "mirror comparator" analysis under s 15 of the *Charter*); *Moore v British Columbia (Education)*, 2012 SCC 61 at para 30, [2012] 3 SCR 360 (a human rights case where a "separate but equal" approach was rejected in the context of the education needs of children with disabilities). See also *Peart v Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 [*Peart*],where the human rights tribunal was prepared to find a distinction even though the legislation in question was targeted at a small segment of workers and excluded many others.

76. *Peart, ibid.*

77. *Ibid* at para 288.

78. *Ibid* at paras 289-345.

79. Watson Hamilton & Koshan, "Adverse Impact," *supra* note 43 at 212-213.

workers employed in large industrial operations.[80] The government's historical exclusion of farm workers may also be linked to the prejudicial view that they are not worthy of the protections to which other workers are entitled, or that they are less likely to fight their exploitation because of lack of capacity, resources, and labour mobility.[81] This argument was not successful in *Peart*, however, even though one would have thought it particularly strong in the case of migrant farm workers.

It is possible to argue that the focus of the discrimination analysis should be on disadvantage more broadly rather than prejudice and stereotyping narrowly, and the Supreme Court seems to be moving in this direction.[82] If so, the historic exclusion of farm workers from labour and employment legislation could be shown to perpetuate their historical disadvantage. The exclusions have the following effects: farm workers have limited access to minimum standards of employment; they are subject to the risks inherent in dangerous, unregulated workplaces; they are typically not entitled to compensation or rehabilitation for their injuries; and they cannot organize collectively to make their working conditions less precarious. Moreover, farm owners are correspondingly advantaged: they can set wages and hours of work that are beneficial to them, employ child labourers, require dangerous tasks of their workers without fear they will complain to regulatory bodies, avoid payment of levies for workers' compensation, and avoid dealing with collective associations of farm workers. Alberta's former Conservative government was also advantaged because it depended on the rural vote for its ongoing power, which was arguably a factor in maintaining the exclusions.[83] Cumulatively, these harms and the corresponding privileges to farm owners and government should be seen as discriminatory towards farm workers, but much would depend on the resolution of issues related to grounds, comparison and the test for discrimination.

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80. Kerry Preibisch, "Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada" (2009) 72:3 Rural Sociology 418. See also *Kapp, supra* note 14 at para 23 for a discussion of the link between stereotyping and the "correspondence factor" from *Law, supra* note 13 at para 88.

81. Eric Tucker, "Will the Vicious Circle of Precariousness be Unbroken? The Exclusion of Ontario Farm Workers from the Occupational Health and Safety Act" in L Vosko, ed, *Precarious Employment* (Montreal: McGill-Queen's University Press, 2006) 256 at 259 [Tucker, "Vicious Circle"].

82. See *Quebec v A, supra* note 14 at paras 327-333, Abella J (noting for the s 15 majority that prejudice and stereotyping are just two indicia of discrimination); *Taypotat, supra* note 14, Abella J (focusing on the perpetuation of arbitrary disadvantage, with no mention of prejudice and stereotyping).

83. See Bob Barnetson, "Some Animals Are More Equal than Others: The Political Economy of Farm Work in Alberta" [unpublished manuscript on file with author]. See also Faraday, *supra* note 57 at 137 (noting that the Court in *Fraser* failed to see the corresponding benefits to government and society flowing from the coerciveness of its policies concerning farm workers).

Compared with the arguments available under section 15, the arguments available to farm workers under sections 2(d) and 7 are relatively strong. Assuming a strong evidentiary record, a section 2(d) challenge to the exclusion of farm workers from Alberta's *Labour Relations Code* would meet the test from *Dunmore* as the exclusion substantially interferes with collective bargaining rights. Although *Fraser* suggested that the standard for a violation of section 2(d) may have been heightened to one of "impossibility" of achieving workplace goals, the Court recently confirmed in *Mounted Police Association of Ontario* that the test remains one of substantial interference.[84] At the same time, *Fraser* indicates that legislators could comply with their obligation to protect freedom of association by enacting a fairly minimalist statutory regime.[85]

Under section 7, the claims are more novel, as there are few Supreme Court decisions involving the rights to life and security of the person in the context of labour and employment legislation.[86] Moreover, the Court has shown reluctance to include economic rights within the scope of section 7 or to interpret section 7 to impose what it sees as positive obligations on the state outside the adjudicative context.[87]

However, based on the strong precedents in *PHS Community Services, Bedford*, and *Carter*, an argument could be made that the historic exclusion of farm workers from the hours of work and child labour protections in the *Employment Standards Code* and from the workplace safety protections in the *Occupational Health and Safety Act* violate security of the person, and perhaps the right to life as well.[88] These exclusions have increased the health and safety risks inherent in agricultural work,[89] resulting in greater risks of bodily injury, serious psychological stress, and possible death. Similar arguments could be made with respect to the exclusion of farm workers from the *Labour Relations Code*, in that the lack of possibility

84. *Mounted Police Association of Ontario, supra* note 8 at paras 73-77. See also *Saskatchewan Federation of Labour, supra* note 8 at paras 77-78.

85. Bill 6, *supra* note 9, fully includes farm and ranch workers in the *Labour Relations Code*, *supra* note 1.

86. A *Charter* challenge in Ontario concerning the exclusion of farm workers from occupational health and safety legislation was abandoned when Ontario amended its legislation in 2006. See Tucker, "Vicious Circle," *supra* note 81 at 274-275.

87. See, e.g., *Gosselin v Québec (AG)*, 2002 SCC 84 at paras 80-83, [2002] 4 SCR 429 (with a majority finding that s 7 does not protect the right to a particular level of social assistance adequate to meet basic needs).

88. *PHS Community Services, supra* note 4; *Bedford, supra* note 4; *Carter, supra* note 4; *Employment Standards Code*, *supra* note 1, s 2(4); *OHSA*, *supra* note 1, s 1(s).

89. Tucker, "Vicious Circle," *supra* note 81 at 265; Bob Barnetson, "No Right to Be Safe: Justifying the Exclusion of Alberta Farm Workers from Health and Safety Legislations" (2012) 8:2 Socialist Studies 134; William Pickett et al, "Fatal Work-Related Farm Injuries in Canada" (1999) 160:13 Can Med Assoc J 1843.

of union oversight has deprived farm workers of safe workplaces, and the *Workers' Compensation Act*, which has excluded farmworkers from rehabilitation and other benefits in ways that have adversely impacted their health.[90] Provided a sufficient causal connection could be shown between the exclusions and the increased risks to farm worker health and safety, violations of the rights to life and security of the person could be made out.[91] As for the hurdles noted above, the impugned legislation clearly involves more than economic benefits. Furthermore, the government's only positive obligation would be to extend the underinclusive legislation to the excluded group—farm workers—which is akin to the obligation recognized in *Dunmore* under section 2(d). The most significant hurdle to a section 7 claim by farm workers would be the lack of adjudicative context at play, but the Court has also been receptive to extending section 7 beyond this context.[92]

Turning to the principles of fundamental justice under section 7, the historic exclusions of farm workers from the impugned legislation could be seen as arbitrary, overbroad, and grossly disproportionate as those terms were defined in *Bedford*.[93] Specifically, the exclusions lack a connection to the overall purposes of the legislation, go further than required in protecting the rights of family and small farm owners, and have adverse effects on farm workers which vastly outweigh their objectives.

Although some of the arguments available under sections 2(d) and 7 overlap with those that apply under section 15—as the Court itself has noted[94]—only the section 15 arguments truly get at the notion of "farm worker exceptionalism": the idea that farm workers have been excluded

90. This argument is supported by *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

91. See *Bedford, supra* note 4 at paras 74-78.

92. See *Chaoulli, supra* note 90 at paras 123-124, where three out of seven justices applied s 7 outside the adjudicative context, finding that Quebec's legislative prohibition on private health insurance violated the rights to life and security of the person.

93. *Bedford, supra* note 4 at paras 97-123 (finding the criminal prohibitions on prostitution-related activities to engage all three principles). See also: *PHS Community Services, supra* note 4 at paras 129-133 (finding the government's refusal to extend an exemption for a safe injection site to be arbitrary and grossly disproportionate); *Carter, supra* note 4 at paras 85-88 (finding the criminal prohibition on assisted suicide to be overbroad).

94. See *Health Services*, *supra* note 8 at para 81, *Mounted Police Association of Ontario, supra* note 8 at para 58, and *Saskatchewan Federation of Labour, supra* note 8 at paras 53-55 (all noting the equality interests engaged by freedom of association).

because of their identity as farm workers.[95] While Alberta has been somewhat of an outlier in terms of the breadth and depth of farm worker exclusions, exceptionalism is not restricted to this context. Farm workers in other provinces continue to be denied full protection under some labour and employment legislation,[96] and in Alberta, domestic workers are also excluded from the relevant legislation.[97] Perhaps not coincidentally, domestic workers are disproportionately identified by immigration status, race and sex as well.[98]

The greater likelihood of success of the associational and security of the person arguments as compared to the identity-based arguments leads to the questions explored in the next section. To take a step back from the specific arguments related to farm workers, what is the nature of the harms protected by the relevant rights, why do the identity-based harms seem to be minimized or ignored by the courts, and what are the consequences?

II. *What is lost when work based inequalities and identities are not recognized?*

It is well accepted that courts are to take a purposive approach in analyzing *Charter* claims by focusing on the harms that different *Charter* rights are intended to protect against.[99] What are the relevant harms in the context of workers' rights?

Section 2(d) of the *Charter* protects both individual and collective interests. The Supreme Court has noted that "freedom of association must take into account the nature and importance of labour associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a

95. See Eric Tucker, "Farm Worker Exceptionalism: Past, Present, and the Post-*Fraser* Future" in Faraday, Fudge & Tucker, *supra* note 51, 30 at 30 [Tucker, "Farm Worker Exceptionalism"], citing Greg Schell, "Farmworker Exceptionalism under the Law" in Charles D Thompson Jr & Melinda F Wiggins, eds, *The Human Cost of Food: Farmworkers' Lives, Labor, and Advocacy* (Austin, TX: University of Texas Press, 2002) 139; Faraday, *supra* note 57 at 111.

96. See, e.g., Tucker, "Farm Worker Exceptionalism," *supra* note 95 at 34-35, noting that farm workers in Ontario continue to be excluded from some aspects of occupational health and safety and employment standards legislation. See also the *Exemptions, Special Rules and Establishment of Minimum Wage Regulation*, O Reg 285/01; *Farming Operations Regulation*, O Reg 414/05.

97. See *Employment Standards Regulation*, Alta Reg 14/1997, s 6 (excluding domestic workers from hours of work and overtime protections); *Labour Relations Code, supra* note 1, s 4(2)(f) (excluding persons employed in domestic work in private dwellings); *OHSA*, *supra* note 1, s 1(s)(ii) (excluding household servants from the scope of occupations covered by the Act).

98. See, e.g., Pothier, *supra* note 31 at 43; Daiva Stasiulis & Abigail B Bakan, "Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada" (1997) 57 Feminist Rev 112. Class or social condition is also relevant to both groups of workers: see Stasiulis and Bakan, *ibid* at 112 and the discussion above at notes 58, 70.

99. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 116, 18 DLR (4th) 321; *Mounted Police Association of Ontario, supra* note 8 at para 47.

fundamental aspect of their lives: employment."[100] Furthermore, "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" are values that "are complemented and indeed, promoted" by section 2(d) of the *Charter*.[101] In its most recent decisions on section 2(d), the Court described freedom of association in terms of empowering those who are vulnerable and marginalized to assert their voices and to correct imbalances of power.[102] Since *Dunmore*, section 2(d) has extended beyond the mere protection against state interference to include the right to state protection of associational freedoms where that protection is necessary to the exercise of those freedoms.[103] To frame freedom of association, as interpreted by the Court, in terms of the harms it is designed to protect against, we might say that it provides workers with a means of remedying the usual disadvantage, power imbalance, and vulnerability they face in negotiating fair terms and conditions of work.[104] At the same time, the Court has been clear that associational rights are largely procedural in nature, protecting processes such as the formation of associations, collective bargaining, and the right to strike without guaranteeing any particular substantive outcome.[105]

Section 7 of the *Charter* guarantees the rights not to be deprived of life, liberty, or security of the person contrary to the principles of fundamental justice. The right to life protects against laws and state actions that increase the risk of death.[106] Liberty includes the right to make fundamental and inherently personal decisions free from state interference, such as where to reside, how to raise one's children and, perhaps, one's choice of occupation.[107] Security of the person has been defined to include freedom from state interference with bodily integrity and personal autonomy and

100. *Dunmore, supra* note 8 at para 37, citing *Delisle*, *supra* note 23 at para 6, L'Heureux-Dubé J.
101. *Health Services, supra* note 8 at para 81. See also *Mounted Police Association of Ontario, supra* note 8 at para 58; *Saskatchewan Federation of Labour, supra* note 8 at paras 53-55.
102. *Mounted Police Association of Ontario, supra* note 8 at paras 55-58; *Saskatchewan Federation of Labour, supra* note 8 at paras 54-57. See also *United Food, supra* note 19 at paras 31-32.
103. *Dunmore, supra* note 8 at para 41.
104. Faraday, *supra* note 57 at 136; *Fraser, supra* note 8 at para 89; *Mounted Police Association of Ontario, supra* note 8 at para 82.
105. See, e.g., *Mounted Police Association of Ontario, supra* note 8 at para 67.
106. *Carter, supra* note 4 at para 62, citing *Chaoulli, supra* note 90 and *PHS Community Services, supra* note 4. The Court in *Carter* declined to rule on whether the right to life also protects the right to a certain quality of life and to die with dignity.
107. *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577; *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 80; *R v Malmo-Levine*, 2003 SCC 74 at para 85, [2003] 3 SCR 571. Liberty was not the focus of our clinic's arguments for the inclusion of farm workers in labour and employment legislation, and to the extent that it may be seen to reinforce arguments about "choice" of occupation that undermine s 15 arguments, it may not be helpful in this context.

decision making with respect to one's body.[108] It also includes a right of access to medical treatment necessary to protecting life and health.[109] Beyond physical security, the section has also been interpreted to provide freedom from serious and profound state-imposed psychological and emotional stress, including harms such as "stigmatization…loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work."[110] Although courts have been cautious about including economic rights within the scope of section 7, as I indicated above, it arguably protects workers' rights to be free from state-imposed risks to bodily and psychological integrity, such as the exclusion from protective legislation. The principles of fundamental justice ensure that such harms are not imposed in ways that are contrary to our basic values, for example through laws that are arbitrary, overbroad or grossly disproportionate to the government's objectives.[111]

As noted above, section 15 of the *Charter* has been subject to varying interpretations over time, perhaps because it protects against harms which are seen as "elusive" and "more than any of the other rights and freedoms guaranteed in the *Charter*," lacking in precise definition.[112] In *Andrews*, the Supreme Court defined discrimination as the imposition of burdens or deprivation of benefits based on grounds relating to the personal characteristics of the individual or group.[113] The Court also spoke about discrimination as oppression, noting that "the worst oppression will result from discriminatory measures having the force of law."[114] In contrast, equality was said to entail "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[115] The role of enumerated and analogous grounds under section 15 was to "limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage" as well as stereotyping.[116] As stated in *Turpin*,

108. *R v Morgentaler*, [1988] 1 SCR 30 at 56, Dickson CJC [*Morgentaler*]; *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 587-588, 107 DLR (4th) 342, Sopinka J. These definitions of security of the person were applied in: *PHS Community Services*, *supra* note 4; *Bedford*, *supra* note 4; *Carter*, *supra* note 4.
109. *Morgentaler*, *supra* note 108 at 90, Beetz J; *Chaoulli*, *supra* note 90.
110. *Morgentaler, supra* note 108 at 55, citing *Mills v R*, [1986] 1 SCR 863 at 919-920, 29 DLR (4th) 161, Lamer J. See also *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, 177 DLR (4th) 124.
111. *Bedford, supra* note 4 at para 96.
112. *Andrews, supra* note 12 at 164.
113. *Ibid* at 174-175.
114. *Ibid* at 172.
115. *Ibid* at 171.
116. *Ibid* at 181.

decided a few months after *Andrews*, the protected grounds focus on aspects of identity linked to "social, political and legal disadvantage in our society."[117] *Andrews* and *Turpin* thus viewed discrimination in terms of a number of harms, including oppression, lack of due regard, prejudice, stereotyping, and disadvantage.

This definition of discrimination prevailed for some time, although differences of opinion developed amongst members of the Court, for example with respect to the degree to which government purposes should be taken into account at the discrimination stage of analysis.[118] The Court's next major consolidation of the test for discrimination came in *Law*, where it focused on "the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."[119] Human dignity was said to protect a number of interests: personal autonomy and self-determination; self-respect and self-worth; physical and psychological integrity and empowerment; and to protect against the harms of oppression, marginalization, and devaluation.[120]

In the Supreme Court's recent section 15 decisions it has purported to return to *Andrews*, with a focus on discrimination as the perpetuation or imposition of prejudice or stereotyping and, sometimes, disadvantage.[121] Critics have noted that the range of harms protected in this formulation is actually narrower than in earlier cases such as *Andrews*, and that a focus on stereotyping and prejudice in particular may create barriers in cases involving unintentional or effects-based discrimination.[122] The Court addressed this critique in *Quebec v A*, with the section 15 minority insisting that prejudice and stereotyping are "crucial markers" of discrimination, and a majority indicating that section 15 protects against other harms,

117. *R v Turpin*, [1989] 1 SCR 1296 at 1333, 96 NR 115.

118. This debate was most pronounced in a trilogy of cases from 1995, where the Court was deeply divided on the question of whether discrimination related to "irrelevant personal characteristics." See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693; *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449.

119. *Law, supra* note 13 at para 88.

120. *Ibid* at paras 42, 53.

121. *Kapp, supra* note 14 at paras 17, 24; *Withler, supra* note 4 at paras 37-39.

122. For a summary of the critiques see Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63 SCLR (2nd) 261 at 278. See also Koshan and Watson Hamilton, "Continual Reinvention," *supra* note 10 at 38-42; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) 183. To the extent that this interpretation of s 15 imposes internal limits, it could be seen as similar to s 7, though s 15 has not been accorded the same leeway under s 1 that s 7 has. See *Bedford, supra* note 4 at para 129.

including the perpetuation of disadvantage more broadly.[123] In its most recent section 15 decision, *Taypotat*, the Court spoke of discrimination as "*arbitrary* disadvantage,"[124] thus maintaining its focus on the purpose of government actions rather than their effects on disadvantaged groups.

Commentators have also weighed in on the harms of discrimination. For example, in response to critiques of the Court's "human dignity" jurisprudence, Denise Réaume has tried to rehabilitate that concept to include a focus on autonomy, self-determination, inherent worth, and access to dignity-constituting benefits.[125] Sophia Moreau has contributed to the discussion by defining discrimination in terms of prejudicial and stereotypical decision making, perpetuation of oppressive power relations, denial of access to basic goods,[126] and interference with deliberative freedoms.[127] Colleen Sheppard posits a theory of inclusive equality that focuses on the prevention of social exclusion and marginalization. For Sheppard, equality has substantive, procedural and relational aspects: "it is critical to examine both the inequitable *substantive outcomes* in various social contexts as well as unfairness and exclusions in the *structures, processes, relationships, and norms* that constitute the institutional contexts of our daily lives."[128]

Moving beyond the Canadian context, Iris Marion Young described five oppressions that are relevant to a consideration of (in)equality and discrimination: exploitation, marginalization, powerlessness, cultural imperialism, and violence.[129] Nancy Fraser has questioned whether these harms can be usefully reduced to two categories, those relating to political economy and culture, requiring remedies of redistribution and recognition

123. *Quebec v A*, *supra* note 14 at paras 169, 185, LeBel J, for the minority on this point; *ibid* at paras 327-333, Abella J, for the majority on this point.

124. *Taypotat, supra* note 14 at paras 16, 18, 20, 28, 34, Abella J [emphasis added]. The term "arbitrary disadvantage" was used only once by Justice Abella in *Quebec v A* (see *supra* note 14 at para 331).

125. Denise G Réaume, "Discrimination and Dignity" (2003) 63 La L Rev 645 at 671-674. For a more recent discussion see Denise Réaume, "Dignity, Choice, and Circumstances" in Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: Oxford University Press, 2013) 539.

126. Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54 UTLJ 291.

127. Sophia Moreau, "What is Discrimination?" (2010) 38:2 Philosophy & Public Affairs 143 at 147 (deliberative freedoms are "freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us").

128. Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 4 [emphasis in original].

129. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: NJ: Princeton University Press, 1990) [Young, *Justice and the Politics of Difference*]. See also Young's response to Fraser's critique: Iris Marion Young, "Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory" (1997) 222 New Left Rev 147.

respectively.[130] These categories are potentially significant in the case of workers' rights, which primarily engage economic forms of oppression—exploitation, marginalization, and powerlessness.[131]

To summarize, the right to equality protects against the harms of disempowerment, marginalization, exploitation, devaluation, social exclusion, prejudice, stereotyping, and disadvantage that are based on or fail to give due regard to protected grounds of identity. Although there is some overlap, particularly with respect to protection of individual autonomy, the harms that section 15 protects against are distinct from those engaged by section 7 in the sense that they are grounded in group identity. The harms encompassed by section 2(d) are less obviously distinct from those covered by section 15. However, associational rights can be seen as more process oriented than equality rights, which may require substantive (re)distribution of resources and benefits in some cases. These differences in the nature of harms, as well as the remedies they may demand, make it crucial to protect the rights of workers under section 15 in addition to sections 2(d) and 7.

The harms engaged by section 15 are all present in the context of farm workers' historic exclusion from labour and employment legislation. They have been excluded precisely *because* farm workers are members of a vulnerable group that is easy to ignore, and they are unable to assert their interests due to their isolation from one another, lack of education, socio-economic disadvantage, and precarious immigration status. Whether intentionally or unintentionally, the government has devalued, excluded, exploited, and marginalized this group of workers to the corresponding advantage of farm owners, government, and society more broadly.[132]

Why are these identity-based harms so difficult for the Court to recognize, and what are the consequences of failing to do so?

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130. Nancy Fraser, "Recognition or Redistribution? A Critical Reading of Iris Young's *Justice and the Politics of Difference*" (1995) 3:2 J Political Philosophy 166 [Fraser, "Recognition or Redistribution?"]. See also Nancy Fraser, "A Rejoinder to Iris Young" (1997) 223 New Left Rev 126. Fraser's later work includes a third category: representation. See Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009) at 144-147.

131. See Fraser, "Recognition or Redistribution?," *supra* note 130 at 177-178. Exploitation is defined as exercising one's capacities under the control of others; marginalization is the condition of expulsion from systems of labour and social life; powerlessness describes the condition of having power exercised over a person by others without having any corresponding power. See Young, *Justice and the Politics of Difference*, *supra* note 129 at 49, 53, 56; see also Fraser, "Recognition or Redistribution?," *supra note* 130 at 174-175.

132. See *Fraser*, FOR, *supra* note 43 at para 133, arguing that "equality analysis provides a more complete context that illuminates why *this* particular group of workers is denied the law's protection" [emphasis added].

One might posit that it is the abstract nature of the harms engaged by section 15 that makes them "elusive," particularly up against the more concrete harms encompassed by section 7. Section 15 rights also have a collective dimension as compared with the individual rights guaranteed by section 7, with the latter being the paradigm in western liberal democracies.[133] And deferential courts may wish to avoid imposing positive obligations on the government to rectify identity-based harms.[134] However, section 2(d) is also a relatively abstract right with a strong collective element to it, and, as interpreted by the Supreme Court, it may lead to obligations on the part of the state beyond non-interference, though as noted above those obligations will be largely procedural.[135] The obligations that would flow from a successful identity-based challenge to the exclusion of farm workers from labour and employment legislation would largely fall on private employers rather than on government, and would not result in the sort of cost implications to government that may cause courts to be deferential.[136] However, this is still a redistributive consequence of recognizing farm workers' rights under section 15, which may explain the courts' hesitation to do so.[137]

Another concern may relate to a floodgates type of argument, that if occupational status was protected for farm workers, it would be more difficult to deny the claims of other groups identified by occupational status or other statuses more broadly. However, recognizing other analogous

133. See Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, Keith Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335 at 349 [Fudge, "Recognition, Redistribution and Imperialism"].

134. For cases discussing positive obligations in the context of section 15, see, e.g., *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385. For literature discussing the courts' deference in this context, see, e.g., Hester A Lessard, "'Dollars Versus [Equality] Rights': Money and the Limits on Distributive Justice" (2012) 58 SCLR (2nd) 299; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in McIntyre & Rodgers, *Diminishing Returns, supra* note 63, 95.

135. See the discussion of *Dunmore*, *supra* notes 29-30 and accompanying text. See also *Fraser, supra* note 8, which affirms the point that s 2(d) does not require a particular model of labour relations.

136. If a government was instead seeking to protect the private sphere from the imposition of equality-based obligations, this might also be problematic. See Brenda Cossman & Judy Fudge, "Introduction: Privatization, Law and the Challenge to Feminism" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 3 (discussing the harms of privatization strategies). See, however, *Dunmore, supra* note 8, where the Court found that protection of family farms was a pressing and substantial objective under s 1 of the *Charter,* and *Quebec v A, supra* note 14, where the majority held that excluding *de facto* spouses from support and property benefits was justified on the basis of protecting individual choices in the context of marital status.

137. Fudge argues that recognition claims have been much more successful under the *Charter* than redistribution claims. See Fudge, "Recognition, Redistribution and Imperialism," *supra* note 133 at 341, 349.

grounds, particularly embedded grounds such as Aboriginality-residence, has not resulted in a flood of claims to open up the broader underlying ground.[138] Attaching analogous grounds status to those aspects of identity that relate to the underlying harms of discrimination—oppression, marginalization, devaluation, exploitation, and disadvantage—would ensure that section 15 remains focused on its purpose and does not extend to protecting the interests of relatively privileged groups of workers.[139]

There is, however, a possible tension inherent in the analogous grounds requirement that Nancy Fraser's work illuminates.[140] Including a group holding particular personal characteristics within section 15 is to recognize the significance of their identity, particularly in terms of the impact of government actions. However, farm workers seek this sort of recognition primarily as a means of trying to eradicate the differences in their treatment as compared to other workers. This would normally be true of other workers seeking recognition under section 15 as well—their occupational status is relevant only to the extent that they are seeking the same benefits accorded to other workers. The same can be said of some other groups seeking recognition of their status under section 15, such as the poor. To recognize occupational status or poverty as an analogous ground is significant for the purpose of remedying the inequality attached to that status through redistribution. The analogous grounds component of the analysis, focused on recognition as it is, may create a conceptual tension for courts in cases claiming redistributive remedies.[141] It is also possible that courts are simply seeking to avoid redistribution regardless of any tensions with recognition rights.

Finally, it could be contended that recognition of farm worker rights under section 15 is not necessary, as their interests are adequately protected under sections 2(d) and 7. As I have argued, however, there are key differences in the harms protected by these sections and the remedies required to eradicate them. To focus on sections 2(d) and 7 without recognizing the unique harms of discrimination would reduce section 15 to an equal protection clause rather than a freestanding guarantee of equality rights. More pragmatically, in the case of farm workers, section

138. See, e.g., *Siemens v Manitoba (AG)*, 2003 SCC 3, [2003] 1 SCR 6 (confirming that residence is not an analogous ground).

139. See *Fraser*, FOR, *supra* note 43 at para 153.

140. See *supra* note 130 and accompanying text. See also Fudge, "Recognition, Redistribution and Imperialism," *supra* note 133 at 350.

141. Redistributive remedies are permitted under the *Charter*, but typically only where the government has decided to accord a particular benefit and has been underinclusive in doing so. See, e.g., *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

2(d) and section 7 arguments are only available or are stronger for some legislative exclusions, whereas section 15 engages all of the exclusions and their cumulative impact. Beyond the specific context of farm workers' rights, it is crucial that we recognize discrimination as a significant harm worthy of protection in its own right, given the important reconciliatory and remedial functions that section 15 can perform in addressing historical identity-based harms perpetrated against workers and other disadvantaged groups.

Conclusion

I have endeavoured to show why the protection of identity-based harms is important and why courts may be struggling with such claims in the context of farm workers' rights and more broadly. It must be recognized that equality rights claims will not solve all social problems, take ongoing work to implement effectively, and may create unintended consequences.[142] Nevertheless, they remain a key site of reform, raising the question of how courts might modify section 15 analysis in order to better capture the harms of inequality.

First, there must be a greater willingness to recognize certain forms of status as analogous grounds under section 15. Courts should not be deterred by the potential heterogeneity of groups such as farm workers or the possible mutability or "choices" behind their characteristics. Instead, they should focus on how the underlying harms of discrimination are engaged by some identity-based characteristics, including some categories of occupational status.[143] This broader approach to analogous grounds would be consistent with the current recognition of other status-based grounds, and it would permit the recognition of other forms of status such as poverty.[144] It would also encourage recognition of the sort of intersecting grounds of identity that may be at play in the case of some workers, such as race, immigration status, and gender.[145] Even if the recognition of some status-based grounds is significant primarily for the purposes of attenuating group differences,

142. See e.g. Robert Leckey & Régine Tremblay, "Introduction: After Equality" (2015) 27 CJWL i; Tucker, "Vicious Circle," *supra* note 81 at 276.

143. The Supreme Court has recognized grounds based on historical disadvantage, vulnerability and powerlessness in previous cases. See Sealy-Harrington, *supra* note 66 at para 48. See also Pothier, *supra* note 31 at 41; Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Can Bar Rev 893 at 908.

144. On the other hand, marital and citizenship status are legal forms of status (see Leckey, *supra* note 66 at 459), whereas occupational status and poverty are forms of socio-economic status. This may raise the issues regarding recognition versus redistribution rights noted above (*supra* notes 140-141 and accompanying text), though marital and citizenship claims may also involve the redistribution of benefits.

145. See Faraday, *supra* note 57 at 135; Pothier, *supra* note 31 at 43.

for example by extending benefits to excluded groups, this is an accepted aim of section 15 analysis.[146]

Second, analysis of whether section 15 is violated must account for a broader range of harms, in keeping with the purposive interpretation required of all *Charter* rights and freedoms. As recognized in *Quebec v A* and as reflected in the work of the commentators discussed in Part II, the harms of inequality go beyond stereotyping, prejudice, and arbitrary disadvantage. A narrow focus on those harms may fail to capture the kinds of inequalities that farm workers, other groups of workers and other socio-economically constituted groups are subjected to. A broader approach to the harms of discrimination would also better recognize claims of adverse effects discrimination, where the government's actions are rarely intentional and therefore difficult to characterize in terms of prejudice, stereotyping, or arbitrariness.[147]

Finally, to the extent that courts' reluctance to accord recognition and remediation to identity-based harms stems from deference to governments because of concerns about the costs of redistribution, the solution is a continued critique of such deference. As the Supreme Court itself recently stated in the labour rights context, "If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?"[148]

146. See, e.g., *Miron v Trudel*, *supra* note 118 (recognizing marital status so as to extend benefits).
147. See Watson Hamilton & Koshan, "Adverse Impact," *supra* note 43.
148. *Saskatchewan Federation of Labour, supra* note 8 at para 76, Abella J, for the majority (critiquing the dissenting justices' refusal to include the right to strike within the scope of s 2(d)).

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TO AFFIRM DIFFERENCE OR TO DENY DISTINCTION?: THE COMPETING CANONS OF EQUALITY LAW

*Flint Patterson**

INTRODUCTION

It has become fashionable within comparative constitutional law circles to identify "canons" of constitutional analysis.[1] "Canons," in this sense, refers to the series of constitutional precedents around which courts across the globe have started to—or perhaps ought to—converge. These precedents ostensibly provide archetypical models for answering some of the world's most vexing normative questions, such as the proper limits on free expression, the conceptual basis for the constitutional protection of private property, and the justiciability of social rights.[2] National courts are increasingly adhering to substantially similar principles when faced with these problems, resulting in a far more uniform set of constitutional guarantees internationally.[3]

The global equality jurisprudence, however, is notoriously uncanonical. National courts cannot seem to agree on whether the equality guarantee is formal or substantive, intersectional or discrete, open-ended

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[1] See e.g. Michaela Hailbronner, "Constructing the Global Constitutional Canon: Between Authority and Criticism" (2019) 69:2 UTLJ 248; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, 1st ed (Oxford: Oxford University Press, 2014).

[2] See Adrienne Stone, "Freedom of Expression and the Constitutional Canon"; David Schneiderman, "A Canon for Comparative Constitutional Law of Property"; and Katharine Young, "The Canons of Social and Economic Rights" in Sujit Choudhry, Michaela Hailbronner & Mattias Kumm, eds, *Global Canons in an Age of Uncertainty: Debating Foundational Texts of Constitutional Democracy and Human Rights* (Oxford: Oxford University Press, forthcoming), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3937270>; <papers.ssrn.com/sol3/papers.cfm?abstract_id=4022457>; and <lawdigitalcommons.bc.edu/lsfp/1326/>.

[3] See Tania Groppi & Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (London: Hart Publishing, 2013) (for a thorough review of the reliance that various national courts have placed on foreign precedents in answering constitutional questions).

or strictly textual.[4] Apex courts often cite one another for particular equality propositions, only to devise doctrines that are radically different when applied *in toto*.[5]

Despite this doctrinal cacophony, this article contends that there are two budding groups of equality canons with the same overarching objectives but different ways of achieving them.

The first group posits that the equality guarantee exists to prohibit pernicious categorical distinctions in the law (the "categorical canons"). This is the dominant approach in Canada and the United States. On this view, equality is a right held by a particular kind of group; generally, groups against whom society finds discrimination to be particularly distasteful. New groups cannot enter the fold unless they resemble the established groups in kind, irrespective of how adverse a legislative distinction is to their interests. Defining the ambit of equality protection under these canons is fundamentally an exercise in determining what makes discrimination against the established groups so distasteful. Categorical courts tend to identify few criteria in this respect, resulting in a very limited number of potentially prohibited grounds of discrimination.

Conversely, the second group posits that the equality guarantee exists to affirm difference (the "difference canons"). This is the dominant approach in South Africa and much of Latin America. On this view, equality is a right held by both groups and individuals that permits them to be themselves without unnecessary state interference. This guarantee guards against legislative distinctions that make the *fact* of being different more difficult and arbitrarily impede the *choice* to be different. The ambit of equality protection under this approach is primarily dictated by the impact of the distinction at issue and not by the ground on which the distinction is based. As these canons target distinctions that impact the choice to be different, they blur the line between equality and liberty rights, resulting in far more open-ended bases of protection.

This article argues that the difference canons are more cogent than the categorical canons for two reasons. First, categorical courts generally agree that the equality guarantee exists to protect human dignity, but the categorical canons arbitrarily exclude many dignity violations from their protection. Categorical courts consider the established grounds of discrimination to be pernicious because they carry a "recognized potential" to harm human dignity—distinctions based on race, sex, and the like rarely pass the smell test. Accordingly, as a pre-condition to equality protection, categorical courts require that all novel grounds resemble the established

[4] See e.g. Susanne Baer, "Equality" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 982 at 986–987, 996–997.

[5] See Vicki Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement" (2005) 119:1 HLR 109 (while many jurists find foreign constitutional authority persuasive, there is understandable resistance to the wholesale importation of one state's constitutional principles into another state with a completely different constitutional text and its own unique socio-political circumstances).

grounds in kind. Yet, the truest sign that a distinction on any ground has the potential to harm one's dignity is surely whether the distinction *actually* impugns their dignity. Any dissimilarity between new and old grounds of protection should not end the inquiry. The inquiry ought instead to focus on the adverse impact of any impugned distinction. There is no reason in principle why equality rights must be reactive, waiting to quash budding inequities until after they have crystallized into widely accepted "-isms."

Second, the whole notion of maintaining broad categories of equality rights with stable traits is discordant with the actual experience of discrimination. Discrimination rarely happens on the basis of a single trait such that most of the people who share the trait bear the burden of the discrimination in the same way. Discrimination is frequently intersectional. Requiring claimants facing discrimination on multiple overlapping grounds to bring constitutional challenges based solely on overly broad categorical grounds creates illogical theoretical and practical challenges.

In sum, the categorical canons, while useful as heuristics, have fundamental conceptual flaws. They offer underinclusive protection in a manner that is inconsistent with their objectives.

That is not to say, however, that categorical courts ought to adopt the difference canons wholesale. As Justice Scalia warned, each constitution carries a unique socio-political context and so may provide for equally unique rights and freedoms.[6] The point is instead that, to the extent that the categorical and difference canons share certain objectives and the former alone have failed to achieve those objectives, categorical courts might improve their jurisprudence by adopting some principles of difference reasoning. As Justice Breyer has said in reply to Justice Scalia, when faced with a tough case to which a foreign precedent has supplied an answer, the precedent may not be binding, but the court "may learn something" from it.[7] Here, categorical courts might learn that their concern for dignity should entail the affirmation of difference and foreclose strict reliance on heuristical equality reasoning. Should they do so, their unique constitutional contexts would still surface in their determinations of what constitutes unequal or undignified treatment.

This article proceeds as follows. Section I outlines the elements of the categorical canons by surveying the "analogous" and "suspect" grounds doctrines of Canada and the United States, respectively. Section II then outlines the elements of the difference canons by surveying the "right to be different" and "right to the free development of the personality" jurisprudence of South Africa and Latin America, respectively. Section III

[6] See e.g. Norman Dorsen, "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer" (2005) 3:4 Int'l J Con L 519 at 521 (as Justice Scalia observed, the framers of the *Constitution of the United States* consciously sought to differentiate the American "moral and legal framework" from that of many other states).

[7] *Ibid* at 523.

draws all the canons together into two overarching doctrines and elaborates on why the difference canons are the most cogent. Section IV concludes.

I. The Categorical Canons

This section examines the categorical canons of Canada and the United States with reference to the textual equality guarantee and leading equality rights precedents of each country. For Canada, this section focuses primarily on the country's "analogous grounds" jurisprudence, which outlines the conditions under which new grounds of discrimination will warrant equality rights protection. The leading canons in this respect are *Corbiere v Canada (Minister of Indian and Northern Affairs)*[8] and its progeny. For the United States, this section will focus primarily on the "suspect classification" cases, which likewise provide the conditions under which new grounds of discrimination warrant "strict" constitutional scrutiny. The leading canon in this respect is *San Antonio School District v Rodriguez*.[9] *Obergefell v Hodges*[10] is also important for its discussion of the purpose of the equality guarantee, even though it does not directly address the "tiers of scrutiny" issue. In both countries, how the courts conceive of the purpose of the equality guarantee informs the ambit of the guarantee's protection. Where equality is a right that protects a particular narrowly defined type of group, be it "analogous" or "suspect," the ambit of equality rights protection is narrow.

A. Canada: The Equality Guarantee is for Vulnerable Groups

1. The Text: Section 15(1) of the Charter

The text of Canada's equality guarantee is fairly standard for a modern constitution.[11] Section 15(1) of the Canadian *Charter of Rights and Freedoms* (the "*Charter*") provides the following:

> "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."[12]

Section 15(1) thus provides four equality interests: before the law, under the law, equal protection of the law, and equal benefit of the law. The drafters intended for this language to provide a more "substantive"

[8] [1999] 2 SCR 203 at para 5, [1999] 3 CNLR 19 [*Corbiere*].
[9] 411 US 1 (1973) [*Rodriguez*].
[10] 576 US 644 (2015), 135 S Ct 2584 [*Obergefell*].
[11] See David S Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYU L Rev 762 at 809–823 (as the authors demonstrate, the Canadian constitutional model has proven highly influential).
[12] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [*Charter*].

guarantee, one which recognized that inequality arises not just when the law treats likes unalike, but also when the law treats people with fundamentally different needs as likes.[13]

Section 15(1) also provides a list of specifically prohibited grounds of discrimination. Each such ground is an "ism" that fails the smell test for normative propriety; racism, sexism, ableism, and the like are pernicious attitudes that have no place in Canada's free and democratic society.

As will become clear below, Canadian courts have paid significant heed to the specifically enumerated grounds, giving them a sort of gravitational force. However, note at the outset that the text of section 15(1) clearly connotes a remedial guarantee with a large and liberal intended ambit of protection that need not be so attached to its specifically enumerated grounds. These grounds are purely illustrative. They are particular examples of discrimination with which the drafters were familiar at the time of enactment, not an exhaustive list.[14] Even if these examples provide clues as to which additional grounds might belong within section 15(1), the broad language of section 15(1) suggests that courts should be generous in extending protection to novel grounds wherever doing so would promote its remedial objectives.[15]

2. The Purpose: Protecting the Dignity of Currently Vulnerable Groups

The Supreme Court of Canada ("SCC") is notorious for incessantly scrapping its equality canons.[16] Nevertheless, the Court has consistently construed the purpose of section 15(1) as the protection of currently vulnerable groups from state-perpetrated attacks on their human dignity. As noted above, the leading case in this respect is *Corbiere*.[17] *Corbiere* observed that section 15(1) "aims to prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice."[18] Despite scrapping the pleading requirement that claimants actually demonstrate harm to their dignity, the SCC has maintained that such harm is what section 15(1) targets. In *Québec (Attorney General) v A*, for example, the Court affirmed the proposition that "the purpose of section 15(1) is to prevent the violation of essential human dignity…and to

[13] See Mary Eberts, "The Fight for Substantive Equality: Women's Activism and Section 15 of the Charter of Rights and Freedoms" 37(1) Atlantis 100 at 101.
[14] See Peter Hogg, *Constitutional Law of Canada*, 2d ed (Toronto: Thomson Carswell, 1985) at 800–801 (shortly after its enactment, Professor Hogg concluded that *any* distinction could trigger s. 15(1)).
[15] If there were any doubt as to this proposition, s 12 of the *Interpretation Act*, RSC 1985, c I-21 dispels it: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."
[16] See e.g. *Québec (Attorney General) v A*, 2013 SCC 5 at paras 142–184, [2013] 1 SCR 61 [*Québec*].
[17] *Corbiere*, *supra* note 8.
[18] *Ibid* at para 5.

eliminate the possibility of a person being treated in substance as 'less worthy' than others."[19] And more recently in *Hansman v Neufeld*, the SCC affirmed that "the equal worth and dignity of every individual" comprise "values at the core of s. 15(1)".[20]

While *Corbiere* and *Québec* refer blanketly to "human" and "personal" dignity, it is clear in the test for violations of section 15(1) that the SCC conceives of the equality guarantee as a right held primarily—and perhaps only—by groups that are widely considered to be vulnerable.

First, the claimant must demonstrate that the impugned provision, either "on its face or in its impact, creates a distinction based on [an] enumerated or analogous ground."[21] The enumerated grounds are all general traits shared across large groups.[22] It is not enough that the law draws a distinction against the claimant. Rather, the distinction must also apply broadly against most members of a group to which the claimant belongs.

Further, while not always explicit in the case law, one can reasonably infer that to succeed on a section 15(1) claim, the claimant must be on the more vulnerable side of the ground in issue. In *Gosselin v Québec (Attorney General)*, the SCC rejected a challenge to a statute creating a distinction that was adverse to youths partly because the enumerated ground of "age" aimed chiefly to protect the elderly.[23] Reading between the lines, one can see similar themes in *R v Kapp*.[24] In *Kapp*, the SCC rejected a challenge to a statute that the claimants alleged to be racially discriminatory insofar as it provided special fishing licenses only to members of the Musqueam, Burrard, and Tsawwassen First Nations.[25] Although the SCC rejected the claim on grounds that the scheme was a remedial program authorized by section 15(2) of the *Charter*, the trial court below did not buy the argument that the scheme "discriminated" against the claimant group comprised of mostly white fishermen. As Justice Brenner noted, the claimant group of "non-Aboriginal peoples" was not "a group that suffer[ed] from any pre-existing disadvantage" such as to be the proper subject of "discrimination" in the normative sense.[26] The use of section 15(1) by majoritarian groups to strike down programs that uplift

[19] See *Québec*, *supra* note 16 at para 138.
[20] 2023 SCC 14 at para 82. Indeed, dignity is an organizing principle of the *Charter* as a whole, crucial to several of its rights and freedoms. See e.g. *R v Hills*, 2023 SCC 2 at para 32, 422 CCC (3d) 1 (holding that s 12 "is meant to protect human dignity and respect the inherent worth of individuals"); *R v Ndhlovu*, 2022 SCC 38 at para 51, 474 DLR (4th) 389 (holding that "[u]nderlying the rights in s 7 is a concern for the protection of individual autonomy and dignity").
[21] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27, 450 DLR (4th) 1 [*Fraser*].
[22] *Charter*, *supra* note 12, s 15(1).
[23] 2002 SCC 84 at para 33.
[24] 2008 SCC 41 [*Kapp*].
[25] *Ibid* at para 68.
[26] *R v Kapp*, 2004 BCSC 958 at paras 5, 79.

historically marginalized groups is inconsistent with the provision's remedial purpose.[27]

The second stage of the section 15(1) analysis further emphasizes the necessity of the claimant's *pre-existing* vulnerability. The claimant must establish that the impugned law "imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[28] This criterion assumes that disadvantage already exists.

Accordingly, the SCC conceives of the equality guarantee as a bulwark against adverse legislative distinctions that further entrench the indignities from which the most vulnerable groups in society already suffer.

The list of vulnerable groups that qualify for section 15(1) protection is not close-ended, which begs the question: what makes a group vulnerable within the meaning of section 15(1)?

In determining which unenumerated groups receive the benefit of section 15(1), the SCC has adhered strictly to the *ejusdem generis* principle. New groups can enter the fold only where they are closely "analogous" to the groups specifically enumerated under section 15(1). The leading case on "analogousness" is again *Corbiere*, which identified two main factors.[29]

First is the "immutability" or "constructive immutability" of the grounds.[30] Discrimination on the basis of a trait that one cannot change about themselves is inherently unfair and the listed grounds are, for the most part, "immutable." However, not all the enumerated grounds are strictly immutable. Faith, for example, is changeable, but only at "great personal cost."[31] For a new ground to be analogous, then, it suffices that the ground is "constructively immutable," such that it involves a choice that is so deeply personal to the claimant that the state ought not to disturb it.[32]

The second factor relevant to identifying analogous grounds is whether the new ground has historically been associated with a lack of political power, disadvantage, or marginalization. [33] The SCC has suggested that this factor may be seen to flow from the central concept of "immutab[ility]" or "constructive[] immutab[ility]", suggesting that it

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[27] This reasoning is consistent with Chief Justice Dickson's admonition in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, [1986] ACS no 70, at para 141, that "courts must be cautious to ensure that [the *Charter*] does not simply become an instrument of the better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

[28] *Fraser*, *supra* note 21 at para 27.

[29] Note here that the Court arguably identifies three factors. The third is that the ground "is important to the [claimant's] identity, personhood, or belonging": *Corbiere*, *supra* note 8 at para 60. However, Canadian courts, including the SCC, appear not to have picked up on this potential factor since *Corbiere*, possibly because the deeply personal choices inherent in the Court's definition of constructive immutability largely replicate it.

[30] *Corbiere*, *supra* note 8 at para 13.

[31] *Ibid* at para 60 (as will become clear below, Canadian courts have not been entirely consistent on this point).

[32] *Ibid* at paras 13, 60.

[33] *Ibid*.

takes secondary importance.[34] Nevertheless, as illustrated above, the assumption of pre-existing disadvantage exists throughout the section 15(1) analysis and this factor further reinforces that notion. In this sense, the section 15(1) analysis is reactive, guarding against widely known inequities while not clearly concerning itself with novel ones.

Corbiere is clear that there may be other relevant factors in the analogous grounds analysis and that "none of the above indicators are *necessary* for the recognition of an analogous ground".[35] Yet, the SCC has since backtracked from this statement, consistently re-emphasizing the necessity of immutability. In *Delisle c Canada (Sous-Procureur Général)*, for instance, the Court rejected that professional status constituted an analogous ground since it was "not a matter of functionally immutable characteristics" given Canada's "labour market flexibility."[36] *Baier v Alberta* affirmed this proposition eight years later.[37] Moreover, in cases that have restated the section 15(1) test, the SCC has—incorrectly—cited *Corbiere* for the proposition that an analogous ground is *only* an analogous ground *because* it is "immutable or changeable only at unacceptable cost."[38]

Consequently, the Canadian equality jurisprudence is highly categorical.[39] The SCC conceives of equality as a right that protects some groups but not others. In deciding whether to extend this protection to new groups, the nature of the enumerated groups has a powerful gravitational force. This holds especially true regarding the immutability criterion. Changeable traits, no matter their other qualities, almost never receive section 15 protection.

What is especially important for the purposes of this article is that, if the new group does not resemble the enumerated groups, the claim cannot succeed. The analogous grounds inquiry is the first step of a conjunctive test. If the claimant fails at this step, it does not matter how adverse the impact of the impugned legislative distinction is; the claim will invariably fail.

Against this backdrop, virtually every attempt to recognize a new analogous ground has failed over the past three decades. The SCC has declined to recognize a new ground for 22 years and has only recognized four analogous grounds in total—namely citizenship, marital status, sexuality, and off-reserve status.[40] Meanwhile, the Court has either held or

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[34] *Ibid* at para 13.
[35] *Ibid* [emphasis in original].
[36] [1999] 2 SCR 989 at para 44, [1999] SCJ No 43 [*Delisle*].
[37] 2007 SCC 31 at para 65.
[38] See e.g. *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 33.
[39] See Douglas Kropp, "'Categorical' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23 Queen's LJ 201 (making a similar comment).
[40] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 53; *Miron v Trudel*, [1995] 2 SCR 418 at para 160; *Egan v Canada*, [1995] 2 SCR 513 at para 5; *Corbiere*, *supra* note 8 at para 6.

indicated that occupation, residence, lifestyle choice, and prison status are not analogous grounds, while intermediate appellate courts have repeatedly held that poverty is not an analogous ground.[41]

Almost all such claims failed because the proposed grounds were insufficiently immutable on strict understandings of the concept that were hardly consistent with the relevant precedent. One would be forgiven for thinking that their occupation or place of abode was a "deeply personal choice" akin to their marital status, such as to at least be constructively immutable.[42] Additionally, it was not enough that many of the foregoing claimant groups—especially the poor—were *actually* vulnerable, despite the fact that the putative purpose of section 15 is to protect the vulnerable from the use of the state's machinery to exacerbate their disadvantage. Finally, the actual harm that the legislation caused to the claimants was irrelevant: a distinction's impact only comes into play if the claimant passes the analogous grounds threshold. No matter how consonant extending section 15(1) protection to new grounds is with the provision's remedial objectives, the SCC will decline to do so if the new ground does not resemble the established grounds. The SCC is fixated on maintaining broad categories of equality rights protection with a small number of stable traits.

B. The United States: The Equality Guarantee Prohibits "Suspect" Classifications

1. The Text: The Fourteenth Amendment

American courts have developed a fairly idiosyncratic set of equality doctrines owing partly to their lack of a modern constitutional equality guarantee. The United States Constitution does not explicitly direct the judiciary to strike down laws that draw adverse distinctions against particular groups. Rather, American courts have construed the Due Process and Equal Protection Clauses of the Fourteenth Amendment (1868) as implying such a direction. The Fourteenth Amendment provides that "no State shall…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."[43]

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[41] *Delisle*, *supra* note 36 at para 44; *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 48; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at paras 184–185 [*Malmo-Levine*]; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 192; and *Alcorn v Canada (Commissioner of Corrections)*, 2002 FCA 154 at para 7, [2002] FJC No 620.

[42] It seems common sense that one's occupation and residence are deeply personal choices. For the average person, one's occupation dictates where and how they will spend almost a quarter of their adult life, and many people find significant personal meaning in their chosen profession. Likewise, that one's home is of central personal import is patent, evinced in the majoritarian Canadian maxim that one's "home is their castle" and the many Indigenous spiritual traditions that emphasize the significance of land and place.

[43] US Const Amend XIV (while on its face, the Fourteenth Amendment only applies against the states, courts have generally construed the Fifth Amendment's Due Process

This provision is general, stating no specific "grounds" of protection. Further, the range of interests protected under the Fourteenth Amendment is not nearly as robust as are those protected in countries like Canada.[44] Thus, the Supreme Court of the United States ("SCOTUS") has not had as much meat on its equality guarantee to work with as have the other countries surveyed here.

Regardless, note that, as in Canada, the text of the American equality guarantee does not necessarily contemplate categorical application. There is no specific language in the Fourteenth Amendment that necessarily restricts its application to particular kinds of discrimination. Indeed, it prohibits *no* specific kinds of discrimination, guaranteeing equal protection in general.[45]

2. The Purpose: Shielding Personal Autonomy From "Suspect" Interference

SCOTUS' view as to the purpose of the Fourteenth Amendment varies according to the judge hearing the case. However, the case law puts some emphasis on ensuring that the state does not fetter individual autonomy for "suspect" reasons. *Obergefell* is apposite.[46] This case considered challenges to various statutory definitions of "marriage" that excluded same-sex couples. In granting the relief sought, Justice Kennedy relied on both the Equal Protection and Due Process Clauses, interpreting

guarantee, which binds the federal government, as incorporating aspects of the Equal Protection Clause: see e.g. *Lawrence v Texas*, 539 US 588 (2003) at 2482, 123 S Ct 2472).

[44] Indeed, Canada specifically included rights to "equality before and under the law" and the "equal protection and equal benefit of the law" largely in response to the American Fourteenth Amendment jurisprudence emphasizing mere "formal" equality. See Mary Eberts, "View of the Fight for Substantive Equality: Women's Activism and Section 15 of the Charter of Rights and Freedoms" (2016) 37:1 Atlantis 100 at 101.

[45] The historical context of the Amendment, which Congress enacted during the Reconstruction Era in the wake of the U.S. civil war, indicates an intent to remedy racial discrimination in particular. This led some jurists to initially conclude that race should be the only prohibited ground of discrimination: see e.g. *Strauder v West Virginia*, 100 US 303 (1880) at 310 (Justice Strong was of the view that states could "confine the selection" of jurors "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications" without offending the Fourteenth Amendment because "[i]ts aim was against discrimination because of race or color"). Yet, if the drafters intended for the Fourteenth Amendment to be so narrow, then they could have indicated as much. That the drafters chose to phrase the Amendment generally, extending to any "person," suggests a broader application, consistent with the spirit of American individualism. A reading of the Fourteenth Amendment that extends meaningful protection to *all* individuals against discriminatory distinctions on more than just racial grounds is consistent with the text of the Amendment.

[46] *Obergefell*, *supra* note 10 (clearly, this reading of the Fourteenth Amendment is liable to change in light of SCOTUS' decision in *Dobbs v Jackson Women's Health Organization*, 597 US (2022) [*Dobbs*], which reversed *Roe v Wade*, 410 US 113 (1973) and seemingly contradicted the latter's more robust conception of due process, but, only Justice Thomas argued outright that *Obergefell* should be overturned at 6–7 of his concurrence).

them as closely interrelated. Justice Kennedy observed that the Due Process Clause protects "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[47] These rights can be "instructive" as to the purpose of "equal protection."[48] The statutory definitions that were in issue in *Obergefell* "burden[ed] the liberty of same-sex couples" by "bar[ring them] from exercising a fundamental right" in the choice to marry.[49] Such a profound intrusion on personal autonomy could not stand without cogent justification. The United States' purported purpose of "protecting the institution of marriage" was not such a justification. This reasoning was arbitrary: same-sex couples sought to marry out of their respect for the sanctity of the institution, not to demean it.[50]

On what bases, then, can the state draw distinctions based on group traits?

The degree of cogency required of the state's reasons for drawing trait-based distinctions depends on the type of trait under consideration. SCOTUS has developed three "tiers of scrutiny" under the Fourteenth Amendment. First is "strict scrutiny," which requires that the state identify a "compelling" interest in drawing the distinction under consideration.[51] The state must also establish that the law is "narrowly tailored" to achieving that purpose and that it has used the "least restrictive means" available.[52] This level of scrutiny only applies to "suspect classifications," which currently include only race, national origin, religion, and alienage.[53]

Second is "intermediate scrutiny," which requires that the state have an "important" interest in drawing the distinction. The state must also show that the means used to further that interest are "substantially related" thereto.[54] Intermediate scrutiny applies to "quasi-suspect" classifications, which currently refers mostly to sex-based distinctions, though some lower courts have applied it to distinctions based on sexuality and gender-identity.[55]

Finally, the third level of scrutiny is "rational basis review," which merely asks whether the distinction is "rationally related" to a "legitimate" government interest.[56] This is the default level of scrutiny for all

[47] *Ibid* at 10.
[48] *Ibid* at 19.
[49] *Ibid* at 22.
[50] *Ibid* at 26–28.
[51] *City of Cleburne v Cleburne Living Ctr*, 473 US 432 at 440 (1985), 105 S Ct 3249 [*Cleburne*].
[52] *Ibid*.
[53] *Ibid*.
[54] *Craig v Boren*, 429 US 190 at para 10 (1976), 97 S Ct 451.
[55] See *Glenn v Brumby*, 633 F3d 1312 (11th Cir 2011) [*Glenn*] (for gender identity); and *Windsor v United States*, 699 F3d 169 (2d Cir 2012) [*Windsor*] (for sexuality, but note that SCOTUS heard this case after the Second Circuit without identifying its preferred level of scrutiny).
[56] See Thomas B Nachbar, "The Rationality of Rational Basis Review" (2016) 102:7 Virginia L Rev 1627 at 1629.

distinctions not listed above. As the Fourteenth Amendment lists no specific grounds, American courts have treated the range of distinctions permissible to challenge under rational basis review as fairly open-ended, having considered petitions based on age, disability, felony status, and even class.[57]

At first blush, SCOTUS may appear to have an anti-categorical equality doctrine. SCOTUS has explicitly stated that one of the Fourteenth Amendment's objectives is the protection of individual autonomy. The doctrine also has a third tier of review that applies regardless of the nature of the challenged distinction. Finally, unlike in Canada, since the focus of the Fourteenth Amendment is on securing equal protection generally—and not just for vulnerable groups—people on either side of a distinction may levy a constitutional challenge against it.[58]

However, in substance, SCOTUS' jurisprudence is highly categorical, and even more so than Canada's approach. Petitions relying on rational basis review virtually never succeed. As Professor Barron observes, the standard is so deferential that it is "more often a statement of conclusion that the law is constitutional than a standard of actual evaluation."[59] In the very few successful cases reviewed on this standard, the impugned laws were so patently absurd that there was no plausible justification for them. For instance, in *Cornwell v Hamilton*, a Federal District Court struck down a cosmetology licensing scheme that required stylists practising exclusively in African hair braiding to undertake 1,600 hours of study in a course that did not include instruction on hair braiding.[60] Conversely, in *In re Christina A*, the California Court of Appeals upheld a statute that granted state-funded reunification services to parents and children generally, but which denied such services to "mentally disabled parents."[61] The statute was apparently rationally related to the legitimate purpose of preserving state resources. Such is the peculiar state of equality law in the United States, that licensing regimes that are averse to hair braiders are more constitutionally suspect than is the exclusion of the differently abled from a crucial parental benefit for budgetary reasons.

Additionally, while petitions predicated on intermediate and strict scrutiny succeed more often than rational basis petitions, SCOTUS has developed strict requirements for recognizing new grounds that attract heightened scrutiny. *Rodriguez* is the leading case in this respect, identifying the following criteria: whether a ground has historically been

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[57] See e.g. *Mass Bd of Ret v Murgia*, 427 US 307 (1976) (for age); *Rodriguez*, *supra* note 9 (for poverty); *Cleburne*, *supra* note 51 (for disability); and *Smith v Fussenich*, 440 F Supp 1077 (D Conn 1977) (for felony status).

[58] *JEB v Alabama,* 511 US 137 (1994), 114 S Ct 1419 (in this case, sex-based discrimination against men ran afoul of the Equal Protection Clause, even though women lie on the more vulnerable side of the sex equation).

[59] Jerome E Barron et al, *Constitutional Law: Principles and Policy*, 9th ed (New York: LexisNexis, 2013) at 305.

[60] *Cornwell v Hamilton*, 80 F Supp 2d 1101 (SD Cal 1999).

[61] *In re Christina A*, 216 Cal Rptr 903, at 905 (Ct App 1989).

associated with disadvantage; whether a ground is immutable; and whether people within the ground are powerless to protect themselves via political processes.[62] As in Canada, these criteria are what purportedly draw the recognized "discrete and insular" minorities together.[63] SCOTUS has thus matched Canada's emphasis on requiring that proposed grounds resemble established grounds in kind, making such resemblance a pre-requisite to the only serious bases of constitutional scrutiny.

Against this backdrop, SCOTUS has recognized new grounds of strict and intermediate scrutiny even less often than the SCC has recognized analogous grounds. The only new grounds that appellate-level courts have recognized in the past five decades are sexuality and gender-identity, and those were both at Federal Circuit courts.[64] SCOTUS has itself struck down laws drawing adverse distinctions on the basis of sexuality in cases like *Obergefell*, but it has never specified the applicable level of scrutiny in such cases. Consequently, the ambit of meaningful equality protection in the United States is restricted to just five to possibly seven broad categories that have remained relatively closed since the 1970s, compared to Canada's 12. The United States has what might be the most categorical equality jurisprudence in the world.

II. The Difference Canons

This section now turns to the difference canons of South Africa and much of Latin America, with reference to their textual guarantees and leading precedents. For South Africa, this section focuses primarily on the country's "right to be different" and "analogous grounds" jurisprudence. While South Africa, like Canada, has "analogous grounds" analysis, the country's understanding of the purpose of the equality guarantee as affirming difference has given rise to a more open-ended test for the guarantee's application. *Minister of Home Affairs v Fourie*[65] is the leading precedent in this regard. Meanwhile, for Latin America, this section looks to Colombia and Mexico's "right to the free development of the personality" jurisprudence. This right is either ancillary to or in coordinate with the rights to equality and human dignity, and, like South Africa, is concerned with affirming individual human difference. The leading canons in this respect are Sentence C-075/07 of the Colombia Constitutional Court and *Amparos en Revisión* 547/2018 of the Mexican Supreme Court.

A. South Africa: The Equality Guarantee Represents a Right to Be Different

[62] *Rodriguez*, *supra* note 9 at 28; see also *Lyng v Castillo*, 477 US 635 at 638 (1986), 106 S Ct 2727.
[63] *United States v Carolene Products Co*, 304 US 144 at 153 (1938), 58 S Ct 788.
[64] *Glenn*, *supra* note 55; *Windsor*, *supra* note 55.
[65] [2005] ZACC 19 [*Fourie*].

The text of South Africa's equality guarantee is fairly consistent with the guarantee under section 15 of the Canadian *Charter*. Section 9(1) of the *Constitution of South Africa* states that "everyone is equal before the law and has the right to equal protection and benefit of the law."[66] Section 9(3) then provides a relatively familiar list of prohibited grounds of discrimination.[67]

Unlike Canada, though, the Constitutional Court of South Africa has construed the purpose of section 9 as the affirmation of difference. *Fourie* is apposite to illustrate this purpose.[68] *Fourie* considered a challenge to South Africa's definitions of marriage in statute and at common law, both of which excluded same-sex couples.[69] In striking down the definition, Justice Sachs observed that "a democratic, universalistic, caring, and aspirationally egalitarian society embraces everyone and accepts people for who they are."[70] Equality entails at "the very least affirm[ing] that difference should not be the basis for exclusion, marginalization, and stigma," and at its best, "celebrat[ing] the vitality that difference brings to society."[71] On this basis, Justice Sachs held that the equality guarantee confers "a right to be different" from the dominant culture.[72] By preventing same-sex couples from realizing the benefits of marriage, the impugned laws impermissibly impeded the ability of same-sex couples to express their love differently from others.

To determine whether a distinction infringes the "right to be different," South African courts apply a three-stage test. First, the court asks whether the impugned provision differentiates between "people or categories of people," and if so, whether the distinction bears "a rational connection to a legitimate government purpose."[73] If the answer to the latter question is "no," then the law is presumptively unconstitutional.

Second, if the impugned law does have a rational connection to a legitimate government purpose, then the court asks whether the differentiation amounts to unfair discrimination. In so doing, the court considers whether the distinction is based on a "specified" or "analogous" ground, and, if so, whether the distinction has an "unfair" impact on persons falling within that ground.[74] If the law does have such an impact, it is presumptively unconstitutional.

Third, even if the impugned law is unfairly discriminatory, the South African state can justify presumptively unconstitutional distinctions under section 33 of the *Interim Constitution*.[75]

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[66] *Constitution of the Republic of South Africa*, No 108 of 1996, s 9(1).
[67] *Ibid*, s 9(3).
[68] *Fourie*, *supra* note 65.
[69] *Ibid* at para 3.
[70] *Ibid* at para 60.
[71] *Ibid*.
[72] *Ibid* at paras 59–62.
[73] *Harksen v Lane NO*, [1997] ZACC 12 at para 53, 1997 (11) BCLR 1489 [*Harksen*].
[74] *Ibid*.
[75] *Ibid*.

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Superficially, this test is remarkably consistent with the tests for equality infringements in Canada and the United States, two categorical states. Step one is functionally equivalent to rational basis review in the United States, while step two looks to whether the impugned legislation creates a distinction based on a "specified" or "analogous" ground just like the Canadian test.

However, in substance, the South African test is anti-categorical. When assessing whether an "unspecified" group is "analogous" to the "specified" groups at the second stage, South African courts focus primarily on the impact that discrimination has on the new group, rather than on how much the new group resembles the specified groups in kind. What draws the specified grounds together is that differentiating between people on these bases frequently impairs the right of the affected persons to be different by violating their dignity.[76] Such violations of dignity are "unfair" and therefore unconstitutional. The specified grounds are thus something of a smell test for such dignity violations. They are inherently suspect but do not necessarily bear on whether *other* distinctions violate dignity. The indicia of unspecified dignity violations include association between the ground of distinction and historical disadvantage; association between the ground and political exclusion; and whether and to what degree the ground is immutable.[77]

These indicia clearly resemble those in the Canadian and American "analogous" and "suspect" grounds analyses. Each are states associated with the specified grounds of discrimination and therefore ask indirectly whether the new ground resembles the listed grounds in kind.

Unlike courts in Canada and the United States, South African courts have repeatedly held that these indicia are not determinative of whether a ground is analogous, and in some cases the indicia are irrelevant in their entirety.[78] The ultimate question is always whether drawing the distinctions on the new ground harms the dignity of the claimant, *even if* the ground is not associated with historical disadvantage or political exclusion and *regardless* of whether it is immutable.[79] In this way the indicia of analogous grounds do not have the same determinative force in South Africa as they do in Canada and the United States. The degree to which a proposed analogous ground resembles the listed grounds in kind is not a standalone threshold inquiry but is instead a sort of shorthand for likely dignity violations when conducting the discriminatory impact analysis. A claim will not fail at the outset just because it does not rely on a ground that looks like the recognized grounds.

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[76] *Ibid* at paras 46–47.
[77] *Ibid*.
[78] *Ibid*; *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*, [1997] ZACC 16 at paras 16–19 [*Larbi-Odam*]; *President of the Republic of South Africa v Hugo*, 1997 (4) SA 1 (CC) at para 43.
[79] *Larbi-Odam*, *supra* note 78 at para 17.

In further contrast with Canadian jurisprudence, South African courts actually abide by the admonition that the analogous grounds indicia are simply indicia. In *Harksen v Lane NO*, for instance, the Constitutional Court considered whether a law that drew an adverse distinction against "solvent spouses" in the bankruptcy context violated South Africa's equality provision.[80] The Court rejected the claim, but in doing so, it made no reference to whether being a solvent spouse was an "immutable" trait and instead focused mainly on whether the impact of the impugned provision adversely impacted the dignity of the claimant. The status of "solvent spouse" was not an analogous ground mostly because the effect of the provision, while inconvenient, did not dehumanize the claimant.[81]

South Africa's approach to analogous grounds is more open-ended than is the categorical canon. Drawing distinctions on the basis of virtually any trait *can* harm the dignity of persons having that trait. South African courts need not wait until the dignity of persons possessing a trait has been harmed so much that their condition in society resembles those of the listed groups. Nor do courts need to sit on their hands if the trait is mutable. Rather, South African courts can proactively quash budding inequities in their infancy no matter their basis.

This is not to suggest that the South African analogous grounds test has resulted in an explosion of new grounds. To date, South African courts have recognized at least four analogous grounds: citizenship, HIV status, marital status, and type 1 diabetes status.[82] Each of these grounds could conceivably fit within Canada's analogous grounds analysis. One likely reason why the list has not grown much further is that South Africa's enumerated grounds are themselves quite numerous already, with 16 grounds compared to Canada's eight.[83]

Nevertheless, what matters for our purposes is that South Africa's approach is more receptive to new grounds as they arise than are the approaches of the categorical states. This approach accords with the notion that the equality guarantee represents a general affirmation of difference. An individual is entitled to be different—whether by choice, accident, or happenstance—without the state imposing dehumanizing burdens on them just because they are different. To that end, the South African test for equality violations is less concerned with the ground of distinction than it is with the impact of the distinction. Does the distinction make being different unnecessarily and unfairly difficult? If so, then the state ought not to draw it.

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[80] *Harksen*, *supra* note 73 at para 55.
[81] *Ibid* at para 61.
[82] See Jamil Ddamulira Mujuzi & Leruri Benjamin Tsweledi, "Discrimination on the Basis of Criminal Record in South Africa: Is Having a Criminal Record an Analogous Ground?" (2014) 14:4 Intl J Discrimination & L 244 at 246–247.
[83] Section 9(3) of the *CRSA* lists: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscious, belief, culture, language, and birth.

B. Latin America: The Equality Guarantee Represents a Right to Freely Develop One's Personality

Latin American equality jurisprudence is not monolithic. However, there has been a consistent trend across many Latin American countries toward construing the right to equality and the rights ancillary thereto as encompassing a right to the "free development of the personality." This subsection will focus on Mexico and Colombia's experience with this trend.

Sentence C-075/07 of the Colombia Constitutional Court is generally illustrative of both states' approaches.[84] That case considered an equality rights challenge to a statutory definition of "civil union" that excluded same-sex couples.[85] Colombian courts consider the equality guarantee to be concerned mainly with the protection of human dignity.[86] The Court observed that "the object of promoting dignity" is to protect the individual's right to "self-determination according to [their] own destiny and [their own] particular idea of perfection, in order to give meaning to [their] existence."[87] On this view, the equality guarantee is not so much concerned with the prohibitive goal of quashing unfair distinctions as with the affirmative goal of promoting the ability to live a meaningful life. The only proper limits on one's leading of a meaningful life are the rights of others and, occasionally, the state's paternal interest in protecting the person from themselves.[88] In Sentence C-075/07, the Court held that the choice as to whom one loved was profoundly meaningful and caused no legally relevant harm to the maker or to others.[89] In denying same-sex couples a state benefit on the basis of that personal choice, the impugned statute impermissibly fettered their right to freely develop their personalities.

The free development of the personality approach to the equality guarantee is clearly anti-categorical. Whether a novel ground of discrimination resembles previously recognized grounds in kind plays no part in Colombia's equality jurisprudence. The only question before the court is whether the distinction at issue limits the claimant's non-harmful decision-making. One need not belong to any particular group for legislative distinctions to limit their autonomy.

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[84] Sentence C-075/07 (2007) of the Constitutional Court of Colombia [Colombia Right to FDP].
[85] *Ibid* at 7 [translated by author]. Original: "unión singular, permanente y continua".
[86] *Ibid* at 62 (the decisions speak of equality, dignity, intimacy, and free development of the personality all in one breath, with each addressing essentially the same problems as a collective unit).
[87] *Ibid* at 50 [translated by author]. Original: "el objeto de protección de la dignidad entendida como posibilidad de autodeterminarse según el propio destino o la idea particular de perfección, con el fin de darle sentido a la propia existencia".
[88] *Ibid* at 61.
[89] *Ibid* at 56–65.

In this respect, Colombia's approach to the equality guarantee appears even more open-ended than South Africa's approach, despite both states considering "dignity" to be the touchstone of the right. South Africa and Colombia have different definitions of what a breach of "dignity" entails. A breach of South Africa's right to be different requires something more than the fettering of an individual's autonomy. The breach analysis requires a normative assessment of whether the fettering is "unfair," almost in the sense of dehumanizing the claimant.[90]

Conversely, a breach of the right to the free development of the personality flows almost automatically from the non-*de minimis* fettering of one's autonomy absent a showing of harm. Obviously, harm is a flexible concept and fettering one's harmful decisions might often be "fair." Nevertheless, where there is no clear harm flowing from one's autonomy, Colombian courts need not make a qualitative assessment of whether the fettering dehumanizes the claimant. The mere fact that the state has fettered the claimant's autonomy simultaneously harms their dignity.

The free development of the personality approach has results that would be unorthodox in states with categorical equality guarantees. As noted above, other Latin American states share Colombia's approach to the right to the free development of the personality, including Mexico—though, Mexico treats it as subsisting in a freestanding right to "dignity." The Mexican Supreme Court recently relied on this right to decriminalize the recreational use of marijuana. In *Amparos en Revisión* 547/2018, the Court observed that the "right to free development of the personality entails a radical rejection of the ever-present temptation of paternalism of the state."[91] The state was not entitled to fetter the choice to consume marijuana unless that choice caused harm. In some contexts, marijuana use would cause sufficient harm for the state to intervene, for example, on the roadway.[92] However, the "mere moral self-degradation of recreational use" was not a harm sufficient to warrant a blanketed prohibition.[93]

Consequently, Mexico and Colombia have developed a doctrine within the umbrella of the equality guarantee which affords an incredibly broad ambit of protection. The right to free development of the personality is a right to choose to be different in virtually any way that does not cause harm. This right represents a substantial endorsement of personal autonomy.

III. The Purposive Potency of the Difference Canon

[90] *Harksen*, *supra* note 73 at paras 50–53.
[91] *Amparos en Revisión* 547/2018 (2018) of the Supreme Court of Justice of the Nation of Mexico at 18 [translated by author]. Original: "el derecho al libre Desarrollo de la personalidad comporta 'un rechazo radical de la siempre presente tentación del paternalism del Estado'".
[92] *Ibid* at 53.
[93] *Ibid* at 38 [translated by author]. Original: "[e]n cambio, la prohibición del consume de marijhuana por la mera autodegradación moral que implica no persigue un propósito legitimo".

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From the preceding sections, one can note two overarching strands of equality reasoning. The first is the categorical doctrine shared between the United States and Canada. While the SCC and SCOTUS differ markedly in terms of which groups they think warrant the protection of the equality guarantee, they both agree that the guarantee only extends to groups with clearly defined traits. Both courts emphasize the necessity that new groups suffer from a well-recognized history of disadvantage on the basis of a trait that is unchangeable to some degree. If a new group does not carry the stench of an "ism" with which the court is already familiar, the claim almost invariably fails. In Canada, a court will decline to even consider the adverse impact of a law if the claimant group does not fit its heuristic of what constitutes a historically marginalized group. Meanwhile, in the United States, at best most courts will feign scrutiny of such a law on their path to accepting virtually any rationales the state puts forward for them. Both countries prefer short-hand, categorical equality reasoning.

Importantly, in both countries, the decision to adopt categorical canons was an interpretive choice not dictated by the textual scope of their equality guarantees. Nothing about the language of Section 15(1) of the *Charter* or the Fourteenth Amendment necessarily limits their scope of protection to an exclusive list of narrowly defined groups. In fact, the remedial purposes and general language of both provisions favour a far more large and liberal application, consonant with the equality canons surveyed below. The provisions admit of better alternatives.

Conversely, the difference doctrine shared between South Africa and Latin America fixates more on the impact of a legislative distinction. The "right to be different" and the "right to the free development of the personality" are both concerned with autonomy. It is not essential that the claimant looks like recognized claimants. What matters is that the state has singled the claimant out for being different, whether by circumstance or choice. South Africa and Latin America courts do not always agree on when the state can limit personal choices. South African courts permit normatively "fair" limitations, while Latin America courts only permit those that limit harm. However, by protecting personal choices generally, both blur the line between equality and liberty rights.

This section explains why the difference canons are generally more cogent than the categorical canons. It begins by offering two reasons why it is inappropriate, both theoretically and practically, to conceive of equality in categorial terms. Specifically, a categorical equality guarantee: (i) will arbitrarily exclude many pernicious legislative distinctions from its protection; and (ii) is discordant with the actual experience of discrimination, which is frequently intersectional. This section then considers and rebuts the two main arguments against the difference canons; namely, that the difference canons are: (i) likely to open the floodgates to frivolous equality claims; and (ii) too vague to admit of a workable legal standard. Finally, this section will explain how categorical courts can

properly adopt aspects of difference reasoning without sacrificing the socio-political contexts of their equality guarantees.

A. Arguments for the Difference Canons

1. Categorical Equality Reasoning is Often Arbitrary

Categorical equality reasoning often results in the arbitrary exclusion of new grounds of protection even where the inclusion of such grounds would better accord with the purpose of the equality guarantee. These arbitrary exclusions occur for at least three reasons.

First, discrimination is a complex normative concept that cannot be reduced to just two or three indicia without providing underinclusive protection. All the states surveyed in this article essentially agree that the equality guarantee exists to protect dignity.[94] Is it really accurate to say that the only bases on which the state can impair dignity are those that bear the indica of immutability and a widely recognized history of social marginalization? Clearly the answer must be no.

Take poverty as an example. Canadian tribunals have repeatedly refused to recognize poverty as an analogous ground because it is insufficiently immutable.[95] The Nova Scotia Utilities Review Board went so far as to state that poverty was not an analogous ground because, "[i]f a person…receives a gift, they would escape from poverty at no great difficulty."[96] This reasoning is clearly faulty. Virtually no one escapes poverty by receiving a fortuitous gift and escaping poverty by other means is incredibly difficult, especially as the cost-of-living rises. Furthermore, poverty is no less immutable in this respect than, say, marital status, which is a recognized ground of protection in Canada. One can divorce just as readily as one can escape homelessness.

But more importantly, why does the mutability of poverty matter from the perspective of protecting human dignity? State actions like erecting "defensively designed" public benches to prevent homeless people from sleeping in parks and using the police to systemically move homeless people to underserved parts of town are dehumanizing.[97] These policies

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[94] See e.g. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 93, 170 DLR (4th) 1 [*Law*]; *Obergefell*, *supra* note 10 at 7.

[95] See generally Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the Charter" (2013) 2 Can J Poverty L 1 (for an excellent and thorough survey of the cases that have considered the matter).

[96] *Affordable Energy Coalition (Re)*, [2008] NSURBD No 11 at para 181.

[97] See e.g. Lauren Pelley, "How 'defensive design' leads to rigid benches, metal spikes, and 'visual violence' in modern cities" (2019) *CBC*, online: <www.cbc.ca/news/canada/toronto/how-defensive-design-leads-to-rigid-benches-metal-spikes-and-visual-violence-in-modern-cities-1.5192333>; "Winter Olympics on slippery slope after Vancouver crackdown on homeless" (2010) *The Guardian*, online: <www.theguardian.com/world/2010/feb/03/vancouver-winter-olympics-homeless-row>; Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 Queen's LJ 297.

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perpetuate a stereotype that the poor are unsightly and therefore less worthy of using public spaces and resources. That narrative, too, demonstrates a history of social marginalization, consistent with the second indicium of analogous grounds. If the poor have been subjected to a history of state-perpetrated marginalization and the equality guarantee exists to remedy such marginalization, then there is no principled justification for failing to extend equality rights protection to the poor.

The second reason why categorical reasoning is arbitrary answers a common retort to the following example: categorical courts conceive of the concept of "constructive immutability" in misleading categorical terms. Some jurists who sit on courts with categorical equality doctrines have shown discomfort with categorical equality reasoning. Justices McLachlin and L'Heureux-Dubé of the SCC fit that description. For Justice McLachlin's part, she devised the concept of constructive immutability in *Miron v Trudel* to address the fact that, while marital status is mutable, the state has no legitimate interest in changing it.[98] This notion that the equality guarantee protects "deeply personal choices" is consistent with the difference canons in that it affirms individual autonomy. The problem is that, while constructive immutability remains a part of Canadian law, subsequent courts have taken the concept and ran with it in illogical directions in what Professor Eisen aptly calls a "bad game of 'broken telephone.'"[99] Specifically, Canadian courts have held that poverty is not constructively immutable because the state *does* have a legitimate interest in changing poverty by changing the condition of the impoverished *for the better*.

This reasoning reveals an unfortunate error in Justice McLachlin's otherwise laudable framing of constructive immutability. It is true that the state has no legitimate interest in changing certain deeply personal choices, but those choices are not co-extensive with broad categorical grounds of equality rights protection. Justice McLachlin suggests that one's faith is constructively immutable and while the state should generally leave one's faith alone, it is not true to say that the state *never* has a legitimate interest in regulating aspects of one's faith.[100] For example, Canada has criminalized polygamy despite the practice being central to certain fundamentalist Mormon traditions and this prohibition has survived constitutional scrutiny.[101] Likewise, although the state clearly has an interest in ameliorating the condition of the poor, that does not mean that it has an interest in changing every aspect of poverty. Spiked park benches do not fix poverty; they simply make the fact of being homeless harder. To say that policies that make being poor harder cannot attract equality rights protection because the state has an interest in remedying poverty is absurd.

[98] *Miron*, *supra* note 40 at para 160.
[99] Eisen, *supra* note 95 at 21.
[100] *Miron*, *supra* note 40 at para LXIX.
[101] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

A more principled way of phrasing constructive immutability analysis would be to particularize it to the case at hand. Does the state have a legitimate interest in regulating this *particular* aspect of this *particular* identity trait? If not, then it does not matter whether the state has a general interest in improving the plight of people who bear that identity trait.

The third and final reason why categorical equality reasoning is arbitrary is that it is too reactive. States with categorical canons use analogous and suspect grounds analysis primarily to screen for "potential" dignity violations.[102] They filter out new grounds by comparing them to established grounds of discrimination with which everyone is familiar. This makes the equality analysis simpler, but it also raises a concerning question: what if today's indignities do not look like the indignities of yesterday? Are courts supposed to sit on their hands until today's indignities become as widely acknowledged and pernicious as racism, sexism, and the like?

Take weight as an example. Overweight people face substantial discrimination in state-funded health institutions. Since obesity is a common morbidity, doctors often lean on weight as a diagnostic crutch, resulting in misdiagnoses.[103] This behaviour perpetuates a dehumanizing narrative that obese people do not deserve equal medical attention. However, obesity does not fit neatly among the established categories of discrimination. Throughout most of human history, when resources were scarce, obesity was associated with wealth and status.[104] The obese were not denigrated as they are today. Further, weight can fluctuate rapidly; it is not remotely immutable. Put simply, obesity does not resemble the established grounds of discrimination in kind, but it is not true to say that obese individuals do not experience undignified, state-funded discrimination.

Determining whether a new ground warrants equality rights protection by comparing it to old grounds is unnecessarily reactive. This approach waits for indignities to become prevalent and untenable, rather than quashing them in their infancy. Surely the truest sign of a "potential dignity violation" is instead whether the impugned state action *actually* violates the dignity of the claimant *today*. In which case, it makes ill-sense that categorical states screen new claims out *before* inquiring into whether the impugned distinction harms the claimant's dignity. Courts ought instead to look into whether the state is actually singling the claimant out in a dehumanizing manner in every case, to prevent the claimant from *becoming* a vulnerable group.

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[102] *Law*, *supra* note 94 at para 93.

[103] See e.g. Meghan Holohan, "'It wasn't about my weight': How weight bias in medicine can lead to missed diagnosis and physical and mental pain" (2018), online: *Today* <www.today.com/health/medical-weight-bias-causes-misdiagnosis-pain-depression-t153840>.

[104] See generally WF Ferris & NJ Crowther, "Once fat was fat and that was that: our changing perspectives on adipose tissue" (2011) 22:3 Cardiovascular J Africa 147.

2. Categorical Reasoning is Discordant with the Actual Experience of Discrimination

Categorical equality reasoning is also discordant with the actual experience of discrimination, which is frequently intersectional. [105] Requiring that claimants predicate their equality rights claims on a single overbroad ground creates unnecessary theoretical and practical challenges.

Theoretically, this approach results in loose-fitting claims that lose their logical potency. To illustrate, suppose that a policy discriminates solely against women of colour. The policy does not discriminate against women or people of colour generally, just the intersectional ground of women of colour. Under the categorical approach, any claimant who challenges such a policy would have to predicate their claim on being either a woman or a person of colour. Doing so would not be particularly persuasive. Women of colour currently comprise a minority of the women in states like Canada and the United States, so it is inaccurate to say that the impugned policy discriminates against women generally. Likewise, it is not entirely accurate to say that the policy discriminates against people of colour generally; at most, it discriminates against half of the state's people of colour. If the court were to grant the claim anyway, the result would be an awkward fit. The claim would afford protection to more people than were actually harmed by the policy at issue. Perhaps having more protection than is necessary is not itself a bad thing in practice, but the foregoing decision would be poorly reasoned, which reflects negatively on the judiciary.

Practically, the categorical approach creates unfair pleading hurdles for diverse claimants. Suppose in the preceding example that the court had instead rejected the claim precisely because the policy did not harm a majority of women or people of colour, even though it harmed nearly all people at the intersection of those two traits. It makes ill-sense to deny protection to the claimant simply because they are doubly burdened by two levels of pernicious discrimination rather than one. Predicating equality rights protection on one's membership in an overbroad group, many members of which may never experience the discrimination in issue, creates even more unfair legal hurdles for the most vulnerable sub-groups of society. A more principled approach to equality reasoning would be intersectional, recognizing the diversity of individual identity traits.

B. Arguments Against the Difference Doctrine

[105] See generally Ben Smith, "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 Equal Rights Rev 73; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37; Denise G Réaume, "Of Pidgeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40:2 Osgoode Hall LJ 113.

1. Abandoning Categorical Heuristics Will Not Open the Floodgates to Frivolous Claims

The strongest argument against the difference doctrine is that equality, as a normative concept, is difficult to define, and courts therefore require heuristics of discrimination to avoid opening the floodgates to frivolous equality rights claims. This argument is implicit in Canadian courts' phrasing of the analogous grounds analysis as screening for "potential" dignity violations.[106] We know that racism, sexism, and the like impair human dignity, so the easiest way to find new dignity violations is to compare them to those grounds. Absent such comparisons, courts are left without a benchmark against which to find novel dignity violations and they risk extending equality rights protection to unintended grounds that ill-reflect the purpose of the equality guarantee.

This argument, while facially plausible, lacks an empirical foundation. As noted above, South Africa has adopted a less restrictive analogous grounds test that gives persuasive but not determinative weight to the established grounds of discrimination. South Africa has by no means opened the floodgates to frivolous new grounds as a result. In fact, South Africa has recognized just four analogous grounds of discrimination: citizenship, HIV status, marital status, and type 1 diabetes status. Canada, as a categorical state, recognizes these grounds in one form or another as well, and they are clearly not trivial.[107] There is simply no evidence that abandoning the rigid sieve of categorical analogous grounds analysis invariably results in an explosion of frivolous claims.

If the current Canadian and South African grounds largely overlap, one might wonder what utility the South African jurisprudence has over Canadian law. The answer is threefold.

First, and as explained elsewhere, the South African approach is proactive. New bases of discrimination may arise over time. There is no reason in principle why courts ought to let them fester until they are as widely recognized as the established grounds, as the Canadian approach does. Courts should instead be required to grapple with the impact of novel grounds in every case, as they are under the South African approach.

Second, by focusing the analysis more clearly on discriminatory impacts, the South African approach directs courts to do the hard work of actually explaining why distinctions on novel grounds either are or are not discriminatory. At minimum, this ensures that claimants see justice done: they will know whether the distinction itself is undignified and not just whether it is similar to recognized bases of discrimination.[108] The process of explaining whether distinctions on novel grounds are discriminatory

[106] *Law*, *supra* note 94 at para 93.

[107] HIV and type 1 diabetes status may arguably fall within the umbrella of disability, or these grounds would at least be analogous thereto.

[108] See e.g. Robert Megarry, "The Judge" (1983) 13 Man LJ 189 at 194 (on the importance of avoiding "short cuts" in judicial reasoning).

may also compel jurists to better flesh out the indicia of discrimination and, as a result, compel them to reconsider grounds that they have previously rejected. In Canada, for instance, if jurists were required to explain why distinctions adverse to the poor are permissible, without reliance on poverty's mutability, they might discover that this conclusion is illogical.

Third, the South African approach itself acts as a bulwark against the need to recognize new grounds. By signalling that the state must explain why the impact of a legislative distinction on virtually any ground is "fair," without undue reliance on heuristics, South African law disincentivizes the enactment of discriminatory laws on any basis, new or old. This is the essence of constitutional dialogue: the judiciary draws constitutional boundaries that the legislature then seeks not to cross.[109] The fewer holes there are in the equality doctrine, the less likely it is that the legislature will discriminate. The very fact that there has not been an explosion in analogous grounds in South Africa might just be a sign of how robust the doctrine is, rather than a sign that South African courts would uniformly reject the same grounds as do Canadian courts. That is not to say that difference reasoning does not have its excesses. The Mexican right to free development of the personality may offer too much protection by sapping the term "dignity"—at least as the term is used in Canada, South Africa, and the United States—of some of its normative weight. To suggest that the state has impaired one's dignity generally betokens some form of dehumanizing conduct. Conversely, the jurisprudence on the Mexican right to the free development of the personality counter-intuitively suggests that basically any state conduct that fetters individual autonomy, absent harm, violates one's dignity. This may be so in Mexico, but clearly is not the case everywhere. In Canada, for example, the equality guarantee may not be an appropriate tool for decriminalizing marijuana use.[110]

This difference of opinion on what constitutes dehumanizing conduct is fine. Canada and the United States can reasonably have more weighty conceptions of human dignity. The point, however, is that Canada and the United States should apply that weighty conception of human dignity to particular cases and not to general categories of people. The South African equality jurisprudence provides a model for doing so that does not open the floodgates to trivial claims.

2. The Difference Canon Admits of Workable Legal Standards

Related to the floodgates argument is the suggestion that the difference canon lacks any workable legal standards. Again, this argument flows from the assertion that categorical reasoning screens for "potential" discrimination. How are courts to know which actions impugn human

[109] See Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75 at 79–82.
[110] See *Malmo-Levine*, *supra* note 41 at paras 184–85.

dignity without reference to precedential grounds? Dignity is a vague and amorphous concept that escapes clear definition. The judiciary is meant to apply clear standards to concrete phenomena; it is ill-equipped to make normative assessments of whether particular conduct is dehumanizing.

This argument has some merit, but it is a guise for what ultimately amounts to lazy reasoning. It is undoubtedly true that determining whether a particular state action impugns an individual's dignity is a daunting task. However, it is the type of task with which courts are routinely vested. Common law courts have been responsible for applying the doctrines of equity for centuries.[111] These standards involve such vague normative determinations as to whether the parties bear "clean hands" or have "done equity" themselves. These considerations of basic fairness are quite similar to the question of whether the state has treated a claimant "unfairly," as the South African approach to the equality guarantee asks.

More importantly, difficult normative questions are already at the heart of Canadian and American constitutional analysis. Section 15(1) of the *Charter* and the Fourteenth Amendment explicitly vest Canadian and American courts with the onus of determining whether the state is treating individuals "equally." These courts have long performed the daunting task of defining that amorphous term in tough cases. In Canada, where a claim passes the categorical analogous grounds inquiry, courts are still required to determine whether the distinction at issue is "discriminatory." This part of the test recognizes that not all legal distinctions that are potentially discriminatory are always discriminatory, and tasks courts with a normative assessment of whether the particular policy under consideration is dehumanizing without reference to any categorical heuristics. To say that categorical courts should abandon categorical reasoning, then, is simply to say that they should continue to apply the second part of a test that is already in operation.

C. A Proposal: Affirm Difference and Relax the Grounds Analysis

In resisting difference reasoning, critics may levy the usual argument against reliance on foreign constitutional precedent: each constitution carries a unique socio-political context and so confers its own unique rights and freedoms.[112] South African and Latin American courts may conceive of the equality guarantee as affirming difference, but is that so in Canada and the United States?

The answer is yes: the Canadian and American constitutions admit of differencing reasoning. The list of grounds under Section 15(1) of the *Charter* is open-ended and the Fourteenth Amendment guarantees equal protection full stop, without limitation as to grounds. The relevant jurisprudence is also clear that the equality guarantee in these states aims

[111] See generally Howard L Oleck, "Historical Nature of Equity Jurisprudence" (1951) 20:1 Fordham L Rev 23.
[112] See Dorsen, *supra* note 6 at 521.

to protect dignity and, at least according to jurists like Justices McLachlin and Kennedy, personal choice. As explained above, difference reasoning gives better effect to these objectives.

Further, adopting some elements of difference reasoning does not equate to abandoning constitutional difference. South Africa, Colombia, and Mexico have all adopted difference reasoning, but their jurisprudence would not answer each constitutional question in the same way. That is because they define dignity differently from one another. And well they should. What constitutes unequal treatment in each state will differ according to the state's socio-political context. That is where constitutional difference remains: in deciding whether, according to the norms of the particular state, the distinction in issue is "discriminatory," "unfair," or "undignified."

To that end, there are two alternative tests that categorical courts could adopt in order to instantiate a more principled conception of equality. First, they could abandon "analogous" and "suspect" grounds analyses altogether and simply proceed to asking whether the particular distinction in issue is discriminatory. Canadian Justice L'Heureux-Dubé was a proponent of this approach in *Dunmore v Ontario*, preferring to focus on the impact of particular policies on particular groups, rather than screening out groups that did not immediately appear to be marginalized at the outset.[113]

Alternatively, if courts insist on using screening mechanisms, they could adopt a less rigid approach to their analogous or suspect grounds analyses. This would entail, at minimum, accepting that some indicia of analogous grounds are instructive rather than binding; not all new grounds need be immutable. Relatedly, to the extent that immutability remains relevant, courts should adopt a more purposive conception of constructive immutability. Courts should ask not whether the state has no legitimate interest in regulating an identity trait wholesale but whether the state has no legitimate interest in regulating this particular aspect of the relevant identity trait.

In either case, courts should accept that categories of discrimination overlap, and many challenged distinctions therefore necessarily entail intersectional analysis. It makes ill-sense to create unnecessary practical and theoretical hurdles to justice for groups who experience discrimination on multiple fronts rather than just one.

IV. Conclusion

This article contributes to the comparative constitutional law project of identifying "canons" of constitutional interpretation by teasing out two canonical traditions of equality: the categorical doctrine and the difference doctrine. The categorical doctrine remains dominant in North America and stresses the protective elements of the equality guarantee. The

[113] *Dunmore v Canada (Attorney General)*, 2001 SCC 94 at para 166, [2001] 3 SCR 1016.

guarantee is a bulwark against the entrenchment of existing social inequities. Meanwhile, the difference doctrine is prevalent in South Africa and Latin America and stresses the affirmative elements of the equality guarantee. The guarantee allows people to be themselves without unnecessary state interference.

Both doctrines have laudable objectives. The problem is that the former has lost sight of how inequities become inequities. When the project of equality law only aims to remedy the ails of groups who are historically marginalized, it lets new inequities fester unchecked. It also becomes difficult to identify new inequities when one is hyper-fixated on the inequities of old. A truly remedial approach to equality would be more proactive; it would affirm difference.

These conclusions open up fruitful areas for further research. This article only touched on the equality jurisprudence of five countries. There are likely many other propitious approaches to the equality guarantee around the world that could add to and improve the reasoning of the more dominant canons. The author hopes that this article starts a conversation with diverse scholars from around the world on what the ideal approaches to progressing social equity might entail under various constitutional regimes.

Onglet 8

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Parental Undocumented Status as an Analogous Ground of Discrimination

Tiran Rahimian*

ABSTRACT

Should Canadian-born children's eligibility for government social and health services depend on their parents' immigration status? Growing reports from across Canada suggest that children born and lawfully residing in Canada are consistently deprived of or have limited access to vital services due to their parents' precarious status. This article contends that parental undocumented status can and should be recognized as an analogous ground of discrimination under section 15 of the Canadian Charter of Rights and Freedoms. The existence of mixed-status families and interdependencies within them suggest that curbs on non-citizens' use of public benefits often impact, intentionally or not, citizen children's enjoyment as well. The variety of ways in which this differential treatment manifests itself—administrative, legislative, and at both levels of government—and the range of services it withholds—health care, education, and child support—suggest that it is of a systemic nature and that the ground on which it is based is a recurring target of prejudicial distinctions. It also conveys the concerning message that certain Canadian children are less worthy of protection from poverty than others, perpetuating prejudice against, and imposing a burden on, families that are already disadvantaged by their lack of permanent or stable status. A recognition of this group as protected under the Charter's equality clause, once identified by courts, could serve as a jurisprudential marker for all suspect differential treatment associated with such children. It would mark a first step in acknowledging that distinctions between Canadian children on such a basis alone can be discriminatory.

I. INTRODUCTION

In May 2018, the Québec Ombudsman released a report urging the provincial health care administrator to cease its "restrictive" and "faulty" interpretation

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of Québec's *Health Insurance Act* (*QHIA*), which withheld coverage from some Canadian children on the basis of their parents' precarious immigration status in the country.[1] The investigation found that the Régie de l'assurance maladie du Québec (RAMQ) tied the children's eligibility to their parents' legal residency in Québec, a practice that it justified with the aim of discouraging "an influx of clandestine migration" into the province.[2] The result, according to the Ombudsman, is systemic differential treatment with severe "physical and psychological" consequences that could "undermine [the children's] integration into school and the community."[3]

This finding reflects a wider trend in the landscape of federal and provincial benefits,[4] where children born and lawfully residing in Canada are consistently deprived due to their parents' precarious status. In Ontario and British Columbia, such children have *de jure* or *de facto* limited access to health care coverage, insofar as their eligibility is similarly contingent on their parents' ambiguously defined "primary place of residency."[5] In Alberta, their access likewise requires that their parents be "lawfully admitted" and have "established residence" in the province.[6] The problem

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1 Québec, *Donner accès au régime québécois d'assurance maladie aux enfants nés au Québec de parents au statut migratoire précaire*, Rapport du Protecteur du citoyen (Québec: Protecteur du citoyen, 30 May 2018) at 4 [Québec, *Donner accès au régime québécois*] [translated by author]. Québec *Health Insurance Act*, RSQ, c A-29 [*QHIA*].

2 Québec, *Donner accès au régime québécois*, *supra* note 1 at para 27 [translated by author].

3 *Ibid* at 4 [translated by author].

4 We use the term "benefit" to broadly denote all services granted by the government such as employment insurance, pensions, and benefits for housing, education, training, family, and people with disabilities.

5 See discussion later in this article for an overview of the Ontario *Health Insurance Act*, RSO 1990, c H.6. In British Columbia, sections 1 and 7 of the *Medicare Protection Act*, RSBC 1996, c 286, similarly tie children's eligibility to the lawful residence of their parents. See also Sarah Berman, "The Precarious Lives of Undocumented Parents Whose Kids Are Born in Canada," *Vice News* (27 July 2016), online: <vice.com/en_ca/article/wdbkww/the-precarious-lives-of-undocumented-parents-whose-kids-are-born-in-canada> [perma.cc/DL9D-HJBT]. Nick Eagland, "Kids of B.C. Families with Precarious Immigration Status Face Health-Care Hurdles," *Vancouver Sun* (31 October 2016), online: <vancouversun.com/news/local-news/undocumented-migrants-struggle-to-access-healthcare-in-b-c> [perma.cc/Q3BY-VXU2].

6 In Alberta, health care coverage is regulated by the Alberta *Health Care Insurance Act*, RSA 2000, c A-20, and its accompanying Alberta *Health Care Insurance Regulation*, Alta Reg 76/2006, s 5(2), which ties eligibility to being "lawfully admitted" and having "established residence in Alberta." The Act itself is notably silent on the eligibility of Canadian children of parents with irregular immigration status, but section 5 is the only provision in the regulation that could apply to the eligibility of dependents of persons without permanent immigration status in Canada (s 5(1)(c)). Children are by definition "dependents" under the regulation (s 1(2)). Nothing in the Act explicitly excludes or defines the eligibility or residency of such dependents, besides the fact that they are always tied to the person to whom they are registered as dependent. Unemancipated minors are generally incapable under law of demonstrating a permanent and continual intent to set up

with these regimes is not that they expressly exclude such dependents but, rather, that the way they define registration, eligibility, or residency is always explicitly or implicitly tied to the parent. Federally, various family benefit programs over the years have denied tax-delivered supports to Canadian children of non-status residents, notwithstanding their parents' contribution to the tax system.[7] There are also reports from across Canada of administrative practices tying children's eligibility for public elementary and secondary education to their parent's immigration status, contrary to Canada's obligations under international law.[8]

Should Canadian-born children's eligibility for government social and health services depend on their parents' immigration status? The above reports suggest the existence of a real and growing subclass of citizens in Canada: native-born children of undocumented parents.[9] Pejoratively referred to as "anchor babies"[10] or "passport babies,"[11] they have been described as

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home or residence somewhere. The website of the Alberta Health Care Insurance Plan (AHCIP) clarifies that the children of non-residents "might" be eligible if their parents show "proof of Alberta residency." Alberta Health, "Temporary Residents and AHCIP," online: *Alberta* <alberta.ca/ahcip-temporary-residents.aspx>. See "Alberta Health Revoked Coverage for 8-Year-Old after Mother's Immigration Status Becomes Unclear," *CBC News* (23 October 2015), online: <cbc.ca/news/canada/calgary/alberta-health-amarjeet-boparai-divya-1.3285670> [perma.cc/5A4H-J93M].

7 For an analysis of the Canada Child Benefit (CCB), see the discussion later in this article.

8 See Québec, *Donner accès au régime québécois*, *supra* note 1; Community Legal Education Ontario, "Helping Parents without Immigration Status Get Their Children into School" (July 2011), online: <cleo.on.ca/en/publications/rightschool> [perma.cc/QN25-GKNL]; Foreign Worker Canada, "Provincial Immigration Regulations Deny Children Access to Schooling," online (blog): *Canadian Immigration Blog* <canadianimmigration.net/news-articles/provincial-immigration-regulations-deny-children-access-to-schooling/> [perma.cc/MJJ5-TW2W].

9 With the exception of children born to foreign officials, a child born in Canada is a citizen of this country by virtue of the *Citizenship Act*, RSC 1985, c C-29, s 3(1)(a). Not everyone agrees with this state of the law. See Althia Raj & Ryan Maloney, "Federal Tory Delegates Vote That Being Born in Canada Shouldn't Guarantee Citizenship," *Huffington Post* (25 August 2018), online: <huffingtonpost.ca/2018/08/25/conservatives-birthright-citizenship_a_23509388/> [perma.cc/LQ6J-6A62].

10 See e.g. Nicholas Keung, "Number of Women Coming to Canada to Give Birth Far Greater Than Previously Estimated, Study Shows," *Toronto Star* (22 November 2018) ("[t]he number of so-called 'anchor babies'—children born to non-residents for the purpose of gaining citizenship—is at least five times higher than Canadian officials had estimated, new research suggests"); Nicholas Keung, "Canada's 'anchor babies': Journey 'home' is tough for children deported with their parents," *Toronto Star* (7 September 2012), online: <thestar.com/news/canada/2012/09/07/canadas_anchor_babies_journey_home_is_tough_for_children_deported_with_their_parents.html> [perma.cc/YWZ9-KMZM].

11 Joseph Brean, "Tory Crackdown on 'Birth Tourists' Will Eliminate Canadian Passport Babies," *National Post* (5 March 2012), online: <nationalpost.com/news/canada/passport-babies-canada> [perma.cc/NTK8-Z4TM].

"special members of an underclass,"[12] "something less than equal,"[13] "born as second class citizens,"[14] and a "particularly disadvantaged"[15] group of an already needy population. They suffer from misguided attempts at immigration control and seem to indirectly inherit their parents' precarious status in their enjoyment of government services. In an effort to dissuade irregular migrants from remaining or giving birth in the country, current administrative practices in effect punish Canadian children for their parent's conduct. In other words, parental undocumented status has a "chilling effect" on citizen children's access to benefits.[16]

This article contends that parental undocumented status can and should be recognized as an analogous ground of discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*.[17] I first provide a glimpse of the legislative and administrative framework underlying the prejudicial treatment of Canadian children with undocumented filiation, analyzing the health insurance plans of Québec and Ontario and the federal Canada Child Benefit (CCB) program as case studies.[18] The picture that emerges is a recurring pattern of administrative reasoning that ties children's eligibility for vital benefits to their parents' legal residency in the country, precluding or limiting the access of those individuals with undocumented filiation.

Against this backdrop, I consider the constitutional analysis that should be used under section 15 when considering parental undocumented status as a ground of discrimination. I first set out the major decisions of the Supreme Court of Canada that recognize analogous grounds and explain how such cases have contributed to a contextual, multi-variable approach that accounts for both personal and societal variables beyond narrow immutability. Lack of control and chronicity, political powerlessness against the majoritarian process, economic and developmental vulnerability, and intersections with

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[12] Cindy Chang "Health Care for Undocumented Immigrant Children: Special Members of an Underclass" (2005) 83 Wash ULQ 1271.

[13] Laura A Hernandez, "Anchor Babies: Something Less than Equal under the Equal Protection Clause" (2010) 19:3 Southern California Rev L & Soc Justice 331.

[14] Bill Piatt, "Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents" (1988) 63:1 Notre Dame L Rev 35.

[15] Judith K Bernhard et al, "Living with Precarious Legal Status in Canada: Implications for the Well-Being of Children and Families" (2007) 24:2 Refuge: Canada's Journal on Refugees 101 at 110.

[16] Michael Fix & Wendy Zimmermann, "All under One Roof: Mixed-Status: Mixed-Status Families in an Era of Reform (6 October 1999) at 1, online (pdf): *Urban Institute* <urban.org/sites/default/files/publication/69806/409100-All-Under-One-Roof-Mixed-Status-Families-in-an-Era-of-Reform.PDF>[perma.cc/YV5X-TVVR].

[17] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].

[18] The case studies in Part I of this article, however, are meant as illustrations of the problem, not as examples that might be rectified by a section 15 challenge.

race and age emerge as distinct indicia of parental undocumented status as an analogous ground. The analysis draws in part on child development theories to emphasize the extraordinary circumstances of children in mixed-status families[19] and the distinct influence of parental "undocumentedness" on their developmental needs. This article finally looks into international human rights standards for persuasive guidance, where the differential treatment of children on the basis of their parents' immigration status is both expressly prohibited and recognized as a recurring target of discrimination.

I hasten to emphasize, however, that a finding of analogousness is not necessarily a direct remedy to the varying ways in which such children are treated differently. But a recognition of this group as protected under the *Charter*'s equality clause, once identified by courts, could serve as a jurisprudential marker for all suspect differential treatment associated with such children. It would mark a first step in acknowledging that distinctions between Canadian children on such a basis alone can be discriminatory. The recognition would additionally be "permanent" in the sense that a finding of analogousness is a conclusion of law,[20] which does not depend on the context of each case.[21] Once the ground is recognized, a more fruitful discussion may be had on whether each case of differential treatment is discriminatory as well as the possible policy justifications underlying them, such as minimizing the incentives for irregular migrants to remain in Canada.[22]

II. ACCESS TO GOVERNMENT BENEFITS FOR CANADIAN CHILDREN OF UNDOCUMENTED PARENTS

There are no accurate census figures on the number or composition of undocumented migrants residing in Canada. Estimates of about half a million

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[19] Mixed-status families in this article consist of parent(s) who are undocumented and who have a child who is a Canadian citizen by birthright.

[20] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 6–10, 173 DLR (4th) 1 [*Corbiere*]; *Lavoie v Canada*, 2002 SCC 23 at paras 39–41 [*Lavoie*].

[21] Hester Lessard is critical of this approach. Hester Lessard, "Mother, Fathers and Naming: Reflections on the *Law* Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16 CJWL 165 at 190–2.

[22] It bears noting that a section 1 justification for a finding of discrimination would be very difficult because a finding of a perpetuation of prejudice or an impairment of human dignity would involve much of the same inquiry as that required by section 1. Indeed, there has only been one a successful section 1 argument since *Law* imported human dignity into section 15: *Newfoundland v NAPE*, 2004 SCC 66. In *Lavoie*, *supra* note 20, four judges upheld citizenship preferences for hiring into the federal public service under section 1. Two based their finding on an absence of a violation of human dignity and three others dissented (at paras 123–5).

have been suggested nationwide,[23] but the numbers can vary across sources that propose anywhere from between twenty thousand to six hundred thousand non-status residents.[24] In 2003, Ontario's Construction Secretariat confirmed that there were seventy-six thousand undocumented migrants in Ontario's construction industry alone, while other sources purported that sixty-four thousand persons had overstayed their work, visitor, or students visas, and another thirty-six thousand rejected asylum seekers had never left the country.[25] In contrast with the United States, where undocumented status is often linked to irregular border crossing,[26] the majority of precarious migrants in Canada entered the country through regularized channels as individuals with valid visitor, work, or student visas, refugee claimants, or sponsored immigrants.[27] If it is presumed that they are accompanied by family, these figures suggest that an unknown, but not insignificant, portion of the Canadian population have undocumented parents. Many of them are born in the country and are therefore citizens on the basis of *jus soli*.[28]

People living with undocumented or precarious status might acquire this status in a variety of ways. Some may have legally entered Canada and overstayed the duration of their visa or entered using fraudulent documents, while others may have irregularly entered the country by crossing the border or through other means.[29] Examples include denied refugee claimants, approved refugees under the *Convention Relating to the*

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[23] Soave Strategy Group, *The Impact of Undocumented Workers on the Residential Construction Industry in the GTA* (Toronto: Laborers' International Union of North America, 2006) at 2.

[24] Peter Cheney & Colin Freeze, "200,000 May Be in Canada Illegally: Economic Underclass Faces Bleak Future, But Now Everyone Supports Amnesty," *Globe and Mail* (26 May 2001); Marina Jimenez, "200,000 Illegal Immigrants Toiling in Canada's Underground Economy," *Globe and Mail* (15 November 2003); Nicholas Keung, "Hope Fades for Plan to Aid Illegal Workers: Illegal Workers Fear Effect of Election," *Toronto Star* (16 May 2005); Maureen Murray, "Hopes, Dreams but No Status: Illegals Meet to Share Stories," *Toronto Star* (15 November 2003); Grant Robertson, "Canada Has No Handle on Illegal Immigrant Workers," *Edmonton Journal* (30 May 2005).

[25] Jimenez, *supra* note 24 at 1.

[26] Luin Goldring, Carolina Berinstein & Judith K Bernhard, "Institutionalizing Precarious Migratory Status in Canada" (2009) 13:3 Citizenship Studies 239 at 240. See also DeAnne K Hilfinger Messias, "Concept Development: Exploring Undocumentedness" (1996) 10:3 Scholarly Inquiry for Nursing Practice 235.

[27] Jacqueline Oxman-Martinez et al, "Intersection of Canadian Policy Parameters Affecting Women with Precarious Immigration Status: A Baseline for Understanding Barriers to Health" (2005) 7:4 J Immigration Health 247 at 251.

[28] While there are not accurate figures in Canada, evidence from the United States suggests that over 70 percent of children with an undocumented parent were are also birthright citizen. Jeffrey Passel & D'vera Cohn, "A Portrait of Unauthorized Immigrants in the United States" (14 April 2009), online: *Pew Hispanic Center* <pewresearch.org/hispanic/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states> [perma.cc/XC57-RATV].

[29] Judith K Bernhard & Julie EE Young, "Gaining Institutional Permission: Researching Precarious Legal Status in Canada" (2009) 7 Journal of Academic Ethics 175 at 176.

Status of Refugees who did not apply for landing within the required 180-day limit, and persons with sponsorship or work permit breakdown.[30] It also includes those who have applied for refugee status or a renewed permit or visa, awaiting (often for protracted periods of time)[31] a decision to establish their legal status.[32] The following case studies demonstrate some of the problems that native-born children of undocumented parents experience in securing access to social and health benefits.

A. Impediments to Health Care Coverage

A considerable body of literature has explored the legal and policy barriers that mixed-status families face in accessing health care in Canada.[33] In addition to *de jure* eligibility impediments, which will be taken up below, several studies document parents' reluctance to seek health care coverage out of fear of deportation,[34] and the administrative difficulties of obtaining the required paperwork for their children without a legal status of their own.[35] Isolation and lack of information (or misinformation) play a role in their ability and willingness to access health services, where the lines between rights and entitlements are often blurred.[36] Against this backdrop, ambiguously defined health insurance laws that either preclude or limit the access of such children in their application widen what is an already significant gap. The health care regimes of Ontario and Québec emerge as particularly instructive in this

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30 *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

31 Nicholas Keung, "Refugees' Rights Not Breached Despite 4-Year Wait for Asylum Decision, Court Rules," *Toronto Star* (6 May 2018) online: <thestar.com/news/immigration/2018/05/06/refugees-rights-not-breached-despite-4-year-wait-for-asylum-decision-court-rules.html> [perma.cc/7PPD-NC4V].

32 Goldring, Berinstein & Bernhard, *supra* note 26 at 249–53.

33 See Cécile Rousseau et al, "Health Care Access for Refugees and Immigrants with Precarious Status: Public Health and Human Right Challenges" (2004) 99:4 Canadian J Public Health 290; Bernhard et al, *supra* note 15; Paul Caulford & Yasmin Vali, "Providing Health Care to Medically Uninsured Immigrants and Refugees" (2006) 174:9 CMAJ 1253; Laura Simich, Fei Wu & Sonja Nerad, "Status and Health Security: An Exploratory Study of Irregular Immigrants in Toronto" (2007) 98:5 Can J Pub Health 369 ("[v]ariations in immigration status, or lack thereof, determine degree of access to health care and benefits" at 369); Mónica Ruiz-Casares et al, "Right and Access to Healthcare for Undocumented Children: Addressing the Gap between International Conventions and Disparate Implementations in North America and Europe" 70:2 Soc Science & Medicine 329.

34 See Bernhard et al, *supra* note 15 at 104.

35 Ruiz-Casares et al, *supra* note 33 ("[e]ven if children are born in Canada and qualify for provincial coverage, parents often find it difficult to obtain documentation or are fearful of the consequences that seeking healthcare might have on their immigration status" at 333).

36 Bernhard et al, *supra* note 15 at 107–8.

respect, where ambiguously defined criteria for "residence" seriously undermine accessibility for such unemancipated minors.

1. Québec

Eligibility for health insurance in Québec[37] is provided by the QHIA and the Regulation respecting Eligibility and Registration of Persons in Respect of the Régie de l'assurance maladie du Québec (Regulation).[38] An insured person is defined as "a resident or temporary resident of Québec who is duly registered."[39] The criteria for residence can be summarized as follows: (1) to be "domiciled" in the province;[40] (2) to possess one of the following legal statuses: Canadian citizen, permanent resident, registered Indian, or refugee; and (3) to meet the conditions prescribed by the Regulation. As a general rule, the domicile of an unemancipated minor is that of their parent.[41] However, the second paragraph of Article 5 of the QHIA provides an exception whereby an unemancipated child "not already domiciled in Québec" is considered to be "domiciled" under the QHIA if he or she has "settled in Québec."[42]

As such, the residence, and, hence, eligibility, of children with undocumented filiation hinges on whether they are deemed to have "settled" in the province. The term is not defined or specified anywhere in the *QHIA* or the *Regulation*, despite being at the heart of such children's access to health care. The concept of "settlement" must also be distinguished from that of "domicile," at least with respect to unemancipated minors, since they are incapable under law of demonstrating a permanent and continual intent to set up home required to establish domicile. Jurisprudential guidance on the question is also limited. The sole publicly available judgment of the Tribunal administratif du Québec that interprets the concept of "settlement" is *N.K. c Québec (Régie de l'assurance maladie du Québec)*.[43] Without explicitly defining the term, the court concluded that, for a child to be "settled" in Québec, the parents must be so as well.[44]

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[37] Québec, "Eligibility for the Québec Health Insurance Plan" (2015), online: *Régie de l'assurance maladie* <ramq.gouv.qc.ca/en/citizens/health-insurance/registration/Pages/eligibility.aspx> [perma.cc/ZHY7-VVB5].

[38] RLRQ, c A-29, r 1 [*Règlement*].

[39] *QHIA*, *supra* note 1, art 1(g.1).

[40] The concept of "domicile" is a question of fact, which implies an intention to both permanently set up home in a place as well as making it one's main place of residence. *FK c Québec (Régie de l'assurance maladie)*, 2016 QCTAQ 04292 at paras 28-32 [*FK*].

[41] *Code civil du Québec*, LQ 1991, c 64 [*CCQ*].

[42] *QHIA*, *supra* note 1, art 5.

[43] *NK c Québec (Régie de l'assurance maladie du Québec)*, 2014 QCTAQ 051010, 2014 CanLII 31609 at para 6.

[44] *Ibid* at para 6.

However, the concept of settlement could be read in tandem with the definition of the "residence" of newly born children.[45] The *Regulation* suggests that children born to undomiciled parents are automatically deemed "residents" of Québec by virtue of their birth and, by extension, are presumably insured, but it creates confusion by referring back to the *QHIA*, which has settlement as a criterion. The three-layered criteria for children born to undocumented parents—including "residence," defined by parental "domicile," which is in turn contingent on "settlement"—leaves considerable room for interpretation and uncertainty. But in the 1999 parliamentary debates on the latest amendment to the Act, partly in response to a series of rejections of such children,[46] the minister of health categorically asserted that the legislator intended children born in Québec to be eligible regardless of their parents' immigration status.[47] Be that as it may, reports continue that the RAMQ continues to systematically tie Québec-born children's eligibility to the regularized "domicile" of their parents.[48] In response, and ostensibly contrary to the legislator's intent, the RAMQ asserts that a child's "settlement" must be interpreted in light of

[45] The provision reads: "4.5. The following shall become residents of Québec from their date of birth: … (3) a child referred to in the second paragraph of section 5 of the Act who is born in Québec."

[46] Notably, in *HJ c Régie de l'assurance maladie du Québec*, SS-51170, 1998 CanLII 26733 (QC TAQ), the Tribunal administratif du Québec declared that a child born in Canada to an undocumented Syrian mother was ineligible before the Régie de l'assurance maladie du Québec.

[47] Quebec, National Assembly, Commission des affaires sociales, "Bill 83: An Act to Amend the Health Insurance Act and Other Legislative Provisions," *Journal des débats*, 36-1, No 22 (8 December 1999) at 16:40 (Pauline Marois): "Mme Marois: 'Bon, alors nous modifions l'article 5. En fait, on le remplace. C'est la notion de « personne résidente au Québec ». … Lorsqu'un enfant est né au Québec, il est donc citoyen canadien, et qu'il est établi au Québec, il y a lieu de le rendre admissible au régime même si ses parents ne sont pas domiciliés au Québec, conformément, en ce sens, aux décisions récentes rendues par le Tribunal administratif du Québec. La disposition nouvelle permet donc de continuer de le faire malgré l'introduction de l'exigence du domicile au début du texte de ce nouvel article. …' Mme Lamquin-Éthier : 'Parfait. Et le paragraphe qui est en dessous : « Toutefois, un mineur non émancipé… » Vous nous parlez donc d'enfants finalement qui naissent au Canada, qui naissent au Québec de parents qui ne seraient pas admissibles. Vous nous confirmez que, malgré le fait que les parents seraient non admissibles, les enfants seraient admissibles et auraient droit aux services. C'est ça?' Mme Marois : 'Oui … *Dès que la personne est née au Québec*, c'est ça' [emphasis added].

[48] Québec, *Donner accès au régime québécois*, *supra* note 1; Medecins du monde & Aministie Internationale, Press Release, "Enfants canadiens exclus du régime d'assurance maladie du Québec" (July 2018), online: <medecinsdumonde.ca/wp-content/uploads/2018/07/Sommaire-enjeux-juridique-Enfants-sans-RAMQ.pdf> [perma.cc/LSY5-RTNQ]. See notably *DO c Québec (Régie de l'assurance maladie*), 2017 QCTAQ 10850; *FK*, *supra* note 40.

the parents' intention to remain in the province, as demonstrated by administrative acts. [49] The effect is that parents with precarious immigration status are automatically declined coverage for their children. In other words, the RAMQ concludes that a child born in Québec cannot be considered to reside in the province independently of the legal domicile, and, thus, immigration status, of his or her parents.

2. Ontario

A surprisingly similar pattern of administrative reasoning also emerges with the Ontario Health Insurance Plan (OHIP). [50] Ontario's *Health Insurance Act* (*OHIA*) provides that a person is eligible if she or he is a "resident" of Ontario and meets the requirement found in the accompanying regulations.[51] To be considered a resident for the purposes of health insurance in Ontario, a person must possess "eligible status," which includes citizenship and thus covers all children born in Canada,[52] and must have their "primary place of residence" in Ontario.[53] For children under the age of sixteen, their primary place of residence is that of the parent with lawful custody.[54] A person's "primary place of residence" is further defined as one that "has the greatest connection in terms of present and anticipated future living arrangements, the activities of daily living, family connections, financial connections and social connections."[55] The criteria of "anticipated future living arrangements" may be problematic for mixed-status families. A review of the case law from the Health Services Appeal and Review Board, the administrative tribunal in charge of reviewing decisions by OHIP,[56] reveals a range of factors, including the existence of financial records,[57] the testimony from neighbours[58] and a landlord,[59] and the ownership of a home,[60] as indicative of residency. There appears to be no single touchstone, and, simply put, "the Appeal

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[49] Québec, *Donner accès au régime québécois*, *supra* note 1 at 15.

[50] Several studies have documented legal and policy barriers faced by children of undocumented parents. See e.g. Bernhard et al, *supra* note 15; Caulford & Vali, *supra* note 33.

[51] *Health Insurance Act*, RSO 1990, c H.6, s 11(1) [*OHIA*].

[52] *Citizenship Act*, *supra* note 9.

[53] RRO 1990, Regulation 552: General, cited under *OHIA*, *supra* note 51, s 1.3(1).

[54] *Ibid*, s 1.3(1).

[55] *Ibid*, s 1(1) [emphasis added].

[56] *OHIA*, *supra* note 51, s 20(1). Decisions of the Health Services Appeal and Review Board (HSARB) may be appealed to the Ontario Divisional Court (s 24(1)).

[57] *MJ and TJ v Ontario (Health Insurance Plan)*, 2012 CanLII 20348 (ON HSARB) at para 23.

[58] *DMW v Ontario (Health Insurance Plan)*, 2011 CanLII 24826 (ON HSARB) at para 26.

[59] *SP v Ontario (Health Insurance Plan)*, 2010 CanLII 70800 (ON HSARB) at para 28 [*SP*].

[60] *JJM v Ontario (Health Insurance Plan)*, 2011 CanLII 57766 (ON HSARB) at para 23.

Board looks for evidence of a person's ties to Ontario that demonstrate Ontario is the person's primary home."[61]

Notwithstanding the law's potential for inclusivity, recurring reports of newborns being denied registration on the basis of their parents' immigration status suggest that there is an implementation challenge.[62] For instance, there have been reports of hospital staff mistakenly thinking that a mother's lack of eligibility automatically entails that their newborn is similarly ineligible.[63] Similarly, a publicly available factsheet prepared by the Ministry of Health and Long-Term Care, which is meant to guide service providers regarding OHIP eligibility, seems to contribute to the confusion by requiring hospital staff to confirm that a newborn "will be physically present in Ontario for at least 153 days in any twelve-month period to retain health insurance coverage."[64] Since the factsheet does not include the regulatory definition of "primary place of residence" or examples of documents that could serve as evidence thereof, it could be misinterpreted as grounds for denying OHIP coverage.

Overall, it appears that both the *OHIA* and the *QHIA* have the potential to be inclusive but are open enough to be misinterpreted. These eligibility impediments are also compounded by practical barriers: many hospitals require parents to include documentation regarding their immigration status in the health insurance application, even if the status is not per se relevant.[65] Additionally, the newborn's OHIP card must be renewed annually.[66] Barriers associated with navigating these procedures, coupled with the fear of exposure to immigration authorities, make it increasingly difficult for non-status parents to obtain health insurance for their children.[67]

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61 *SP*, *supra* note 59 at para 21.

62 See e.g. Rebecca Cheff & Lauren Bates, "Using the Law to Advance Health Equity: OHIP Eligibility of Ontario-born Babies of Uninsured Parents" (June 2018) at 16, online (pdf): *Wellesley Institute* <wellesleyinstitute.com/wp-content/uploads/2018/06/OHIP-Eligibility-of-Ontario-born-Babies-of-Uninsured-Parents-.pdf> [perma.cc/M4DV-UEFY]. Rousseau et al, *supra* note 33; Bernhard et al, *supra* note 15; Caulford & Vali, *supra* note 33. See also the discussion earlier in this article.

63 Cheff & Bates, *supra* note 62 at 6.

64 Ministry of Health and Long-Term Care, "OHIP Eligibility of Canadian-Born Children of OHIP-ineligible Parents" (2011), online: <health.gov.on.ca/en/public/publications/ohip/eligibility_2.aspx> [perma.cc/77A7-J4V2].

65 Committee for Accessible AIDS Treatment, "Status, Access & Health Disparities: A Literature Review Report on Relevant Policies and Programs Affecting People Living with HIV/AIDS Who Are Immigrants, Refugees or without Status in Canada" (2006) at 36, online (pdf): <hivimmigration.ca/wp-content/uploads/2011/07/Status-Access-and-Disparities-Report-May-2006.pdf> [perma.cc/M93M-8267].

66 *Ibid*.

67 *Ibid*.

B. Denial of Child Benefit Payments

The same pattern of exclusion arises in the federal Canada Child Benefit (CCB) program. The program takes the form of a tax-free, monthly payment made to eligible families, calculated from the basic information from income tax.[68] Introduced in 2016, the CCB was proclaimed to assist low- and middle-income families with the cost of raising children, while playing an important role in the reduction of child poverty[69] and acting as a driver of economic growth.[70] But while the CCB may benefit some Canadian children, it widens the gap for those with undocumented parents. Since it is administered by the Canada Revenue Agency, the CCB is only paid to an "eligible individual" under the *Income Tax Act* who lives with, and is primarily responsible for, the upbringing of the beneficiary child.[71] This limits eligibility for the CCB to families where the parents or legal guardians are citizens, permanent residents, protected persons (for example, those who have received refugee status in Canada), temporary residents who meet certain conditions, or an Indian within the meaning of the *Indian Act*.[72] These rules exclude Canadian children whose parents do not have regularized immigration status, such as those awaiting a determination of their asylum claim or those who cannot leave Canada because of a moratorium on removal in their country of origin. Many of these mixed-status families will be in Canada for protected periods of time and may ultimately be granted the right to remain. By way of contrast, the programs include some families with only a temporary link to Canada, such as those with a work permit of only eighteen months.

Nonetheless, residency for tax purposes does not require "legal" residency in the sense of having a permanent residence. Rather, it can simply mean having "significant residential ties" to Canada, such as a spouse or home and dependants in the country.[73] A resident is considered

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[68] Canada, "Canada Child Benefit: Overview," online: <canada.ca/en/revenue-agency/services/child-family-benefits/canada-child-benefit-overview.html> [perma.cc/8RW5-LY5R].

[69] See Justin Trudeau, "Statement by the Prime Minister of Canada on National Child Day" (20 November 2016), online: <pm.gc.ca/en/news/statements/2016/11/20/statement-prime-minister-canada-national-child-day>.

[70] See Justin Trudeau, "Families Now Receiving New Canada Child Benefit" (2016), online: <pm.gc.ca/eng/news/2016/07/20/families-now-receiving-new-canada-child-benefit> [perma.cc/2UCH-RJJD]. The benefit makes a difference. For instance, a single parent family with a child under the age of six whose net income is at the low-income measure after tax would see a 24.5 percent increase in revenue as a result of the CCB.

[71] RSC 1985, c 1 (5th Supp), s 122.6.

[72] RSC 1985, c I-5. Canada, "Canada Child Benefit: Before You Apply," online: <canada.ca/en/revenue-agency/services/child-family-benefits/canada-child-benefit-overview/canada-child-benefit-before-you-apply.html>.

[73] Canada, "Income Tax Folio S5-F1-C1, Determining an Individual's Residence Status," online: <canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-5-international-residency/folio-1-residency/income-tax-folio-s5-f1-c1-

a taxpayer if he or she is present on Canadian soil for a minimum of 183 days in any calendar year.[74] In other words, many families with precarious immigration status in Canada (awaiting, for instance, the renewal of their work visa or asylum claim) are required under law to pay taxes just like permanent residents but are nonetheless excluded from tax-delivered supports for their children. By way of context, rough estimates from the Canadian Centre for Policy Alternatives suggest that there are three thousand mixed-status families in Canada that are denied the CCB on the basis of parental immigration status.[75] Expanding eligibility to these children would only cost approximately $30 million annually in a program that delivers over $20 billion per year to Canadian individuals.[76]

III. PARENTAL UNDOCUMENTED STATUS AS AN ANALOGOUS GROUND

The previous discussion provides a glimpse of a social problem whose dimensions remain largely elusive. The existence of mixed-status families and the interdependencies within them suggest that curbs on non-citizens' use of public benefits often impact, intentionally or not, citizen children's enjoyment as well. The variety of ways in which this differential treatment manifests itself—administrative, legislative, and at both levels of government—and the range of services it withholds—health care, education, and child support—suggest that it is of a systemic nature and that the ground on which it is based is a recurring target of prejudicial distinctions. It also conveys the concerning message that certain Canadian children are less worthy of protection from poverty than others, perpetuating prejudice against, and imposing a burden on, families already disadvantaged by their lack of permanent or stable status.

The following section assesses whether the group in question—Canadian children of undocumented parents—constitute an analogous ground under section 15 of the *Charter*. After laying out how the major decisions of the Supreme Court of Canada on the matter are characterized by a contextual and purposive inquiry that accounts for a range of societal and personal variables, I observe that these various variables can conceptually be subsumed under the umbrella understanding of immutability that is endorsed by the court. The section then groups the variables into two distinct, but related, bundles of indicia, divided by their

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determining-individual-s-residence-status.html> [perma.cc/2V5U-S8GL].

74 *Ibid* at s 1.32.

75 See Income Security Advocacy Centre et al, "Every Child Counts: Making Sure the Canada Child Benefit Is a Benefit for All Children" (September 2018) at 10, online (pdf): <rightsofchildren.ca/wp-content/uploads/2018/10/Every-Child-Counts-Canada-Child-Benefit-for-All-September-2018.pdf> [perma.cc/VQ6A-XNLJ].

76 See *ibid* at 12.

unit of focus, before turning to international human rights law for further interpretative guidance. Taken together, I conclude, both societal and personal variables recognized by the court support a recognition of parental undocumented status as an analogous ground.

A. Criteria for Analogousness

It is now well established, at least since *Andrews v Law Society of British Columbia*, that the nine grounds listed in section 15 are not exhaustive and that equality claims can also be based on grounds that are analogous to them.[77] To date, the Supreme Court of Canada has recognized citizenship,[78] marital status,[79] sexual orientation,[80] and off-reserve membership for Aboriginal people[81] as analogous grounds within section 15's ambit. Other courts have similarly recognized receipt of public assistance,[82] adopted status,[83] parental status,[84] and manner of conception (anonymous sperm donor).[85] Conversely,

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[77] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 33 [*Withler*]. The grounds approach to identifying discrimination has received near universal acceptance from the Supreme Court of Canada. See e.g. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 39 [*Law*]; *R v Kapp*, 2008 SCC 41 at para 37 [*Kapp*]; Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thompson Reuters, 2007) ("the restriction of s 15 to listed and analogous grounds is a permanent feature of the s 15 jurisprudence" at 55.8(a)). However, some judges and scholars have expressed alternative approaches to equality rights. See e.g. *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 at paras 54–69, L'Heureux-Dube J, dissenting [*Egan*]; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill LJ 627.

[78] *Andrews*, *supra* note 77 at paras 49–53 [*Andrews*]; *Lavoie*, *supra* note 20 at paras 37–52. Given section 6 of the *Charter*, there is no discrimination when it comes to distinctions between citizens and non-citizens regarding the right to enter, remain in, and leave Canada. *Chiarelli v Canada (Minister of Employment and Immigration*), [1992] 1 SCR 711 at para 34, 90 DLR (4th) 289.

[79] *Miron v Trudel*, [1995] 2 SCR 418 at paras 160–6, 124 DLR (4th) 693 [*Miron*]; *Nova Scotia (Attorney General) v Walsh*, [2002] 4 SCR 325, 221 DLR (4th) 1.

[80] *Egan*, *supra* note 77 at para 13; *Vriend v Alberta*, [1998] 1 SCR 493 at paras 90–1, 156 DLR (4th) 385; *M v H*, [1999] 2 SCR 3 at paras 63–4, 171 DLR (4th) 577.

[81] *Corbiere*, *supra* note 20; the Court has repeatedly rejected the argument that residence can be an analogous ground for non-Aboriginals: *R v Turpin*, [1989] 1 SCR 1296 at para 53, 96 NR 115 [*Turpin*]; *Haig* v *Canada (Chief Electoral Officer*), [1993] 2 SCR 995 at paras 95–8, 105 DLR (4th) 577; *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 48 [*Siemens*].

[82] *Falkiner v Ontario (Ministry of Community and Social Services)*, [2002] OJ No 1771, 59 OR (3d) 481 (CA) [*Falkiner*].

[83] *Re Marshal Estate*, 2009 NSCA 25 at paras 31–2.

[84] *Dartmouth-Halifax County Regional Housing Authority v Sparks*, [1993] NSJ No 97, 101 DLR (4th) 224 (CA). See also *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 [*Inglis*], which recognized being the child of an incarcerated parent as an analogous ground of discrimination.

[85] *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656, rev'd 2012 BCCA 480. The trial judge found that the manner of conception is an analogous ground (at para

grounds that have been rejected by the Supreme Court include drug use,[86] being covered by workers' compensation schemes,[87] place of residence (where the *Criminal Code* provides for different trial rights depending on the province),[88] being subjected to military courts,[89] the timing of an incident,[90] the sector of employment (Royal Canadian Mounted Police officers and health care workers treated differently for the purpose of labour relations),[91] having committed a war crime or a crime against humanity abroad,[92] and residence in a particular municipality.[93]

How is a court to assess whether a ground of differential treatment is similar enough to constitute an analogous ground? The Supreme Court of Canada's case law on the question remains one of the most elusive areas of its *Charter* jurisprudence, suffering from a lack of conceptual clarity that has been subject to extensive commentary and criticism.[94] The simplest and most recurring indicium that emerges from a review of the Court's reasoning is that analogous grounds must constitute "personal" and "immutable" characteristics—that is, they must be "personal" in the sense of attributes that form an inherent part of an individual's identity or personhood and denote "what a person is rather [than] what a person does."[95] Additionally,

234). The BC Court of Appeal said that it was unnecessary to consider that point because the legislation could be upheld under section 15(2). Thus, it denied the equality claim.

86 *R v Malmo-Levine; R v Caine*, 2003 SCC 74 ("[a] taste for marihuana is not a 'personal characteristic' in the sense required to trigger s. 15 protection, but is a lifestyle choice that bears no analogy with the personal characteristics listed" at para 185).

87 See *Reference Re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 1 SCR 922 at para 2, 56 DLR (4th) 765 (being denied a right to sue for work-related accidents is not an analogous ground of discrimination).

88 *Turpin*, *supra* note 81 at para 53. *Criminal Code*, RSC 1985, c C-46.

89 *R v Généreux*, [1992] 1 SCR 259, [1992] SCJ No 10.

90 *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429, 278 DLR (4th) 385 (in the process of rejecting the government's argument that that was the relevant distinction).

91 *Delisle v RCMP*, [1999] 2 SCR 989, 176 DLR (4th) 513 (status of being an Royal Canadian Mounted Police officer was not an analogous ground of discrimination) [*Delisle*]; *Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [*Health Services*] (restrictions on bargaining by health care workers were found not to amount to discrimination because the "differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects stereotypical application of group or personal characteristics" at para 165).

92 *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513.

93 *Siemens*, *supra* note 81.

94 See Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 at 40–5, for an overview of the scholarship criticizing the ambiguity of the Court's analogous grounds jurisprudence.

95 Hogg, *supra* note 77 at 55.8(b).

they must be either "immutable"—in the same way that race or national origin are actually unchangeable—or at least "constructively immutable"—in the sense that they are "changeable only at unacceptable cost to personal identity," as is the case with religion or marital status.[96]

But a Manichean dichotomy between status and conduct or the immutable and mutable, despite having a seemingly self-evident strength, overlooks the rich contextual approach adopted by the Court. In fact, the Court's jurisprudence reveals a rather broad and generous multi-variable conception of immutability, accounting for both personal and societal variables that largely support the recognition of parental undocumented status as an analogous ground. A review of the jurisprudence reveals that societal variables, such as political powerlessness and economic vulnerability, often inform and overlap with the Court's discussion of personal variables such as immutability. Immutability is thus best understood as a multi-variable umbrella term that accounts for various indicia of analogousness recognized by the Court.

In *Andrews*, the very first equality case to reach the Supreme Court of Canada,[97] the issue of immutability—in the dictionary sense—was only one of several factors weighed by Justice William McIntyre in assessing whether citizenship constituted an analogous ground under section 15. He acknowledged that "[n]oncitizens … are … a good example of a discrete and insular minority who come within the protection of s. 15."[98] Justice Bertha Wilson elaborated in her concurring reasons that "discrete and insular minorities" are "those groups in society to whose needs and wishes elected officials have no apparent interest in attending" and, consequently, "will continue to change with changing political and social circumstances."[99] This suggests a fluidity in the inquiry into analogousness, informed by social relations of power and the comparative capacity of the minority group to marshal the will of lawmakers to effect change.

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[96] *Corbiere*, *supra* note 20 at para 13, per McLachlin and Bastarache JJ for the majority. A frequently quoted passage from Peter Hogg, *Constitutional Law of Canada*, student ed (Toronto: Carswell, 2011) at 55, encapsulates the heart of the separation between attributes deemed to be "immutable" and inherent to individuals from what is otherwise performative and expressive "conduct": "[Analogous grounds] are not voluntarily chosen by individuals, but are an involuntary inheritance. … What is objectionable about using such characteristics as legislative distinctions is that consequences should normally follow what people do rather than what they are. It is morally wrong to impose a disadvantage on a person by reason of a characteristic that is outside the person's control."

[97] *Andrews*, *supra* note 77.

[98] *Ibid* at 183, McIntyre J dissenting.

[99] *Ibid* at 152, Wilson J concurring, citing JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 151.

The interplay of societal and personal variables was again present in *Egan v Canada*, where a dissenting Justice Claire L'Heureux-Dubé rejected the notion of analogousness altogether. She emphasized instead the social vulnerability of the affected group as the cornerstone of the inquiry, warning that "looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences."[100] Justices Peter Cory and Frank Iacobucci, similarly in dissent, raised the (still) flexible notion of "discrete and insular minorities" as one pertinent factor in the assessment of analogous grounds.[101] Justice Gerard La Forest, for the majority, recognized sexual orientation as an analogous ground on the basis that it was a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."[102]

A concern for societal variables beyond rigid immutability resurfaced again in *Miron v Trudel*. For the majority, Justice (as she then was) Beverley McLachlin undertook a purposive, contextual analysis, apparently making the assessment of marital status as an analogous ground hinge on whether it engaged the underlying objectives of section 15. Variables such as prior group disadvantage, identity as a "discrete and insular minority," as well as immutability were all deemed to "signal an analogous ground," but McLachlin J was clear that none was decisive. She ruled that immutability ("sometimes associated with analogous grounds") existed merely as an "attenuated" form with regard to marital status and that equally relevant was the "reluctance of one's partner to marry; financial, religious or social constraints."[103] Far more central to her analysis was a concern for "human dignity" in general, and anti-

[100] *Egan*, *supra* note 77 at para 53, L'Heureux-Dubé dissenting. See also *Miron*, *supra* note 79 at 14 (Justice L'Heureux-Dubé rejected the necessity of analogous grounds being based on "innate" characteristics and instead supported a multi-variable approach).

[101] *Ibid* at para 180, Cory J dissenting (pertinently, the two judges took the chance to reject the status/conduct distinction in the determination of analogous grounds): "Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a 'status' that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. The Charter protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of 'status' and 'conduct' and that both should receive protection. Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected" at para 184).

[102] *Egan*, *supra* note 77 at para 5.

[103] *Miron*, *supra* note 79 at paras 160–6.

stereotyping in particular, which she deemed to be the "unifying principle" behind the Court's analogous grounds jurisprudence.[104]

It was only in the 1999 decision in *Corbiere*, which is now the leading precedent for analogous grounds, that the Supreme Court expressly adopted a broad umbrella-type understanding of the concept that subsumed the range of societal variables it previously recognized. *Corbiere* challenged section 77(1) of the *Indian Act*, which limited the right to vote in band elections of the Batchewana First Nation to band members who were "ordinarily resident on the reserve,"[105] arguing that "aboriginality-residence" was analogous to the grounds enumerated under section 15. While reiterating that the analogous grounds inquiry must consider the general objectives of section 15, the majority suggested that other factors to be considered in the analogous grounds analysis "may be seen to flow from the central concept of immutable or constructively immutable personal characteristics."[106] The majority judgment goes on to say:

> [T]he thrust of identification of analogous grounds ... is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.[107]

The majority in *Corbiere* thus appears to leave us with three progressively expansive conceptions of "immutability." The first, and narrowest, aligns with a dictionary definition of immutability[108] and denotes characteristics that are actually unchangeable. A second one, which the Court now calls "constructive" immutability, encompasses those characteristics that are changeable but only at an unacceptable cost to personal identity. The third, and broadest, conception extends the protection to attributes with which the legislator has no "legitimate interest" in interfering.

The Supreme Court never fully defines any of these three conceptions of immutability. For instance, it remains unclear whether "actual immutability" denotes the impossibility of the characteristic changing or

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[104] *Ibid* at para 148, citing *Andrews*, *supra* note 77, Sopinka, Cory & Iacobucci JJ concurring.
[105] RSC 1985, c 1-5, s 71(1).
[106] *Corbiere*, *supra* note 20 at para 13.
[107] *Ibid.*
[108] The *Concise Oxford English Dictionary* defines immutable as "not changing or able to be changed." *Concise Oxford English Dictionary*, 12th ed (Oxford: Oxford University Press), *sub verbo* "immutable."

the impossibility for an individual controlling its change at will. It could potentially encapsulate both. The question of "unacceptable cost to personal identity" also remains elusive. Is the assessment meant to be subjective or objective, and what are the criteria for unacceptability? The notion of legitimate government interests in interfering with characteristics similarly lacks precision, and it is unclear how the assessment differs from an analysis of "pressing and substantial" interests under section 1.[109] All of these questions are at the heart of a robust understanding of immutability, but they remain ultimately unanswered in *Corbiere*.

But it remains clear, conceptual ambiguities aside, that societal variables flow from, and are central to, the umbrella conception of immutability adopted in *Corbiere*. This is evident from the majority's tacit confirmation in *Corbiere* of L'Heureux-Dubé J's concurring reasons, which set out a broad, multi-variable approach to analogous grounds. L'Heureux-Dubé J elaborates on "various contextual factors ... that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential."[110] These include not only immutability and constructive immutability but also personal significance, difficulty to change, political powerlessness and disadvantage, and whether the ground is included in federal and provincial human rights codes.[111] Additionally, L'Heureux-Dubé J does not consider the list to be exhaustive and finds that "none of the above indicators are necessary for the recognition of an analogous ground."[112] Far from rejecting the pertinence of these variables, the majority finds instead that they "flow from the central concept of immutable or constructively immutable personal characteristics,"[113] thus acknowledging the relevance of societal variables but providing no explanation for how or why this is the case. The new analytical framework thus appears to fuse the (formerly) socially contingent notion of "discrete and insular minority" with an umbrella understanding of immutability.

Overall, it appears that a narrow focus on immutability or a status/conduct dichotomy would overlook the complex, multi-variable analysis that the Supreme Court often applies.[114] There is no single touchstone, and the Court consistently refers to societal attributes such as

[109] *R v Oakes*, [1986] 1 SCR 103 at para 69, 26 DLR (4th) 200.
[110] *Corbiere*, *supra* note 20 at para 60.
[111] *Ibid*.
[112] *Ibid* [underlined in the original].
[113] *Ibid* at para 13.
[114] See Sealy-Harrington, *supra* note 94 (for a typology running from "narrow immutability" to "multivariable" approaches to analogous grounds).

historical disadvantage,[115] vulnerability,[116] link to a discrete and insular minority,[117] and political powerlessness[118] in recognizing analogous grounds. The literature on analogous grounds similarly reflects the pertinence of factors beyond rigid immutability.[119] The Supreme Court has consistently held that the inquiry must be undertaken in a purposive and contextual manner[120] and consider the "nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society's treatment of that group."[121] Ultimately, the thrust of identification of analogous grounds appears to be guided by the overarching purposes of section 15, and it seems to favour a more relational, disadvantage-focused inquiry over a rigid immutability standard.

B. Children of Undocumented Parents as an Insular Group

For the purposes of our inquiry into parental undocumented status, the various variables raised by the Supreme Court's jurisprudence on analogous grounds can be grouped into two distinct, but related, bundles of indicia, divided by their unit of focus. In addition to conceptual clarity, such a categorization moves the analytical framework beyond a shallow engagement with rigid immutability and accounts for the interplay of personal and societal variables that shapes the Court's jurisprudence. It also reflects the contextual and purposive analysis called for by the Court, acknowledging that meaningful control over a status cannot be divorced from, and is impacted by, societal factors.

The first bundle, looking at the individual, explores both the possibility and consequences of changing the targeted characteristic. It therefore not only includes the first two of the three progressively expansive conceptions of immutability set out by the majority in *Corbiere* but also extends it to questions of personal significance and meaningful control over the choosing and relinquishing of the characteristic—all of which have been recognized as relevant to the analogousness inquiry or as

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[115] See *Miron*, *supra* note 79 at para 158, per McLachlin J; *Egan*, *supra* note 77 at para 59, per L'Heureux-Dubé J; *Delisle*, *supra* note 91 at para 44; *Baier v Alberta*, 2007 SCC 31 at para 65.

[116] See *Andrews*, *supra* note 77 at 152; *Egan*, *supra* note 77 at para 59, per L'Heureux-Dube J.

[117] See *Andrews*, *supra* note 77 at 152; *Miron*, *supra* note 79 at para 158, per McLachlin J; *Egan*, *supra* note 77 at para 59, per L'Heureux-Dube J, at 171, per Cory and Iacobucci JJ.

[118] See Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Can Bar Rev 893 at 908.

[119] See *ibid* at 913; Sealy-Harrington, *supra* note 94 at 42; Dale Gibson, "Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado about Next to Nothing" (1991) 29 Alta L Rev 772 at 787, implicitly recognizes the factor of difficulty of change while deconstructing the boundaries of constructive immutability.

[120] *Law*, *supra* note 77 at para 6; *Andrews*, *supra* note 77 at para 46.

[121] *Law*, *supra* note 77 at para 93.

flowing from an umbrella understanding of immutability. Reference to the term "immutability" in this part reflects its dictionary definition and traditional understanding and not the umbrella term from which all relevant variables flow. The second bundle, looking externally, focuses on socially contingent relations of power and subordination. It thus encompasses the broader conception of immutability identified by the majority in *Corbiere*, but extends it to variables such as historical and contemporary vulnerability, disadvantage, and the ability to participate in the political process. Taken together, both societal and personal variables support a recognition of parental undocumented status as an analogous ground.

1. Personal Variables

There are at least three bundles of arguments and rejoinders that arise in a consideration of personal factors relevant to children of undocumented parents. The first pertains, most obviously, to the complete absence of any meaningful control or choice by the affected children. That is, the status is an involuntary inheritance that exceeds the children's sway and, indeed, their comprehension. They can neither remove themselves from the country, choose their place of birth, or alter their parents' past conduct. Prejudicial treatment on the basis of a status that is so beyond the control of an individual generates a particular type of moral objection that goes to the core of the concept of immutability—one famously raised by H.L.A. Hart in the context of criminal punishment.[122] The unfairness, Hart argues, resides in the individual's inability to change, choose, or renounce the characteristic even if they wished,[123] which ultimately represents a type of constitutive moral luck or determinism.[124] This is the same moral objection that arises when considering the illegitimacy of punishing or criminalizing status.[125]

In line with this thought, the Supreme Court of the United States, in *Plyler v Doe*, struck down a Texas law excluding undocumented immigrant children from public education.[126] While acknowledging that "undocumented status" itself was not "an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action," the court nonetheless found that the statute in question "imposes its discriminatory burden on the basis of a legal characteristic over which

[122] HLA Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 2008) at 152–3.
[123] *Ibid*.
[124] Thomas Nagel, *Mortal Questions* (Cambridge, UK: Cambridge University Press, 1979) at 28.
[125] Paul Roberts, "Criminal Law Theory and the Limits of Liberalism" in Antje du Bois-Pedain, ed, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (London: Hart, 2004) at 341.
[126] *Plyler v Doe*, 457 US 202 (1982) [*Plyler*].

children can have little control."[127] Central to the court's reasoning was the fundamental powerlessness of children over their parent's decisions, holding that "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." [128] In coming to this conclusion, the court emphasized undocumented children's unique voicelessness and dependency and the unfairness of punishing them for their parent's actions.[129]

A second argument in favour of recognition pertains to the chronicity and constructive immutability of parental "undocumentedness." That the children's status is changeable upon the parents' receiving of a legal status (through an asylum application or renewal of visa) or the temporariness of the disadvantage (once the children reach majority) does not per se preclude a finding of immutability. A denial of equality claims on this basis would represent a misapplication of the multivariable concept of immutability and the contextual and purposive analysis called for in *Miron* [130] and *Corbiere*. [131] In assessing whether off-reserve status constituted an analogous ground in *Corbiere*, it will be recalled, the Court did not consider the issue of immutability in the abstract, nor did it resort to data quantifying the frequency of movement between off-reserve and on-reserve residence. Instead, it hinged its immutability inquiry on the socially constructed characteristics and values associated with on-reserve and off-reserve status, how it tied with identity and communal relations, and whether it stood "as a constant marker of potential legislative discrimination" and of "suspect distinctions."[132]

Similarly, the Supreme Court in *Andrews* made clear that "[t]he characteristic of citizenship [and, by analogy, other immigration statuses] is one typically not within the control of the individual and, in this sense, is immutable."[133] Indeed, the analysis of immutability must, and often does, look beyond the fact that it is theoretically subject to change. If "often [lying] beyond the individual's effective control" can qualify as an "attenuated" form of immutability (as was the case with marital status), then the legal residency of one's parents should very well meet that standard. [134] Requiring all personal characteristics to be permanent also

[127] *Ibid* at 220.
[128] *Ibid*.
[129] *Ibid* at 219–23.
[130] *Miron*, *supra* note 79 at para 100.
[131] *Corbiere*, *supra* note 20 at para 59.
[132] *Ibid* at paras 10–11
[133] *Andrews*, *supra* note 77 at para 34.
[134] *Miron*, *supra* note 79 at para 73.

conflates the underlying rationales of immutability with those of constructive immutability. Arguably, whereas the former is concerned with the actual impossibility of changing the trait, the latter is concerned with those characteristics that the claimant should not have to change in order to avoid discrimination—that is, it denotes those characteristics that should remain in the realm of choice. In other words, the logic of constructive immutability is chiefly liberty based as opposed to capacity based and is said to be linked to values such as freedom, autonomy, and dignity.[135]

It bears interpolating here that whether the existence of an element of "choice" should dilute the degree of protection a ground receives under Canadian law has been subject to commentary.[136] Peter Hogg suggests that "chosen" grounds such as marital status and citizenship should prompt courts to uphold legislation that distinguishes on such grounds.[137] Lynn Smith and William Black conversely argue that the existence of "choice" is often illusory or constrained and should be of limited relevance.[138] Robert Leckey similarly contends that the focus should be on autonomy and zones of privacy—characteristics that the government has no legitimate interest in interfering with—rather than a dichotomy between the chosen and the unchosen.[139] A distinction must also be drawn, I must emphasize, between the choice to attract a certain status and the choice to not relinquish it once its disadvantageous impact is apparent. Whereas the former could denote a potentially uninformed or illusory decision, the latter at least captures a degree of agency in that it involves a cost-benefit analysis in the face of concrete differential treatment. Hence, while the relevance of choice in attracting a status might be open to discussion, the

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[135] Sophia Moreau, "In Defense of a Liberty-based Account of Discrimination" in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 71 at 81, 85.

[136] See Jennifer Koshan, "Inequality and Identity at Work" (2015) 38:2 Dal LJ 473 at 486; Robert Leckey, "Chosen Discrimination" (2002) 18 SCLR (2d) 445. On the role of choice in Canadian equality jurisprudence more generally, see Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in Law, 2002" (2003) 20 SCLR (2d) 93; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sandra Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) at 115; Margot Young, "Social Justice and the Charter Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669.

[137] Hogg, *supra* note 77 at 55.23.

[138] William Black & Lynn Smith, "Chapter 19: The Equality Rights" in Errol Mendes & Stephane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham, ON: Lexis Nexis Canada, 2013) at 123.

[139] Leckey, *supra* note 136 at 447.

absence of any choice in whether to relinquish it could raise distinct moral objections that are without doubt pertinent.

I hasten to add, however, that there are personal characteristics, such as the one at stake, that claimants may wish to relinquish, but they lack the capacity to do so. Unfortunately, it seems that the Supreme Court's traditional approach to constructive immutability, as laid out in *Corbiere*, generates confusion when applied to undesirable traits that one may wish to relinquish. To approach constructive immutability by asking whether the status is only changeable at "unacceptable cost to personal identity" assumes that the characteristic is desirable. However, many undesirable—and potentially immutable—traits struggle to satisfy this test, and characterizing their renouncement as a "cost" would be misleading. Maintaining such characteristics does not denote the sanctity of independent choice; rather, it anchors or invites differential treatment. If anything, keeping the trait is the "cost" and renouncing it is the benefit. Such traits are better addressed by asking whether the government has any "legitimate interest in expecting us to change"[140] and whether it "lies beyond the individual's effective control."[141] And, indeed, undesirable traits such as the receipt of social assistance have been ruled to fit within "the expansive and flexible concept of immutability."[142] As such, recognizing undesirable traits, such as parental undocumented status, as constructively immutable is possible and has jurisprudential support.

In a similar vein, the contention that a child's parental immigration status is not sufficiently "personal" in the sense of relating to their personhood or identity is also unpersuasive. Describing parental undocumented status as an extraneous or non-personal characteristic ignores the normative implications of belonging to an undocumented family, which profoundly affects many aspects of daily life. Some scholars have argued that the consequences of unstable family immigration status, and, specifically, undocumented status, have a profound connection with the sense of belonging and the social identity of youth.[143] Rejecting such characteristics as not sufficiently "personal" also fails to treat the claimants as individuals and risks perpetuating the very stereotypes that substantive

[140] *Corbiere*, *supra* note 20 at para 13.
[141] *Miron*, *supra* note 79 at para 73.
[142] *Falkiner*, *supra* note 82 at para 90.
[143] Bernhard & Young, *supra* note 29; Zulema Valdez & Tanya Golash-Boza, "Master Status or Intersectional Identity? Undocumented Students' Sense of Belonging on a College Campus" (2018) Identities: Global Studies in Culture and Power 481; Kristian Hollins, "Comparative International Approaches to Establishing Identity in Undocumented Asylum Seekers" (2018) Migration and Border Policy Project Working Paper 8; Jean S Phinney et al, "Ethnic Identity, Immigration, and Well-Being: An Interactional Perspective" (2001) 57:3 J Soc Issues 493.

equality aims to counter.[144] Again, courts have recognized extraneous traits such as "receipt of social assistance" as amounting to constructively immutable personal characteristics.[145] Hence, the "internality" of a characteristic is in no way a decisive element.

A third and perhaps more difficult rejoinder pertains to the contingency of parental undocumented status on association. That is, it does not relate per se to a characteristic of the affected children themselves but, rather, to something about their parents. The Supreme Court of Canada has consistently ruled that a party cannot generally rely upon the violation of a third party's *Charter* rights,[146] and an objection could be made that such children lack standing as they are indirectly attempting to raise their undocumented parents' interests. It bears emphasizing, in response, that the recognition of relational grounds of discrimination based on a parental association of some sort enjoys significant precedent. In *Benner v Canada*, for instance, the Supreme Court of Canada struck down a provision of the *Citizenship Act* that imposed more onerous requirements for the acquisition of citizenship on children of women who married non-Canadians compared to men who married non-Canadians.[147] Without creating a general doctrine of "discrimination by association," Iacobucci J, writing for a unanimous Court, explained that the claims rooted in parental association were distinct from raising the *Charter* rights of a third party, wherein the claimant would have lacked standing.[148] Rather, he explained, "[t]he link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own." He went on to add:

> [Permitting section 15 scrutiny of the treatment of the appellant's citizenship application] is simply allowing the protection against discrimination guaranteed to him by s. 15 to extend to the full range of the discrimination. This

[144] See Benjamin Eidelson, "Treating People as Individuals" in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 203 at 208.

[145] *Falkiner*, *supra* note 82.

[146] *R v Edwards*, [1996] 1 SCR 128 at 145, 132 DLR (4th) 31; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 367, 57 DLR (4th) 231.

[147] *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358, 143 DLR (4th) 577 [*Benner*]; *Citizenship Act*, *supra* note 9.

[148] *Benner*, *supra* note 147 at paras 78–9.

> is precisely the "purposive" interpretation of Charter rights mandated by this Court in many earlier decisions.
>
> Where access to benefits such as citizenship is restricted on the basis of something so intimately connected to and so completely beyond the control of an applicant, … that applicant may … invoke the protection of s. 15.[149]

Similarly, in *Inglis v British Columbia*, a BC court recognized parental incarcerated status as an analogous ground of discrimination on the basis that it constitutes an "immutable characteristic of historic disadvantage" for the affected children.[150] This judgment mirrors the *McIvor* decisions, also from the courts of British Columbia,[151] which recognize that a child could suffer discrimination breaching section 15 on the basis of their parent's gender; in this case, with respect to entitlement to status under the *Indian Act* depending on whether a parent was an Indian male married to a non-Indian female or an Indian female married to a non-Indian male. In the immigration context, the Federal Court of Appeal ruled in *Cheung v Canada*[152] that the second child of a Chinese woman could qualify for refugee status in Canada due to the treatment she would receive as a second child in China. The court acknowledged that prejudicial treatment could occur based not on something the victim had done but, rather, on something to do with the parent—in this case, that the parent had had a previous child.

In sum, the personal implications of parental undocumented status *vis-à-vis* the affected children is twofold. First, it relates to the fact that it is an involuntary inheritance—that the children lack any control over both their choosing and their relinquishing. Second, it denotes the significant difficulty, acknowledged in *Andrews*, of changing one's immigration status in general. This understanding finds support in the contextual and purposive analysis called for in *Miron*[153] and *Corbiere*[154] and reflects the underlying moral concerns of immutability. Furthermore, the fact that the status is not of particular significance to personal identity or that it is contingent on parental association does not necessarily preclude a finding

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[149] *Ibid* at paras 80, 85.

[150] *Inglis*, *supra* note 84.

[151] *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 26 (the "Statutory Appeal"); *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827 (the "Constitutional Case"); *McIvor v Canada (Registrar, Indian and Northern Affairs),* 2007 BCSC 1732 (the "Trial Order"); *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (the "Appeal").

[152] [1993] 2 FC 314, 102 DLR (4th) 214.

[153] *Miron*, *supra* note 79 at para 100.

[154] *Corbiere*, *supra* note 20 at para 59.

of analogousness since the jurisprudence has consistently recognized extraneous, undesirable, and relational grounds.

2. Societal Variables

Our inquiry into parental undocumented status must also be informed by such children's unique place within society and "the social, political and legal history of Canadian society's treatment of the group."[155] There are similarly two bundles of arguments that emerge in a review of the relevant societal variables, relating to the children's political powerlessness as well as their distinct developmental and economic vulnerability. Both of these variables support a recognition of parental undocumented status as an analogous ground. Though not every aspect of vulnerability would be directly relevant to every possible claim that might be brought on behalf of Canadian children of undocumented parents, a comprehensive picture of the forces affecting such children demonstrates their generally vulnerable status and supports the argument for treating this status as an analogous ground.

The first, as mentioned, concerns the affected children's political powerlessness against the majoritarian process. Minor Canadian children of undocumented parents cannot vote against discriminatory legislators or legislations, despite being prevented by law from accessing vital social and health services. The cumulative effect of their differential treatment can foster a shadowy underclass, which is this time comprised of actual citizens, not undocumented migrants. Surely, section 15 was meant to prevent this result. In *Andrews*, it will be recalled, all three opinions suggested that powerlessness was a characteristic of the groups protected by section 15. Both Wilson and McIntyre JJ referred to non-citizens as good examples of a "discrete and insular minority who come within the protection of s. 15."[156] Wilson J elaborated by explaining that non-citizens were "a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[157] La Forest J, concurring, described them as "an example without parallel" of a group "who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions."[158] Likewise in *Miron*, eight judges ruled that membership in a powerless group was a helpful "indicator"[159] or "indicium"[160] of analogousness.

[155] *Law*, *supra* note 77 at 554–5.
[156] *Andrews*, *supra* note 77 at para 49.
[157] *Ibid* at para 51.
[158] *Ibid* at para 76.
[159] *Miron*, *supra* note 79 at para 149.
[160] *Ibid* at paras 15, 57.

Everything that was said in *Andrews* and *Miron* regarding non-citizens can apply *a fortiori* to mixed-status families.

The notion that the greatest benefit of equality rights should accrue to members of politically powerless groups similarly finds support in American jurisprudence and scholarship. In the now famous footnote 4 of *United States v Carolene Products* in 1938, Justice Harlan Stone of the Supreme Court of the United States noted that prejudice against minorities can effectively distort "those political processes ordinarily to be relied upon to protect minorities."[161] Likewise in *Plyler v Doe*, in striking down a statute that denied public education to American children of undocumented parents, the court warned against the creation of a permanent underclass of persons who lacked the resources and attributes to advance their rights in American society.[162] The same theory is advanced by John Hart Ely in his defence of equality review as a correction of political powerlessness.[163] In other words, judicial review on equal protection grounds judges as "servants of democracy even as they strike down the actions of supposedly democratic governments."[164]

The political voicelessness of these children must also be considered in tandem with their economic vulnerability. Simply put, children of undocumented parents who are excluded from government benefits are among those most in need of them. It is well documented that recent immigrants face considerably higher rates of poverty than the average Canadian (20.3 percent in contrast with 8.8 percent).[165] While there are no census or reliable published data providing accurate counts of poverty among those with undocumented status, statistics about regularized immigrants paint a sombre portrait that can apply a *fortiori* to those with precarious status. The 2016 census provides a glimpse. It reveals that the poverty rate of immigrants without permanent residence (including those with precarious or undocumented status) is an astounding 42.9 percent, in stark contrast with 12.5 percent and 17.9 percent for the general population and permanent residents respectively.[166] Recent immigrants additionally experience higher unemployment (10 percent, versus 7 percent among

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[161] 304 US 144, 58 S Ct 778, 82 L Ed 1234, at 304 (1938).

[162] *Ibid* at 222 (majority opinion).

[163] Ely, *supra* note 99. For a similar argument in the Canadian context, see HS Fairley, "Enforcing the Charter" (1982) 4 SCLR 217 at 243, 249–50.

[164] Laurence Tribe, "The Puzzling Persistence of Process-based Constitutional Theories" (1980) 89 Yale LJ 1063 at 1063.

[165] Canada, "A Backgrounder on Poverty in Canada" (Ottawa: Government of Canada, October 2016) at 9 [Canada, "Backgrounder on Poverty"].

[166] See Statistics Canada, *2016 Census Program*, Data Table 98-400-X201673 (Ottawa: Statistics Canada, 30 May 2019) (low income is defined by Statistics Canada as a fixed percentage (50 percent) of median adjusted after-tax income).

Canadian-born workers).[167] In the long term, they are deemed to be thirteen times more likely to live in chronic low income than families born in Canada.[168] These figures suggest that children of undocumented parents are most in need of government social and health benefits and are nonetheless excluded. Underinvestment in these children reinforces existing deprivations and intergenerational poverty.[169]

The effects of these deprivations, while harmful to all, are particularly severe on the development of children. Early childhood marks the most rapid period of change and growth throughout the human lifespan.[170] Deprivations associated with child poverty can have dire consequences on physical and mental health, cognitive capabilities, rate of injury, and propensity for obesity, amongst other repercussions.[171] Low-income children fare poorer than average on most measures of well-being, ranging from life expectancy to infant mortality.[172] Deficiencies that begin in early life can translate into a greater likelihood of low income, poor health, and lower skills in adulthood.[173] Another analogy can be drawn to the American case of *Plyer*, where the court distinguished public education from other forms of government benefits through "the lasting impact of its deprivation on the life of the child."[174] As with education, health services

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[167] Canada, "Backgrounder on Poverty," *supra* note 165 at 15.

[168] Anita Khanna, "Report Card on Child and Family Poverty in Canada: A Poverty-Free Canada Requires Federal Leadership" (2017) at 10, online (pdf): *Campaign 2000* <campaign2000.ca/wp-content/uploads/2017/11/EnglishNationalC2000ReportNov212017.pdf> [perma.cc/85U9-6ZAT].

[169] United Nations Committee on the Rights of the Child (UNCRC), *General Comment no. 19 on Public Budgeting for the Realization of Children's Rights (art. 4)*, UN Doc CRC/C/GC/19 (July 2016) at para 50, online: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f19> [perma.cc/9CQ9-W5JK].

[170] UNCRC, *General Comment no. 7: Implementing Child Rights in Early Childhood,* 40th Sess, UN Doc CRC/C/GC/7/Rev.1 (30 September 2005) at para 6(a), online: <refworld.org/docid/460bc5a62.html>[perma.cc/8YX4-E7LW].

[171] See Rita Paul-Sen Gupta, Margert L de Wit & Dave McKeown, "The Impact of Poverty on the Current and Future Health Status of Children" (2007) 12:8 Paediatrics & Child Health 667; UNICEF Canada, "UNICEF Report Card 13: Canadian Companion, Fairness for Children" (Toronto: UNICEF Canada, 2016) at 12.

[172] UNICEF Canada, *supra* note 171 at 12; Canada, "Backgrounder on Poverty," *supra* note 165 at 24, 26–7.

[173] UNICEF Canada, *supra* note 171 at 15.

[174] *Plyler*, *supra* note 126 at 221. The court noted: "Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a

can be differentiated from other government benefits through their lasting impact. Adequate health care is crucial to the very being of a child and is inextricably linked to all other determinants of their ability to thrive.[175]

Recognition of the inherent vulnerability of children also has consistent and deep roots in Canada's social and legal fabric.[176] But a significant and growing body of literature suggests that children growing up with an undocumented parent face unique developmental challenges that render them particularly vulnerable.[177] These pertain chiefly to lower levels of cognitive and educational skills, poor socio-emotional development, and long-term psychological distress. Hirokazu Yoshikawa associates a proxy for parental undocumented status with lower levels of standardized cognitive skills in children as young as two and three years of age.[178] Controlling for traditional indicators of socio-economic status such as income and employment, Roberto Gonzales links the legal vulnerability of having an undocumented family member to lower academic expectations and various barriers to educational attainment.[179] A longitudinal study of American-born Mexican children found that having an undocumented mother was associated with 1.5 fewer years of schooling.[180] Related is work by Stephanie Potochnick and Krista Perreira, who, controlling for children's own legal status, link having undocumented parents to higher levels of anxiety and depressive symptoms.[181]

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status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause."

[175] See Ruby Takanishi, "Levelling the Playing Field: Supporting Immigrant Children from Birth to Eight" (2004) 14:2 Future of Children 61 ("family economic security, access to health care, and access to sound early education" is the "three-legged stool of child well-being by age eight" at 63).

[176] *AB (Litigation Guardian of) v Bragg Communications Inc*, 2012 SCC 46 ("[r]ecognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law" at para 17).

[177] A large part of this literature focuses on the United States, where the net population of undocumented households is more pronounced. But insights from developmental theory can apply, *mutatis mutandis*, to the Canadian context.

[178] Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* (New York: Russell Sage Foundation, 2011. See also Carola Suárez-Orozco et al, "Growing Up in the Shadows: The Developmental Implications of Unauthorized Status" (2011) 81:3 Harvard Educational Rev 438 at 451.

[179] Roberto G Gonzales, "Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood" (2011) 76:4 American Sociological Rev 602.

[180] Frank D Bean, Mark A Leach & Susan K Brown, "The Educational Legacy of Undocumented Migration: Comparisons across U.S. Immigrant Groups in How Parents' Status Affects Their Offspring" (2018) 45:2 Intl Migration Rev 348.

[181] Stephanie R Potochnick & Krista M Perreira, "Depression and Anxiety among First-Generation Immigrant Latino Youth: Key Correlates and Implications for Future Research" (2010) 198:7 J Nervous & Mental Disease 470.

Developmental theory has suggested a range of mechanisms to explain the influence of parental undocumented status on the well-being of children. Three of them bear unpacking. The first mechanism is the chronic prospect of removal proceedings against a parent, identified as one of the most damaging and pervasive events for a child. Qualitative studies suggest that fear of parental removal can affect and be transmitted to children through family stress, with repercussions for psychological well-being and learning.[182] In one study of American-born children of Mexican immigrants, children expressed sentiments of marginalization and discomfort at revealing their parent's status and a generalized fear of their family being split up.[183] Ajay Chaudry has linked this generalized sense of fear with behavioural problems and anxiety symptoms.[184]

A second mechanism pertains to a reduced access to public benefits that affect children's development. As discussed in the first part of this article, undocumented parents face barriers in accessing various services distinct from *de jure* eligibility requirements. Aside from linguistic barriers and lack of information, this could be explained by a restricted social network that itself consists of recent and undocumented immigrants.[185] Additionally, the fear of revealing their status to authorities may dissuade them from accessing programs that require, *inter alia*, proof of income,[186] such as the CCB. Yoshikawa's study of poor undocumented households in New York suggests that children's lack of access to government benefits has developmental repercussions on their cognitive and educational progress.[187]

Last is the generalized psychological distress and sense of alienation that living in a mixed-status family entails. Generally, parental hardship is consistently linked to heightened stress and emotional vulnerability among children.[188] More specifically, Judith Bernhard and Julie Young's study of

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[182] Kalina M Brabeck, M Brinton Lykes & Rachel Hershberg, "Framing Immigration to and Deportation from the United States: Guatemalan and Salvadoran Families Make Meaning of Their Experiences: Community" (2011) 14:3 Community, Work & Family 275.

[183] Joanna Dreby, "The Burden of Deportation on Children in Mexican Immigrant Families" (2012) 74:4 J Marriage & Family 829.

[184] Ajay Chaudry et al, "Facing Our Future: Children in the Aftermath of Immigration Enforcement" (2 February 2010), online (pdf): *Urban Institute* <urban.org/publications/412020.html> [perma.cc/NJ38-YDJG].

[185] Yoshikawa, *supra* note 178.

[186] Randy Capps & Karina Fortuny, "Immigration and Child and Family Policy" (14 September 2006) at 15, online (pdf): *Urban Institute* <urban.org/publications/311362.html> [perma.cc/7Z8J-9S6A].

[187] Yoshikawa, *supra* note 178.

[188] Hirokazu Yoshikawa, J Lawrence Aber & William R Beardslee, "The Effects of Poverty and the Mental, Emotional and Behavioral Health of Children and Youth" (2012) 67:4 American Psychologist 272.

youth living with undocumented parents in Toronto found that they consistently felt "othered," having to negotiate their parent's status and justify why they did not have key documents such as health cards.[189] While, at times, able to be with friends and forget about their family status, they also expressed a constant sense of anxiety about their family's future in the country.[190] A similar study carried out by Carola Suarez-Orozco in the United States explored how children living in this situation viewed teachers, police officers, and various authority figures with distrust and fear, feeling "constantly hunted" or worried that, if detained, "they will never be reunited with their parent."[191] While limited, the literature suggests that parental undocumented status is associated with distinct vulnerability and adversity in several key contexts for child development. These are all factors that advocate for the recognition of the status as an analogous ground of discrimination.

3. Intersections with Age, Race, and Civil Status

A purposive and contextual assessment of parental undocumented status as an analogous ground must also be informed by the ways in which it intersects with other protected grounds. In both *Law v Canada* and *Corbiere*, the majority emphasized that categories of discrimination cannot be reduced to watertight compartments but, rather, will often overlap in significant measure.[192] Awareness of, and sensitivity to, the lived reality—material, political, economic, and social—of the members of the group whose equality rights are at issue is an important task that the court must undertake in assessing analogous grounds. The confluence and cumulative effect of disadvantageous treatment on the basis of multiple grounds, in turn, advocates for a recognition of parental undocumented status as an analogous ground.[193]

What grounds does parental undocumented status intersect with? Three stand out. First, and simplest, is the enumerated ground of age. Citizen children's limited access to benefits is not solely based on their parents' undocumented status but, rather, on the fact that they are minors with undocumented parents. Their legal residency/domicile and eligibility for government services as Canadian citizens becomes uncontested the day they reach majority. Similarly, their entitlement to the CCB, should they have children of their own, is without limitation once they are emancipated. In other words, the child is victim of their lack of legal capacity to determine their own "primary place of residence" or "settlement."

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[189] Bernhard & Young, *supra* note 29 at 34.
[190] *Ibid* at 43.
[191] Suárez-Orozco et al, *supra* note 178 at 444.
[192] *Law*, *supra* note 77 at 554–5; *Corbiere*, *supra* note 20 at 259.
[193] *Corbiere*, *supra* note 20 at 253, 259.

Second, differential treatment on the basis of parental undocumented status can hardly be separated from the reality that racialized children are disproportionately affected by the restrictive measures at stake. It is estimated that the vast majority of irregular border crossers into Canada since 2015 have been of African descent.[194] More generally, over 80 percent of recent arrivals between 2006 and 2011 (permanent and non-permanent residents combined) were from Asia (56.9 percent), Africa (12.5 percent), and Central and South America (12.3 percent).[195] European-born migrants only accounted for 13.7 percent of arrivals in the country.[196] In *Andrews*, La Forest J noted that the historical and contemporary tendency to exclude non-citizens on irrelevant grounds is often "an inseparable companion of discrimination on the basis of race and national or ethnic origin."[197]

Indeed, much of the rhetoric surrounding "birthright tourism" and stereotypes of "anchor babies" as social "parasites" that drain public resources can hardly be separated from racist sentiments.[198] Politically charged efforts to deny rights and benefits of citizenship to such children is believed to have emerged, concurrently in Canada and the United States, with the influx of Chinese immigrants in the early 1900s.[199] In recent years, the discourse on such children is believed to have become increasingly acerbic and focused on gender and race, denoting a "weaponization of the birth canal as the focus on immigrant women [which] reflects an attempt to blame supposedly the bearers of alien ... practices and cultures."[200] The origin of the term "anchor baby" itself can

[194] See Teresa Wright, "Majority of Illegal Migrants to Canada in 2018 Are Nigerians with U.S. Travel Visas," *Global News* (30 April 2018), online: <globalnews.ca/news/4177786/migrants-nigeria-us-travel-visas> [perma.cc/LM76-AZQZ].

[195] Statistics Canada, *Immigration and Ethnocultural Diversity in Canada*, National Household Survey, 2011, Catalogue no. 99-010-X2011001 (Ottawa: Statistics Canada, May 2013), online: <statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm> [perma.cc/44SB-4W6F].

[196] *Ibid*.

[197] *Ibid* at para 68.

[198] See Chang, *supra* note 12 at 1271 ("[m]any view this population as a parasite on public funds"); Prithi Yelaja, "'Birth Tourism' May Change Citizenship Rules," *CBC News* (5 March 2012), online: <cbc.ca/news/canada/birth-tourism-may-change-citizenship-rules-1.1164914> [perma.cc/LA2D-4J4P]; Emilie Cooper, "Embedded Immigrant Exceptionalism: An Examination of California's Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein" (2004) 18:2 Geo Immigr LJ 345 (discussing the motivations for California's Proposition 187, which excluded undocumented immigrants from public services and public education).

[199] Joon K Kim, Ernesto Sagás & Karina Cespedes, "Genderacing Immigrant Subjects: 'Anchor Babies' and the Politics of Birthright Citizenship" (2018) 24:3 J Study Race, Nation & Culture at 322.

[200] *Ibid* at 313

be traced back to the arrival of Vietnamese immigrants who arrived in North America in the 1980s, in relation to what was originally coined "anchor child."[201] The term is deemed racist and dehumanizing by many, denoting the idea that children of unauthorized migrants are dropped (like an anchor) in the country to tie their family to it.[202] The anchor metaphor further links to the term "chain migration," in that children in this situation facilitate the arrival of other family members by reducing costs and legal barriers. Specifically, a 2011 study into the prevalence of this term in the twenty-first century found that it has been chiefly used on "extreme right-wing and anti-immigrant sites."[203]

A third, perhaps less obvious, ground that may be of relevance to our inquiry is that of civil or family status. Of course, whereas the narrower category of marital status has been recognized by the Supreme Court of Canada as an analogous ground under section 15, that of civil or family status per se has not. But grounds protected under provincial human rights codes are relevant to, and can orient, the Court's analogousness inquiry.[204] For example, civil status under the Quebec *Charter of Human Rights and Freedoms* enjoys a relatively broad ambit in that it prohibits discrimination based on any form of family ties or affinity with another person including "a range of facts … relating to the three classical elements of civil status – birth, marriage and death. … Other facts, such as interdiction or emancipation, which do not relate to birth, marriage or death but instead to legal capacity may also be included in civil status under s. 10."[205]

In *Brossard (Ville de) c Québec*,[206] the Supreme Court recognized "filiation" as "one of the cardinal elements of the notion of civil status," with the act of birth constituting one of the central documents that establishes the civil status of a child and their parents.[207] For our purposes, the denial of health and social services to children of undocumented parents can be construed as discrimination on the basis of their filiation

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[201] James Maples, "Ancor Baby" in Charles A Gallagher & Cameron D Lippard, eds, *Race and Racism in the United States: An Encyclopedia of the American Mosaic*, vol 1 (Westport, CT: Greenwood, 2014) at 51.

[202] *Ibid* at 51.

[203] Gabe Ignatow & Alexander T Williams, "New Media and the 'Anchor Baby' Boom" (2011) 17:1 J Computer-Mediated Communication 60 at 61.

[204] *Corbiere*, *supra* note 20 at para 60.

[205] *Brossard (Ville de) c Québec (Commission des droits de la personne)*, [1988] 2 SCR 279 at para 15, 53 DLR (4th) 609 [*Brossard*]; *Charter of Human Rights and Freedoms*, RSQ, c C-12.

[206] *Ibid*.

[207] Quebec, Commission des droits de la personne et des droits de la jeunesse (CDPDJ), *Lignes directrices relatives aux plaintes fondées sur l'état civil*, by Daniel Carpentier (Montreal: CDPDJ, 6 April 1990) at 3, online: <yumpu.com/fr/document/read/28465428/lignes-directrices-relatives-aux-plaintes-fondaces-sur-lactat-cdpdj> [perma.cc/HTB6-E8FK].

with their parents—that is, their civil status. With regard to health insurance, the children's lawful domicile/residence (and, by extension, their eligibility) is tied to their parents' legal status in the country. Similarly, their enjoyment of the child payment benefits is contingent on their parents' immigration status.

C. Relevance of the Convention on the Rights of the Child

Any assessment of the merits of parental undocumented status as an analogous ground of discrimination must also be informed by Canada's obligations under international law. Indeed, Canadian courts have consistently referred to international human rights standards to guide their analytical framework and interpretation of the *Charter*. In his 1987 dissent in *Reference Re Public Service Employee Relations Act (Alberta*), Chief Justice Brian Dickson declared that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[208] This interpretative presumption has since been endorsed and reaffirmed by the Court multiple times.[209] In *Health Services Bargaining Assn*, for instance, McLachlin CJ and Justice Louis Lebel found that "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." [210] Similarly, in *Slaight Communications v Davidson*, [211] the majority referred to Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* as evidence that the *Charter* guarantee of freedom of expression must be balanced against the fundamental human right to work.[212] In doing so, the Court reiterated that

> [t]he various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary

[208] [1987] 1 SCR 313 at para 59, 38 DLR (4th) 161 [*Alberta Reference*]. See generally Ruth Sullivan & Elmer A Driedger, *Driedger on the Construction of Statutes*, 3d ed (Markham, ON: Butterworths, 1994) at 330.

[209] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight Communications*]. See also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193 [*Baker*]; *R v Ewanchuk*, [1999] 1 SCR 330 at para 73, 169 DLR (4th) 193 [*Ewanchuk*]; *Health Services*, *supra* note 91 at para 70.

[210] *Ibid* at para 78

[211] *Slaight Communications*, *supra* note 209 at para 23.

[212] *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

> norms—must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.[213]

Of prime relevance in any assessment of the rights of children of undocumented parents is the United Nations (UN) *Convention on the Rights of the Child* (*CRC*),[214] which was ratified by Canada in 1991.[215] There are two provisions of the *CRC* that emerge as particularly pertinent. The first provision is Article 2, which sets out the obligation of states to "respect and ensure"[216] all the rights in the convention—including the right to health care, social security, and primary education—to all children "within their jurisdiction"[217] without discrimination of any kind. Grounds of discrimination include "the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." The *CRC* additionally asserts the need to protect children from "all forms of discrimination or punishment" based on "the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."[218]

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[213] *Alberta Reference, supra* note 208 at para 57. See also Craig Scott, "Reaching beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'" (1999) 21:3 Hum Rts Q 633 at 648; Martha Jackman & Bruce Porter, "Socio-Economic Rights under the Canadian Charter" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214–15.

[214] *Convention on the Rights of Children*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*CRC*].

[215] Canada, "Rights of Children" (14 November 2017), online: <canada.ca/en/canadian-heritage/services/rights-children.html> [perma.cc/G39R-AQVU].

[216] Comments published in the *Bulletin of Human Rights* explains that, under international law, the obligation "to respect" requires states "to refrain from any actions which would violate any of the rights of the child under the Convention. ... The obligation 'to ensure' goes well beyond that of 'to respect', since it implies an affirmative obligation on the part of the State to take whatever measures are necessary to enable individuals to enjoy and exercise the relevant rights." Philip Alston, "The Legal Framework of the Convention on the Rights of the Child" (1992) 91:2 United Nations Bulletin of Human Rights 1 at 5.

[217] The words "within their jurisdiction" entail that all the rights in the *CRC*—including the rights to health care services (art 24), and social security (art 26)—must apply to all children in the state, including refugees, children of migrant workers, and those in the state illegally. In its *General Comment no 6*, the UNCRC explains: "[T]he principle of non-discrimination, in all its facets, applies in respect to all dealings with … children. In particular, it prohibits any discrimination on the basis of the status of a child as being … a refugee, asylum seeker or migrant." UNCRC, *General Comment no 6*, UN Doc CRC/GC/2005/6 (September 2005) at para 18, online: <undocs.org/CRC/GC/2005/6> [perma.cc/X3JJ-32TQ].

[218] *CRC*, *supra* note 214 [emphasis added].

The Committee on the Rights of the Child, the quasi-judicial treaty-monitoring body that reports on implementation of the *CRC* by governments, has to date recognized fifty-three additional grounds of discrimination[219] to those enumerated in Article 2, including the following: children of migrant and seasonal workers,[220] children of refugees/asylum seekers,[221] children of illegal immigrants,[222] children of minorities and indigenous peoples.[223] Interestingly, most of the cases recognizing

[219] For a simple list of the grounds recognized by the UNCRC, see Rachel Hodgkin & Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd rev ed (Geneva: UNICEF, 2008) at 24–5, online (pdf): <unicef.org/publications/files/Implementation_Handbook_for_the_Convention%20_on_the_Rights_of_the_Child.pdf> [perma.cc/CTX2-7QB7].

[220] See UNCRC, 41st Sess, 1120th Mtg, UN Doc CRC/C/THA/CO/2 (2005) ("[i]n addition, the Committee notes with particular concern that children of migrant workers lack access to a range of health and education services, including those related to HIV/AIDS prevention and care, that their living conditions are often extremely poor and that many of them work long hours in hazardous conditions. ... *It recommends that the children of migrant workers are ensured access to health and social services and to education in accordance with the principle of non-discrimination*" at paras 68–9) [emphasis added].

[221] UNCRC, *General Comment no 7 (2005): Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7 (September 2006) ("[y]oung children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum seekers" at paras 11–12). See also UNCRC, 38th Sess, 1025th Mtg, UN Doc CRC/C/15/Add.250 (2005) ("[t]he Committee recommends that the State Party consider all possible measures through which foreign children and children of asylum seekers can be granted equal access to the same standard of services in the field of education" at paras 50–1).

[222] UNCRC, 39th Sess, 1025th Mtg, UN Doc CRC/C/15/Add.260 (2005) ("[t]he Committee is concerned that the country's complex political structure and the lack of unified laws and policies make equitable *access to health-care services for all children increasingly difficult* ... the Committee expresses serious concern that some 90 per cent of Roma have no health insurance, which results in their de facto exclusion from access to health care. … The Committee recommends that the State Party undertake all necessary measures to ensure that all children enjoy the same access and quality of health services, *with special attention to children belonging to vulnerable groups, especially Roma*" at paras 47, 49) [emphasis added].

[223] UNCRC, 40th Sess, 1080th Mtg, UN Doc CRC/C/15/Add.268 (2005) [UNCRC, 40th Sess, 1080th Mtg] ("[t]he Committee recommends that the State Party undertake all necessary measures to ensure that all children enjoy the same access to and quality of health services, *with special attention to children belonging to vulnerable groups, especially indigenous children and children living in remote areas.* In addition, the Committee recommends that the State Party take adequate measures, within a set time period, to overcome the disparity in the nutritional status between indigenous and non-indigenous children" at para 48) [emphasis added]; UNCRC, 42nd Sess, 1157th Mtg, UN Doc CRC/C/MEX/CO/3 (2006) ("[t]he Committee … recommends that the State Party implement all necessary measures to reduce the persistence of regional disparities in access to health care, the high rates of malnutrition among children under five years of age and those of school age, *especially in rural and remote areas and among children belonging to indigenous groups*" at para 49) [emphasis added].

discrimination on the basis of parental immigration status similarly pertained to children's right to health services and education. For instance, in a case involving Thailand, the committee recommended that "the children of migrant workers [be] ensured access to health and social services and to education in accordance with the principle of non-discrimination."[224] The committee has also already reprimanded Canada for the fact that immigrant and asylum-seeking children often do not have the same access to education as others, which it deemed to be in violation of the principle of non-discrimination.[225] The fact that children's access to social and health services should not depend on their parents' immigration status is also a recurring theme across UN soft law. For instance, in an outcome document of the UN General Assembly's session on children, member states (including Canada) signed on to the following recommendation:

> 11. Adopt and implement policies for the prevention, protection, rehabilitation and reintegration, as appropriate, of children living in disadvantaged social situations and who are at risk, including, … children of migrant workers, … and ensure their access to education, health, and social services as appropriate.[226]

A second relevant provision of the *CRC* is Article 3, which requires states to make the best interests of children the "primary consideration" in all legislation and administrative actions affecting them.[227] The term "primary consideration" implies that the child's best interests may not be considered on the same level as all other considerations, such as the regulation of clandestine migration. According to the Committee on the Rights of the Child, this strong position is justified by the special attributes of children: "dependency, maturity, legal status and, often, voicelessness."[228] Because children have less capacity than adults to make a case for their rights, decision-makers must be explicitly aware of their

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[224] UNCRC, 41st Sess, 1120th Mtg, *supra* note 223 at para 69.

[225] UNCRC, 34th Sess, 918th Mtg, UN Doc CRC/C/15/Add.215 (2003) ("[t]he Committee nevertheless reiterates the concern of the Committee on the Elimination of Racial Discrimination (A/57/18, para. 337) about allegations that children of migrants with no status are being excluded from school in some provinces" at para 44).

[226] *Report of the Ad Hoc Committee of the Whole of the Twenty-Seventh Special Session of the General Assembly*, UNGAOR, 27th Sess, Supp No 3, UN Doc A/S-27/19/Rev.1 (2002) at 20, online: <undocs.org/en/A/S-27/19/REV.1(SUPP)> [perma.cc/JP7Z-KHZF].

[227] UNCRC, *General Comment no 14 on the Right of the Child to Have His or Her Best Interests Take as a Primary Consideration*, UN Doc CRC/C/GC/14 (May 2013), online: <undocs.org/en/CRC/C/GC/14> [perma.cc/ZYZ3-DNLK] [UNCRC, *General Comment no 14*].

[228] *Ibid* at para 37.

interests, as they may otherwise be overlooked. The committee underlines, *inter alia*, the following parameters in assessing children's best interest:

> (a) The universal, indivisible, interdependent and interrelated nature of children's rights; (b) Recognition of children as right holders; (c) The global nature and reach of the Convention; (d) The obligation of States parties to respect, protect and fulfill all the rights in the Convention; (e) Short-, medium- and long-term effects of actions related to the development of the child over time.[229]

The committee has additionally emphasized the vulnerability of migrant families and their access to health care as central determinants of the best interest of children:

> An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee [or migrant[230]] or asylum seeker, victim of abuse, living in a street situation, etc.
> …
> The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest. [231]

Denying or effectively limiting access to vital social and health services on the basis of the immigration status of children's parents would run against these human rights obligations. The recurring process of tying such children's eligibility for vital services to their parents' legal status would appear incompatible with the *CRC*'s emphasis on children as autonomous holders of rights. It additionally neglects the potent effects of denying social and health services on children's developmental needs in early life, which can affect their foundational cognitive and social skills throughout

[229] *Ibid* at para 16 [emphasis added].

[230] Interestingly, the French version of the UNCRC's General Comments uses the words "migrant ou demandeur d'asile." UNCRC, *Observation générale no 14 (2013) sur le droit de l'enfant à ce que son intérêt supérieur soit une considération primordial (art 3, par 1),* UN Doc CRC/C/GC/14 (May 2013) at para 75, online: <undocs.org/fr/CRC/C/GC/14> [perma.cc/PFA2-C45G], whereas the English version says "refugee or asylum seeker." UNCRC, *General Comment no 14*, *supra* note 227. Despite this inconsistency, the underlying objective appears to be emphasizing the child's situation of vulnerability as a relevant determinant of their best interest. This, of course, should encapsulate their parents' lack of a permanent immigration status, be they asylum seeker or other irregular migrants.

[231] UNCRC, *General Comment no 14*, *supra* note 227 at paras 71, 75, 77.

their lifespan. Of course, Canada's practices also disregard the inherent vulnerability of such children due to their parents' precarious immigration status and often corollary poverty, an element expressly recognized by the committee as relevant to their best interest.

IV. CONCLUSION

Section 15 exists to protect the politically powerless from overeager legislation that cuts too broadly. Canadian-born children of undocumented parents are a perfect example of a discrete and insular minority who are being treated as expendable by various Canadian administrative practices that fail to appreciate or even consider the implications of immigration status for a person's primary social units and networks. Distinctions between Canadian-born children on such bases perpetuate arbitrary disadvantage with long-term developmental repercussions, inseparable from stereotypes of "anchor babies" as social "parasites" that drain public resources and unjustly benefit from their parents' "illegal" presence. Simply put, parental undocumented status emerges "as a constant marker of potential legislative discrimination" associated with analogous grounds.[232]

A recognition of the ground as protected under the *Charter*'s equality clause would mark a first step in remedying what is largely an elusive social ill and serve as a jurisprudential marker for all "suspect distinctions" associated with such children.[233] It is also consistent with jurisprudence. The status is constructively immutable in that it represents an attribute—the parents' legal residency—over whose choosing or relinquishing native-born children have no control whatsoever. It epitomizes the type of involuntary inheritance for which no Canadian should be discriminated. This conclusion is also buttressed by the group's political voicelessness as well as the distinct economic and developmental vulnerability of children growing up in mixed-status families. Further interpretative guidance in that respect can come from international human rights law, where the differential treatment of children on the basis of their parents' immigration status is both expressly prohibited and recognized as a recurring target of discrimination. Lastly, such a recognition would be consistent with the values and objectives underpinning section 15 of the *Charter*: to promote substantive equality and acknowledge that such children are worthy of equal concern, dignity, and protection from poverty and disease, regardless of their parents' decisions. Children do not have a say in who their parents are, nor should they be disadvantaged on the basis of something their parents did.

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[232] *Corbiere*, *supra* note 20 at paras 10–11.
[233] *Ibid*.

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Roach, Kent W., Constitutional Remedies in Canada, 2e éd., Toronto (ON), Thomson Reuters, 2024 (*extraits*)

Constitutional Remedies in Canada, 2nd Edition § 14:35

Constitutional Remedies in Canada, 2nd Edition
Kent W. Roach

Part III. Constitutional Remedies

Chapter 14. Remedies Involving Legislation

VII. Extension by Reading in or Nullification of Underinclusive Legislation

C. Cases Where Extenstion by Reading in Is Appropriate; Cases Where Extenstion by Reading in Was Not Appropriate

§ 14:35. Cases Where Extension by Reading In is Appropriate

The easiest cases to justify reading in to extend unconstitutionally underinclusive legislation are those where both the purposes of the legislation and those of the Charter will clearly be advanced by saving the legislation through a reading in extension rather than striking the legislation down. The more difficult cases will be those where reading in will substantially change the legislation but is nevertheless supported by the purposes of the Charter. As will be seen, the Supreme Court and lower courts have not shied away from reading in remedies. Such remedies have been less exceptional than perhaps suggested in *Schachter*.

In *Miron v. Trudel*, [1] the Supreme Court read in common law spouses to a scheme providing accident insurance benefits to married spouses after finding that the exclusion of common law spouses violated s. 15 of the Charter. This was presented as an easy case where reading in was consistent with legislative intent as well as the Charter. McLachlin J. noted that subsequent legislative amendments including common law spouses in the scheme "provide the best possible evidence of what the Legislature would have done had it been forced to face the problem the appellants raise". [2] She also added that remedies short of extension would "perpetuate the effects of a discrimination which the court has found to violate the Charter when the obvious remedy — the payment of the benefits that should have been paid — remains available". [3] The decision to extend the legislation immediately was consistent with legislative objectives and intent, but "most importantly" it "cure[d] an injustice which might otherwise go unremedied". [4] Extension through reading in was supported in *Miron v. Trudel* by both concerns about legislative intent and the purposes of the Charter.

The Supreme Court in *Vriend v. Alberta* found that reading in sexual orientation as a prohibited ground of discrimination that was left out of *Alberta Human Rights Code* was required given both the purposes of the legislation and of the Charter. [5] Iacobucci J. for the court rejected the Court of Appeal's remedies of striking down the entire legislation on the basis that the reading in remedy "would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere" compared to striking down the entire human rights code. [6] The court took a broad and functional approach to the legislative purpose and did not focus on the narrow purpose of the unconstitutional omission of sexual orientation. Iacobucci J. rightly recognized that "Charter scrutiny will always involve some interference with the legislative will" [7] and concluded that the choice to exclude gays and lesbians was not integral to the broader legislative scheme. He helpfully explained that once part of legislation has been found unconstitutional "the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional". [8] Here, the legislature would have chosen the less drastic remedy of reading in sexual orientation as opposed to abandoning the entire Act. The court was sensitive to the practical implications of risking the invalidation of fundamental legislation simply because of an unconstitutional omission.

The court also did not find that the Court of Appeal's concerns about remedial precision were compelling. Iacobucci J. concluded that the words sexual orientation were sufficiently precise enough to be read in. He also found that whether or not sexual orientation was included in a statutory exemption for pension plans was "a peripheral issue which does not deprive the reading in remedy of sufficient precision", especially considering that the legislature could always intervene if it disagreed about the details of the court's remedy. This approach is valuable because it recognizes the reality of dialogue between the courts and the legislatures. The courts' reading in remedy did not have to be the final word, especially on matters of detail. [9]

Although the court focused on matters concerning legislative intent and precision, it did not ignore the other guiding principle identified in *Schachter*, namely, respect for the purposes of the Charter. It held that the balancing provisions internal to the human rights code could deal with a claimed conflict between reading in protection against discrimination on the basis of sexual orientation and religious freedom. Iacobucci J. also concluded that expanding the grounds of discrimination would enhance the purposes of both the Charter and the human rights code. He recognized that the group added was small and vulnerable to discrimination. The smallness of the group should not only be related to the degree of intrusion on the legislative objective, but also to whether the reading in remedy accords with the purpose of s. 15 in protecting minorities vulnerable to discrimination. Iacobucci J. combined concerns about respect for democracy and the Charter when he indicated that "[w]here the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly". [10]

Many lower courts followed *Vriend* in extending benefits to include gays and lesbians through reading in. As suggested above, such remedies are generally consistent with the broad purposes of the impugned legislation and the purposes of the Charter. [11] Extending benefits to gays and lesbians is relatively easily justified under *Schachter*. Including gays and lesbians in benefit schemes generally constitutes a minimal intrusion on legislative objectives, given the small size of the group added. More importantly, the exclusion of gays and lesbians, as vulnerable minorities, amounts to discrimination contrary to the purposes of the Charter. A number of courts used similar reasoning to find that same sex couples should be read in to legislation that limited marriage to couples of the opposite sex. They stressed that such a remedy advanced the purpose of the legislation in promoting married life while also advancing the purpose of the Charter in including a vulnerable minority in a benefit that was available to the majority. Two Courts of Appeal were prepared to read in same sex couples to marriage legislation on this basis, but would have suspended such a reading in remedy for two years in order to give legislatures an opportunity to address the matter, perhaps by providing and attempting to justify same alternative to traditional marriage for same sex couples. [12] The British Columbia Court of Appeal concluded that same-sex marriage was "the only road to true equality for same-sex couples", but nevertheless delayed the remedy to allow for consequential amendments of the law and "to avoid confusion and uncertainty in the application of the law". [13] In that case, it denied the applicants' request for an immediate remedy accompanied by a mandamus requiring the issuance of marriage licences to same-sex couples and a prohibition against denying licences in such cases.

The Ontario Court of Appeal took a bolder approach and ordered an immediate reformulation of the definition of marriage and a mandamus requiring the province to accept the marriage certificates of two named same-sex couples in *Halpern v. Canada (Attorney General)*. [14] It stressed that a delayed remedy would not achieve the purposes of equality and that the case did not fit into the three categories contemplated by the Supreme Court in *Schachter v. Canada* to justify the use of a suspended declaration of invalidity. [15] The result created a situation in which same-sex couples could marry in Ontario but not in Quebec and British Columbia, which were still subject to the suspended reading in remedy. The British Columbia Court of Appeal subsequently rescinded its suspension at the request of the successful Charter applicants and with no opposition from the Attorneys General of Canada and British Columbia. The Court of Appeal noted that the Attorney General of Canada had decided not to appeal the decision on the merits. The court reasoned that it was thus reasonable to assume that "any consequential amendments to the law which may be required as a result of this court's decision do not require the suspension of remedy which this court originally imposed". [16]

The immediate reading in of same sex couples into marriage law would be justified if the courts were convinced that such a remedy fulfilled the purposes of the law and there was no other constitutional alternative other than same sex marriages. On the

other hand, the suspension of the reading in remedy as a form of prospective ruling could be justified if the courts concluded that same other alternative such as the creation of a "separate but equal" domestic partnership regime could be justified by the government either as not violating s. 15 or as justified under s. 1 of the Charter. [17] Courts concerned about the latter possibility could not make a full ruling on the constitutionality of the less than full marriage alternative, but they could be influenced by "constitutional hints" about whether such an alternative could be justified under the Charter. A further complication is that an immediate remedy could also have limited the response open to legislature by creating vested rights. In other cases, the court has suspended declarations of invalidity to avoid creating vested rights. [18] The creation of vested rights could inhibit subsequent legislation and the possible use of the override under s. 33 of the Charter because the override cannot be used with retroactive effect. [19] If the courts formed the view, as both the Ontario and British Columbia courts apparently did, that same-sex marriage was the only constitutionally required option, then the case for delay through a prospective ruling is much weaker. In such circumstances, the purposes of the Charter would be best served by an immediate remedy. [20] A suspension could be justified under a dialogic approach because it would allow the legislature a full opportunity to consider using the override and would not create vested rights that could not be retroactively removed through the use of the override. Courts should respect the entire constitutional structure, including the possibility of using the override when exercising remedial discretion. [21]

Footnotes

1 Miron v. Trudel, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693. See also Taylor v. Rossu (1996), 140 D.L.R. (4th) 562, 39 C.R.R. (2d) 362 (Alta. Q.B.), reversed in part (1998), 161 D.L.R. (4th) 266, 53 C.R.R. (2d) 219 (Alta. C.A.), where the Court of Queen's Bench read in common law spouses to Alberta legislation. The judge emphasized legislative intent, not Charter values, by concluding that "the Alberta Legislature would have provided for dependent spouses, even common law spouses, rather than see all of the dependent sources left without maintenance and support": Taylor v. Rossu (1996), 140 D.L.R. (4th) 562, 39 C.R.R. (2d) 362 (Alta. Q.B.), reversed in part (1998), 161 D.L.R. (4th) 266, 53 C.R.R. (2d) 219 (Alta. C.A.), at p. 569. The Alberta Court of Appeal rejected the reading in remedy and declared the provision invalid, subject to a 12-month delay. It was concerned about remedial precision in defining a common law spouse. It also concluded that the legislature should be given an opportunity to revisit the issues of support, common law unions and discrimination on the basis of marital status in other legislation. The Saskatchewan courts have also read in common law spouses to matrimonial property legislation: see Watch v. Watch (1999), 67 C.R.R. (2d) 311, (*sub nom.* C.L.W. v. G.C.W.) 182 Sask. R. 237 (Q.B.) at p. 245. In a subsequent case, Gruending, Re (1999), 170 D.L.R. (4th) 541 at pp. 557-8, 8 C.B.R. (4th) 246 (Alta. Q.B.), Veit J. refused to employ a reading in remedy to include common law spouses in insurance legislation on the basis that the courts should not interfere with legislative prerogatives and should allow the legislature an opportunity to redraft the legislation or use the notwithstanding clause. This remedial decision seems wrong in its refusal to follow the Supreme Court's use in *Miron v. Trudel* of reading in. It also ignores the fact that the legislature could always respond to the court's reading in remedy by using the notwithstanding clause. Reading in common law spouses to an undefined legislative provision of spouse was done in a subsequent case: Ferguson v. Armbrust (2000), 187 D.L.R. (4th) 367, 76 C.R.R. (2d) 342. In contrast where spouse was specifically defined to exclude common law spouses, the Nova Scotia Court of Appeal held that the provision should be struck down on the basis that "it is for the Legislature, not the court, to define with precision common law relationships so as to comply with the constitution": Walsh v. Bona (2000), 186 D.L.R. (4th) 50, 5 R.F.L. (5th) 188 (N.S.C.A.), additional reasons (2000), 186 D.L.R. (4th) 50 at 83, 7 R.F.L. (5th) 451, reversed [2002] 4 S.C.R. 325, (*sub nom.* Nova Scotia (Attorney General) v. Walsh) 221 D.L.R. (4th) 1.

2 Miron v. Trudel, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693, at p. 758. See also Grigg v. Berg Estate (2000), 186 D.L.R. (4th) 160, 71 C.R.R. (2d) 117 ([In Chambers]), additional reasons (2000), 186 D.L.R. (4th) 160 at p. 173, 76 C.R.R. (2d) 54 (S.C.) (reading in definition of common law spouse in new and unproclaimed legislation to existing unconstitutional legislation consistent with legislative intent and required to ensure that the successful applicant receive some remedy). Common law spouses have been read into statutes making married couples immune from testifying against each other, with the judge noting that such a remedy was relatively precise and consistent with the objectives of the legislation and the Charter: R. v. Masterson (2009), 245 C.C.C. (3d) 400, 69 C.R. (6th) 266 (S.C.J.)

3 Miron v. Trudel, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693.

4 Miron v. Trudel, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693.

5 The Ontario Court of Appeal had earlier reached a similar conclusion with respect to the omission of sexual orientation from the *Canadian Human Rights Code*. Krever J.A. stressed that "the remedy chosen must not only respect the role of the legislature but it must also promote the purposes of the Charter. In choosing the remedy one must look to the values and objectives of the Charter, because an appreciation of the Charter's deeper social purposes is central to the determination of remedy, especially when the impugned legislation confers a benefit on disadvantaged groups": Haig v. Canada (1991), 86 D.L.R. (4th) 617, 16 C.H.R.R. D/224 (Ont. Ct. (Gen. Div.)), reversed (1992), 94 D.L.R. (4th) 1 at 12, 16 C.H.R.R. D/226 (C.A.). He realized that reading in sexual orientation would require the human rights commission to spend more money on enforcement, but concluded that the remedy would not substantially change the nature of the legislative scheme: Haig v. Canada (1991), 86 D.L.R. (4th) 617, 16 C.H.R.R. D/224 (Ont. Ct. (Gen. Div.)), reversed (1992), 94 D.L.R. (4th) 1 at pp. 13-14 (C.A.), 16 C.H.R.R. D/226 (C.A.).

6 Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 at para. 166.

7 Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, at para. 166 (S.C.C.).

8 Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, at para. 167. The court also gave weight to a subsequent statement by a commission which reviewed the legislation, Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, at para. 170.

9 Governments can pass new legislation altering details of the reading in remedy which are not dictated by Charter rights. More fundamentally (Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, at para. 178 (S.C.C.)):

> Governments are free to modify the amended legislation by passing exceptions and defences which they feel can be justified under s. 1 of the Charter. Thus, when a court reads in, this is not the end of the legislative process because the legislature can pass new legislation in response … Moreover, the legislators can always turn to s. 33 of the Charter, the override provision, which in my view is the ultimate 'parliamentary safeguard".

10 Vriend v. Alberta, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385, at para. 176.

11 Rosenberg v. Canada (Attorney General) (1998), 158 D.L.R. (4th) 664, 4 Admin. L.R. (3d) 165 (Ont. C.A.), at para. 53; O.P.S.E.U. Pension Plan Trust Fund (Trustee of) v. Ontario (Management Board of Cabinet) (1998), 20 C.C.P.B. 38 (Ont. Ct. (Gen. Div.)), at p. 45 (reading in same sex couples to legislation affecting the tax status of pensions); Newfoundland (Human Rights Commission) v. Newfoundland (Minister of Employment & Labour Relations) (1995), 127 D.L.R. (4th) 694, 24 C.H.R.R. D/144 (N.L.T.D.) (reading in sexual orientation to Newfoundland's human rights code); M. (S.C.), Re (2001), 202 D.L.R. (4th) 172, 606 A.P.R. 362 (S.C.) (Reading in reference to same sex adoptions); K., Re (1995), 125 D.L.R. (4th) 653, 31 C.R.R. (2d) 151 (Ont. Prov. Div.) (reading in same sex couples to adoption legislation); Fraess v. Alberta (2005), 278 D.L.R. (4th) 187, 135 C.R.R. (2d) 158 (Alta. Q.B.) (reading in word "parent" to replace "male person" and "father"). In Tighe (Guardian ad litem of) v. McGillivray Estate (1994), 112 D.L.R. (4th) 201, 20 C.R.R. (2d) 54 (N.S.C.A.), the Nova Scotia Court of Appeal read in the words "or father" to legislation allowing children born out of wedlock to inherit from their biological mothers. Applying the criteria outlined in *Schachter*, Chipman J.A. stated that the benefits of the legislation should be extended to "the disadvantaged class" and that striking down the underinclusive legislation would be a greater intrusion on the legislative objective of allowing children to inherit from their parents than extending the legislation. Chipman J.A. concluded: "The remaining portion of the legislation will not be significantly changed by reading in. It will simply be saved. Reading in does not impose any intrusion into legislative budgetary decisions": Tighe (Guardian ad litem of) v. McGillivray Estate (1994), 112 D.L.R. (4th) 201, 20 C.R.R. (2d) 54 (N.S.C.A.), at p. 209. The court also dismissed the option of a delayed declaration of invalidity, noting that a previous decision declaring that the legislation was discriminatory did not result in any legislative action.

12 Hendricks v. Québec (Procureure générale), [2002] R.J.Q. 2506, [2002] R.D.F. 1022 (S.C.), varied 2003 CarswellQue 93 (C.A.), affirmed (2004), 238 D.L.R. (4th) 577, [2004] R.J.Q. 851 (C.A.).

13 EGALE Canada Inc. v. Canada (Attorney General) (2003), 228 D.L.R. (4th) 416, 2003 BCCA 406, at paras. 156 and 161.

14 Halpern v. Toronto (City) (2003), 225 D.L.R. (4th) 529, (*sub nom.* Halpern v. Canada (Attorney General)) 106 C.R.R. (2d) 329 (Ont. C.A.).

15 Halpern v. Toronto (City) (2003), 225 D.L.R. (4th) 529, (*sub nom.* Halpern v. Canada (Attorney General)) 106 C.R.R. (2d) 329 (Ont. C.A.), at paras. 150 and 152. Arguably, the test for justifying the use of prospective remedies should have applied. See now Hislop v. Canada (Attorney General), [2007] 1 S.C.R. 429, 278 D.L.R. (4th) 385 discussed §§ 14:50 to 14:50.

16 EGALE Canada Inc. v. Canada (Attorney General) (2003), 228 D.L.R. (4th) 416, 2003 BCCA 406, at para. 6.

17 Under Hislop v. Canada (Attorney General), [2007] 1 S.C.R. 429, 278 D.L.R. (4th) 385, discussed *below*, the government would have to justify the prospective ruling and the departure from the norm of immediate remedies as necessary to deal with a significant change in the law and good governance concerns.

18 See Guignard v. St-Hyacinthe (Ville), [2002] 1 S.C.R. 472, (*sub nom.* R. v. Guignard) 209 D.L.R. (4th) 549, at para. 32, for a situation where a delayed declaration was used to avoid allowing people to develop claims should an immediate remedy issue before the legislature had an opportunity to reformulate new constitutional restrictions on the use of signs. An alternative to prevent the accumulation of acquired rights might have been a stay of the judgment pending appeal.

19 Ford v. Québec (Procureur général), [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577.

20 A somber but logical footnote to the gay marriage cases was the decision in M. (M.) v. H. (J.) (2004), 247 D.L.R. (4th) 361, 125 C.R.R. (2d) 161 (Ont. S.C.J.), at para. 64 to read in a reference to two persons into the *Divorce Act* after the requirement that divorces be granted to married persons of the opposite sex was found unconstitutional. The court reasoned that the reading in remedy advanced the purpose of the legislature within the constraints of the Charter and that there was no need to remand the issue to Parliament to select among many possible policy responses.

21 See Kent Roach, "Dialogic Judicial Review and its Critics" (2004), 23 S.C.L.R. (2d) 49 at pp. 83-85.

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Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach

Joshua Sealy-Harrington

> I'm beautiful in my way, 'cause God makes no mistakes,
> I'm on the right track, baby I was born this way.
>
> Lady Gaga, *Born This Way* (23 May 2011)

I. INTRODUCTION

Lady Gaga's "Born This Way" brand of equality rights advocacy is premised, in part, on the injustice of being discriminated against because of personal characteristics beyond our control. Her political message has broad appeal and a long history.[1] From the suffragettes to Martin Luther King, Jr., many of the most influential civil rights advocates have made arguments that centred on so-called immutable personal characteristics. This popular attitude has also played a significant role in the evolution of equality rights under the *Canadian Charter of Rights and Freedoms*,[2] influencing the doctrine for determining grounds of discrimination analogous to those enumerated in section 15. However, what does it mean for a personal characteristic to be immutable, and should our understanding of discrimination be limited to such characteristics?

The case law on this question has suffered from a lack of conceptual clarity because of the Supreme Court of Canada's inconsistency with respect to the legal test it describes and applies. While the Court has

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1 The political message of opposing discrimination based on (allegedly) immutable characteristics such as sexual orientation persists in popular culture and the music industry. More recently than "Born This Way," Macklemore and Ryan Lewis released the single "Same Love" on 18 July 2012, which advocates for gay rights in the United States on the basis of the immutability of sexual orientation even more explicitly than Lady Gaga: "I can't change, even if I tried, even if I wanted to … I might not be the same, but that's not important, no freedom till we're equal, damn right I support it."

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

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applied many different tests, these can be grouped into three progressively expansive conceptions of immutability. The first, and narrowest, conception of immutability includes characteristics that are actually immutable (that is, unchangeable) along with those that are changeable only at unacceptable cost to personal identity. This narrow conception introduces the notion of constructive immutability but limits it to unacceptable costs to identity. The second and more expansive conception of immutability builds on the first by including as constructively immutable those characteristics that the government has no legitimate interest in pressing one to change. Finally, the third and broadest conception of immutability includes all of the above while adopting a wider account of factors beyond implications for personal identity that make a change difficult or costly and adds factors such as whether a characteristic is linked with vulnerability or historical disadvantage, or is present within human rights codes, into the analysis.

This article makes an argument in favour of this third and broadest conception of immutability. I argue that such a multi-variable approach to the recognition of analogous grounds is best for promoting substantive equality and is consistent with the jurisprudence. Others have criticized the Supreme Court of Canada's approach to identifying analogous grounds, but their alternative approaches are not grounded in the jurisprudence. I extend the argument by directing it towards an alternative approach emerging from the leading precedents on the identification of analogous grounds under section 15. Following Carl Stychin[3] and Cheryl Harris,[4] I argue that a multi-variable approach promotes a more sophisticated discourse regarding identity. Drawing on Emily Luther[5] and Martha Jackman,[6] I argue that a multi-variable test allows for the most expansive protection against discrimination and the greatest promotion of substantive equality.

I start by setting out the doctrinal developments in order to demonstrate the lack of clarity in the Court's use of the term "immutable." Since the Court's current legal test is unclear, I criticize the first and least inclusive test and contrast it with the final and most

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3 Carl Stychin, "Essential Right and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Can JL & Jur 49.

4 Cheryl I Harris, "Whiteness as Property" in Kimberle Crenshaw et al, eds, *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995) 276.

5 Emily Luther, "Justice for All Shapes and Sizes: Combatting Weight Discrimination in Canada" (2010) 48 Alta L Rev 167.

6 Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian *Charter* and Human Rights Law" (1994) 2:1 Rev Const Stud 76.

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expansive multi-variable analysis to illustrate the need for the latter. Based on a discussion of identity and how it should be understood in light of the goal of promoting substantive equality, I argue that a multi-variable approach promotes superior discourse, whereas a narrow immutability approach oversimplifies identity and effectively narrows the conception of discrimination targeted by section 15. Finally, I demonstrate the superiority of a multi-variable approach by showing how it more effectively encapsulates the currently protected grounds of discrimination, recognizes intersectional analogous grounds, and prevents discrimination based on weight and poverty, two equality claims on the horizon.

II. DESCRIBING IMMUTABILITY

Section 15(1) prohibits only discrimination that is based on protected grounds, whether enumerated or analogous. The enumerated grounds consist of the following personal characteristics: race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. The analogous grounds are an open set of personal characteristics that are comparable to the enumerated grounds.[7] Many personal characteristics fall outside of the protection of section 15. Consequently, an area of controversy in equality jurisprudence focuses on which personal characteristics ought to be protected and which criteria the courts should use to identify them.[8] Among the many factors inconsistently relied on by the Court, immutability is the factor used most frequently.

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[7] *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 33, [2011] 1 SCR 396 [*Withler*]. The grounds approach to identifying discrimination has received near-universal acceptance from the Supreme Court of Canada. See, for example, *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 39, 170 DLR (4th) 1 [*Law*]; *R v Kapp*, 2008 SCC 41 at para 37, [2008] 2 SCR 483 [*Kapp*]; Peter Hogg, *Constitutional Law of Canada*, 5th edition (Toronto: Thompson Reuters, 2007): "[T]he restriction of s 15 to listed and analogous grounds is a permanent feature of the s 15 jurisprudence" (chapter 55 at 22). However, some judges and scholars have expressed alternative approaches to equality rights. See, e.g., *Egan v Canada*, [1995] 2 SCR 513 at 548-52, 124 DLR (4th) 609 (L'Heureux-Dubé J, dissenting) [*Egan*]; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill LJ 627; Stychin, *supra* note 3 at 65.

[8] See, for example, Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Canadian Journal of Women and the Law 37; Stychin, *supra* note 3; Gilbert, *supra* note 7.

A. *Corbiere v Canada (Minister of Indian and Northern Affairs)*: A Foundation for Immutability

A clear understanding of the Supreme Court of Canada's current approach is necessary before evaluating its merit. The leading case on the test for identifying analogous grounds is *Corbiere v Canada (Minister of Indian and Northern Affairs)*, in which immutability was the central focus.[9] A close analysis of the decision reveals the ambiguity in the analytical framework established by the majority judgment—this ambiguity was compounded by the majority's implicit acceptance of the reasoning of the concurring judgment of Justice Claire L'Heureux-Dubé.

Corbiere was a status Indian belonging to the Batchewana First Nation. Like two-thirds of the Batchewana band members, he did not live on the band's reserve land and therefore was not permitted to vote in band elections. Corbiere challenged section 77(1) of the *Indian Act*, which limits the right to vote to band members who are "ordinarily resident on the reserve."[10] He argued that section 77 violated his *Charter* equality rights because "Aboriginality-residence" was analogous to the legal grounds of discrimination enumerated in section 15.

The majority judgment in *Corbiere* identifies three types of personal characteristics that fall within the concept of immutability and provide the foundation for a discussion of the test for identifying analogous grounds. To begin with, the majority refers to "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."[11] This quote identifies two categories of personal characteristics: actually immutable ones[12] and ones that are changeable (or mutable) but only at an unacceptable cost to personal identity.

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[9] [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*]. More recently, in *Withler*, *supra* note 7 at para 33, the Supreme Court of Canada affirmed the approach in *Corbiere*. However, because *Withler* involved discrimination on the basis of the enumerated ground of age, the discussion of analogous grounds was minimal. One Court decision following *Withler* mentions analogous grounds but does not meaningfully discuss them in any way that assists our understanding of the identification of analogous grounds. The judgment skips the identification of an analogous ground and denies the equality claim because the group of farm workers involved in that case did not prove that they had been disadvantaged. See *Fraser v Ontario,* 2011 SCC 20, [2011] 2 SCR 3 at para 116: "[I]t has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the *AEPA* is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature."

[10] RSC 1985, c I-5.

[11] *Corbiere*, *supra* note 9 at para 13, cited in *Withler, supra* note 7 at para 33.

[12] Immutability is the central concept of analogous grounds. Thus, describing a characteristic simply as "immutable" in the context of section 15 jurisprudence is an imprecise statement comprising different, more specific conceptions of immutability.

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The majority judgment goes on to say:

> [T]he thrust of identification of analogous grounds … is to reveal grounds based on *characteristics that we cannot change or that the government has no legitimate interest in expecting us to change* to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on *grounds that are actually immutable, like race, or constructively immutable, like religion.*[13]

This passage does two things. First it introduces a third category of personal characteristics, those "the government has no legitimate interest in expecting us to change." Second, it places those characteristics into the category of constructively immutable characteristics.[14] Since characteristics that can be changed, but only at high cost, are also constructively immutable, the innovation in this passage seems to be to extend the notion of constructive immutability.

These passages leave us with three types of characteristics that fall within the scope of analogous grounds: (1) actually immutable characteristics, (2) characteristics that are changeable but at an unacceptable cost to personal identity, and (3) characteristics that the

To clarify this conceptual ambiguity, I have added the qualifier "actually" to this category here.

[13] *Corbiere, supra* note 9 at para 13 [emphasis added]. The Court has failed to engage with a proper understanding of race. See, for example, *Kapp, supra* note 7 at para 29, where McLachlin CJ and Abella J describe Aboriginality as a race. The Court's understanding of race as an immutable characteristic like national origin is problematic given that race is socially constructed. The mutability of another enumerated ground, colour, helps to illustrate the construction of race. See Robert Leckey, "Chosen Discrimination" (2002) 18 Sup Ct L Rev (2d) at 450, n 17: "Race's social construction makes me uneasy listing it as immutable. Not only the effects ascribed to race, but also racial identities are contingent and variable. Someone considered 'white' in South America may be considered 'Hispanic' in the United States."

[14] See Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" in Sanda Rodgers and Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Canada: LexisNexis, 2010) 129 at 151. The examples provided in the paragraph support the accuracy of this inference. Race is described as "actually immutable" and is considered by the Court to be a personal characteristic that we cannot change. Alternatively, religion is described as "constructively immutable," and it would be reasonable to describe a government expectation of changing a personal characteristic such as religion as illegitimate (*Corbiere*, *supra* note.9 at para 13).

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government has no legitimate interest in expecting us to change. The second and third possibilities make up the category of constructively immutable. The abstract notion of "immutability" is relevant to all three types of characteristics. The first aligns with a dictionary definition of immutability.[15] By contrast, the second and third categories set out a broader understanding of immutability, including the cost of changing a characteristic and the legitimacy of the government expecting us to do so.

The application of the test to the potential ground of Aboriginality-residence provides further insight into the Supreme Court of Canada's approach. The Court describes Aboriginality-residence as "constructively immutable," like religion and citizenship. The majority's reference to religion and citizenship suggests that it views constructively immutable characteristics as being linked to identity, community, and personal values. This link is what makes the cost of change unacceptable and the government's interest in change illegitimate. Next, the Court describes Aboriginality-residence as "essential to a band member's personal identity" and changeable "only at a great cost."16 These are the only statements in which the Court actually analyzes the constructive immutability of Aboriginality-residence, and the only insight gained from this analysis is from the reference to "great cost," which suggests a threshold that must be met to count as an "unacceptable cost."

The Supreme Court of Canada never fully defines any of these types of immutability. For example, what it means for a personal characteristic to be actually immutable is never set out. Immutability might refer to the impossibility of a characteristic changing or the impossibility of a person controlling its change at will, but it is unclear whether the Court is referring to one or both of these. The notion of unacceptable cost to personal identity also lacks definition. In what way is a cost deemed to be unacceptable and according to whose perspective: the claimant's, the court's, or someone else's? Finally, how does the court determine that a government interest is legitimate and how does this decision differ from determining whether the interest is "pressing and substantial" under section 1?[17] All of these questions are at the heart of a robust

[15] The *Concise Oxford English Dictionary* defines immutable as "not changing or able to be changed." *Concise Oxford English Dictionary,* 12th edition (Oxford: Oxford University Press), *sub verbo* "immutable." The jurisprudence has not adhered to a dictionary definition of immutability. See *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703 at para 27, 186 DLR (4th) 1 [*Granovsky*]. Nevertheless, reviewing the dictionary definition explains why "immutable" is a confusing word for the courts to use given the extent to which they have deviated from the usual understanding of immutability.

[16] *Corbiere, supra* note 9 at para 14.

[17] *R v Oakes*, [1986] 1 SCR 103 at para 69, 26 DLR (4th) 200.

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understanding of these immutability categories but are left unanswered in *Corbiere*.

These ambiguities are exacerbated because the majority tacitly accepts the reasoning in the concurring judgment of L'Heureux-Dubé J, which was based on a broader understanding of immutability. The majority states that "L'Heureux-Dubé J's discussion makes clear that the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship."[18] This statement suggests that L'Heureux-Dubé J's reasoning fits within the analytical framework established by the majority but is unclear whether all of her argument is relevant or only those parts directly addressing the constructive immutability of Aboriginality-residence. The majority makes a point of commenting on "the criteria that identify an analogous ground" and hints at having a different approach from L'Heureux-Dubé J, but then never expressly rejects any of the factors she considers.[19]

Whereas the majority outlines a narrower conception of immutability for identifying analogous grounds, L'Heureux-Dubé J sets out a broad multi-variable approach to immutability, according to which the "fundamental consideration … is whether recognition of the basis of differential treatment as an analogous ground would further the purposes of s 15(1)," namely preventing violations of human dignity.[20] L'Heureux-Dubé J then sets out "various contextual factors … that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential."[21] These factors include personal significance, immutability, difficulty of change, cost of change, vulnerability to being overlooked, historical disadvantage, and whether the ground is included in human rights codes.[22] This test includes both actual and constructive immutability, as in the majority's approach, but is not confined by them. Additionally, L'Heureux-Dubé J considers these

[18] *Corbiere*, *supra* note 9 at para 14.
[19] *Ibid* at paras 6 and 13.
[20] *Ibid* at paras 58-9. Human dignity as a test for identifying analogous grounds has been rejected by the Supreme Court of Canada: *Kapp, supra* note 7 at paras 21-2. However, this rejection was due to dignity being an unworkable test. The Court still recognizes its enduring significance of dignity as the underlying purpose of section 15. Consequently, I argue that L'Heureux-Dubé J's reliance on dignity does not undermine the precedential value of her test.
[21] *Corbiere*, *supra* note 9 at para 60.
[22] *Ibid* [emphasis in the original].

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factors to be non-exhaustive and does not consider any of the above factors to be "*necessary* for the recognition of an analogous ground."[23]

The majority does not explicitly reject factors such as vulnerability or historical disadvantage but, rather, regards them as "flow[ing] from the *central* concept of immutable or constructively immutable personal characteristics."[24] Again, this statement suggests that some of L'Heureux-Dubé J's factors fit within the majority's analytical framework, but it is unclear which factors are included and whether an independent analysis of them adds value under the majority's approach. Stating that these other factors "flow from" immutability and constructive immutability could be interpreted either to signal an expansive conception of constructive immutability capacious enough to encompass L'Heureux-Dubé J's list along with new additions as they crop up or to indicate that factors such as vulnerability and historical disadvantage are relevant only insofar as they are connected to actual and constructive immutability in a narrow sense. It is not clear from the judgment whether the majority endorses either of these interpretations.

A final source of confusion from Corbiere is the absence of a clearly defined perspective from which to perform the legal analysis of analogous grounds. Both the majority and the concurring judgments hint at the consideration of a perspective that is not purely objective. For example, the majority considers only Aboriginality-residence to be an analogous ground and not the ordinary residence decisions "faced by the average Canadian" due to the "the profound decisions Aboriginal band members make to live on or off their reserves."25 These statements necessarily take into account the relative perspectives of Aboriginals and non-Aboriginals. Moreover, in the concurring judgment, L'Heureux-Dubé J refers to the perspective of "a reasonable person in the position of the claimant," which is also not a purely objective approach.26 The legal test in Corbiere is replete with conceptual ambiguities. These ambiguities are not resolved by the rest of the jurisprudence, but an examination of the case law does show a general trend towards the acceptance of a multi-variable approach to identifying analogous grounds.

[23] *Ibid* [emphasis in the original].
[24] *Ibid* at para 13 [emphasis added].
[25] *Ibid* at para 15.
[26] *Ibid* at para 60.

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B. Case Law beyond *Corbiere:* Shaping the Boundaries of Immutability

The Supreme Court of Canada has recognized only a few analogous grounds: citizenship,27 marital status,28 Aboriginality-residence,29 and sexual orientation.30 It has rejected occupation,31 province of residence,32 and substance orientation33 as analogous grounds. A discussion of cases both before and after Corbiere demonstrates that there is considerable support in both lines of jurisprudence for a multi-variable approach to analogous grounds.

*1. Pre-*Corbiere *cases*

Andrews was the first section 15 case to recognize a new analogous ground (citizenship).[34] Justice William McIntyre, writing for the majority on the section 15 analysis (but dissenting in the result), makes no mention of immutability. Instead, McIntyre J states that "distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape a charge of discrimination."[35] McIntyre J's description of non-citizens as "vulnerable to having their interests overlooked" and as a "discrete and insular minority who come within the protection of s 15" is the only hint of factors later flagged in *Corbiere* for identifying analogous grounds.[36] However, the key point to take away from *Andrews* is not the limits on the scope of analogous grounds, which the majority expressly states are unnecessary in this case[37] but, rather, the implicit understanding that analogous grounds cannot be limited to actually immutable characteristics given the Court's unanimous recognition of citizenship as an analogous ground.[38]

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27 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].
28 *Miron v Trudel*, [1995] 2 SCR 418 at para 156, 124 DLR (4th) 693 [*Miron*]; *Walsh v Bona*, 2002 SCC 83 at para 32, [2002] 4 SCR 325 [*Walsh*].
29 *Corbiere*, *supra* note 9.
30 *Egan*, *supra* note 7.
31 *Baier v Alberta*, 2007 SCC 31 at paras 63-7, [2007] 2 SCR 673 [*Baier*].
32 *R v Turpin*, [1989] 1 SCR 1296, 48 CCC (3d) 8.
33 *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571.
34 *Andrews, supra* note 27 at 183.
35 *Ibid* at 174-5
36 *Ibid* at 183.
37 *Ibid*.
38 *Ibid* at 31 (per Wilson J); at 152 (per McIntyre J); at 197 (per La Forest J).

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In 1995, a trilogy of equality cases came before the Supreme Court of Canada: *Egan*,[39] *Miron*,[40] and *Thibaudeau v Canada*.[41] While there is substantial disagreement within the Court in these cases, which is reflected in thirteen separate judgments being written, the majority of the Court on the section 15 issue affirms a multi-variable approach in the two cases where a grounds discussion is considered relevant to the resolution of the decision.[42] In *Egan*, a majority (split between the judgments of Justice Peter Cory and L'Heureux-Dubé J) finds a violation of section 15 and recognizes sexual orientation as an analogous ground.[43] Cory J accepts an approach to section 15 premised on the fundamental consideration of human dignity. He recognizes historical disadvantage, vulnerability, whether the group is a discrete and insular minority, and legislative and judicial consensus as relevant factors in identifying analogous grounds.[44]

L'Heureux-Dubé J rejects the enumerated and analogous grounds approach to section 15 but acknowledges the relevance of the factors considered by Cory J when describing the nature of the group affected by discriminatory government legislation,[45] the first step in her distinctive approach to section 15.[46] L'Heureux-Dubé J also considers the relevance of personal significance when identifying discrimination.[47] In *Miron*, a majority of the court (split between the judgments of Justice Beverley McLachlin, as she then was, and L'Heureux-Dubé J) finds a violation of section 15 and recognizes marital status as an analogous ground. McLachlin J recognizes the relevance of historical disadvantage, whether the group constitutes a discrete and insular minority, immutability, comparisons with the enumerated grounds, and recognition by legislators

[39] *Egan, supra* note 7.
[40] *Miron, supra* note 28.
[41] [1995] 2 SCR 627, 124 DLR (4th) 449 [*Thibaudeau*].
[42] In *Thibaudeau*, *ibid*, a majority (split between the judgments of Sopinka J, Gonthier J, and Cory and Iacobucci JJ) found that there was no burden imposed by provisions of the *Income Tax Act* thus making a discussion of analogous grounds unnecessary in their ruling.
[43] While Cory, Iacobucci (concurring) and L'Heureux-Dubé JJ were only three of the nine justices of the Supreme Court of Canada in *Egan*, *supra* note 7, they represented a majority on the section 15 issue because both Sopinka and McLachlin JJ agreed with Cory and Iacobucci JJ on the section 15 violation.
[44] *Egan*, *supra* note 7 at 599 (per Cory J).
[45] While L'Heureux-Dubé J does not state in *Egan*, *supra* note 7, that she considers legislative or judicial consensus relevant to analogous grounds, she does discuss it in the companion case *Miron*, *supra* note 28 at para 100, and expressly recognizes its relevance in *Corbiere*, *supra* note 7 at para 60.
[46] *Egan*, *supra* note 7 at 554.
[47] *Ibid* at 544 and 554.

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and jurists that the ground is discriminatory.[48] L'Heureux-Dubé J reaffirms her approach in *Egan* and considers historical disadvantage, whether the group is a discrete and insular minority, personal significance, and recognition by legislators and jurists that the ground is discriminatory.[49] Thus, pre-*Corbiere*, a multi-variable approach was consistently employed by a majority of the Court.

2. Post-Corbiere Cases

Following *Corbiere*, there have been a series of rejected claims for new analogous grounds with minimal development of the Court's approach. In *Delisle v Canada*[50] and *Baier v Alberta,*[51] the Supreme Court of Canada rejects occupation as an analogous ground. In both decisions, the Court bases its reasoning on the mutability of occupation and the absence of historical disadvantage or vulnerability among these two groups, thereby supplementing the recognition in the pre-*Corbiere* jurisprudence of a broader set of factors beyond immutability as relevant when identifying analogous grounds under section 15.[52] *Withler* is the most recent Supreme Court of Canada decision to mention analogous grounds, but it does so only in passing because it addressed discrimination based on age, an enumerated ground. *Withler* defines analogous grounds narrowly as characteristics that are actually immutable or "changeable only with unacceptable cost to personal identity."[53] There is no mention of illegitimate government interests (from *Corbiere*) or other factors such

[48] *Miron*, *supra* note 28 at para 148.
[49] *Ibid* at paras 91, 93-4, 97.
[50] [1999] 2 SCR 989, 176 DLR (4th) 513 [*Delisle*]. In *Delisle,* the president of an RCMP member association argued that the exclusion of RCMP members from multiple labour acts violated sections 2(d), 2(b), and 15(1) of the *Charter*.
[51] *Supra* note 31. In *Baier*, three teachers argued that legislation prohibiting a school employee from concurrently holding a position with an Alberta school board as both an employee and trustee violated sections 2(b) and 15(1) of the *Charter*.
[52] In *Delisle*, *supra* note 50 at para 44, the Court stated: "It is not a matter of functionally immutable characteristics in a context of labour market flexibility. A distinction based on employment does not identify, here, 'a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality' (Corbière, at para. 8), in view in particular of the status of police officer in society." In *Baier*, *supra* note 31 at para 65, the Court stated, "[n]either the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics." The Court went on to say that school employees are not a "discrete and insular minority" and that distinguishing school employees will not be likely to result in discrimination.
[53] *Supra* note 7 at para 33.

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as historical disadvantage that have been repeatedly considered by the Court in other cases.

C. Conclusion to the Descriptive Question: A Consistently Affirmed Multi-Variable Approach

The preceding discussion makes clear that the jurisprudence has consistently recognized the relevance of all of the factors considered by L'Heureux-Dubé J in *Corbiere*. In determining whether a personal characteristic should be protected under section 15, the Supreme Court of Canada has consistently considered whether this characteristic is immutable,[54] personally significant or associated with unacceptable personal costs when changed,[55] difficult to change,[56] related to historical disadvantage[57] or vulnerability,[58] linked to a discrete and insular minority,[59] or recognized by jurists or legislators as a basis for discrimination.[60] Scholarship regarding analogous grounds has also reflected the relevance of factors beyond immutability and, at times, beyond constructive immutability.[61]

In *Corbiere*, the leading precedent for analogous grounds, the Court defines an analogous ground as a personal characteristic that is either (1) actually immutable or (2) constructively immutable (a characteristic whose change results in unacceptable cost to personal identity or engages illegitimate government interests). While this leading precedent does not

[54] See *Andrews*, *supra* note 27 at 195; *Miron*, *supra* note 28 at para 158 (per McLachlin J); *Delisle*, *supra* note 50 at para 44; *Baier*, *supra* note 31 at para 65.

[55] See *Andrews*, *supra* note 27 at 195; *Miron*, *supra* note 28 at para 161 (per McLachlin J); *Egan*, *supra* note 7 at 554 (per L'Heureux-Dubé J).

[56] See *Andrews*, *supra* note 27 at 195; *Miron*, *supra* note 28 at para 163 (per McLachlin J).

[57] See *Miron*, *supra* note 28 at para 158 (per McLachlin J); *Egan*, *supra* note 7 at 554 (per L'Heureux-Dubé J); *Delisle*, *supra* note 50 at para 44; *Baier*, *supra* note 31 at para 65.

[58] See *Andrews*, *supra* note 27 at 152; *Egan*, *supra* note 7 at 554 (per L'Heureux-Dubé J).

[59] See *Andrews*, *supra* note 27 at 152; *Miron*, *supra* note 28 at para 158 (per McLachlin J); *Egan*, *supra* note 7 at 554 (per L'Heureux-Dubé J) and 599 (per Cory and Iacobucci JJ).

[60] See *Miron*, *supra* note 28 at para 158 (per McLachlin J); *Egan*, *supra* note 7 at 602 (per Cory and Iacobucci JJ).

[61] Luther, *supra* note 5 at 183 and 184, bases her argument for the recognition of weight as an analogous ground on immutability and historical disadvantage. Additionally, her discussion engages other factors such as difficulty of change, personal significance, and unacceptable personal costs. Hogg, *supra* note 7, chapter 55 at 83 and 87, implicitly accepts the notion of unacceptable costs and difficulty of change in his discussion of constructive immutability regarding occupation in *Delisle*, *supra* note 48, and *Baier*, *supra* note 31. Finally, Dale Gibson, "Analogous Grounds of Discrimination under the Canadian *Charter*: Too Much Ado about Next to Nothing" (1991) 29 Alta L Rev 772 at 787, implicitly recognizes the factor of difficulty of change while deconstructing the boundaries of constructive immutability.

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explicitly rely on factors such as historical advantage, the judgment itself and the case law following *Corbiere* both make clear that the Court recognizes that other factors may be relevant. The majority judgments of the Court have never expressly rejected the relevance of factors considered by L'Heureux-Dubé J in *Corbiere*, and the absence of discussion of some of these factors in recent case law, when coupled with their consistent recognition in previous decisions, affirms their ongoing relevance to a section 15 analysis.

Still, many terms have been left undefined, resulting in a lack of clarity. The Court has never thoroughly defined what it really means for a characteristic to be actually or constructively immutable, leaving scholars and practitioners without a clear set of criteria to attempt to satisfy when arguing for novel analogous grounds. For example, L'Heureux-Dubé J states in *Egan* that "the common characteristics of all of the enumerated grounds other than religion is that they involve so-called 'immutable' characteristics."[62] However, how would the Court characterize the actual immutability of generally stable, yet changeable, enumerated grounds such as sex and colour? How would the Court characterize the immutability of enumerated grounds that change over time but often due to factors beyond our control, such as age and temporary disability? With respect to potential analogous grounds, how would the Court characterize the actual immutability of characteristics that are difficult, but not impossible, to change, such as weight and poverty? To date, an adequate answer to these questions remains elusive, and they must be discussed further to develop a robust and predictable approach to analogous grounds.

Furthermore, the Court has at times allowed for a very flexible and thus unpredictable understanding of immutability. For example, McLachlin J in *Miron* describes marital status as immutable "albeit in an attenuated form" because "it often lies beyond the individual's effective control."[63] The spectrum from actual immutability (national origin) to attenuated immutability (marital status) is broad and vague and needs further definition for greater clarity.

Constructive immutability also has a very unclear scope. The Court has rejected occupation and province of residence as analogous grounds, but the analysis of their constructive immutability has been sparse. Why is the cost of naturalizing unacceptable while the cost of abandoning a lifelong career acceptable? Why is the government's expectation that a

[62] *Egan, supra* note 7 at 550.
[63] *Miron*, *supra* note 28 at para 73.

French Canadian move outside of Quebec for employment legitimate, but the expectation that a common law couple get married to qualify for benefits illegitimate?[64] These questions are central to the approach established in *Corbiere*, but the Court's discussion of such issues has been very limited. The lack of conceptual clarity is not the only problem with the immutability test. Other arguments have been directed against the consideration of immutability within the context of equality rights, a topic to which this article will now turn.

III. CRITICIZING IMMUTABILITY: SHOULD NARROW IMMUTABILITY BE THE APPROACH TO IDENTIFYING ANALOGOUS GROUNDS?

The Supreme Court of Canada's approach to identifying analogous grounds has suffered from imprecision, ranging from a broad "multi-variable" approach applied in *Miron,* which considers a non-exhaustive list of factors, to a "narrow immutability" approach outlined in *Withler*, which mentions only actual immutability and unacceptable costs to personal identity. Contrasting these two approaches illustrates the superiority of a multi-variable approach and demonstrates the need for the Court to explicitly affirm it. This article will criticize the effectiveness of the narrow immutability test in two steps. First, it will describe the concept of identity, which is central to any discussion of equality, and explain how a full appreciation of the importance of identity demands a multi-variable approach. Second, it will criticize the narrow immutability test by comparing it with a multi-variable approach in two ways. First, it will describe the discursive superiority of a multi-variable approach, discussing how a multi-variable approach promotes more empowering discourse about identity by recognizing the complexity of identity construction and not counteracting the efforts of minorities who attempt to avoid discrimination. Second, it will demonstrate the superiority of a multi-variable approach by applying it to the currently recognized protected grounds, intersectional forms of discrimination, and emerging equality claims based on weight and poverty.

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[64] An astute description of these different instances of constructive immutability is provided by Gibson, *supra* note 61 at 787:

> It would be highly fictitious to tell a native trapper from the Northwest Territories, or the spouse of a Nova Scotia fisherman, or a francophone shop clerk from Trois Rivières, that they are free to move anywhere in Canada. Because of the powerful deterrents to migration that so frequently exist in the real world, a person's place of residence is for many an 'immutable' characteristic … In many cases it is little less so than citizenship.

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A. Identity and the Pursuit of Equality beyond Immutability

Identity factors heavily into the Supreme Court of Canada's approach to analogous grounds. For example, in *Corbiere*, Aboriginality-residence is recognized as an analogous ground because it is "essential to personal identity." However, what does personal identity mean? My analysis of identity will revolve around the question of the kinds of changes a person should accept and can accommodate.[65] This legal understanding of identity, which is evidential rather than constitutive, is well suited to a discussion of the pursuit of substantive equality, which the Court has recently affirmed as the "animating norm" of section 15.[66] Evidential criteria of identity are what we use in our everyday practices of identification—they allow for a discussion of identity without going into deep philosophical discussions about how the self is constituted. The pursuit of substantive equality seeks the prevention of disadvantage.[67] Thus, different approaches to section 15 must be adjudicated through a "substantive contextual approach,"[68] which recognizes that government action should never result in prejudice or disadvantage to people as a result of irrelevant personal differences. How we standardly identify others and the effects this identification has on them are pertinent to an equality rights discussion.

Equipped with a substantive contextual approach and an identity analysis that emphasizes both the ability to change and the normative implications of being coerced into changing, the inadequacy of a discussion predicated entirely on narrow immutability becomes clear. For example, what should a discussion of poverty as an analogous ground take into consideration? Focusing on either the mutability of poverty (that is, on the occasional ability for the poor to escape poverty) or the cost of escaping it (which makes little sense since escaping poverty is generally desirable and thus not costly) to the exclusion of factors such as the historical disadvantage experienced by the poor and their economic and political vulnerability fails to consider the substantive contextual approach that the Court has adopted. It also fails to consider that the unlikely possibility of escaping poverty is not equivalent to the poor being able to easily accommodate such a change. Thus, a better approach must consider not only narrow immutability but also any factor

[65] Carsten Korfmacher, "Personal Identity," Internet Encyclopedia of Philosophy (29 May 2006), online: Internet Encyclopedia of Philosophy <http://www.iep.utm.edu/person-i/>.
[66] *Withler*, *supra* note 7 at para 2.
[67] *Law*, *supra* note 7 at para 51.
[68] *Ibid* at para 43.

that contributes to a contextual understanding of the experience of prejudice and disadvantage. The Court has often hinted at an approach that is broader than narrow immutability, but it must explicitly recognize other factors to ensure that these are considered consistently in future considerations of new potentially analogous grounds.

L'Heureux-Dubé J's multi-variable approach to analogous grounds in *Corbiere* makes the most promising move in the right direction. L'Heureux-Dubé J identifies a non-exhaustive list of factors to be considered when identifying analogous grounds, all of which contribute to a greater appreciation of the diverse ways in which people can experience prejudice and disadvantage. L'Heureux-Dubé J outlines her approach as follows:

> An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground … It is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked … Another indicator is whether the ground is included in federal and provincial human rights codes … Other criteria, of course, may also be considered in subsequent cases, and none of the above indicators are *necessary* for the recognition of an analogous ground or combination of grounds.[69]

This multi-variable approach is far better than narrow immutability at answering the question: "What kinds of changes should a person accept and can a person accommodate?" On the narrow approach, people should accommodate changes to their personal characteristics when it is possible for them to change and they do not suffer unacceptable costs to personal identity.

Many potential grounds of discrimination struggle to satisfy this test. For example, escaping drug addiction is possible (though "very difficult"[70]) and becoming someone who is no longer an addict does not

[69] *Corbiere*, *supra* note 9 at para 60 [emphasis in the original].

[70] See, for example, *R v Nikolovski* (2002), 104 CRR (2d) 126 at para 164, 2002 CarswellOnt 4483 (Sup Ct): "[G]aining control of a long-term crack cocaine addiction will be very difficult, requiring strict controls and meaningful treatment."

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result in unacceptable cost to personal identity.[71] If anything, being a drug addict is the cost and escaping addiction the benefit. By contrast, on a multi-variable test, it is fairly easy to argue that addiction is difficult to change and that addicts have suffered historical disadvantage and are a vulnerable group in society. Additionally, because the multi-variable approach considers, among other things, immutability and personal significance, it encapsulates grounds that would be recognized by the narrow immutability criteria (for example, immutability and cost to personal identity). Consequently, the narrow immutability test is subsumed within the multi-variable approach, and there is no concern that the different factors under a multi-variable approach would fail to recognize any analogous grounds that would be recognized by a narrow approach.

The multi-variable approach is not without its own flaws. A review of the factors included in L'Heureux-Dubé J's test shows that many of them are themselves difficult to analyze. However, it is possible to tease out a clearer understanding of what is meant by each factor by reference to the enumerated or currently protected analogous grounds. This discussion makes it clear that none of these factors should be relied on exclusively as an indicator for when the Court should recognize a new analogous ground.[72] However, when relied on in concert, the factors under a multi-variable approach fill in the gaps left by the other factors and result in a more robust test than the narrow immutability approach.

Personal significance (or, as L'Heureux-Dubé J puts it in *Corbiere*, the "fundamental nature of the characteristic") is the most difficult factor to analyze.[73] Whether a personal characteristic is significant is complicated because assessing similar, deeply personal issues is a subjective inquiry according to constitutional jurisprudence generally.[74] To not discuss

[71] While I recognize that addiction could also be considered to fit within the enumerated grounds (disability), this discussion is simply meant to illustrate the greater versatility in a multi-variable approach.

[72] The benefit of not relying on a single factor when applying a multivariable approach is reflected in the Court's reasoning. See, for example, *Miron*, *supra* note 28 at para 156, where, following a consideration of personal significance, historical disadvantage, immutability, and legislative and juristic consensus, McLachlin J posited that "[t]hese considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the *Charter*."

[73] *Corbiere, supra* note 9 at para 60.

[74] See, for example, *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 46, [2004] 2 SCR 551, where, when discussing another deeply personal characteristic, religion, Justice Frank Iacobucci explicitly endorses a subjective test for freedom of religion, stating:

significance subjectively removes any human element from section 15 and fails to recognize the unique experience of discrimination faced by many Canadians. However, subjective considerations, such as the rejected human dignity test from *Law*, are admittedly complicated as legal tests.[75]

Purely objective legal tests also have problems. For example, identifying characteristics essential to identity or describing unacceptable personal costs through an objective lens by making assumptions about groups facing discrimination relies on broad generalizations, which themselves may reinforce prejudice.[76] The relevance of personal characteristics to identity is heavily influenced by socially constructed values, and many personal characteristics have shared (albeit contested) social meanings. Thus, an objective approach that is willing to interrogate the perspective of particular communities (for example, religion is significant to the devout, residence is significant to Aboriginals) may adequately balance the need for an accurate, while also manageable, approach to identifying significant personal characteristics. The factor of personal significance, even when applied objectively, resonates with the currently recognized protected grounds. For many people, all or most of the characteristics identified by the protected grounds play a substantial role in defining who they are, and to be forced to change any of these would result in unacceptable cost to personal identity.

Difficulty and cost of change also strengthen the multi-variable approach to identifying analogous grounds. These two factors enable a more robust understanding of the barriers that prevent people from changing a characteristic and the unfairness that results from such a change when coerced by government actions. The harms of discrimination in the context of enumerated grounds (such as sex) and analogous grounds (such as citizenship) cannot be fully appreciated without consideration of the personal, financial, and logistical barriers that confront individuals attempting to change their sex or citizenship.

> freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

[75] *Law, supra* note 7.

[76] To claim that a personal characteristic is essential to a group's identity in the abstract (see *Corbiere*, *supra* note 9 at para 14) fails to fully appreciate how widely the significance of personal characteristics can vary between individuals, even within small groups.

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For example, changing citizenship status is difficult not only because of the cost to identity but also because of the barriers to changing citizenship that often lie beyond an individual's control. Additionally, the unfairness of experiencing discrimination because of a characteristic over which an individual exercises no control (an actually immutable characteristic) persists with characteristics over which an individual exercises minimal control.

The consideration of historical disadvantage—or what Dale Gibson calls "prior group disadvantage"—helps to ensure that equality rights "should accrue to the members of certain disadvantaged groups" and that "a finding of discrimination will … in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."[77] Like the other factors, the consideration of historical disadvantage in identifying analogous grounds has strengths and weaknesses. Its key strength is that it effectively characterizes all of the enumerated and analogous grounds. The protected grounds are united as personal characteristics that have been historically (and contemporarily) a basis for discrimination.[78] Moreover, historical disadvantage is often the best way to explain our stronger intuitive opposition to particular legislative distinctions. For example, historical disadvantage is the easiest way to explain how "race, perhaps more than any other, is a basis for distinction repugnant in Canadian society."[79]

On the other hand, a salient criticism of historical disadvantage is that it is overly restrictive, "[shrinking] the ambit of the equality guarantee much more severely than either the language of s 15(1) or the common understanding of Canadians fairly permits."[80] If the legal test for identifying analogous grounds relied exclusively on a historical disadvantage test, novel forms of discrimination could never receive constitutional protection and equality seekers would have no constitutional redress for significant breaches of equality (for example, if people with blue eyes were prohibited from voting). However, this weakness is predicated on an exclusive reliance on historical disadvantage, which is not how a multi-variable approach should work.

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[77] Gibson, *supra* note 61 at 782.

[78] Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can J Fam L39 at 77.

[79] Leckey, *supra* note 13 at 461. Leckey substantiates this claim by noting, "it is unlikely that a reviewing court would grind a race-based distinction through the normal *Oakes* analysis."

[80] Gibson, *supra* note 61 at 785.

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When considered with other factors, novel claims can be easily recognized by those other factors, while historical disadvantage still helps to recognize some of the worst instances of discrimination. Thus, when considered in conjunction with other factors, historical disadvantage makes a positive contribution to the strength of a multi-variable test for identifying analogous grounds.

Taking account of vulnerability when identifying analogous grounds resonates with many of the currently protected grounds. Youth, people with severe disabilities, and minority groups that may be too small in size to effectively lobby the government are all effectively disenfranchised by their limited political influence and therefore liable to having their interests overlooked. This is especially true for non-citizens who have no right to vote.[81] However, the similarities between vulnerability and historical disadvantage risk these two considerations collapsing into one another with the consequence of obfuscating the identification of analogous grounds and limiting the independent (and at times overlapping) value that each factor brings to the discussion of equality. An explicit example of subsuming vulnerability within historical disadvantage can be found in *Law*:

> The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not *per se* determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.[82]

Clearly delineating between groups that have experienced prejudice in the past (historical disadvantage) and groups that are liable to experiencing prejudice in the present and future (vulnerability) will ensure that these two important factors are fully considered and not confused.

Finally, considering the inclusion of a personal characteristic within human rights codes also supports the strength of a multi-variable test. The symmetry between the *Charter* and provincial human rights codes, which are all directed towards the similar objective of promoting human rights, enhances the comprehensiveness of a multi-variable test for the

[81] See, for example, *Andrews*, *supra* note 27 at 152 (per Wilson J).
[82] *Law*, *supra* note 7 at para 88.

analysis of human rights under the *Charter*. Furthermore, the flexibility of updating human rights codes provides advantages and disadvantages to their consideration. Being subject to the discretion of provincial legislators enables human rights codes to adapt more easily than constitutional documents to evolving social norms about discrimination.[83] While social norms do not always evolve in a progressive manner, reference to human rights codes, with a cautious recognition of how current political trends can themselves be discriminatory, expands the court's resources in the aim of equality.

Each of the factors from the multi-variable approach has its own strengths and weaknesses. However, most of the weaknesses of each factor when considered in isolation are eliminated or minimized when the factors are considered in concert. All of the factors can contribute to an understanding of the protected grounds in different ways, and they should all be open to the court's consideration to provide a thorough understanding of the nuances and diversity present within potential analogous grounds while also counteracting the pitfalls of each when analyzed independently. When answering the question "what kind of changes should a person accept and can a person accommodate," a multi-variable approach is far better equipped at recognizing and adapting to the various types of characteristics—mutable or immutable, difficult or easy to change, significant or insignificant to personal identity—than an approach limited to immutability and cost to personal identity.

B. The Discursive Superiority of a Multi-Variable Approach

The evaluation of legal tests for identifying analogous grounds should consider their merit "not only in terms of the actual results of litigation … but also with reference to the form of *political* discourse constitutional litigation generates."[84] The narrow immutability test may communicate messages about identity that are "highly problematic" because of its rigidity.[85] Carl Stychin provides a thorough overview of the negative discursive impact of applying the narrow immutability test, in particular

[83] The recent addition of gender identity and gender expression to the Ontario *Human Rights Code*, RSO 1990, c H.19, as amended by SO 2012, c 7, reflects this enhanced flexibility that has responded to the needs of the transgendered, a recently recognized group who face discrimination.

[84] Lisa Gotell, "Queering Law: Not by *Vriend*" [2002] 17:1 CJLS 89 at 92 [emphasis in the original]; see also Ron Levy, "Expressive Harms and the Strands of *Charter* Equality: Drawing Out Parallel Coherent Approaches to Discrimination" (2002–3) 40 Alta L Rev 393 at 395: "[L]aw constructs social norms and social meanings, which in turn burden (or benefit) individuals."

[85] Stychin, *supra* note 3 at 56.

with respect to the gay rights movement.[86] Conceiving of disadvantaged groups through the lens of narrow immutability portrays these personal characteristics as "(unfortunate) deviations from a static norm."[87] In other words, the logic that we must prevent discrimination against the "others" who are inherently different from the norm (for example, heterosexual, able-bodied, white, male) fails to challenge the implied superiority of the norm and, thus, the inferiority of the other. This failure to challenge the hierarchy among various identities has many negative consequences for political discourse regarding identity and equality.

The negative discursive consequences of the narrow immutability test are twofold. First, the narrow test oversimplifies identity. Second, it is in tension with strategies of self-preservation used by oppressed communities. Both of these create barriers to substantive equality and detract from the normative strength of this test. Narrow immutability fails to appreciate the complexity of identity construction. By conceiving of a person's identity as a combination of attributes that are either unchangeable or costly to change, the test classifies individuals based on stable characteristics generally beyond their control and pays inadequate attention to how individuals define themselves through conscious decisions and actions. This approach fails to take account of "identity as a complex developmental outcome, the consequence of an interactive process of social labelling and self-identification" and reinforces an approach to identity that conceives of identity through rigid categories that exist in a social, political, and cultural vacuum.[88] This simplistic approach fails to understand the diversity of processes through which identities are produced and the diversity of identities that deserve protection. In turn, it "constrains the challenge posed by [equality seekers] to the coherence and stability of identity categories and disguises the role of relations of oppression in their construction and maintenance."[89] The narrow immutability test will be unlikely to advance our understanding of the constructed and dynamic nature of identity and, as a consequence, will never be able to succeed in the "broader political project" of challenging the dominant ideologies that perpetuate substantive inequality in our society.[90] In particular, a narrow approach

[86] *Ibid*. Notwithstanding Stychin's focus on gay rights discourse, his arguments apply equally to any marginalized group that is perceived by society as counter to the norm.
[87] *Ibid*.
[88] Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism" in E Stein, ed, *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (New York: Routledge, 1992) at 250-1.
[89] *Ibid* at 62.
[90] *Ibid* at 61.

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merely characterizes the other based on impediments to change. While some protection against discrimination may be won through the narrow immutability analysis, the foundation of prejudice remains unchallenged.

While a multi-variable approach does not necessarily interrogate the constructed nature of identity or challenge prejudicial attitudes, it is more likely to foster the recognition of constructed identity and counteract prejudice. A multi-variable approach provides a broader legal vocabulary with which to discuss personal characteristics such as whether they are the basis for historical disadvantage, linked to vulnerability, or personally significant. For some grounds, such as weight and poverty, which will be discussed later in this article, this broader vocabulary greatly facilitates the discussion of analogous grounds by interrogating more aspects of personal characteristics confronted with discrimination.

Furthermore, because the narrow immutability test's primary emphasis is on the barriers to changing a characteristic, it reinforces a more simplistic understanding of identity that can be challenged by a multi-variable approach. For example, it could be argued that public discourse often describes sexual orientation as actually immutable because that is perceived to be a barrier to receiving legal protection. By contrast, a multi-variable approach to identifying analogous grounds would allow for recognition of the social influences acting upon sexuality without any concern of detracting from its protection under section 15. Under a multi-variable approach, sexual orientation need not be actually immutable to receive protection. Instead, sexual orientation can be protected because of historical disadvantage and difficulty of change, leaving discussion about the various factors contributing to the construction of sexual identity open for debate. Opening up dialogue regarding personal characteristics, while not guaranteeing a more complex understanding of identity, at least makes a more complex understanding of identity possible.

The wisdom of the narrow immutability test can be further challenged because of its potential to lead courts into misunderstanding how oppressed groups cope with discrimination. Narrow immutability fails to recognize how many minorities attempt to redefine parts of their identity with the hopes of accessing privilege. When facing discrimination based on attributes that are misconceived as permanent by the majority (such as skin colour), minorities may alter those attributes to avoid this discrimination. By "not merely passing but trespassing" into what are perceived to be superior and immutable identity categories, minorities express an outward identity that mirrors what the majority deems to be

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acceptable and thus worthy of privilege.[91] In her essay "Whiteness as Property," Cheryl Harris describes how her grandmother, using the "gift" of "fair skin, straight hair, and aquiline features" passed as a white person in order to gain the privilege of employment in Chicago's central business district.[92] Notwithstanding this transformation, the Court considers personal characteristics like race to be unchangeable. Given that race is socially constructed, the ability of an individual to re-define their race for all those who see them is arguably equivalent to literally changing their race.[93] For example, skin colour is a primary factor considered when identifying race, and it is clearly a changeable characteristic. The use of skin lightening creams in India and skin bleaching in the Caribbean are well-known practices indicative not only of the mutability of colour but also of the contemporary value of passing between fluid racial categories in order to gain access to privilege.[94] Eyelid surgery in Japan and chemical relaxation of Black hair are two further examples of how individuals seek to redefine personal characteristics they are born with or naturally develop in light of the oppression they experience because of them.

The twofold narrow immutability approach conflicts with the use of passing for self-preservation. Passing suggests not only that such characteristics are mutable but also that the cost of changing them is acceptable to the individuals who voluntarily set them aside. A court would still be able to reject discrimination against groups who pass because it could nonetheless find an unacceptable cost to personal identity. However, a court might well misunderstand a group's motivations when redefining identity. The difference between a transsexual who is driven towards a new identity because of their rejection of a former identity and an African Canadian who is driven away from a prized identity because of its negative associations is complex. When these two motivations are confused it could undermine claims of equality by making the costs to identity acceptable to the passing claimant. Decreasing the likelihood of receiving protection under section 15 when minorities have struggled long enough with oppression to have developed effective passing strategies is both unjust and

[91] Harris, *supra* note 4 at 276.

[92] *Ibid*.

[93] See, for example, Constance Backhouse, "The Historical Construction of Racial Identity and Implications for Reconciliation," online: <http://canada.metropolis.net/events/ethnocultural/publications/historical.pdf> at 22.

[94] For skin lightening creams, see Rajini Vaidyanathan "Has Skin Whitening in India Gone Too Far," *BBC News* (5 June 2012) online: BBC News <http://www.bbc.co.uk/news/magazine-18268914>. For skin bleaching in the Caribbean, see "Women Bleach at Their Peril," *BBC News* (6 September 2004), online: BBC News <http://www.bbc.co.uk/caribbean/news/story/2004/09/040906_bleaching.shtml>.

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incoherent. It is in strong tension with another relevant factor for identifying analogous grounds—historical disadvantage, which is itself evidenced by prolonged efforts by minorities to develop effective passing strategies—and creates a perverse incentive against self-preservation. The better a minority is at redefining themselves, the less likely it is that the courts, when applying a narrow immutability approach, will intervene to prevent the discrimination that the minority reacted to—an unjust cycle of discrimination.

A multi-variable approach conflicts with self-preservation much less than an immutability test. For example, racial discrimination, which struggles for recognition under a narrow immutability approach because of passing, is more likely recognized by a multi-variable approach that considers the historical disadvantage experienced by racial minorities, the personal significance of racial identity, and the presence of race in human rights codes, all of which call attention to the past and present evils of racism. The prevention of discrimination based on race, which is an enumerated ground, admittedly does not depend on the Court's approach to identifying new analogous grounds. However, the example of race still demonstrates how the concept of passing can go unnoticed and be misunderstood, particularly when the court only considers narrow immutability. The strategy of passing, provoked, for example, by such contemporary problems as the oppression of naturally Black hair in professional work environments,[95] is still not recognized and could apply to other presently undiscovered forms of passing not associated with the enumerated grounds. While the factors of immutability, difficulty of change, and cost of change are still potentially at odds with these strategies of self-preservation, other factors such as historical disadvantage, vulnerability, significance, and presence in human rights codes all ensure that minorities implementing these strategies can still access equality rights and concurrently attempt to protect themselves against discrimination.

C. The Superiority of a Multi-Variable Approach in Application

In addition to its discursive superiority, a multi-variable approach to analogous grounds has other strengths. First, it better explains the currently recognized protected grounds. It also provides a better basis for understanding intersectional grounds. Last, it better promotes substantive

[95] See, e.g., Tania Padgett, "Ethnic Hairstyles Can Cause Uneasiness in the Workplace," *Chicago Tribune* (12 December 2007), online: Chicago Tribune <http://articles.chicagotribune.com/2007-12-12/features/0712100189_1_hair-glamour-dreadlocks>: "[A]n undertone that natural hair is unacceptable, unprofessional and even ugly continues to pervade society."

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equality by facilitating the recognition of new equality claims such as those based on poverty and weight.

1. A Multi-Variable Approach Encapsulates the Protected Grounds Better Than Immutability

The currently recognized protected grounds are more easily characterized as protected through a multi-variable, rather than narrow, immutability approach. The only actually immutable protected grounds are national or ethnic origin, age, and permanent disabilities. If we adopt the narrow immutability test, the remaining protected grounds (race, colour, religion, temporary disability, citizenship, sexual orientation, marital status, and Aboriginality-residence) must be characterized as grounds changeable only at unacceptable cost to personal identity. This single analytical tool is not as comprehensive as a multi-variable approach when discussing these characteristics.

The multi-variable approach will almost invariably result in a broader discussion of potential grounds. For example, the narrow immutability test would have to say that demanding that someone change their sexual orientation or race imposes an unacceptable cost to personal identity. However, this tells only part of the story about why members of these groups might need to claim the protection of section 15. The difficulty of changing sexual orientation or race, their personal significance, the historical disadvantage suffered by such groups, and the vulnerability they currently experience add to the picture, which might be said to explain why both characteristics are included in human rights codes. Even if the Court is willing to recognize an analogous ground without going beyond narrow immutability, other criteria provide a broader understanding of the experience of oppressed groups, and this information informs the purpose underlying section 15 of preserving human dignity.[96] The narrow immutability test is not incapable of confirming the currently recognized protected grounds. However, the multi-variable approach encapsulates the currently protected grounds in a much more intuitive and comprehensive way.

2. A Multi-Variable Approach Is More Likely To Accept Impending Equality Claims Based on Intersectional Grounds

A multi-variable approach is also more effective at engaging with intersectional grounds—that is, a combination of different personal characteristics. For example, poor immigrants experience intersectional forms of inequality. An account capable of dealing with such cases is

[96] *Corbiere*, *supra* note 5 at para 5.

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particularly important given that "intersectional discrimination claims … will undoubtedly become the primary task of the courts as equality challenges develop."[97] First, intersectional identities are far more specific than the broad enumerated grounds. Proving that a single characteristic such as poverty is unchangeable or changeable only at unacceptable cost to personal identity is complex enough in isolation. Multiple layers of intersectionality compound this complexity. Intersectional grounds, such as "single mothers on social assistance," are "difficult to recognize in [their] specificity as analogous to those listed in section 15."[98] Moreover, the more layers of intersectionality, the narrower the group of individuals who fit into that intersectional category. As a result of this complexity, intersectional identities are difficult if not impossible to fit within the binary of mutable/immutable. As a consequence, equality discussion about intersectional claimants is stunted. If the court instinctively wants to protect a group, the insufficient complexity of narrow immutability may result in a contrived immutability discussion. For example, the vulnerability of poor immigrant communities, regardless of the mutability of that classification, may still weigh on the minds of the judiciary and lead them to characterize such a classification as "close enough" to actually immutable and meriting protection.[99] Alternatively, if the court instinctively wants to reject a group's claim, the insufficient complexity of narrow immutability may result in an overly mechanistic discussion. Rejecting poor immigrants because becoming a rich immigrant is not literally impossible fails to engage the broad purposive analysis section 15 demands. The extent to which the question "are these characteristics immutable?" is impossible to answer for certain intersectional characteristics limits the possibility of a successful claim to many claimants simply due to the structure of the analysis, rather than the severity of the discrimination they face.

A multi-variable approach makes the recognition of complex intersectional characteristics as analogous grounds much easier. To claim that being a single mother on social assistance is immutable or that changing her current state will impose costs on her personal identity is a much more difficult and unclear argument than claiming that she is part of a group that has experienced historical disadvantage, that she is vulnerable, or that she finds it very difficult to change her current financial status. Each added layer of intersectionality adds barriers to escaping oppression but is unlikely to ever surpass the threshold of actual

[97] Gilbert, *supra* note 3 at 649.
[98] *Ibid* at 648.
[99] See, for example, *Miron*, *supra* note 28 at para 153, where McLachlin J describes marital status as immutable "albeit in attenuated form."

or constructive immutability and is therefore unlikely to be protected by narrow immutability. Similarly, it would take an impressive feat for an obese drug addict to escape these conditions, but it would be inaccurate to describe it as impossible. Taking into account factors such as difficulty of change and vulnerability would easily recognize this combination of factors as an analogous ground. Thus, the rigid analysis of narrow immutability generally affords much less protection to equality claims based on intersectional grounds than does a multi-variable approach.

3. A Multi-Variable Approach Is More Likely To Accept Emerging Equality Claims Based on Weight and Poverty

Efforts to secure recognition of weight and poverty as analogous grounds have been underway for some time.[100] If the Supreme Court of Canada applies a narrow immutability test in future decisions, equality advocates will have to confront the significant initial hurdle of arguing that obesity and poverty qualify as absolutely immutable or changeable only at an unacceptable cost to personal identity. In both cases, entrenched stereotypical beliefs understand weight and poverty to be within an individual's control and therefore mutable.[101]

Emily Luther's argument that weight is both immutable and subject to historical disadvantage supports the contention that weight is much less likely to be recognized as an analogous ground by the narrow immutability test than by a multi-variable approach.[102] While Luther claims that weight satisfies the Court's understanding of immutability, it is difficult to argue that weight is either actually immutable or only changeable at unacceptable cost to personal identity. Weight is highly complicated given the "number of different causal factors that both cause and maintain higher weights" and how these factors vary between people.[103] Genetics, metabolism, and other medical and psychological disorders can all have an influence.[104] Thus, depending on the cause of obesity in a particular case, it could be argued that it is permanent for some and potentially changing over time but outside of the control of

[100] For weight, see Luther, *supra* note 5; J Paul R Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17 Advocates' Q 338; Nola M Ries and Barbara Von Tigerstrom, "Legal Interventions to Address Obesity: Assessing the State of the Law in Canada" (2011) 43 UBC L Rev 361; and *McKay-Panos v Air Canada,* 2006 FCA 8, [2006] 4 FCR 3. For poverty, see Jackman, *supra* note 6; *Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (CA) [*Falkiner*].

[101] Luther, *supra* note 5 at 182-3; Jackman, *supra* note 6 at 90.

[102] Luther, *supra* note 5.

[103] *Ibid* at 183.

[104] *Ibid*.

others.[105] However, the conventional understanding of weight as a mutable personal characteristic could undermine these arguments. "The perception that larger people are at fault for their weight,"[106] while "simplistic, inaccurate, and rooted in society's stereotype of the obese as persistent, compulsive gluttons,"[107] may still infiltrate legal reasoning. The popular understanding of weight as being exclusively contingent on psychological factors such as will power, as opposed to the more accurate understanding of it as dependent on both psychological and physical factors such as metabolism, poses a significant barrier to the recognition of weight as an absolutely immutable characteristic.

Assuming that the argument that weight is absolutely immutable fails, advocates could still argue that it satisfies the narrow immutability test because it is changeable only at an unacceptable cost to personal identity. However, the connection to identity is unclear. Luther outlines many significant personal costs associated with weight loss and describes how "[w]eight loss and diets can be both physically and psychologically dangerous, resulting in such undesirable results as metabolic slowing, which can lead to even more weight gain, and eating disorders, which can lead to serious health problems and even death."[108] Describing these costs as analogous to the role of residence in Aboriginal identity is difficult because the cultural and historical resonances of Aboriginality-residence are not present in the case of the obese. Furthermore, while Luther also outlines how weight is tied to deeply personal questions about practices and lifestyles, claiming that these questions reach the *Corbiere* threshold of essential to personal identity could still be a difficult argument to make.[109]

The likelihood that weight would be recognized as an analogous ground increases dramatically under L'Heureux-Dubé J's multi-variable test. Luther makes a good case for the difficulties associated with changing weight and the historical disadvantages associated with this characteristic.[110] Moreover, the significant financial costs often associated with effective weight loss (for example, healthy eating, access to fitness facilities, and medical advice and procedures) can also be taken into account by a multi-variable approach that considers the cost of change.

[105] *Ibid*.
[106] *Ibid*.
[107] Howard, *supra* note 100 at 340.
[108] *Ibid*.
[109] *Ibid* at 184.
[110] *Ibid* at 184-8.

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Poverty suffers from similar misconceptions and has already struggled for recognition by the courts as an analogous ground.[111] People often think of the poor as losers in the free market of meritocracy and view them as largely responsible for their situation.[112] These attitudes are also present among some members of the judiciary.[113] Martha Jackman argues that without attention to discrimination based on poverty "the *Charter*'s guarantee of substantive equality will remain meaningless for a vast number of Canadians."[114]

Poverty, like weight, is a complex characteristic with multiple causes and is often difficult to change. The "socio-economic barriers preventing those who are poor from obtaining post-secondary education, trade, technical or professional training translate into marginal employment prospects—a guarantee of continuing poverty."[115] Moreover, other personal characteristics beyond our control greatly increase the likelihood of being poor.[116] Still, to argue that escaping poverty is completely beyond an individual's control is unlikely to succeed. Some individuals in the most dire of circumstances have been able to escape the cycle of poverty. This fact was used by the Nova Scotia Court of Appeal when it rejected poverty as an analogous ground of discrimination because "financial circumstances may change."[117] Thus, poverty is another example of how equality rights contingent on narrow immutability are insufficiently broad to tackle significant bases of substantive inequality. Again, it could be argued that poverty is only changeable with unacceptable cost to personal identity, but such an argument is as awkward when applied to poverty as when it is applied to weight. Generally, poverty is a condition individuals want to escape, so to characterize this escape as associated with negative costs to identity is counter-intuitive.

A multi-variable approach would increase the likelihood of the recognition of poverty as an analogous ground. Escaping poverty is difficult, and the poor have been subject to historical disadvantage. They are vulnerable to having their interests overlooked. All of these factors are relevant to the question of whether poverty should be recognized as an analogous ground. The examples of weight and poverty demonstrate how the

[111] See, for example, *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17, 275 NSR (2d) 214 [*Boulter*], and *Falkiner, supra* note 94, both of which stopped short of recognizing poverty, in general, as an analogous ground.
[112] Jackman, *supra* note 6 at 90.
[113] *Ibid* at 91-2.
[114] *Ibid* at 78.
[115] *Ibid* at 89.
[116] *Ibid* at 82-3: "Being a member of a mother led single-parent family, being an elderly women, being a person with a disability, a member of a visible minority, a recent immigrant, or an aboriginal person" all greatly increase the likelihood of being poor, and in turn, increase the impediments to escaping poverty.
[117] *Boulter*, *supra* note 111 at para 42.

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current legal tool of immutability is likely insufficient on its own to challenge the status quo and promote substantive equality by enabling these marginalized groups from bringing claims under section 15 even though both the poor and the obese suffer ongoing discrimination.[118] Adoption of a multi-variable test for identifying analogous grounds is more likely to recognize these important grounds than narrow immutability and enhance the Supreme Court of Canada's pursuit of substantive equality as a consequence.

IV. CONCLUSION

Narrow immutability when compared to a multi-variable approach has an inferior doctrinal foundation. It also has many normative weaknesses. It is an ineffective tool for promoting substantive equality because it contributes to harmful discourse regarding identity and equality and excludes important claims from groups experiencing oppressive forms of inequality. Furthermore, narrow immutability is much less effective than a multi-variable test at characterizing the currently recognized protected grounds. Consideration of a broader set of factors including difficulty of change, its cost, vulnerability, historical disadvantage, and inclusion within human rights codes in conjunction with immutability mitigates many of the normative criticisms of narrow immutability and provides for a more flexible approach to recognizing possible grounds of discrimination that is more likely to promote substantive equality.

The Supreme Court of Canada should more explicitly and consistently endorse a multi-variable approach to identifying analogous grounds in future equality disputes to provide greater access to section 15 for equality seekers and expand its pursuit of substantive equality. Greater analytical clarity about which factors are relevant when identifying analogous grounds and the meaning of those factors would also be welcome. Lady Gaga's message of self-love has inspired many and contributed to a powerful movement advancing gay rights worldwide. As Jon Savage notes, "[t]he idea that sexuality is inborn, rather than some lifestyle choice or unfortunate disease, is at the heart of much modern gay identity formation."[119] However, we should be wary of a discourse that perpetuates tying protection from inequality to immutability. The concept may resonate with, and inspire, many, but it also suffers from several analytical and normative flaws. It is far more limited than the broader access to equality that the law should seek to promote.

[118] See Luther, *supra* note 5 at 167; Jackman, *supra* note 6 at 90.

[119] Jon Savage, "Lady Gaga's New Gay Anthem," *The Guardian* (14 February 2011), online: The Guardian <http://www.guardian.co.uk/music/2011/feb/14/lady-gaga-gay-anthem>.

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Grounds-Based Distinctions: Contested Starting Points in Equality Law

Colleen Sheppard

Over the past five years, the Supreme Court of Canada has continued to grapple with the meaning of constitutional equality and discrimination. In this regard, there is a clear consensus that the Court should follow a two-step test to assess violations of section 15(1) of the Canadian Charter of Rights and Freedoms. *First, the Court must identify a grounds-based distinction and, second, determine whether the distinction violates substantive equality. While both parts of the test present interconnected conceptual and contextual challenges, this article focuses on how the Court has applied the first step of the section 15 equality analysis. Recent case law reveals a deeply divided Court. First, fundamental differences are apparent with respect to whether grounds-based distinctions may be understood as inextricably embedded in legislative schemes. Second, the justices diverge on the exigencies of proving adverse impact discrimination. Legal technicalities, comparator group formalities, and fear of imposing any positive rights obligations on governments obscure critical dimensions of the disproportionate effects of law. Third, the association of adverse impact with unintentional discrimination risks overlooking the importance of the actual knowledge of disparities in the effects of laws and policies. Finally, the complex realities of intersectionality, while recognized by some justices, continue to remain on the periphery of equality rights doctrine. While the second step of the equality analysis engages more directly with an assessment of the contextual realities of substantive inequality, it is critical to ensure that courts reach this stage of the analysis and that it is not thwarted or obstructed by narrow and formalistic approaches to identifying grounds-based distinctions.*

Au cours des cinq dernières années, la Cour suprême du Canada a continué de s'interroger sur la signification de l'égalité constitutionnelle et de la discrimination. À cet égard, le consensus est clair: la Cour devrait faire une vérification en deux étapes pour évaluer les violations du paragraphe 15(1) de la Charte canadienne des droits et libertés. *D'abord, la Cour doit identifier*

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une distinction fondée sur des motifs et ensuite, déterminer si cette distinction porte atteinte à l'égalité réelle. Bien que les deux parties de la vérification présentent des difficultés conceptuelles et contextuelles interreliées, cet article porte sur la façon dont la Cour a appliqué la première étape de l'analyse de l'égalité au sens de l'article 15. La jurisprudence récente révèle une Cour profondément divisée. Premièrement, des divergences fondamentales sont apparentes lorsqu'il s'agit de savoir si les distinctions fondées sur les motifs peuvent être interprétées comme étant inextricablement inscrites dans les régimes législatifs. Deuxièmement, les opinions des juges divergent sur les exigences visant à prouver la discrimination indirecte. Les subtilités juridiques, les formalités relatives aux groupes de référence et la crainte d'imposer aux gouvernements des obligations positives occultent les dimensions critiques des effets disproportionnés de la loi. Troisièmement, l'association de l'effet négatif à la discrimination involontaire risque de masquer l'importance de connaitre réellement les disparités dans les effets des lois et des politiques. Enfin, les réalités complexes de l'intersectionnalité, quoique reconnues par certains juges, demeurent à la périphérie de la doctrine des droits à l'égalité. Bien que la deuxième étape de l'analyse de l'égalité vise plus directement une évaluation des réalités contextuelles de l'inégalité réelle, il est essentiel de s'assurer que les tribunaux atteignent cette étape de l'analyse et qu'elle ne soit pas contrecarrée ou obstruée par des approches étroites et formalistes de l'identification des distinctions fondées sur des motifs.

Introduction

Over the past five years, the Supreme Court of Canada has continued to grapple with the meaning of constitutional equality and discrimination. While there is a clear consensus regarding the basic doctrinal framework for assessing violations of section 15(1) of the *Canadian Charter of Rights and Freedoms*, the Court is deeply divided on its specific legal requirements and application.[1] Pursuant to the two-step test, the claimant must first prove a grounds-based distinction and, second, that the distinction violates substantive equality. While both parts of the test present interconnected conceptual and contextual challenges, this article focuses on how the Court has interpreted and applied the first step of the section 15(1) equality analysis.

In this regard, recent case law reveals divergent understandings and approaches. First, fundamental differences are apparent with respect to whether grounds-based distinctions may be understood as inextricably embedded in legislative schemes. Second, the justices disagree on the exigencies of proving a

1 *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

distinction based on adverse effects. Legal technicalities, comparator group formalities, and fear of imposing any positive rights obligations on governments affect judicial assessments of disproportionate impact. Third, the association of adverse impact with unintentional discrimination risks overlooking the importance of actual knowledge of disparities in the effects of laws and policies—a reality that blurs the line between direct and indirect discrimination. Finally, the complex realities of intersectionality, while recognized by some justices, continue to remain on the periphery of equality rights doctrine. While the second step of the equality analysis engages more directly with an assessment of the contextual realities of substantive inequality, it is critical to ensure that courts reach this stage of the analysis and that it is not thwarted or obstructed by narrow and formalistic approaches to identifying grounds-based distinctions. Indeed, a purposive and contextual approach to the first prong of the section 15(1) analysis has long suggested that identifying a grounds-based distinction ensures that constitutional equality focuses on concerns related to human rights—specifically, group-based discrimination and exclusion.[2]

Four recent equality cases provide particularly important insights into the complexities and challenges of understanding grounds-based distinctions. Two cases involved challenges to pay equity legislation in relation to its failure to adequately redress past gender-based pay inequities and for delays in providing pay equity to women working in predominantly female workplaces.[3] The third case addressed the question of whether the negative pension consequences of participating in a federal government job-sharing scheme constituted gender-based discrimination.[4] And the fourth was brought by a young Indigenous woman against legislative provisions limiting the operation of ameliorative legislative initiatives for Indigenous sentencing.[5] Significantly, all four cases involved legislative initiatives aimed at redressing systemic inequalities—an important contextual dimension and source of conceptual complexity. All four raise issues of inequality in women's lives.

Four Recent Cases: Context and Contested Legislation

Before examining the complexities of how the discrimination analysis is framed, it is helpful to outline some additional factual and legal aspects of these recent

2 This basic starting point was established in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 per McIntyre J [*Andrews*].

3 See *Québec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*]; *Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18 [*Centrale des syndicats*].

4 *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*].

5 *R v Sharma*, 2022 SCC 39 [*Sharma*].

cases. The pay equity cases, decided in 2018, challenged provisions in Québec's *Pay Equity Act*, an initiative enacted "to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes."[6] The Act sets out a proactive regulatory scheme that requires public and private sector employers to develop initiatives to provide equal pay for work of equal value in their organizations. Though introduced in 1996, widespread employer non-compliance persisted a decade after its enactment.[7] Rather than reinforcing the monitoring mechanisms, the Québec government introduced amendments in 2009 that actually reduced employer obligations "in the hope that doing so would lead to better compliance."[8] Instead of an ongoing obligation to secure pay equity, which had been included in the initial legislation, employers were now required to do pay equity audits every five years. The audit approach was a positive initiative to the extent that it ensured regular pay equity reviews. Unless there was evidence of bad faith on the part of employers, however, the reforms eliminated the obligation to provide retroactive remedies for pay inequities arising during the five-year intervals; employers only had to rectify pay inequities going forward.[9] Nor were employers obliged to provide any information regarding the date upon which specific pay inequities emerged. In effect, the legislative amendments eliminated redress for pay inequities arising between the five-year audits. These provisions were successfully challenged as being unconstitutional in the first pay equity case, *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*.[10] The Court concluded that the impugned provisions infringed section 15(1) of the *Charter* and were not justified pursuant to section 1.

The second pay equity case, *Centrale des syndicats du Québec v Québec (Attorney General)*, concerned provisions aimed at providing pay equity in female-dominated workplaces.[11] Recognizing that, in such workplaces, there may not be any available male comparator group to allow for the standard pay equity assessment, the Québec legislature mandated the Pay Equity Commission

6 *Pay Equity Act*, CQLR, c E-12.001, s 1. See also *Alliance*, *supra* note 3 at para 11.

7 See *Alliance*, *supra* note 3, where the Court noted: "Despite specific deadlines set out in the *Act*, in the 10 years following its enactment, only 47 percent of employers had established a pay equity plan. Of the remainder, 38 percent had not initiated the process to establish such a plan" (at para 16).

8 See an *Act to Amend the Pay Equity Act*, SQ 2009, c 9, discussed in *Alliance*, *supra* note 3 at para 16.

9 *Ibid* at para 17.

10 See *Alliance*, *supra* note 3.

11 See *Centrale des syndicats*, *supra* note 3 at paras 18–19. See also Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Déjá Vu in the Supreme Court of Canada" (2019) 15:2 Journal of Law and Equality 1.

to devise a methodology to address this gap.[12] As a result of the time it took to develop an appropriate methodology and to enact regulations, women in workplaces without male comparators experienced a six-year delay in accessing proactive before pay equity.[13] This delay was challenged as a violation of gender equality. A majority of the Court concluded that the delay constituted sex-based discrimination. It went on to find, however, that the regulations were constitutionally justified pursuant to the reasonable limits clause of the *Charter*, given the complexities and time required to devise an effective and equitable scheme for expanding the reach of pay equity.[14]

The third case, *Fraser v Canada (Attorney General)*,[15] was decided in 2020. The denial of equitable pension benefits for women participating in a job-sharing scheme was alleged to be discriminatory. The Royal Canadian Mounted Police's (RCMP) job-sharing program was designed to respond to the needs of employees trying to balance work and childcare responsibilities; however, participants in the program were not allowed to buy back pension benefits. Although job sharing was available to all employees, the evidence "revealed that RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children" and that "[f]rom 2010–2014, 100 percent of members working reduced hours through job-sharing were women, and most of them cited childcare as their reason for doing so."[16]

Most recently, *R. v Sharma* was decided in 2022.[17] It involved a constitutional challenge to restrictions on granting conditional sentences for certain

12 The Quebec Pay Equity Commission is charged with overseeing the objectives of the *Pay Equity Act*, *supra* note 6. Section 93 of the Act confers a broad range of powers and responsibilities on the Commission, which include overseeing the implementation of pay equity plans, determining compensation adjustments, and conducting pay equity audits.

13 As noted by the majority, "[t]he Pay Equity Commission did not settle on a methodology until 2003 and the *Regulation respecting pay equity in enterprises where there are no predominantly male job classes* (2005) 137 G.O. II, 976 (now CQLR, c. E-12.001, r. 2), was not promulgated until May 5, 2005. The two-year grace period … further postponed pay equity for workplaces without male comparators until May 5, 2007." *Centrale des syndicats*, *supra* note 3 at para 17.

14 See *ibid* at paras 42–55. The majority opinion diverges in this respect from McLachlin CJ's dissenting opinion. See earlier discussion in this article. See also Sonia Lawrence, "Critical Reflections on Fraser: What Equality Are We Seeking?" (2021) 30:2 Constitutionnal Forum Constitutionnel 43 at 47–50 <doi.org/10.21991/cf29421> (discussing increased reliance on section 1 to justify limits on equality rights).

15 *Fraser*, *supra* note 4.

16 *Ibid* at para 97.

17 *Sharma*, *supra* note 5.

offences, thereby undermining the *Gladue* sentencing regime for Indigenous individuals.[18] The case raised critical issues about the heightened risks of incarceration that a young Indigenous mother would face if the *Gladue* principles could not be applied to certain offences. The justices disagreed about whether a race-based distinction could be identified pursuant to the first step of the section 15(1) analysis, with the majority concluding that no adverse race-based effects had been proven. The dissenting justices were of the view that limiting the availability of conditional sentences undermined the *Gladue* sentencing principles, thus specifically impacting Indigenous individuals and creating a race-based distinction.

"Inextricably Related": Recognizing Grounds-based Distinctions That Are Overtly Embedded in Legislative Schemes

The first type of grounds-based distinction that arises in these cases is a direct one or one where the legislative provision is integrally connected to a ground of discrimination or "inextricably related" to a protected group.[19] Such is the case in the pay equity cases and is relevant as well to the framing of a race-based distinction in *Sharma*.[20] Although we often expect direct distinctions to be evident and easily discernable, these cases reveal disagreement and divergent conclusions, even in cases alleging direct discrimination. In the first pay equity

18 The special sentencing provision for Indigenous offenders is set out in section 718.2(e) of the *Criminal Code*, RSC 1985, c C-46. It requires sentencing judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances … for all offenders, with particular attention to the circumstances of aboriginal offenders." Interpretation of this provision was clarified in *R v Gladue*, [1999] 1 SCR 688 [*Gladue*], where a number of guiding principles were elaborated (the *Gladue* principles).

19 The terminology "inextricably related" was used by Abella J in the pay equity cases. It has not been widely used in equality law cases. One exception is *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, where Justice Antonio Lamer comments on the Federal Court of Appeal's judgment: "While, with respect, I am not in agreement with all of Marceau J.A.'s judgment, I believe that he correctly identified the relationship which exists between sexual orientation and the discrimination at issue in this case (at p. 37): '... should it be admitted that a homosexual couple constitutes a family in the same manner as a husband and wife, it then becomes apparent that the disadvantage that may result to it by a refusal to treat it as a heterosexual couple is *inextricably related* to the sexual orientation of its members'" [emphasis added].

20 As outlined later in this article, I suggest that *Fraser* could also be understood as involving a direct gender-based discrimination, though it was unanimously characterized as a case of adverse impact discrimination.

case, *Alliance*, Justice Rosalie Abella began by noting that the primary purpose of pay equity legislation is to redress systemic gender-based discrimination. As she explains, the pay equity legislation as a whole "targets women in redressing pay discrimination":

> And the impugned provisions target women, in more specific ways, to that end. They set out how deficiencies in *women's* pay, in comparison to men, will be identified. They set out when *women* will—and will not—receive compensation for those inequities. And they set out the information that will—and will not—be made available about when those inequities emerge to the *women* who may need to challenge them.[21]

With respect to the first part of the section 15(1) test, Abella J concludes that "[t]he impugned provisions therefore draw distinctions based on sex, *both on their face and in their impact*."[22]

A similar analysis is provided in the second pay equity case, which delayed pay equity for women in workplaces without male comparators: "[T]he sex-based character of the distinction ... is inescapable. That is because the two categories into which the *Act* sorts women—women in workplaces with male comparators ... and those without such comparators ... are themselves *inextricably related to sex*."[23] Though the category "workplaces without male comparators" is more complex than a straightforward gender-based classification, it is apparent to Abella J that the distinction is "inextricably related to sex." As she puts it, "[o]nly if we ignore the gender-driven bases for the two categories can it be said that the distinction is based only on workplace and not on sex."[24] She explains that the categories are "expressly defined by the presence or absence of men in the workplace" and that they are "set up to address disparities in pay between men and women."

Furthermore, women working in female-dominated sectors of the labour force "suffer more acutely from the effects of pay inequity precisely because of the absence of men in their workplaces." Accordingly, Abella J concludes that the pay equity provisions "draw distinctions based on sex both on their face—that is, by their express terms—and in their impact."[25] The category "workplaces without male comparators" is understood as one which is *defined in relation to gender*—both in terms of the absence of male workers and the disproportionate presence of women.[26] Such female-dominated sectors of the labour force are also recognized

21 See *Alliance*, *supra* note 3 at para 29 [emphasis in original].

22 *Ibid* [emphasis added].

23 See *Centrale des syndicats*, *supra* note 3 at para 29 [emphasis added].

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

as being characterized by systemic inequalities and historically low rates of remuneration (that is, the childcare sector).[27] Abella J's reasoning in this case demonstrates a contextual appreciation of the ways in which the content of pay equity legislation has a direct and significant impact on the struggle for gender equality.

While Abella J's recognition of the ways in which pay equity legislation is, by definition, "inextricably related to sex" seems cogent, the dissenting justices disagreed. In *Alliance*, they recognized that pay equity legislation affects "a group consisting essentially of women"; nevertheless, the dissenting justices found that it is necessary to consider not only whether the distinctions affect women but also whether they are disadvantageous to women at the first step of the section 15(1) analysis.[28] Otherwise, they feared that every group-based ameliorative law would pass this first step.[29] The dissenting justices further suggested that, since pay equity laws generally improve the situation of the women workers to whom they apply, any shortcomings in the legislation improve the situation of women relative to the pre-legislation *status quo*. They insisted that the *Charter* does not impose any positive obligations on governments to redress societal inequities and, in so doing, endorsed a negative rights approach. Accordingly, they had "great difficulty accepting" a grounds-based distinction in this case.[30]

In *Centrale des syndicats*, the dissenting justices expressly found no sex-based distinction. Although the overt gendered character of the category is apparent on its face—that is, women working in "workplaces without male comparators"—Justice Suzanne Côté (writing on behalf of the dissenting justices) concludes that the classification is not based on sex. She recognizes that the provision has adverse effects on a group that "consists mostly of women and

27 In *Centrale des syndicats*, the unions represented women working in the childcare sector. On pay inequities in traditionally female jobs, see Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94 Supreme Court Law Review 299 at 309–10. See also Martin Oelz, Shauna Olney & Manuela Tomei, *Equal Pay: An Introductory Guide* (Geneva: International Labour Organization, 2013) at 17–18, cited in *Centrale des Syndicats*, *supra* note 3 at para 3.

28 See *Alliance*, *supra* note 3 at para 72.

29 *Ibid* (noting that "[i]t would be absurd if an approach whose focus was on discriminatory effects did not deal first with the issue of the disadvantage resulting from one or more of those distinctions, at least on a *prima facie* basis"). This judicial reformulation of the first step of the section 15(1) analysis reflects a concern that equality challenges to ameliorative laws be treated differently, even at the distinction phase of the analysis. Indeed, the dissent justices concluded (in the alternative) at para 107 that "even if it were to be held that the specific mechanism created by the statutory amendments can be considered discriminatory, the Act as a whole should be protected under s. 15(2)."

30 *Ibid* at para 93.

is at a particular disadvantage in the labour market."[31] She concludes, however, that there is no sex-based distinction because, rather than sex, "the basis for the differential treatment affecting the employees in question lies in the lack of male comparators in their employers' enterprises."[32] More generally, Côté J found that pay equity legislation may well include distinctions that are "more advantageous for one group consisting of women than for another group also consisting of women."[33] To conclude otherwise, she maintains, parallel to her conclusions in *Alliance*, would lead to every legislative distinction in pay equity laws being sex-based and thus satisfying the first step of the section 15(1) analysis. In her view, this would unduly undermine generally ameliorative legislative initiatives like pay equity. The consequence of her judicial deference to legislative choices in pay equity legislation, and of her narrow and formalistic interpretation of sex-based distinctions, is to leave unrecognized the inequities facing more vulnerable women in the labour force—precisely those women most in need of pay equity.

In *Sharma*, it is also possible to view the impugned legislative provision as inextricably related to a grounds-based distinction. Although a majority of justices did not accept this view, such a connection was emphasized in Cheyenne Sharma's factum to the Court:

> [C]onditional sentences are *inextricably connected* with s. 718.2(e), which *does* draw a race-based distinction, by expressly identifying Indigenous offenders as requiring particular consideration in the sentencing process. Any modification to the *Gladue* framework necessarily impacts Indigenous offenders differently than non-Indigenous offenders.[34]

The majority justices in *Sharma* "accept that there is a link between the *Gladue* framework relating to s. 718.2(e) and the conditional sentence regime."[35] The justices further note that "[b]oth were adopted as part of the same legislation aimed at reducing the use of prison as a sanction and expanding the use of restorative justice principles in sentencing."[36] Yet they go on to reject that these connections suffice for proving a race-based distinction and insist that the legislative restrictions on conditional sentences must be assessed in isolation from the *Gladue* principles.

The dissenting justices appear to accept Sharma's framing of the distinction, while highlighting the broader effects of the facially neutral impugned

31 *Centrale des syndicats*, *supra* note 3 at para 121.

32 *Ibid* at para 122.

33 *Ibid* at para 128.

34 *Sharma*, *supra* note 5, Respondent's Factum, at para 63 [emphasis in original].

35 *Ibid* at para 73. For a discussion of section 718.29(e) and the *Gladue* framework, see *Gladue*, *supra* note 18.

36 *Sharma*, *supra* note 5 [citations omitted].

provisions. Though they do not use the phrase "inextricably connected to race," they conclude that the non-availability of conditional sentences for certain offences is integrally related to race. To quote Justice Andromache Karakatsanis, "removing conditional sentences for many offences has particular impact on Indigenous offenders. The distinction created on the basis of race is apparent."[37] She writes further: "[T]he challenged provisions *necessarily* impact Indigenous offenders differently; a distinction arises from the interaction of these provisions, against a backdrop of facts of which courts must take judicial notice. … [T]he distinction is plain."[38] Finally, Karakatsanis J connects her analysis of the impugned provision to Sharma's life circumstances, noting that she is a "prime candidate for a conditional sentence" as both a first-time offender and a single mother of an infant daughter."[39] However, this option, which considers both Indigenous legal perspectives and her background, was unavailable to her:

> The differential impact is apparent with respect to Ms. Sharma herself. Her background reflected, in the sentencing judge's words, a "constellation of classic *Gladue* factors". … As a first-time offender with a low risk of reoffending, and single mother to an infant daughter, she was undoubtedly a "prime candidate" for a conditional sentence. … Yet because of the challenged provisions, such a sentence—which would consider her background as an Indigenous woman and draw on Indigenous legal perspectives—was unavailable.[40]

While the grounds-based distinction in the *Sharma* case may be understood as being inextricably related to Indigenous status, the case was more overtly assessed through the lens of the adverse effects of seemingly neutral legislative provisions prohibiting conditional sentences for certain offences. It is important, therefore, to examine how an analysis based on adverse impact provides an alternative or concomitant framing for this case.

Distinctions Linked to Adverse Impact

Recognition of the adverse effects of apparently neutral laws on protected groups is an important dimension of Canadian constitutional equality law. In

37 See *ibid* at para 225, per Karakatsanis J dissenting.

38 *Ibid* at para 227 [citations omitted;emphasis in original]. See also *Ontario (Attorney General) v G*, 2020 SCC 38 at para 51 (where disadvantage arose from the intersection of two different laws: "These distinctions flow from the manner in which Christopher's Law interacts with federal legislation" since "legislation does not exist in a vacuum").

39 *Sharma*, *supra* note 5 at para 224.

40 *Ibid* at 224.

both *Fraser* and *Sharma*, the inequitable effects of a facially neutral legislative provision are the focus of the judicial inquiry. Before applying an adverse impact discrimination analysis to the specific facts in *Fraser*, Abella J outlines its broader contours, evidentiary exigencies, and significance to equality law. She clarifies that it "occurs when a seemingly neutral law [or policy] has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground."[41] Thus, the law or policy "indirectly places them at a disadvantage."[42] Abella J further explains that recognition of adverse impact discrimination attests to an important "shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups."[43] Drawing on the recognition of adverse impact discrimination in both US and Canadian statutory anti-discrimination law, as well as the importance accorded to it by equality scholars both in Canada and beyond, Abella J affirms this critical anti-discrimination law concept.[44]

Two types of adverse impacts are outlined in *Fraser*, including those resulting from "seemingly neutral rules, restrictions or criteria that operate in practice as 'built-in headwinds' for members of protected groups"[45] and those that arise due to an "*absence* of accommodation for members of protected groups."[46] To prove adverse impact discrimination, Abella J highlights the need for evidence of disproportionate impact, based on "the situation of the claimant group" and "the results of the law [or policy]."[47] Evidence may include witness testimony, expert evidence, extrinsic evidence (that is, social science research, academic studies, governmental reports), or judicial notice.[48] Statistical evidence may provide assistance though the Court has been careful not to require such evidence, due in part to its non-availability in many instances. As Abella J notes, "[w]hen evaluating evidence about the

41 *Fraser*, *supra* note 4 at para 30.

42 *Ibid*, citing Sophia Moreau, "What Is Discrimination?" (2010) 38:2 Philosophy and Public Affairs 143 at 155.

43 *Fraser*, *supra* note 4 at para 31 [citations omitted].

44 Note that adverse impact discrimination is widely acknowledged internationally. See UN Committee on Economic, Social and Cultural Rights, *General Comment no 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, Doc E/C12/GC/20 (2 July 2009). In her discussion of adverse impact discrimination, Abella J draws extensively from the work of numerous Canadian and international equality law scholars.

45 *Fraser*, *supra* note 4 at para 53 [citations omitted].

46 *Ibid* at para 54 [citations omitted; emphasis in original].

47 *Ibid* at para 56.

48 *Ibid* at para 57.

group, courts should be mindful of the fact that issues which predominantly affect certain populations may be under-documented."[49] On a final note, Abella J explains that "[a]t the heart of substantive equality is the recognition that identical or facially neutral treatment may 'frequently produce serious inequality.'"[50] Crucially, the recognition of adverse impact discrimination is integrally related to the concept of substantive equality.

Applying these principles in *Fraser*, Abella J concludes that the provision for reduced pension benefits for those participating in the job-sharing program, though neutral on its face, has adverse gender-based effects.[51] She explains that "the use of an RCMP member's temporary reduction in working hours as a basis to impose less favourable pension consequences plainly has a disproportionate impact on women."[52] The evidence revealed that the job-sharing program was used exclusively by women RCMP officers and that a majority of those who participated in job sharing did so to balance work and childcare obligations. Abella J also relied on broader social context evidence about the inequitable effects of family responsibilities on women in the labour force.[53]

In contrast, in her dissenting reasons, Côté J concludes that there is neither a direct nor indirect gender-based distinction in *Fraser*. In her view, the negative effects of the job-sharing scheme create "a distinction not on the basis of being a *woman*, but being a woman *with children*. In other words, a distinction exists not because one is a *woman*, but because one has *caregiving* responsibilities. One does not job-share *because* one is a woman; one job-shares because one needs to take care of someone."[54] To further buttress her conclusion, she points to "same-sex male couples who also have to bear the

49 *Ibid* at para 57. See also *Sharma*, *supra* note 5 at para 205. For an excellent review of evidentiary challenges in antidiscrimination cases, see *Radek v Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 [*Radek*].

50 *Sharma*, *supra* note 5 at para 47, citing Andrews, *supra* note 2 at 164.

51 For other important discussions of adverse impact and gender, see *Symes v Canada*, [1993] 4 SCR 695; *Thibaudeau v Canada*, [1995] 2 SCR 627.

52 *Fraser*, *supra* note 4 at para 97. Although dissenting justices Brown and Rowe JJ agree that there is a gender-based distinction, they also emphasize the relevance of what is in effect a narrow "mirror group" comparator group: those taking leave without pay (LWOP), who were accorded pension buyback options (*ibid* at paras 184–88). For a critique of narrow comparator group analysis, see Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in Sanda Rodgers & Sheila McIntyre, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) 135. See also *Withler v Canada (Attorney General)*, 2011 SCC 12, per Abella J [*Withler*].

53 *Fraser*, *supra* note 4 at paras 98–106.

54 *Ibid* at paras 234–35, Côté J dissenting [emphasis in original].

burden of taking care of their children" and "individuals who bear the burden of taking care of their aging parents or spouse."[55] She concludes that "[t]he impugned provisions therefore create a distinction on the basis of caregiving responsibilities, not sex *simpliciter*."[56] Central to Côté J's argument is her separation of being a caregiver and being a woman—an approach that erases the gendered dimensions of family care realities. For Côté J, to fit within the category of sex discrimination, it would be necessary to show that only women are caregivers rather than showing the disproportionate impact of caregiving responsibilities on women.

In reaching her conclusion to narrow the scope of sex-based distinctions, Côté J distinguishes an earlier Supreme Court of Canada decision, *Brooks v Canada Safeway*,[57] where the Court concluded that pregnancy-based discrimination was sex discrimination because of the close association between pregnancy and women's lives, even though not all women are pregnant. In Côté J's opinion, however, "caregiving, unlike pregnancy, is not, *by definition*, associated with sex."[58] Adopting a very biologically driven understanding of sex discrimination, Côté J distinguishes pregnancy from childcare. Pregnancy only affects women, whereas it is not only women who participate in childcare. Not only does this conclusion overlook the deeply gendered realities of familial and social relations, but it is also inconsistent with the *Janzen* case, which was decided the same day as the *Brooks* case.[59]

In *Janzen*, the Court concluded that sexual harassment constitutes a form of sex discrimination even though not all women, and some men, are victims of it. As Chief Justice Brian Dickson stated, "[p]erpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female."[60] The Court also responded to the argument that it was not the sex of the victims but,

55 *Ibid* at para 236.

56 *Ibid*, citing *Withler*, *supra* note 52 at para 62.

57 [1989] 1 SCR 1219 [*Brooks*]. See also *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 [*Janzen*].

58 *Fraser*, *supra* note 4 at para 242, Côté J dissenting [emphasis in original].

59 In *Janzen*, *supra* note 57, the Court concluded that sexual harassment constitutes sex discrimination because of the negative, gendered impact it has on women's employment opportunities and conditions. For a powerful critique of Côté J's reasoning, see Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Constitutional Forum Constitutionnel 53 at 62 ("[s]he reasons that asserted grounds lose protection when something—a characteristic, attribute, or condition—is appended to them. … I struggle to think of a form of discrimination that cannot, through this logic, be rearticulated outside the scope of section 15").

60 *Janzen*, *supra* note 57 at 1284.

rather, their sexual attractiveness that resulted in the harassment, noting: "To argue that the sole factor underlying the discriminatory action was the sexual attractiveness of the appellants and to say that their gender was irrelevant strains credulity. Sexual attractiveness cannot be separated from gender. The similar gender of both appellants is not a mere coincidence, it is fundamental to understanding what they experienced."[61] In contrast to Côté J's "sex simpliciter" reasoning, past jurisprudence demonstrates a more nuanced understanding of the ways in which social and economic structures contribute to realities of gender-based discrimination.

A further concern articulated by Côté J is the risk that sex discrimination could be identified solely on the basis of statistical disparities. She critiques Abella J's conclusion for its over-reliance on statistical evidence as the basis for finding a sex-based distinction. In her view, "[d]isproportionate impact alone cannot be sufficient to meet step one of the s 15(1) analysis ... simply pointing to the fact that the majority of job-sharers are presently women with children cannot in itself be sufficient to say that step one has been met."[62] She further suggests that to base a finding of discrimination solely on statistical disparities is "not currently supported by this Court's jurisprudence."[63] Yet, contrary to Côté J's conclusions, a statistically significant quantitative disparity has sufficed to satisfy a finding of adverse impact.

Indeed, in *Fraser*, there was clear data—both within the RCMP specifically and in society more broadly—that women were disproportionately burdened by the inequitable pension benefits for job-sharers. Abella J's conclusion to this effect does not undermine the fact that some men also participate in childcare in ways that impact their working lives or that there are same-sex couples with children and care responsibilities.[64] It rather reminds us that the law is applied contextually based on evidence about contemporary societal realities. One such source of evidence is the disparate impact of childcare on women in the labour force and the multiple ways in which it contributes to economic disparities, including in relation to pension benefits. Côté J's rejection of statistical disparities as a basis for finding a grounds-based legal distinction is also inconsistent with the unanimous decision of the Supreme Court in *Meiorin*.[65] In this case, a unanimous Court concluded that the plaintiff had "discharged the burden of

61 *Ibid* at 1290.

62 See *Fraser*, *supra* note 4 at para 244. See also *Alliance*, *supra* note 3 at paras 70–72, Côté, Brown, and Rowe JJ dissenting.

63 *Fraser*, *supra* note 4 at para 244.

64 Indeed, remedying the gendered inequities in the job-sharing program would assist male caregivers in the future, the same way that pay equity remedies are also provided to the small number of men working in predominantly female jobs.

65 See e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] (albeit a human rights statutory case, not a *Charter* case).

establishing that, *prima facie*, the aerobic standard discriminate[d] against her as a woman."[66] Statistical disparities were sufficient to find *prima facie* discrimination; women were disproportionately affected by the high aerobics standard test because of their generally lower aerobic capacity.

Similarly, pay equity legislation is premised on a theory of sex discrimination rooted in statistical patterns in the labour force, not on biology. To use one of Côté J's examples, based on statistical data, we may well find a distinction impacting the nursing profession (which is 90 percent female) is sex based—a conclusion she appears to find suspect.[67] Accordingly, some male nurses will experience gender-based discrimination because of their membership in a predominantly female job category. Contrary to Côté J's conclusion, sex discrimination may be discerned from patterns of statistical disparity rather than an absolute alignment between gender and job classifications. The implications of Côté J's conclusions in both *Fraser* and the pay equity cases are troubling. She adopts a narrow approach to sex-discrimination that does not recognize differences between women, thereby denying protection to more vulnerable women workers. Likewise, she rejects recognition of the gendered dimensions of legal categories based on their disproportionate adverse effects on women workers.[68] Her refusal to recognize gender-based distinctions in these cases resonates with a very narrow and formal conception of equality—an approach rejected by the Supreme Court in the 1980s.[69]

The reasoning of Justices Russell Brown and Malcolm Rowe in *Fraser*, regarding whether there is a sex-based distinction, is quite circuitous. Ultimately, comparing full-time RCMP officers to job-sharers, they conclude that the distinction is "based on sex because members of the job-sharers program are disproportionately women, whereas uninterrupted full-time employment is a male pattern of employment."[70] Despite finding a sex-based distinction, they

66 *Ibid* at para 69. For an extended discussion, see Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v B.C.G.S.E.U.*" (2001) 46:2 McGill Law Journal 533.

67 *Fraser*, *supra* note 4 at para 244 (she also gives the example of the "top one percent of income earners in Canada [who] are majority male").

68 Implicitly, her approach leaves no room for an intersectional lens that attends to diverse women's lives.

69 *Andrews*, *supra* note 2 at 165. See e.g. *Bliss v Attorney General of Canada*, [1979] 1 SCR 183 [*Bliss*] (where the Court's decontextualized and formal approach to equality under the *Canadian Bill of Rights* ("[i]f section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is … because they are pregnant and not because they are women" at 190). *Bliss* was later expressly overruled a decade later in *Brooks*, *supra* note 57.

70 See *Fraser*, *supra* note 4 at para 185.

raise concerns about causation issues in adverse impact claims, cautioning that "statistical disparity and broader group disadvantage" are insufficient to demonstrate that a law creates a distinction.[71] They are concerned that any law or policy that is enacted "to incrementally *narrow* a pre-existing systemic disadvantage" will contain "an element of disparity" if the disadvantage is not fully eradicated.[72] The result would be "an undisciplined judicial expansion of the scope of s. 15 … because it would render the state responsible for discrimination it has not caused."[73]

Brown and Rowe JJ revisit this causal connection idea in their majority decision in *Sharma*, emphasizing, that Sharma was required to prove that the impugned provisions limiting conditional sentences

> created or contributed to a disproportionate impact on Indigenous offenders. While she did not have to prove that the impugned provisions removed access to a conditional sentence *because* she was Indigenous or that the impugned provisions were the *only* or the *dominant* cause of the disproportionate impact, she *did* have to demonstrate a causal connection.[74]

Thus, they required Sharma to prove that limits on conditional sentences, without regard to the *Gladue* principles provision, have a disproportionate impact on Indigenous offenders. This dissociation of the conditional sentencing provisions from the *Gladue* principles by the majority leads to a problematic comparator group analysis. The majority required Sharma to prove disparities in the effects of the conditional sentencing provisions without consideration of the direct and negative impact on the *Gladue* principles—a difficult challenge and one for which there is little social science research.[75]

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71 Yet evidence of statistical disparities within a workplace, coupled with broader extrinsic evidence about group-based disadvantage, is precisely the kind of cogent and robust evidence needed to understand grounds-based distinctions. Indeed, the Supreme Court of Canada has long endorsed a contextual approach to assessing constitutional equality rights. See *Fraser*, *supra* note 4 at para 77.

72 *Fraser*, *supra* note 4 at para 181 [emphasis in original].

73 *Ibid*.

74 *Sharma*, *supra* note 5 at para 73 [emphasis in original] (though in the same paragraph, they accepted that "there is a link between the *Gladue* framework relating to section 718.2(e) and the conditional sentence regime").

75 Requiring statistical evidence in all cases would impose too high a burden on claimants seeking to prove discrimination. See discussion in *Radek*, *supra* note 49 at paras 502–13. See also Colleen Sheppard & Mary Louise Chabot, "Obstacles to Crossing the Discrimination Threshold: Connecting Individual Exclusion to Group-Based Inequalities" (2018) 96:1 Canadian Bar Review 1.

In line with a framing of the first step of the equality analysis that dissociates the conditional sentencing and *Gladue* principles provision, the majority in *Sharma* also concludes that it is not "enough to show that the law restricts an ameliorative program."[76] They were concerned that to conclude otherwise would make it too easy to challenge incremental ameliorative initiatives.[77] The majority's conclusions in this regard are directly at odds with the Court's decisions in the pay equity cases and in *Fraser*. In all three of the previous cases, the inadequacies of ameliorative initiatives were at the heart of the constitutional challenges. Furthermore, as Abella J recognized in the earlier cases, challenging inequities in ameliorative legislative initiatives does not impose positive obligations on governments to redress societal inequalities—a recurrent concern in the decisions of Rowe, Brown, and Côté JJ.[78]

The following example illustrates the conceptual weaknesses in the majority's analysis. Assume that a legislature enacts a maternity leave scheme for biological mothers to spend time at home following childbirth. The particular health and recovery needs of birthing are central to this type of legislative benefit. Now, assume that a legislative provision is introduced denying any form of family leave (for mothers, fathers, or adoptive parents, including post-childbirth maternity leave) in a particular industry. The no-family-leave provision would have a particularly negative impact on biological mothers since it would deny them a leave to be at home to recover from the health effects of childbirth—specific needs that other workers do not have. There should be no need to prove a disproportionate impact on mothers versus fathers or adoptive parents in relation to the family-leave provision. Rather, the family-leave prohibition (like the prohibition on the availability of conditional sentences for certain offences) has an acute impact on biological mothers (like the acute impact of removing conditional sentences from consideration pursuant to the

76 *Sharma*, *supra* note 5 at para 71. See also *R v Sharma*, 2020 ONCA 478 at para 83 (concluding that a grounds-based distinction exists where "a law removes a remedial provision that was put in place to alleviate the discriminatory effect of other laws").

77 *Sharma*, *supra* note 5 at paras 63–65, citing *Alliance*, *supra* note 2 at para 42 (note also the long discussion of LWOP comparator group analysis and part-time worker comparison).

78 For a discussion of judicial reluctance to recognize positive obligation to advance socio-economic rights, see Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Oñati Socio-Legal Series 237. In contrast, the United Nations Human Rights Committee imposed positive obligations on Canada to protect the right to life, including essential health care. See United Nations Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication no. 2348/2014, Toussaint v. Canada* (20 August 2018) at para 10.9.

Gladue principles). The impact of a more general legislative provision negatively affects an ameliorative program (that is, maternity leave or *Gladue* sentencing) in a way that implicates a grounds-based distinction. That is all that is needed in the first step of the equality analysis. Such a conclusion does not constitutionalize the ameliorative program; it simply acknowledges how legislative provisions can impact groups differently, particularly in the interconnected regulatory world in which we live. Such distinctions, of course, may be justified or may not perpetuate the harms or disadvantages of substantive inequality, but, at the threshold stage, the grounds-based distinction should be acknowledged.

In contrast to the majority in *Sharma*, Karakatsanis J, in her powerful and poignant dissenting reasons, insists on examining the legislative provisions together. She explains that the conditional sentencing and *Gladue* principles provisions "are neither wholly independent nor forever inseparable, yet they each invariably shape the other... they have long been conceptualized together."[79] She goes on to conclude that the restrictions on conditional sentences for some offences "more acutely affected Indigenous offenders than it did others, creating a *differential impact* on a group based on race."[80] The restrictions undermined the specific accommodation offered by the *Gladue* principles, which set out "a different sentencing methodology that was animated by [the] … unique needs and circumstances [of]… Indigenous people."[81] In short, the dissenting justices recognized the adverse effects of the conditional sentencing provisions on Indigenous peoples and thus concluded that there was a race-based distinction.

Acknowledging Knowledge: The Social Meaning of Distinctions

> The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify simply because there are few cases that can be so neatly characterized.[82]

In an important statutory human rights case involving a claim of adverse impact sex discrimination, Chief Justice Beverley McLachlin reminds us of

79 *Sharma*, *supra* note 5 at para 221.

80 *Ibid* at para 223 [emphasis added].

81 *Ibid*.

82 *Meiorin*, *supra* note 65 at para 2. For an extensive discussion of this case, see Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU"* (2001) 46 McGill Law Journal 533.

the difficulty of fitting the complexities of life into legal categories. In this case, McLachlin CJ described the distinction between direct and indirect discrimination as "malleable" and "unrealistic."[83] She notes that "a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect—or an even broader effect—could be easily realized by couching it in neutral language."[84] Her concern attests to the difficulty in delineating discrete categories of direct and adverse impact discrimination in many cases. While the *Fraser* case is significant for its clarification of the meaning of adverse impact discrimination, it also provides an interesting example of a case where the line between direct and adverse impact discrimination is dynamic and blurred. So too does the *Sharma* case.

The overlap between direct and indirect discrimination is often linked to knowledge or awareness of adverse effects. What appears to be adverse impact discrimination becomes a more direct form of discrimination if a decision-maker has knowledge of the negative effects of the seemingly neutral rule. In such cases, adverse impact discrimination may simultaneously be a form of direct discrimination. Indeed, it has been noted that, even in the classic US disparate impact decision, *Griggs v Duke Power Co*., the employer adopted the standardized tests and high school diploma requirement knowing that they would disproportionately screen out Black candidates and employees.[85] In short, discrimination caused by apparently neutral rules may also be a form of direct discrimination, where a decision-maker (1) is aware of the discriminatory dimensions of the "neutral" policy choices and (2) has the authority, power, or discretion to respond and refuses to do so.[86]

While *Fraser* is heralded for affirming and clarifying adverse impact discrimination,[87] it also illustrates the overlap between direct and adverse impact discrimination. Circumstances that begin as problems of indirect discrimination can, and do, evolve to become problems of direct discrimination. As *Fraser*

83 *Meiorin*, *supra* note 65 at para 29, citing M David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Canadian Labour and Employment Law Journal 1 at 8–9.

84 *Ibid.*

85 See Alfred Blumrosen, "Strangers in Paradise: *Griggs v Duke Power Co.* and the Concept of Employment Discrimination" (1972) 71:1 Michigan Law Review 59 at 64 (discussing *Griggs v Duke Power Co*, 420 F2d 1225, and observing this practice in the wake of the passage of Title VII of the *Civil Rights Act*, 1964, Pub L 88-352, § 716(a), 78 Stat 266).

86 Such an overlap may arise particularly in *Charter* cases involving the exercise of administrative discretion.

87 See e.g. Jonnette Watson Hamilton, "Cautious Optimism: Fraser v Canada (A.G.)" (2021) 30:2 Constitutionnal Forum Constitutionnel 1 <doi.org/10.21991/cf29418>.

illustrates, the negative gendered effects of job sharing on pension benefits were communicated to the leadership of the RCMP. In a memorandum to the RCMP's senior management, fourteen women affected by the job-sharing scheme outlined their concerns about the absence of a pension buyback option and why they believed this was "illogical and unfair."[88] The memo concluded: "Job-sharing is a progressive, proactive, and innovative step for the RCMP. It is time to support members who choose to job-share, rather than penalizing them for choosing an option the Force has made available."[89]

In the wake of this memorandum, a member of the senior management team expressed concern about the potential unfairness of the refusal to extend a pension buyback option to job-sharers. The RCMP's Pension Advisory Committee also indicated that the plan could be amended given flexibility in income tax legislation. Finally, an External Review Committee set up to review a grievance brought by the job-sharers found in their favour. Despite these developments, the RCMP's acting commissioner denied the grievance and refused to allow the job-sharers the option to buy back pension credits. It was only then that the *Charter* challenge was initiated. On the facts of the *Fraser* case, the gendered effects of denying pension benefits to women job-sharers were clearly known by the RCMP's commissioner; furthermore, he appeared to have had the authority to recommend the extension of a pension buyback benefit to job-sharers, and he refused to do so.[90]

Interestingly, the dynamic overlap between adverse impact and direct discrimination resonates with what Robin Dembroff, Issa Kohler-Hausmann, and Elise Sugarman call the social meaning of categories.[91] Understanding discrimination requires an inquiry into "the generalizations, stereotypes, norms, and assumptions associated with these group-based categories."[92] Their argument, therefore, critiques the "but for" test that has emerged in US employment discrimination law as a means for assessing sex-based classifications. This approach was relied on in recent cases that extended protection against sex discrimination to gay male and transwomen individuals.[93] "But for" their sex (that is, if they had been biologically female), they would not have been fired. While this formulation appears to provide a neat and objectively clear

88 *Fraser*, *supra* note 4 at para 17.

89 Memorandum to Senior Management, cited in *ibid* at para 17.

90 *Ibid* at paras 18–20 (noting the refusal of the Royal Canadian Mounted Police's (RCMP) acting commissioner to accept an RCMP External Review Committee's conclusion that job-sharers could be accorded the pension buyback option).

91 See Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, "What Taylor Swift and Beyoncé Teach Us about Sex and Causes" (2020) 169 University of Pennsylvania Law Review Online 1 at 4.

92 *Ibid*.

93 See *Bostock v Clayton County*, 140 S Ct 1731 (2020).

way to enlarge the scope of protection against sex discrimination, Dembroff, Kohler-Hausmann, and Sugarman critique it for being premised on a biological counterfactual and an "individual-level explanation" rather than a "social explanation."[94] They insist instead that anti-discrimination law be informed by the social meaning of group-based categories.

In a similar vein, what appear to be neutral categories, policies, or rules are also often deeply infused with gendered social meanings. These social meanings blur the distinction between direct and adverse impact discrimination. In *Fraser*, it was abundantly clear to those introducing and implementing the job-sharing initiative that it was designed predominantly for RCMP mothers to assist in balancing career and childcare obligations. It was a "neutral" legislative initiative in form, but its social meaning was deeply gendered. The line between direct and indirect discrimination is also somewhat blurred in *Sharma.* The legislative restrictions on ordering conditional sentences for certain offences are neutral on their face, yet it is widely acknowledged that conditional sentences are a critical means for reducing incarceration rates for Indigenous people.[95] Indeed, though framing her analysis as one linked to adverse effects, Karakatsanis J's dissent acknowledges "a reality long-recognized throughout our *Gladue* jurisprudence: removing conditional sentences for many offences has a particular impact on Indigenous offenders."[96]

Intersectionality

A final framing issue concerns the place of intersectionality analysis in these cases. The concept of intersectionality was recognized by the Supreme Court of Canada in an earlier equality rights decision. In *Law v Canada*, the Court wrote that "[t]here is no reason in principle ... why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1)."[97] The concept, however, has not been further elaborated by the Supreme Court. Despite the ways in which the effects of sex discrimination impact women differently, particularly in *Centrale des Syndicats* and in *Fraser*, and the ways sentencing impacts non-Indigenous and Indigenous men and women differently, intersectionality was not central to the analysis in any of these cases.[98]

94 See Dembroff, Kohler-Hausmann & Sugarman, *supra* note 91 at 9. See Colleen Sheppard, "Multiple Discrimination in the World of Work" (2011) International Labour Organization Working Paper No 66.

95 *Sharma*, *supra* note 5 at para 225.

96 *Ibid.*

97 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 94.

98 *Fraser*, *supra* note 4 at para 116.

Intersectionality is an important concept interwoven into the tapestry of issues regarding inequality and discrimination.[99] Its importance underscores both the necessity of assessing how intersecting inequalities affect our understanding of problems of discrimination and of ensuring that the policy solutions we imagine are equitable and inclusive. Though having its roots in the legal domain, specifically with respect to anti-discrimination law, the concept of intersectionality has been developed and applied in multiple disciplinary contexts—sociology, philosophy, political science, history, anthropology, psychology, ethnic studies, queer studies, feminist studies, and social work. It is a deeply interdisciplinary concept and has been the focus of extensive academic and applied analysis. A path-breaking concept, it has evolved into what Sumi Cho, Kimberlé Crenshaw, and Leslie McCall refer to as the "field of intersectional studies."[100] They observe that connecting intersectional theory to "praxis has not only clarified intersectionality's capacities; it has also amplified its generative focus as an analytical tool to capture and engage contextual dynamics of power."[101]

One of the main contributions of intersectionality theory is its insistence on questioning and challenging the adequacy of traditionally binary categories of analysis. The categories "woman," "sex," and "gender," for example, are challenged for the ways in which they have been used to endorse essentialist understandings of "women" that fail to consider the differences between women or problematize categorical dichotomies.[102] Traditional categories tend to distort the complexities of social reality and risk inequitably excluding some groups from inclusion or protection. Intersectionality, therefore, prompts recognition

99 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1 University of Chicago Legal Forum 139. Crenshaw's analysis focused on employment discrimination cases where Black women's experiences of exclusion and discrimination are rendered invisible by reliance either on race-based statistics or sex-based statistics. In his way, the specificity of Black women's experiences of disadvantage and discrimination is not recognized. As Crenshaw explains, intersectionality is not just a matter of compound or additive discrimination. It describes discrimination that is unique to Black women. See also International Labour Organization, *Time for Equality at Work, Global Report under the Follow Up to the Fundamental Principles and Rights at Work* (Geneva: International Labour Organization, 2003) at 37.

100 Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, "Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis" (2013) 38:4 Signs: Journal of Women in Culture and Society 785 at 785. See also Devon Carbado et al, "Intersectionality: Mapping the Movements of a Theory" (2013) 10:2 Du Bois Review 303.

101 Cho, Crenshaw & McCall, *supra* note 100 at 788.

102 See Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stanford Law Review 581.

of the intra-categorical diversity within the category "woman." In effect, this recognition means that other identity markers beyond gender (for example, race, religion, age, sexual orientation, family status, national or ethnic origin, disability) are integrated into an analysis that examines the ways in which they intersect to affect the experience of inequality and oppression. As Patricia Hill Collins explains, identity markers function not as "unitary, mutually exclusive entities, but rather as reciprocally constructing phenomena."[103] This relational turn in feminist intersectionality theory highlights the important "difference between looking at the intersection of static categories and questioning the relationship between them, or the process and systems of domination that marginalize or discriminate."[104]

So how does intersectionality theory enter into these recent equality cases? Recognition of diversity in women's lives and the realities of complex identities across divides of power and privilege is critical to many of the areas that are central to women at work, including care work, informal and fragmented work, pay inequities, occupational segregation, and workplace discrimination. The specific realities of Indigenous women in the criminal justice system also make intersectionality critical to race discrimination. There is a real risk that if we are not attentive to intersecting inequalities, we will advance legal and policy initiatives that do not take intra-categorical diversity into account, thereby being unresponsive to the needs of the most vulnerable individuals within the categories of discrimination law.[105] Such initiatives, in turn, risk further marginalizing those individuals most lacking in political power. In thinking about diversity and gender discrimination claims, it is also important to observe how some of the most economically disadvantaged and vulnerable women continue to be invisible in our jurisprudence.

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103 Patricia Hill Collins, "Intersectionality's Definitional Dilemmas" (2015) 41 Annual Review of Sociology 1 at 2.

104 Anne McBride, Gail Hebson & Jane Holgate, "Intersectionality: Are We Taking Enough Notice in the Field of Work and Employment Relations?" (2015) 29:2 Work, Employment & Society 331 at 338, citing Marie-Ange Hancock, "Intersectionality as a Normative and Empirical Paradigm" (2007) 3:2 Politics & Gender 248. See also Judy Fudge, "From Women and Labour Law to Putting Gender and Law to Work" in Margaret Davies & Vanessa Munro, eds, *A Research Companion to Feminist Legal Theory* (London: Routledge, 2013) 321 (examining "gender as a constructed, contested, and differentiated social relationship" at 322).

105 See Nitya Iyer, "Some Mothers Are Better Than Others: A Re-examination of Maternity Benefits" in Susan B Boyd, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168. See also Katherine Arnup, "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada" (1989) 3:1 Canadian Journal of Women and the Law 18.

In both *Centrale des Syndicats* and *Fraser*, not all women were equally impacted by the impugned provisions. This raises questions about how anti-discrimination law should take the diversity between women into account. Although an intersectional analysis was not raised in *Centrale*, and no disaggregated workplace data was adduced, labour force studies have revealed racial and ethnic origin disparities in workplaces where women predominate.[106] In *Fraser*, diversity between women is linked to the fact that not all women have childcare responsibilities, meaning that women with caregiving responsibilities experience different equality challenges and intersecting sources of discrimination.[107] In *Fraser*, Abella J briefly discusses intersectionality, noting that it is integrated into her analysis of sex-based discrimination. As she puts it, "[a] robust intersectional analysis of gender and parenting—as this case shows—can be carried out *under the enumerated ground of sex*, by acknowledging that the uneven division of childcare responsibilities is one of the 'persistent systemic disadvantages [that] have operated to limit the opportunities available' to women in Canadian society."[108] In contrast, and given her rejection of sex-based discrimination, Côté J speculates that to succeed the appellants in *Fraser* would have to base their claim either on "family/parental/caregiver status" as an analogous ground or, "alternatively[, on] the intersection of that ground and sex."[109] Neither argument is accepted by Côté J, who goes so far as to affirm in the footnotes: "To be clear, I am not endorsing an intersecting grounds approach or the recognition of new analogous grounds."[110]

While intersectionality was not central to *Fraser*, it is nonetheless important to reflect upon Abella J's recognition that intersectionality may be relevant even in cases where the claim can fit within an existing ground of discrimination. Indeed, even in Kimberlé Crenshaw's initial analysis of the concept, it was important that Black women not be excluded from the category "women." For example, when Black women were denied the right to represent women in a sex discrimination class action lawsuit, Crenshaw critiqued the erasure of Black women from the category "women," revealing the "implicit grounding of white female experiences in the doctrinal conceptualization of sex discrimination."[111]

106 See e.g. Canadian Women's Foundation et al, "Resetting Normal: Women, Decent Work and Canada's Fractured Care Economy", *Canadian Women's Foundation* (2020) <canadianwomen.org/wp-content/uploads/2020/07/ResettingNormal-Women-Decent-Work-and-Care-EN.pdf>.

107 See e.g. Jennifer Koshan, "Intersections and Roads Untravelled: Sex and Family Status in *Fraser v Canada*" (2021) 30:2 Constitutionnal Forum Constitutionnel 53.

108 *Fraser*, *supra* note 4 at para 116 [citations omitted; emphasis added].

109 *Ibid* at para 251.

110 *Ibid* at para 239.

111 Crenshaw, *supra* note 99 at 144.

Thus, intersectionality theory may simply gesture towards recognition of the importance of inclusive categories. Reliance on intersectionality in this way has emerged in relation to equality claims advanced by Muslim women targeted for discrimination at the intersection of their religious and gender identities.[112] While it is impossible to separate the religious and gendered dimensions of their identities, it is important that, as women, they be able to avail themselves of specific gender equality protections. A robust intersectional analysis of gender and religion is particularly critical to advancing Muslim women's rights at this historical juncture.[113] As a legal theory and conceptual tool, intersectionality is relevant not only in cases that do not otherwise fit within existing grounds of discrimination; it is also needed to ensure that our existing categories, such as sex discrimination, are interpreted expansively and inclusively. Furthermore, sensitivity to intersecting sources of inequality within discrete grounds of discrimination provides a response to dilemmas of comparison that sometimes arise in identifying and applying intersectional categories.[114] Discrimination against Muslim women is recognized as a problem of gender inequality, even though not all women are affected by it. Incorporating an understanding of intra-categorical gender diversity rightfully challenges the rigid and bifurcated male-female comparator analysis. Rather, the key legal question becomes: does this law or policy impact women, in all of their diversity, in harmful ways?

Attentiveness to the insights of intersectionality theory also prompts broader questions about the limits of litigation and access to justice. As Sonia Lawrence queries, "[d]oes *Fraser* work to help women who aren't already pension-earning professionals," and whether and how can it "meaningfully improve things for

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112 See Vrinda Narain, "Gender, Religion and Workplace: Reimagining Reasonable Accommodation" (2017) 20:2 Canadian Labour and Employment Law Journal 307. See also Vrinda Narain, "Critical Multiculturalism" in Beverley Baines et al, eds, *Feminist Constitutionalism: Global Perspectives* (Cambridge, UK: Cambridge University Press, 2012) 377.

113 Sirma Bilge, "Reading the Racial Subtext of the Québécois Accommodation Controversy: An Analytics of Racialized Governmentality" (2013) 40:1 Politikon 157. For a discussion of the current Québec debates on religion and discrimination, see Rebecca Jones, Nathaniel Reilly & Colleen Sheppard, "Contesting Discrimination in Quebec's Bill 21: Constitutional Limits on Opting Out of Human Rights", *Canadian Race Relations Foundation* (November 2019) <issuu.com/crrf-fcrr/docs/directions8_bill_21_commentary_sheppardjonesreilly>.

114 See Suzanne B Goldberg, "Discrimination by Comparison" (2011) 120:4 Yale Law Journal 728 <scholarship.law.columbia.edu/faculty_scholarship/978/>. See also Silma Bilge & Olivier Roy, "La discrimination intersectionnelle: la naissance et le développement d'un concept et les paradoxes de sa mise en application en droit antidiscriminatoire" (2010) 25:1 Canadian Journal of Law and Society 51.

the most vulnerable, most economically compromised women in Canada?"[115] She reminds us that *Fraser* involved white women working in stable, unionized, non-precarious RCMP jobs, who had meaningful access to justice regarding their experiences of discrimination. Attentiveness to intersectionality and diversity in women's lives, therefore, prompts us to situate equality rights litigation in the broader political economy of law.[116]

Intersectionality also provides insights into the inequality experienced by Cheyenne Sharma. As a young Indigenous mother risking eviction, the inequalities she faced engaged overlapping and intersecting harms linked to being a young, economically disadvantaged Indigenous woman with childcare responsibilities. Expert testimony referred to in the majority reasons acknowledges that the "removal of conditional sentences for any offence with a mandatory minimum, impeded the sentencing regime's capacity to account for the 'contextual and intersectional factors that render Indigenous women vulnerable to [committing] drug crimes.'"[117] Despite acknowledging this expert testimony, the majority's reasons fail to recognize the intersectional realities of inequality.

In dissent, Karakatsanis J engaged with intersectionality through her commitment to a contextual approach, situating the legal issues within an assessment of the broader historical and structural realities of inequality. She explained that, since "substantive equality looks to real-world effects, the inquiry is always contextual."[118] Recognizing that grounds of discrimination may "intersect, compounding to form an individual or group's experience," she explained that "in the context of systemic discrimination … it is especially important to be alive to the intersectionality of disadvantage."[119] Applying these insights to the *Sharma* case, Karakatsanis J takes judicial notice of the historical disadvantage of Indigenous people, particularly their severe over-incarceration. She goes on to outline the particular disadvantages facing Indigenous women:

> Those disadvantages are worse still for Indigenous women, many of whom continue to face multiple and compounding forms of discrimination. Policies that have removed children from Indigenous families … have disproportionately impacted Indigenous mothers, who are typically primary caretakers. … Disenfranchisement, … coercive birth control measures like forced sterilization, pervasive stereotypes, and the

115 Lawrence, *supra* note 14 at 44.

116 On the political economy of law, see Jedediah Britton-Purdy et al, "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century" (2020) 129 Yale Law Journal 1784.

117 See *Sharma*, *supra* note 5 at para 26 (regarding the expert testimony of Dr. Murdocca).

118 *Ibid* at para 196.

119 *Ibid.*

> ongoing epidemic of violence against Indigenous women and girls have been more direct causes of harm to Indigenous women. This history follows Indigenous women and shapes their experiences—both as victims and offenders—in the criminal justice system.[120]

Karakatsanis J thus concludes that the second step of the equality analysis is met—that "[b]y impairing … [sentencing] accommodation, these provisions reinforce, perpetuate, and exacerbate the disadvantages of an Indigenous offender."[121] Significantly, in *Sharma*, we see how sensitivity to intersectional inequality emerges at different moments in the equality analysis. While important in relation to how discriminatory distinctions are framed, it is also critical to assessing the harms of substantive inequality.

Conclusion

Constitutional equality speaks to a critical human right. Its meaning should be clear and comprehensible; yet, it continues to be subjected to multiple and contested interpretations and legal analyses. The Supreme Court of Canada's continued commitment to substantive equality reinforces the importance of an approach rooted in contextualism and informed by an appreciation of histories and realities of group-based disadvantage and exclusion. While there is general consensus regarding the doctrinal framework for equality, embedded within each step of the legal analysis are deeply divergent views. This article has focused on contested understandings of the first step of the constitutional equality analysis—the identification of a grounds-based distinction.

A review of four recent cases reveals that some justices are creating significant roadblocks for claimants seeking to prove a grounds-based distinction. Such is the case with respect to both direct and adverse impact distinctions. While a contextual and generous interpretation of grounds-based distinctions is advanced by some justices, others are tightening the evidentiary and comparator group exigencies to deny equality claims at this first step. Thus, in the two pay equity cases, a majority of justices concluded that the impugned legislative provisions were "inextricably linked to sex" so as to give rise to a direct sex-based

120 *Ibid* at paras 234–35. See also Charlotte Baignent, "Why *Gladue* Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions" (2020) 32:1 Canadian Journal of Women and the Law 1; Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism and Correctional Practice" (1999) 19:1–2 Canadian Woman Studies 24; Fran Sugar & Lana Fox, "Nistum Peyako Seht'wawin Iskwewak: Breaking Chains" (1990) 3:2 Canadian Journal of Women and the Law 465.

121 *Ibid* at para 242.

distinction. In contrast, a minority of justices found no sex-based distinction despite the express gender-based distinctions in pay equity laws. Central to their reasoning was a fear that to recognize a gender-based distinction would open up ameliorative laws to constitutional challenge.

In *Fraser*, adverse impact discrimination was the focus of the analysis—with a majority of justices finding that the facially neutral no pension buyback rule for job-sharers had a disproportionate impact on women. As Abella J's last major equality decision while on the Supreme Court of Canada, she took the opportunity to elaborate the evidentiary and conceptual exigencies of adverse impact discrimination and substantive equality. In contrast, two of the dissenting justices were reticent to find adverse impact discrimination, heightening the causation requirements for finding a group-based distinction. The third dissenting justice declined to find a gender-based distinction, insisting instead that the only relevant distinction was caregivers versus non-caregivers.

In *Sharma*, the dissenting justices from the three earlier cases were in the majority and concluded that Sharma had failed to prove any race-based distinction in the limits on conditional sentences. The majority concluded that Sharma failed to adduce sufficient evidence of a race-based distinction. Applying a formalistic comparator group analysis, the majority further refused to consider how limiting access to conditional sentences would undermine the effectiveness of special Indigenous sentencing principles. Karakatsanis J's powerful dissenting reasons in *Sharma* affirms her emerging role as an important judicial defender of an expansive interpretation of equality rights. She concluded that the facially neutral limits on conditional sentences had an adverse impact on Indigenous offenders. Although Sharma's equality claim was denied, the subsequent legislative amendments attest to a broader political consensus about the merits of her claims.[122]

Finally, these cases were litigated at a time when intersectionality theory was becoming widely recognized as a critical component of an inclusive approach to equality rights. Indeed, while Abella J positively endorses and acknowledges the insights of intersectionality theory, she limits her legal analysis to sex discrimination. A more comprehensive intersectionality analysis was not required in the *Fraser* case since protection was available using existing grounds-based categories. Nevertheless, Abella J's recognition of intersectionality underscores the importance of an expansive approach to sex-based classifications attuned to the diversity in women's lives. In *Sharma*, the dissenting reasons of Karakatsanis J acknowledge the importance of examining systemic inequality through an intersectional lens and provide an expansive discussion of the historical and ongoing

122 See *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15. See also *Women's Legal Education and Action Fund's Case Summary: R v Sharma* <www.leaf.ca/case_summary/r-v-sharma-2019/>.

effects of colonialism and the intersecting inequities in Cheyenne Sharma's life circumstances. Though relying exclusively on a race-based distinction, the dissenting reasons underscore a sensitivity to intersecting inequalities facing a young Indigenous mother touched by the continuing legacies of the injustices of colonialism.

In the early days of *Charter* interpretation, the Supreme Court of Canada emphasized the importance of a "generous rather than a legalistic" interpretation of fundamental rights and freedoms—an approach rooted in a sensitivity to both their broad purposes and diverse contexts.[123] Yet, in some judicial opinions, we are witnessing a "narrow and technical construction" of equality, constrained by unfair evidentiary hurdles, technical comparator framings, a refusal to acknowledge effects-based inequities, and disproportionate fear of acknowledging governmental responsibility to redress systemic inequities.[124] Fortunately, many justices continue to recognize that our Constitution deserves a "large and liberal" interpretation.[125] In the domain of equality rights, this means going beyond formal equality to embrace the challenges and complexities of substantive equality, beginning with an expansive and intersectional understanding of grounds-based distinctions.

About the Contributor / Quelques mots sur notre collaboratrice

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123 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 117. See also *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, per Wilson J concurring. For an early discussion of this in the context of grounds, see Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Canadian Bar Review 893.

124 Indeed, the living tree approach endorsed in *Edwards v Attorney-General for Canada*, [1930] AC 124 at 136, rejected a "narrow and technical construction" of the Constitution and affirmed the need for "a large and liberal interpretation." Cited with approval in the early *Charter* case *Hunter v Southam*, [1984] 2 SCR 145 at 156. It is apt that Lord Sankey affirmed women's right to be included as "persons" and thus eligible for appointment to the Senate—a significant legal moment in Canadian constitutional history.

125 *Ibid.*

Sheppard, Collen, « Grounds-Based Distinctions: Contested Starting Points in Equality Law », (2024) 35 Canadian Journal of Women and the Law 1

Discrimination Stories: Exclusion, Law and Everyday Life (Delve Books, 2021); *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010); "Mapping Anti-discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law" (2012) 151 International Labour Review 1; and "Institutional Inequality and the Dynamics of Courage" (2013) 31:2 Windsor Yearbook of Access to Justice 103.

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Skolnik, Terry, « Homelessness and Unconstitutional Discrimination », (2019) 15 Journal of Law & Equality 69

Homelessness and Unconstitutional Discrimination

Terry Skolnik[*]

ABSTRACT

In a series of recent judicial decisions, Canadian courts have rejected homelessness as a ground of discrimination in Canadian constitutional law. Judges have concluded that homeless people are not a protected class under section 15 of the Canadian Charter *of Rights and Freedom for two principal reasons. First, they have decided that homelessness is not an immutable or constructively immutable personal characteristic. Second, they have determined that the term "homelessness" is too vague to constitute a protected class under the Charter's equal protection framework. This article challenges these two conclusions and demonstrates why homelessness—a condition where individuals lack a real private property right—constitutes a plausible ground of discrimination. I argue that we gain a richer understanding of the wrongs of discrimination and the moral concerns underlying homelessness by appealing to the republican theory of freedom (or republicanism) that construes liberty as non-domination. The term "domination" implies that others possess a unilateral power to interfere with an individual's actions, plans, or purposes. Drawing on the connection between equality and liberty, I show how the republican theory of freedom provides for a more purposive interpretation of the right to equal protection. Notably, republicanism's insights can illuminate certain limitations of section 15 Charter jurisprudence, highlight the harms of discrimination based on quasi-immutable traits, and assist in identifying new analogous grounds of discrimination. Ultimately, this article demonstrates why unfreedom undermines equality and why a meaningful conception of section 15 of the Charter must recognize this reality.*

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I. INTRODUCTION

Suppose that Parliament enacted a law stating: "Homeless people are not allowed in public parks." According to current jurisprudence, this law would not amount to discrimination violating section 15 of the *Canadian Charter of Rights and Freedoms*.[1] Unconstitutional discrimination involves distinctions that impose disadvantages or perpetuate stereotypes or prejudice on the grounds enumerated in section 15 or characteristics deemed analogous.[2] For two principal reasons, Canadian courts have rejected homelessness as an analogous ground of discrimination.[3] First, some judges reason that homeless people form an amorphous group whose scope cannot be circumscribed.[4] Second, the judiciary has concluded that homelessness is not an immutable or constructively immutable personal characteristic akin to race, age, gender, citizenship, or religion.[5] In addition, courts worry that recognizing homelessness as an analogous ground of discrimination would endow people with a positive right to housing or would constitutionalize a minimum core of entitlements.[6]

This article argues that homelessness can constitute an analogous ground of discrimination and refutes the main reasons that are offered against it. I begin by demonstrating how homeless people have historically experienced discriminatory disadvantages through vagrancy statutes and laws that regulate public property—a conclusion that militates in favour of recognizing a new analogous ground under section 15 of the *Charter*.[7] I then tackle the principal arguments for rejecting homelessness as an analogous ground of discrimination. By bridging the gap between case

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

2 *Centrale des syndicats du Québec v Quebec (AG)*, 2018 SCC 18 at para 22, [2018] 1 SCR 522; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 18, [2015] 2 SCR 548 [*Taypotat*]; *Quebec (AG) v A*, 2013 SCC 5 at paras 324–7, [2013] 1 SCR 61 [*Quebec (AG) v A*].

3 *Tanudjaja v Canada (AG)*, 2013 ONSC 5410 at paras 122–37, 116 OR (3d) 574 [*Tanudjaja* SC]; *Abbotsford (City of) v Shantz*, 2015 BCSC 1909 at para 231, 392 DLR (4th) 106 [*Shantz*].

4 *Tanudjaja* SC, *supra* note 3 at para 130.

5 *Ibid.*

6 *Ibid* at paras 103–10.

7 Prashan Ranasinghe, "Vagrancy as a Penal Problem: The Logistics of Administering Punishment in Late-Nineteenth-Century Canada" (2012) 25 Journal of Historical Sociology 531 at 534–6.

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law,[8] liberty-based conceptions of equality,[9] and the republican theory of freedom (or republicanism) that construes liberty as non-domination, I highlight some limitations to section 15 *Charter* jurisprudence in protecting against discrimination.[10] In response, I build on Tarunabh Khaitan's and Sophia Moreau's work to show how the republican theory of liberty offers a plausible way of understanding certain wrongs of discrimination that we otherwise ignore.[11] My core argument is that republicanism should inform our understanding of section 15 of the *Charter*, assist in identifying new analogous grounds of discrimination, and lend support to why homelessness should be recognized as an analogous ground of discrimination.

The next section of the article sets out how homeless people are a marginalized group that experience significant discriminatory disadvantages. It highlights the connection between unfreedom and inequality. The third section refutes two principal reasons why courts have rejected homelessness as an analogous ground, notably: (1) that homelessness is not an immutable or constructively immutable personal trait and (2) that the term "homelessness" is too vague to constitute an analogous ground. It sets out how individuals can suffer discrimination as a result of complex personal traits that individuals often do not meaningfully choose and that can only be changed incrementally and with great difficulty.[12] This section also shows why homelessness constitutes such a complex personal trait that is quasi-immutable in nature and gives rise to a distinct form of discrimination. The fourth section challenges the claim that recognizing homelessness as an analogous ground of discrimination would necessarily lead to the recognition of new justiciable positive rights. Nevertheless, in certain circumstances, unconstitutional discrimination could result in the judiciary justifiably requiring the state to redistribute certain resources towards homeless people.

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8 *Tanudjaja* SC, supra note 3; *Shantz*, supra note 3.

9 Sophia Moreau, "In Defense of a Liberty-based Account of Discrimination" in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 71.

10 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999) [Pettit, *Republicanism*].

11 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) at 96–98, 100–1 [Khaitan, *Theory*]; Sophia Moreau, "What Is Discrimination?" (2000) 38 Philosophy and Public Affairs 143 [Moreau, "What Is Discrimination"].

12 Marc Stuart Gerber, "Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited" (1993) 81 Geo LJ 2141 at 2154, 2162.

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Republicanism, therefore, not only captures certain wrongs of discrimination that section 15 of the *Charter* might otherwise overlook. It also demonstrates how the law's disparate impact imposes discriminatory disadvantages on homeless people. By appealing to the republican theory of freedom as an insightful way of thinking about liberty and its connection to discrimination, it establishes that homeless people's unfreedom undermines any prospect of them enjoying substantive equality.

II. HOMELESSNESS: HISTORICAL AND CONTEMPORARY DISADVANTAGES

Section 15 of the *Charter* aims to "ensure equality in the formulation and application of the law."[13] The provision serves to promote a more egalitarian society premised on a recognition that all individuals deserve equal concern and respect.[14] It also fulfils an important remedial function to rectify unconstitutional discrimination and its negative effects.[15] Canadian courts consider the underlying purpose of section 15 when recognizing new analogous grounds of discrimination.[16] As part of that analysis, they accord significant importance to the historical and contemporary disadvantages experienced by marginalized groups.[17] This section sets out three interrelated disadvantages faced by homeless people and their connection to discrimination.

A. Life and Security Interests

First, a lack of access to housing places life and security interests at risk.[18] Numerous studies show that homeless people's life expectancy is significantly lower than that of people with access to housing.[19] Stephen Hwang's research demonstrates that the mortality rates for homeless men between the ages of eighteen and twenty-four in Toronto's shelter system

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[13] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, [1989] 2 WWR 289 [*Andrews*].

[14] *Ibid*; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 42, 170 DLR (4th) 1.

[15] *Andrews*, *supra* note 13 at 171; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1238, 59 DLR (4th) 321, cited in *Quebec (AG) v A*, *supra* note 2.

[16] *Andrews*, *supra* note 13 at 180; *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 20, 173 DLR (4th) 1 [*Corbière*].

[17] *Andrews*, *supra* note 13 at 180–1; *Corbière*, *supra* note 16 at para 17; *Withler v Canada (AG)*, 2011 SCC 12 at para 38, [2011] 1 SCR 396 [*Withler*]; *Lavoie v Canada*, 2002 SCC 23 at para 45, [2002] 1 SCR 76.

[18] Martha Jackman & Bruce Porter, "Rights-Based Strategies to Addressing Homelessness and Poverty in Canada: The *Charter* Framework" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Markham, ON: Irwin Law, 2014) 65 at 74.

[19] Stephen W Hwang, "Homelessness and Health" (2001) 164 CMAJ 229 at 230.

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are roughly eight times higher than that of the general population.[20] The former are also more likely to contract contagious diseases due to the confined nature of shelters.[21] Elise Roy and her colleagues conducted a study analyzing the mortality rate amongst Montreal's street youth aged between fourteen and twenty-five.[22] They concluded that homeless male and female youth mortality rates in Montreal were respectively nine and thirty-one times higher than that of the general population.[23] Hwang and his colleagues' research shows that those living in shelters, rooming houses, or hotels also have a lower life expectancy compared to the general public.[24]

Homeless people are also significantly more likely to be victims of crime compared to the general population,[25] and homeless women are more likely to be victims of violence and sexual assault compared to women in the general population.[26] In 2015, Stephen Gaetz and his colleagues conducted a survey of over 1,100 homeless youth aged between twelve and twenty-seven in forty-seven communities across Canada's provinces and territories.[27] Roughly 69 percent of the respondents reported being victims of violent crime within the past year (compared to 8 percent of the general population), with 63 percent of respondents indicating that they had been victims of violence on more than one occasion within the past year.[28] Members of the lesbian, gay, bisexual, transgender, queer, and two spirited (LGBTQS2) community, minorities, and Indigenous persons are not only disproportionately over-represented in the homeless population, but they are also more likely to be victims of violence compared to other individuals who make up Canada's youth homeless

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[20] Stephen W Hwang, "Mortality among Men Using Homeless Shelters in Toronto, Ontario" (2000) 283 Journal of the American Medical Association 2152, cited in *ibid.*

[21] James Frankish, Stephen W Hwang & Darryl Quantz, "Homelessness and Health in Canada: Research Lessons and Priorities" (2005) 96 Canadian Journal of Public Health S23 at S24–5.

[22] Elise Roy et al, "Mortality in a Cohort of Street Youth in Montreal" (2004) 292 Journal of the American Medical Association 569 at 569–70.

[23] *Ibid.*

[24] Stephen W Hwang et al, "Mortality among Residents of Shelters, Rooming houses, and Hotels in Canada: 11 Year Follow-up Study" (2009) 339 Brit Med J 1068 at 1069–70.

[25] Barrett A Lee, Kimberly A Tyler & James D Wright, "The New Homelessness Revisited" (2010) 36 American Review of Sociology 501 at 506.

[26] Jana Jasinski et al, *Hard Lives, Mean Streets: Violence in the Lives of Homeless Women* (Lebanon, NH: Northeastern University Press, 2010) at 55–6.

[27] Stephen Gaetz et al, *Without a Home: The National Youth Homelessness Survey* (Toronto: Canadian Observatory on Homelessness Press, 2016), citing Samuel Perrault, *Criminal Victimization in Canada, 2014* (Ottawa: Statistics Canada, 2015).

[28] Gaetz et al, *supra* note 27 at 79.

population. [29] Furthermore, women, members of the LGBTQS2 community, and transgendered or gender non-binary persons reported being victims of sexual violence within the past year at the rates of approximately 37 percent, 36 percent, and 41 percent respectively compared to a 10 percent rate for the general population.[30] The likelihood of living a safe and prolonged life is severely compromised for homeless people compared to those with access to housing.

B. Homelessness and Liberty

Second, homeless people lack freedom (or liberty—I use the terms interchangeably). Jeremy Waldron, adopting a negative conception of freedom, argues that homeless people's unfreedom stems from the fact that "everything that is done has to be done somewhere," meaning on public property or on private property. [31] The cumulative effect of private property rules and laws governing public property, however, forecloses homeless people's liberty to pursue both options.[32] Because homeless people lack private property rights, they can only be on others' private property and alleviate their needs in those places with others' permission.[33] Furthermore, they may only exist on public property or perform certain acts in public if the law does not limit their presence or conduct in those places.[34] Many cities, however, prohibit sleeping in subway stations, erecting temporary shelters in parks, and urinating on public property—acts that homeless people characteristically perform in public because they lack a private property right and other alternatives.[35] As a result, homeless people generally lack the freedom to alleviate their basic needs both on public property and on private property without interference from the state or from other individuals.[36]

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[29] *Ibid* at 79–80.

[30] *Ibid* at 79.

[31] Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991–2) 39 UCLA L Rev 295 at 296 [Waldron, "Homelessness"].

[32] *Ibid* at 315.

[33] *Ibid* at 304.

[34] *Ibid* at 315.

[35] Marie-Ève Sylvestre, "Policing the Homeless in Montreal: Is This Really What the Population Wants?" (2010) 20 Policing and Society 432 at 433.

[36] *Ibid* at 301, 303–4; Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43 Queen's LJ 297 at 313–19 [Skolnik, "How and Why"].

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Christopher Essert takes Waldron's argument one step further.[37] Homelessness not only constrains one's negative freedom, meaning freedom from actual interference by others,[38] but it also undermines republican freedom, so called because it emerged during the Roman republic.[39] This is the core problem with homelessness, according to Essert. Republican freedom, as described by the theory's leading contemporary exponent, Philip Pettit, construes freedom more broadly as non-domination, meaning the absence of a risk of interference by others.[40] Domination refers to circumstances in which others possess the unilateral power to interfere with others' actions and purposes, irrespective of whether that power is exercised.[41] An individual experiences domination if they must live with the fear that others will exercise that power and interfere with the individual's actions or purposes.[42] In the republican tradition, domination is exemplified by the relationship between master and slave.[43]

The core difference between the negative and republican notions of freedom is that republicanism recognizes the notion of "domination without interference"—that is, individuals can be unfree even when others do not concretely obstruct their actions.[44] Dominated individuals live with the constant fear, anxiety, and uncertainty that others will frustrate their plans and purposes.[45] Furthermore, as Pettit points out, dominated individuals may also develop liberty-limiting coping mechanisms to escape others' interference.[46] A person may abandon their authenticity, adapt their preferences to those of the dominating party, become deferential towards others, or ingratiate others as a means to avoid such hinderances.[47] In Pettit's view, liberty as non-interference leads to the

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[37] Christopher Essert, "Property and Homelessness" (2016) 44 Philosophy and Public Affairs 266 at 266, 275.

[38] Waldron, "Homelessness," *supra* note 31 at 397, 304. On the notion of negative freedom, see Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969); Waldron, "Homelessness," *ibid* at 266.

[39] Essert, *supra* note 37 at 266.

[40] *Ibid.*

[41] Pettit, *Republicanism*, *supra* note 10 at 63–5.

[42] *Ibid.*

[43] *Ibid* at 22.

[44] *Ibid.*

[45] *Ibid* at 85.

[46] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, UK: Cambridge University Press, 2012) at 64.

[47] *Ibid.*

absurd conclusion that individuals adopting such coping mechanisms are free, so long as others do not concretely frustrate their actions or wishes.[48]

Republicanism acknowledges that a range of modern relationships involving asymmetric power dynamics exemplifies domination with and without interference, such as an abusive husband that dominates his spouse or an employer who can fire his or her employee at will.[49] In these contexts, the moral wrong of domination is that individuals become subordinated to the unpredictable and unilateral exercise of others' power.[50]

Essert argues that domination exemplifies the wrong of homelessness; homeless people are reliant on others' good graces precisely because they lack a private property right.[51] Private property rights not only endow individuals with a power to exclude others, but they also ensure that individuals have access to a space where they are not subject to others' power of exclusion.[52] Without such a right, homeless people lack both the ability to lawfully exclude others and the ability to protect themselves from others' power of exclusion.[53] And the consequences are serious. The freedom to be in a certain place is a precondition to freely performing any act in that place.[54] To experience homelessness is not only to live at the mercy of everyone else's power of exclusion but also to constantly depend on others' good will in order to do what one wishes or act as one pleases.[55] Homelessness is not simply the lack of a private property right, the absence of access to housing, or living without a roof over one's head. As I have argued elsewhere, to experience homeless "is to lack protection against others' power over us."[56]

Concerns about these types of asymmetric power dynamics have led scholars to draw the connection between domination and discrimination.[57] Some observe that dynamics of subordination and dependency are

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[48] *Ibid.*

[49] *Ibid* at 58.

[50] *Ibid* at 63.

[51] Essert, *supra* note 37 at 266.

[52] *Ibid*; Morris R Cohen, "Property and Sovereignty" (1927) 13 Cornell L Rev 8 at 12.

[53] Essert, *supra* note 37 at 276.

[54] *Ibid* at 276.

[55] *Ibid.*

[56] Skolnik, "How and Why," *supra* note 36 at 324.

[57] See e.g. Khaitan, *Theory*, *supra* note 11 at 100; Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50 Osgoode Hall LJ 669 at 676; Elizabeth Anderson, "What Is the Point of Equality?" (1999) 109 Ethics 287 at 313–15; Kerri Froc, "Immutability Hauntings: Socio-Economic Status and Women's Rights to Just Conditions of Work under Section 15 of the *Charter*" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Markham, ON: Irwin Law, 2014) 187 at 221 [Froc, "Immutability"].

hallmarks of both inequality and discrimination.[58] Catherine MacKinnon, for instance, argues that inequality is rooted in the existence and effects of asymmetrical power dynamics, where one party unilaterally possesses power over another.[59] She explains:

> [I]nequality, substantively speaking, is always a social relation of rank ordering, typically on a group or categorical basis—higher and lower, more and less, top and bottom, better and worse, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate, justly forceful and rightly violated or victimized, commanding and obeying.[60]

Pettit draws a similar connection between unfreedom and inequality. He remarks that domination becomes internalized by individuals and shapes their interactions with one another.[61] Notably, those who possess a unilateral power to interfere with others are generally aware that they can do so and recognize others' subordinated status.[62] Conversely, an individual who experiences domination knows that others wield power over them and that they are subordinated to others' whims.[63]

David Dyzenhaus, for his part, emphasizes how republican theorists were historically concerned with the problem of domination in both public and private contexts and its potential to destroy equality in both spheres.[64] Without public recognition of marginalized groups' equal status and mechanisms to remedy and prevent discrimination, powerful groups can dominate others in private contexts.[65] Kerri Froc advances a similar argument that underscores the need for discrimination law to prevent the

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[58] Catherine A MacKinnon, "Reflections on Sex Equality under Law" (1991) 100 Yale LJ 1281 at 1297; Catherine A MacKinnon, "Difference and Dominance: On Sex Discrimination" in Katherine T Bartlett & Rosanne Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* (Boulder, CO: Westview Press, 1991) 81.

[59] Catherine MacKinnon, "Substantive Equality: A Perspective" (2011) 96 Minn L Rev 1 at 11.

[60] *Ibid.*

[61] Pettit, *Republicanism*, *supra* note 10 at 60–2.

[62] *Ibid.*

[63] *Ibid.*

[64] David Dyzenhaus, "Rand's Legal Republicanism" (2010) 55 McGill LJ 491 at 499.

[65] *Ibid.* Dyzenhaus's exact quote is: "Thus [republicans] will be alert in a way that liberals are not to non-state or private sources of domination, whether the domination is exercised by economic elites, or by men over women, or by one ethnic group over others."

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entrenchment of hierarchies and power imbalances that result in subordination.[66] The republican conception of freedom captures a core problem inherent to a narrow interpretation of analogous grounds in the section 15 jurisprudence. Namely, the failure to address domination in the public sphere can allow domination and subordination to persist in the private sphere.

Concerns about the connection between freedom and equality explain why some scholars advance a liberty-based conception of discrimination.[67] Sophia Moreau argues that a major problem of discrimination is that it restricts one's deliberative freedoms in a manner that undermines equality.[68] "Deliberative freedoms" are "freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender."[69] In her view, individuals who are not treated as equals must constantly deliberate about whether others will discriminate against them in their daily lives.[70] Those individuals therefore lack the freedom to make certain choices without factoring in the risk that they will face discrimination.[71]

Although Moreau's theory of discrimination does not directly allude to republicanism, her theory shares certain concerns at the core of the republican tradition and its revulsion to domination without interference. The concept of deliberative freedoms highlights how individuals might not make certain choices out of fear that others will deny them those choices based on some normatively irrelevant personal characteristic that they possess.[72] The notion of deliberative freedoms underscores how one lacks the status of an equal if they must resort to coping mechanisms to avoid discrimination.[73]

Tarunabh Khaitan echoes this concern.[74] In his view, discrimination law seeks to ensure secured access to three basic goods: "negative freedom, an adequate range of valuable opportunities, and self-respect."[75] Referring to republicanism, he argues that domination undermines the potential for individuals to enjoy those basic goods and, ultimately, be

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[66] Kerri Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38 NJCL 35 at 40, 84.
[67] Moreau, "What Is Discrimination," *supra* note 11.
[68] *Ibid* at 147.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*
[74] Khaitan, *Theory*, *supra* note 11 at 101.
[75] *Ibid* at 91.

treated as a full and equal member of the community.[76] Moreau and Khaitan's theories illustrate how domination imperils not only freedom but also equality. Their work points to certain major concerns that underlie republicanism and offer a plausible way of thinking about the relationship between freedom, equality, and discrimination. Those insights in turn show how homeless people's unfreedom undermines their substantive equality.[77] To experience homelessness is to be subject to a unique form of subordination, domination, and vulnerability to others' power.[78] Homeless people must rely on others' benevolence to temporarily benefit from basic interests that others continually enjoy: security, privacy, predictability, and, ultimately, substantive equality.

C. Disparate Impact

Third, many laws disproportionately impact homeless people's fundamental interests, impose unique disadvantages on them, and exemplify domination that undermines their substantive equality. Historically, vagrancy statutes prohibited positive acts in which homeless people characteristically engaged, such as wandering and sleeping on public property without providing an account of oneself.[79] Laws also criminalized the reasons why individuals experience homelessness, notably by making it an offence to lack visible means of support or to live without employment.[80]

Many scholars observe that vagrancy laws were disparately enforced against homeless people and other marginalized groups, which highlights the historical disadvantages that homeless people faced. James Fitzjames Stephens notes that vagrancy statutes constituted "the criminal aspect of the poor laws."[81] Deborah Livingston points out that those laws were used to police homeless people and marginalized groups "who lacked effective political power to complain."[82] In a similar vein, Constance Backhouse states that vagrancy laws "were designed to remove indigents, persons of

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[76] *Ibid* at 112.

[77] Essert, *supra* note 37 at 294.

[78] *Ibid.*

[79] William Douglas, "Vagrancy and Arrest on Suspicion" (1960) 71 Yale LJ 1 at 6–7. Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005) at 134.

[80] *Ibid.*

[81] James Fitzjames Stephen, *History of the Criminal Law England*, vol 3 (London: Macmillan, 1883) at 266.

[82] Deborah Livingston, "Police Discretion and the Quality-of-life in Public Places: Courts, Communities, and the New Policing" (1997) 97 Colum L Rev 551 at 596.

lewd behaviour, and other undesirables from the streets."[83] According to Risa Goluboff, vagrancy statutes were used to "enforce racial segregation and subordination, and discipline minorities and nonconformists of all stripes."[84] Bernard Harcourt observes that the laws were used to police other vulnerable groups, such as homosexuals, prostitutes, transgendered individuals, and racial minorities.[85]

Scholars have also shown that modern laws governing public property—known as quality-of-life offences—disproportionately impact homeless people.[86] "Quality-of-life offences" refer to ordinances that regulate minor incivilities (for example, urban camping, sleeping in subway stations, and public defecation and urination) in an effort to improve residents' quality of life.[87] Studies support the argument that certain laws disparately impact homeless people. The Quebec Human Rights Commission concluded that in 2004 homeless people represented less than 1 percent of the city of Montreal's population yet received roughly 30 percent of the total number of quality-of-life citations.[88]

Waldron also alludes to the discriminatory effects of such laws. In his view, everyone knows that only homeless people violate certain quality-of-life offences that are specifically enacted as a response to homelessness, such as sleeping in subway stations or urban camping.[89] He remarks that those acts are so unpleasant that individuals would not engage in them if other reasonable alternatives were available.[90] To understand the

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[83] Constance Backhouse, "Nineteenth Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18 Social History 387 at 389.

[84] Risa L Goluboff, "Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links between Them Reveal about the History of Fundamental Rights" (2010) 62 Stan L Rev 1361 at 1371.

[85] Bernard Harcourt, "Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style" (1998) 97 Mich L Rev 291 at 299.

[86] See e.g. Céline Bellot et al, "Judiciarisation et criminalisation des populations itinérantes à Montréal" (2005), online (pdf): *Réseau d'aide aux personnes seules et itinérantes de Montréal* <rapsim.org/docs/rapport_Bellot_05_VF.pdf>.

[87] Harcourt, *supra* note 85 at 292, 301–5.

[88] Christine Campbell & Paul Eid, "La judiciarisation des personnes itinérantes à Montréal: Un profilage social" (2009) at 41–2, online (pdf): *Commission des droits de la personne et des droits de la jeunesse* (*CDPDJ*) <cdpdj.qc.ca/Publications/itinerance_avis.pdf>; see also CDPDJ, "The Judiciarization of the Homeless in Montréal: A Case of Social Profiling. Executive Summary of the Opinion of the Commission" (2009) at 2, online (pdf): *CDPDJ* <cdpdj.qc.ca/publications/Homeless_Summary.pdf>. Both sources citing Céline Bellot et al, *supra* note 86.

[89] Waldron, "Homelessness," *supra* note 31 at 314.

[90] *Ibid.*

discriminatory impact of these laws, consider who brings constitutional challenges to them. In virtually every Canadian case that challenges a law that governs need-alleviating acts undertaken on public property, the claim is brought by homeless people or on their behalf because those are the only individuals who are concretely impacted by the statutes.

There is a deeper connection between the application of vagrancy statutes, quality-of-life offences, and domination. Vagrancy statutes and quality-of-life ordinances regulate acts that were lawful when done on private property yet illegal when done on public property, such as sleeping, urinating, and loitering.[91] Because homeless people lack free access to private property, they are both uniquely vulnerable to coercion from laws regulating their basic needs and are often forced to sacrifice their fundamental interests to comply with the law.[92] Two decisions from the courts of British Columbia illustrate this point: *Victoria (City) v Adams* and *Abbotsford (City) v Shantz*.[93]

In those decisions, municipal ordinances prohibited individuals from erecting temporary shelters on public property at all times, despite the lack of sufficient shelter spaces for their homeless populations. The ordinances created no problems for individuals with access to housing because they could sleep in their homes and obey the law. If homeless people obeyed the ordinances, they alone risked physical and psychological harm from being unable to lawfully shelter themselves from the elements, disparately endangering their section 7 life and security interests.[94] The courts ruled that the ordinances were unconstitutionally overbroad and deprived homeless people of their section 7 *Charter* right to life and security of the person, by requiring them to endanger their health and mental well-being in order to obey the ordinances.[95]

The *Adams* and *Shantz* decisions highlight several ways in which homeless people were subject to unique wrongs that exemplify domination and its connection to discrimination.

First, in both cases, homeless people's ability to obey the law and lawfully protect their fundamental interests depended significantly on others' benevolence.[96] For instance, their opportunity to abide by the ordinances was contingent on admission to a homeless shelter, police

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[91] Skolnik, "How and Why," *supra* note 36 at 320–2.

[92] *Ibid* at 316–17.

[93] *Victoria (City of) v Adams*, 2009 BCCA 563 at para 74 [*Adams*]; *Shantz*, *supra* note 3 at para 82.

[94] *Adams*, *supra* note 93 at paras 102–10; *Shantz*, *supra* note 3 at para 145.

[95] *Adams*, *supra* note 93 at paras 102–10, 166; *Shantz*, *supra* note 3 at para 145.

[96] Skolnik, "How and Why," *supra* note 36 at 314–15.

discretion allowing them to pitch a tent overnight, or an altruistic friend or family member accepting to shelter them.[97] Others therefore exerted significant control over homeless people's possibility to escape coercion and lawfully protect their physical and mental well-being. Such dependence undermines both republican freedom and substantive equality.

Second, because homeless people lacked free access to private property and were required to alleviate their needs on public property, they alone were disparately subject to a constant threat of interference from the police when engaging in basic and unavoidable human functions (for example, sleeping, urinating, and defecating).[98] Homeless people were solely required to internalize that threat of interference and devise ways to avoid it. They alone were forced to choose between obeying the law and risking coercion, on the one hand, or complying with the law and endangering their well-being, on the other hand.[99]

Third, by exclusively subjecting homeless people to pervasive risks of dominating interference, the state committed a distinct type of expressive wrongdoing that is at the core of discrimination: treating homeless people with less consideration and respect.[100] The cities did not properly assess whether there was a disparity between the number of shelter spaces and the number of homeless people prior to enacting the ordinances. Nor did they adequately evaluate the concrete consequences of that disparity on homeless people's physical and mental well-being. The cities, therefore, failed to treat homeless people's fundamental interests as equally important or, in other words, express the type of equal consideration that substantive equality and section 15 of the *Charter* require.[101]

The republican theory of liberty, therefore, assists in identifying some unique wrongs of discrimination that current section 15 jurisprudence overlooks. Consistent with Moreau and Khaitan's theories, republicanism also recognizes how others' unilateral power to interfere with an individual's actions and interests destroys their prospect of enjoying

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[97] *Ibid.*

[98] *Ibid* at 320–2; Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2019) 35 Windsor YB Access Just 226 at 240 [Skolnik, "Freedom and Access"].

[99] Skolnik, "How and Why," *supra* note 36 at 316–18.

[100] Richard McAdams, "An Attitudinal Theory of Expressive Law" (2000) 79 Or L Rev 339 at 385; Jessica Eisen, "Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory" (2017) 42 Queen's LJ 41 at 77–8.

[101] *Andrews*, *supra* note 13 at 171; see also Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 272–3, cited in *Andrews*, *ibid.* On the expressive wrong of discrimination, see Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous nor a Panacea" (2012) 32 Oxford J Leg Stud 1.

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substantive equality. As explained next, understanding domination as a distinct wrong of discrimination not only highlights certain shortcomings of prevailing section 15 theory but can also serve as the basis for identifying new analogous grounds.

III. HOMELESSNESS AS AN ANALOGOUS GROUND OF DISCRIMINATION

Given that laws disproportionately disadvantage homeless people's core interests and subject them to domination, why do courts not yet recognize homelessness as a protected class? *Tanudjaja v Canada (AG)* is the leading decision that rejects homelessness as an analogous ground, and its reasons are instructive.[102] Although the Ontario Court of Appeal upheld the trial decision in *Tanudjaja*, it left open the question of whether homeless people constitute a protected class under section 15 of the *Charter*.[103] This section of the article challenges the reasons for rejecting homelessness as an analogous ground offered in *Tanudjaja* at trial. Appealing to the insights of republican liberty and its connection to equality, I argue that homelessness constitutes a personal characteristic and a plausible analogous ground of discrimination.

In *Tanudjaja*, the claimants argued that in the 1990s the provincial and federal governments made a series of decisions that decreased access to housing.[104] Some of the claimants were precariously housed and on the verge of losing access to housing, while others lived on the streets and frequented homeless shelters occasionally.[105] The claimants contended that the government's changes increased the incidence of homelessness and jeopardized their section 7 life, liberty, and security interests.[106] They also argued that those governmental decisions violated section 15 of the *Charter* and unconstitutionally discriminated against homeless people.[107] The Court rejected both the section 7 and section 15 *Charter* claims.

Justice Thomas Lederer concluded that section 7 of the *Charter* did not guarantee a free-standing right to housing or to a minimum core of entitlements.[108] He reasoned that there was no affirmative constitutional duty for the state to put in place programs that allow individuals to enjoy

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[102] *Tanudjaja* SC, *supra* note 3.
[103] *Tanudjaja v Canada (AG)*, 2014 ONCA 852 at paras 37, 73, 326 OAC 257 (CA) [*Tanudjaja* CA].
[104] *Tanudjaja* SC, *supra* note 3 at para 20.
[105] *Ibid* at para 14.
[106] *Ibid* at para 2.
[107] *Ibid.*
[108] *Ibid* at paras 58–9.

the right to life, liberty, and security of the person.[109] Citing *Gosselin v Quebec (AG)*, Lederer J ruled that existing jurisprudence did not yet recognize such a positive state duty, even though such a duty might be recognized in the future.[110] He held that the state could restrict the extent of governmental assistance or entitlements that individuals receive without breaching section 7 of the *Charter*.[111] The Ontario Court of Appeal upheld the trial judge's conclusion, affirming that section 7 of the *Charter* did not create a free-standing right to housing.[112]

More pertinent to my present purposes, the trial judge also ruled that the government's decisions did not violate the claimant's section 15 *Charter* rights because homelessness does not constitute an analogous ground of discrimination for two principal reasons. First, the court concluded that homelessness is not an immutable or constructively immutable personal characteristic.[113] Second, the court held that homelessness is too vague of a concept to constitute an analogous ground of discrimination.[114] In the following subsections, I address these two reasons for rejecting homelessness as an analogous ground. I begin by showing how homelessness can be intimately tied to one's personhood and a source of discrimination. I then argue that homelessness constitutes a complex personal characteristic (a concept discussed more fully below) that is changeable with significant difficulty over a protracted period of time, resulting in a form of "quasi-immutability."[115] I use republicanism's insights to explain why discrimination based on complex personal traits results in unique moral concerns that are different than those underlying

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[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid* at para 59. Citing, amongst other decisions *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 at paras 81–2 (concluding that the *Charter* did not impose a positive duty on the state to ensure that individuals can enjoy their section 7 *Charter* interests, while leaving the door open to the recognition of positive duties in the future); *Masse v Ontario (Minister of Community and Social Services)*, [1996] 134 DLR (4th) 20, OJ No 363 (Ont Ct J (Gen Div)) (concluding that the state decreasing the amount of social assistance did not violate the claimants' section 7 *Charter* rights, as section 7 does not provide an affirmative right to a certain level of governmental aid); *Clark v Peterborough Utilities Commission*, [1995] OJ No 1743, 24 OR (3d) 7 (Ont Ct J (Gen Div)) (rejecting an affirmative duty for the state to provide certain entitlements under section 7 of the *Charter*).

[112] *Tanudjaja* CA, *supra* note 103 at paras 30–1, citing *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 104, [2005] 1 SCR 791: "The Charter does not confer a freestanding constitutional right to health care."

[113] *Tanudjaja* SC, *supra* note 3 at para 130.

[114] *Ibid* at paras 129–32.

[115] On the concept of quasi-immutability, see Gerber, *supra* note 12 at 2154, 2162.

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discrimination based on immutable and constructively immutable traits. I conclude this section by providing an account of how homelessness can be defined in a precise manner that captures the moral wrong of that condition while avoiding vagueness concerns.

A. Homelessness as a Personal Characteristic

In *Tanudjaja*, the trial court ruled that homelessness is not a personal characteristic akin to race, gender, or age.[116] As the court explained in *Corbière v Canada (Minister of Indian and Northern Affairs)*, discrimination is based on personal characteristics that either cannot be changed or can only be changed "with great difficulty" or "at unacceptable cost to personal identity."[117] As Justice Claire L'Heureux-Dubé explained in that case, the term "personal characteristics" implies fundamental traits that are important to one's identity, personhood, or belonging.[118]

The argument that homelessness is not such a "personal characteristic" is problematic for several reasons. For one, it makes assumptions about which traits are central to one's identity, personhood, or belonging.[119] Such assumptions are objectionable because they can be rooted in stereotypes.[120] Notably, the claim that some individual trait is not sufficiently "personal" is often associated with the potential to change it.[121] As Jessica Eisen points out, such a position accords greater importance to marginalized groups' hypothetical potential to improve their situation instead of their actual disadvantages.[122] Margot Young raises a similar objection. She notes that courts' over-emphasis on the notion of hypothetical choices in section 15 jurisprudence overshadows the actual predicament of marginalized groups facing discrimination.[123] Rejecting homelessness as a personal characteristic, therefore, risks reinforcing the stereotype that homelessness is a personal choice.

Rejecting homelessness as a personal characteristic also ignores how a lack of access to housing is both a core aspect of individual identity and accounts for why homeless people are uniquely vulnerable to interference

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[116] *Tanudjaja* SC, *supra* note 3 at para 130.
[117] *Corbière*, *supra* note 16 at 219, per the majority, and at 252, per L'Heureux-Dubé J, aff'd in *Withler*, *supra* note 17 at para 33.
[118] *Corbière*, *supra* note 16.
[119] Jessica A Clarke, "Against Immutability" (2015) 125 Yale LJ 2 at 10–11.
[120] *Ibid.*
[121] *Ibid.*
[122] Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2 Canadian Journal of Poverty Law 1 at 20.
[123] Young, *supra* note 57 at 687–91.

by others.[124] Margaret Jane Radin alludes to the connection between property (notably housing) and personhood.[125] She argues that a home is central to personhood because it protects interests such as privacy, security, dignity, and liberty—all of which are central to one's lived experience and self-actualization.[126] Furthermore, the home offers a physical and psychological connection to one's past, present, and future.[127] Benjamin Barros explains that a private property right safeguards certain values and interests that protect expectations, offer stability, and allow people to plan their lives.[128]

If individuals lack access to housing, they cannot fully benefit from those core interests and values that are intimately tied to the home and to one's identity. For reasons like those, Jessie Hohmann explains that "the denial of the private space amounts to a denial of the freedoms and rights provided by that space."[129] To the extent that individuals cannot extricate themselves from homelessness, they also lack significant control over their capacity to protect their own rights and interests from the risk of interference by the state and other private individuals.[130] Therefore, certain dimensions of one's personhood may be defined by how those interests and values are insufficiently protected precisely because one lacks access to housing.

B. Homelessness and Immutability

Even if one accepts that homelessness is sufficiently tied to one's personhood and identity, courts have rejected homelessness as an analogous ground on the basis that homelessness is not an immutable or constructively immutable personal characteristic.[131] Despite nearly three decades of section 15 jurisprudence, the Supreme Court of Canada has devoted little attention to the distinction between immutable and constructively immutable traits. The Court set out the classic distinction between the two types of immutability in *Corbière*.[132]

In that decision, the majority observed that certain traits (for example, age and ethnicity) are immutable in the sense that they cannot be

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[124] Essert, *supra* note 37 at 294.
[125] Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan L Rev 957 at 991–2.
[126] *Ibid.*
[127] *Ibid.*
[128] Benjamin Barros, "Home as a Legal Concept" (2006) 46 Santa Clara L Rev 255 at 279–81.
[129] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford: Hart Publishing, 2013) at 152.
[130] Skolnik, "Freedom and Access," *supra* note 98 at 240–1.
[131] For a history and critique of Canadian court's rejection of poverty and homelessness as constructively immutable characteristics, see Froc, "Immutability," *supra* note 57.
[132] *Corbière*, *supra* note 16.

changed.[133] Such traits are therefore assigned to the individual on the basis of chance or constitutive moral luck.[134] As Jessica Clarke explains, the notion of immutable traits in the US Equal Protection Clause affords constitutional protection against discrimination based on chance.[135] The core problem is that it is morally objectionable and unfair to discriminate against individuals on the basis of traits they did not choose and may lack the capacity to change.

Other personal characteristics are constructively immutable and may even be chosen by the individual, such as religion, marital status, or citizenship.[136] Individuals also have the capacity to change constructively immutable traits. However, as Clarke points out, requiring individuals to change those traits in order to avoid discrimination is morally objectionable because the choice to maintain those traits is central to one's identity.[137] The Supreme Court of Canada has defined constructively immutable characteristics in different ways.[138] The justices explain that such traits can be changed "only at unacceptable cost to personal identity,"[139] "are difficult to change,"[140] or are characteristics over which "the individual exercises limited but not exclusive control over the designation."[141] When examining the concept of constructive immutability, the Supreme Court of Canada is primarily concerned with the interest in maintaining—or at least the freedom to maintain—those traits to avoid discrimination.[142]

However, one can conceptualize a plausible third category of personal characteristics that are difficult, though not impossible, to change and account for why individuals face pervasive discrimination. This third category is consistent with the majority of the Supreme Court of Canada's recognition that an analogous ground of discrimination can be founded on personal traits that are difficult to change.[143] Those personal characteristics

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[133] *Ibid* at 219.
[134] Thomas Nagel, *Mortal Questions* (Cambridge, UK: Cambridge University Press, 1979) at 28.
[135] Clarke, *supra* note 119 at 13–14.
[136] *Corbière*, *supra* note 16 at 219.
[137] *Ibid.*
[138] Joshua Sealy-Harrington, "Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 at 48.
[139] *Corbière*, *supra* note 16 at 219.
[140] *Ibid* at 252; *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 166, [2001] 3 SCR 1016, L'Heureux-Dubé J concurring.
[141] *Miron v Trudel*, [1995] 2 SCR 418 at 498, 124 DLR (4th) 693, McLachlin J; *Quebec (AG) v A*, *supra* note 2 at para 334, Abella J dissenting.
[142] *Ibid.*
[143] *Corbière*, *supra* note 16 at para 60.

include traits such as poverty, homelessness, being overweight, or possessing a criminal record.[144] Let us call these characteristics "complex personal characteristics"—traits that are relatively stable and can only be changed incrementally and with great difficulty over a prolonged period of time.[145]

These types of quasi-immutable traits may be central to one's identity and result in discrimination, even though they do not fit squarely within rigid conceptualizations of immutable and constructively immutable personal characteristics.[146] Unlike constructively immutable traits such as religion or marital status, individuals may wish to change their complex personal characteristics because they lead to discrimination, but often cannot do so due to a combination of personal and structural factors. Complex personal traits lead to discrimination based on a combination of backward-looking and forward-looking stereotypes. From a backwards-looking standpoint, others may reason that the individual is largely responsible for his or her complex personal trait and deserves adverse treatment.[147] From a forward-looking standpoint, others may reason that individuals could easily change their complex personal traits if they chose to do so and, thus, invite adverse treatment upon them.[148]

It is mistaken, though, to conclude that individuals cannot suffer discrimination because they exerted some control over acquiring a complex personal trait in the past or have some capacity to change it in the future. Such a claim ignores the relevance of discrimination in the present and how it undermines substantive equality. That claim also denies the remedial potential of section 15 for individuals who truly lack the capacity to change their complex personal traits and the opportunity to avoid discrimination on the basis that others possess that capacity and opportunity. Furthermore, as discussed below, such reasoning ignores the structural and systemic forces that can cement one's status as a second-class citizen.[149]

Discrimination based on complex personal traits raises several important concerns. First, many individuals may face discrimination until they manage to change a personal trait that they may not wish to possess.

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[144] Clarke, *supra* note 119 at 53–61, 76–84.

[145] Gerber, *supra* note 12 at 2154, 2162; see also Dale Gibson, "Analogous Grounds of Discrimination under the *Canadian Charter*: Too Much Ado about Next to Nothing" (1991) 29 Alta L Rev 772 at 787–8.

[146] Gerber, *supra* note 12 at 2154, 2162.

[147] See Denise Réaume, "Discrimination and Dignity" (2003) 63 La L Rev 645 at 681.

[148] Khaitan, *Theory*, *supra* note 11 at 53.

[149] Young, *supra* note 57 at 692; see also Sarah Hamill, "Caught between Deference and Indifference: The Right to Housing in Canada" (2018) 7 Can J Hum Rts 67 at 86.

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And those who do not manage to change their complex personal characteristics may experience discrimination indefinitely. Second, an individual's inability to immediately alter their trait is often leveraged against that individual in rationalizing discrimination.[150] An individual's failure to change their personal characteristic is seen as proof of their lesser worth or as a justification for their subordinated status.[151] For instance, one might inappropriately reason that individuals would simply cease being poor or experiencing homelessness if they were not so lazy.[152] Third, discrimination based on complex personal characteristics may compound the difficulty of modifying those traits or further entrench one's disadvantaged position within society.[153]

For example, homeless people are issued fines for erecting temporary shelters despite a lack of shelter space and must pay those fines instead of rent.[154] Because fines prolong their condition of homelessness, it increases their chances of alleviating their needs in public and experiencing greater public and private domination.[155] Discrimination based on complex personal traits can thus result in a self-fulfilling prophecy; it leads to greater restrictions on liberty and, in turn, to greater vulnerability to discrimination.[156] In line with concerns that are central to republicanism, the failure to address domination in the vertical relationship between the state and individuals results in domination in the horizontal relationships between those with and without access to housing.[157] As the republican theory of freedom suggests, such social stratifications and hierarchies are antithetical to substantive equality.

Republicanism also highlights how individuals may also adapt a range of coping mechanisms to avoid further discrimination in their daily lives.

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[150] Young, *supra* note 57 at 692.

[151] Réaume, *supra* note 147 at 681.

[152] Khaitan and Réaume offer this example of discriminatory stereotyping. See Khaitan, *Theory*, *supra* note 11 at 53; Denise Réaume, "Dignity, Choice, and Circumstances" in Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: Oxford University Press, 2013) 539 at 552.

[153] See e.g. Clarke, *supra* note 119 at 42.

[154] Terry Skolnik, "Rethinking Homeless People's Punishment" (2019) 22 New Crim L Rev 73 at 81–3.

[155] *Ibid.*

[156] Clarke, *supra* note 119 at 42; Lu-in Wang, "Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes" (2004) 53 DePaul L Rev 1013 at 1048–9.

[157] Skolnik, "How and Why," *supra* note 36 at 310. On vertical and horizontal domination, see Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (London: Norton & Company, 2014) at 6–7.

They may self-restrict the range of opportunities available to them.[158] For example, individuals who reasonably fear being denied employment, promotions, or services based on their complex personal traits may not apply for those opportunities in the first place.[159] One may also come to believe that their complex personal characteristics reflect their self-worth and change their preferences accordingly.[160] The failure to remedy—or even recognize—discrimination based on complex personal traits results in a form of insult to injury. Individuals not only suffer discrimination but also are then told that they cannot experience such discrimination according to our current understanding of section 15 of the *Charter*. To truly promote substantive equality in a manner that is consistent with a purposive interpretation of section 15 of the *Charter* and the concept of analogous grounds, courts should recognize how discrimination results from complex personal traits that can only be changed with great difficulty over a prolonged period of time—traits that are in essence quasi-immutable.

C. Homeless People as a Vaguely Defined Group

Courts also reject homelessness as an analogous ground of discrimination for the reason that the term "homelessness" is too vague.[161] In *Tanudjaja*, three out of the four applicants lived in inadequate housing, whereas one of the applicants lacked access to housing.[162] The court concluded that, in the context of the application, it was unclear what the term "homelessness" implied, and, therefore, it was hard to determine which individuals were experiencing homelessness.[163] That same reasoning underpinned the Ontario Court of Appeal's conclusion that poverty does not constitute an analogous ground of discrimination in *R v Banks*.[164]

There are different definitions of homelessness, some of which include within their scope individuals with access to inadequate housing and those at risk of losing access to housing.[165] The various definitions appear to

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[158] *Ibid.*

[159] Moreau, *supra* note 11 at para 155.

[160] Clarke, *supra* note 119 at 42.

[161] *Tanudjaja* SC, *supra* note 3 at paras 129–32.

[162] *Ibid* at para 129.

[163] *Ibid* at paras 129–32.

[164] *R v Banks*, 2007 ONCA 19, [2007] OJ No 99 at para 104.

[165] Stephen Gaetz et al, "Canadian Definition of Homelessness" (Toronto: Canadian Observatory on Homelessness Press, 2012) at 4.1; Stephen Gaetz, Tanya Gulliver & Tim Richter, "The State of Homelessness in Canada: 2014" (Toronto: Homeless Hub Press, 2014) at 39. The US Department of Housing and Urban Development defines homelessness as "lack[ing] a fixed, regular, and adequate nighttime residence." See

complicate a court's task of defining and circumscribing the breadth of homelessness as an analogous ground. But homelessness can be defined in a precise manner that captures homeless people's distinct unfreedom and how it undercuts their substantive equality. Essert defines homelessness as a condition where individuals lack a real private property right.[166] Because private property law already demarcates when someone possesses or lacks a real property right, his definition avoids the vagueness concerns that have preoccupied judges in prior cases.[167] Essert's characterization also connects the denial of homeless people's substantive equality to the reason for their subordinated position in society. His definition recognizes homelessness as a condition where the lack of a private property right places an individual at the constant mercy of others' power—where the individual must persistently depend on others' permission to be somewhere or do something.[168] That definition addresses a court's concern about the difficulty of circumscribing the scope of homelessness or identifying who is homeless at any given time.[169]

Additionally, Essert's definition highlights how the law imposes unique disadvantages on homeless people because they lack a private property right—disadvantages that undermine their freedom and substantive equality. Appealing to Wesley Hohfeld's concept of jural correlatives, Waldron notes that the correlative of a right is that it imposes duties of non-interference on others.[170] As Waldron and Jane Baron observe, homeless people's lack of a real private property right results in a disproportionate allocation of duties on homeless people.[171] They must respect everyone else's private property rights, while lacking any reciprocal right or lawful authority to exclude others.[172] The definition proposed by Essert also captures how homeless people are denied interests that promote substantive equality. It recognizes how the lack of a real private property right deprives individuals from benefiting from liberty,

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"2018 Annual Homeless Assessment Report (AHAR) to Congress," part 1 (Washington, DC: US Department of Housing and Urban Development, December 2018) at 2.

[166] Essert, *supra* note 37 at 266, 276.

[167] *Tanudjaja* SC, *supra* note 3 at paras 129–32.

[168] *Ibid*; Waldron, "Homelessness," *supra* note 31 at 299.

[169] *Tanudjaja* SC, *supra* note 3 at paras 129–32; *Shantz*, *supra* note 3 at para 231.

[170] Wesley Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710 at 710. This argument was originally advanced by Jeremy Waldron, "Property and Community: For Those Who Have Neither" (2009) 10 Theoretical Inquiries in Law 161 at 164 [Waldron, "Property"].

[171] Waldron, "Property," *supra* note 170 at 164; Jane Baron, "Homelessness as a Property Problem" (2004) 36 Urban Lawyer 273 at 287.

[172] Waldron, "Property," *supra* note 170 at 164; Baron, *supra* note 171 at 287.

privacy, and security that others possess and that are preconditions for one's full membership in the community.[173]

D. Homelessness, Discrimination, and Redistribution

Lastly, the judiciary is concerned that recognizing homelessness as an analogous ground of discrimination will constitutionalize a positive right to housing or to a minimum core of entitlements.[174] In *Tanudjaja,* Lederer J concluded that accepting the applicants' section 15 claim would ultimately require courts to adopt an alternative theory of distributive justice.[175] The majority of the Ontario Court of Appeal arrived at a similar conclusion. The justices observed that courts are ill-suited to conduct wide-scale judicial review of the state's economic and social policies.[176] In their view, there is no manageable standard to determine when the state has satisfied its constitutional duties.[177] But recognizing homelessness as an analogous ground will not necessarily lead to a positive right to housing and massive resource redistribution as courts fear. Two examples illustrate this point.

First, suppose claimants bring a section 15 *Charter* challenge to the Constitution's current eligibility requirement that prospective senators possess a real property right worth at least $4,000 and $4,000 of property "over and above [their] debts and liabilities."[178] Though a Senate bill has been introduced to amend those constitutional provisions, they discriminate against homeless people and those living in poverty by denying them the equal opportunity to be nominated to the Senate.[179] If a court struck down the provision because it violated section 15 of the *Charter*, it would not result in resource redistribution as judges fear. Instead, it would simply change the eligibility requirements for future senators. Second, suppose the courts in *Adams* and *Shantz* indeed decided that the ordinances indirectly discriminated against homeless people by prohibiting the erection of temporary shelters at all times despite the lack of shelter space. The courts could have made that finding and limited the

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[173] Kevin Bundy, "'Officer, Where's My Stuff?' The Constitutional Implications of a De Facto Property Disability for Homeless People" (2003) 1 Hastings Race & Poverty LJ 57 at 61–8.

[174] *Tanudjaja* SC, *supra* note 3 at para 120.

[175] *Ibid.*

[176] *Tanudjaja* CA, *supra* note 103 at paras 32–4.

[177] *Ibid.*

[178] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 23(3), 23(4), reprinted in RSC 1985, Appendix II, No 5.

[179] Bill S-221, *An Act to Amend the Constitution Act, 1867 (Property Qualifications of Senators)*, 1st Sess, 42nd Parl, preamble (first reading 10 March 2016).

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scope of those ordinances—as they ultimately did—without mandating resource redistribution.[180]

There may be contexts where a finding of unconstitutional discrimination against homeless people could justifiably require courts to redistribute resources as an appropriate remedy. Suppose the state creates and extends some novel social benefit, such as a universal basic income, to everyone except homeless people. Suppose further that the state discriminatorily denies that benefit because it fears that homeless people will waste that money on drugs or alcohol. Conceding that homelessness can constitute an analogous ground of discrimination, such a scheme would violate section 15 of the *Charter*. Homeless claimants could point to the discriminatory law that denies them benefits that are available to others on the basis of stereotypes.[181] The judiciary could legitimately require the state to extend the universal basic income to those falling within the scope of homelessness as an analogous ground.

IV. CONCLUSION

I have argued that homelessness can and should be recognized as an analogous ground of discrimination under section 15 of the *Charter*. A truly purposive interpretation of the constitutional right to equal protection, therefore, would recognize not only the connection between unfreedom and inequality but also between domination and discrimination. A more robust conception of analogous grounds and section 15 of the *Charter* should affirm that those who are subordinated to others' power are second-class citizens. At its richest, a republicanism-inspired notion of equal protection would admit that substantive equality cannot be achieved for those whose life, liberty, and security interests are imperilled by their economic or social condition.

Appealing to the republican theory of freedom, I have demonstrated how domination is both antithetical to equality and constitutes a distinct wrong of discrimination. I showed how republicanism offers a plausible way of thinking about what makes discrimination wrong, understanding why homeless people lack substantive equality, and identifying new analogous grounds of discrimination, including homelessness. In support of that latter argument, I set out how homeless people have experienced historical and contemporary disadvantages that undermine their most basic interests and hopes of securing substantive equality. I have discussed how laws governing public property disparately impact homeless people, and I

[180] *Adams* CA, *supra* note 93 at para 166; *Shantz, supra* note 3 at para 280.
[181] *Taypotat*, *supra* note 2 at paras 19–20.

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have provided an account of how these laws result in homeless people's domination in their vertical relationship with the state and in their horizontal relationship with others.

Furthermore, the principal reasons why courts have rejected homelessness as an analogous ground are not compelling. There are good reasons for treating homelessness as a complex personal characteristic that is deeply tied to one's personhood and explains why homeless people are subject to unique unfreedom and discrimination. My account has described how such quasi-immutable characteristics—traits that individuals generally do not choose and cannot change without significant difficulty over a prolonged period of time—can give rise to a distinct form of discrimination.[182] It has explored why complex personal traits do not fit within inflexible conceptions of immutable and constructively immutable traits, yet can still give rise to discriminatory treatment and disadvantage. Appealing to Essert's definition of homelessness and its connection to domination, I also refuted the argument that the term "homelessness" is too vague to constitute an analogous ground.[183] Finally, I showed how recognizing homelessness as an analogous ground will not inevitably require judges to massively redistribute resources, though court-mandated redistribution may be justified in some circumstances.

The republican tradition, therefore, illuminates the relationship between two sacrosanct values that shape what it means to be one another's equal—in our own eyes, in the eyes of others, and in the eyes of the state. Its insights allow us to better understand why homeless people are denied the very liberty that is a precondition to one's substantive equality. Beyond homelessness, the republican theory of freedom sheds light on a truism of what it means to be a full and free member of the community. Without freedom, we are not equal. And, without equality, we are not free.

[182] Gerber, *supra* note 12 at 2154, 2162.
[183] Essert, *supra* note 37 at 266.

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Expanding Equality

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Expanding Equality

Section 15 of the Canadian Charter *provides a constitutional right to equality. But the Supreme Court of Canada has interpreted this right restrictively. Today, the Constitution fails to protect certain individuals and groups against obvious forms of direct and indirect discrimination. This article argues that s. 15 of the* Charter *is interpreted narrowly in three respects and advances proposals to expand the right to equality. First, the right to equality framework fails to protect marginalized persons and groups against direct discrimination. Second, courts overlook how individuals can suffer discrimination based on quasi-immutable traits, which are personal characteristics that are relatively stable and difficult to change. Third, s. 15 of the* Charter *is largely absent from areas of the law where discrimination is widespread, such as criminal law and procedure. This article offers a more expansive right to equality framework that addresses these limitations. In doing so, it deepens our understanding of discrimination based on different personal traits, distinguishes their respective normative significance, and offers an account of their different psychological harms. It also explains why the right to equality can call the State to account for discrimination—and require the State to justify disparate treatment—in ways that other constitutional rights cannot. Ultimately, this article offers a path forward to broaden the right to equality in order to counteract unconstitutional discrimination more effectively.*

L'article 15 de la Charte *canadienne prévoit un droit constitutionnel à l'égalité. Mais la Cour suprême du Canada a interprété ce droit de manière restrictive. Aujourd'hui, la Constitution ne protège pas certaines personnes et certains groupes contre des formes évidentes de discrimination directe et indirecte. Dans le présent article, je soutiens que l'article 15 de* la Charte *est interprété de manière restrictive à trois égards et j'avance des propositions pour élargir le droit à l'égalité. Premièrement, le cadre du droit à l'égalité ne protège pas les personnes et les groupes marginalisés contre la discrimination directe. Deuxièmement, les tribunaux négligent la façon dont les individus peuvent subir une discrimination fondée sur des traits quasi-immuables, qui sont des caractéristiques personnelles relativement stables et difficiles à modifier. Troisièmement, l'article 15 de* la Charte *est largement absent des domaines du droit où la discrimination est répandue, tels que le droit pénal et la procédure pénale. Dans cet article, je propose un cadre plus large pour le droit à l'égalité qui tient compte de ces limites. Ce faisant, j'approfondis notre compréhension de la discrimination fondée sur différents traits personnels, je distingue leur signification normative respective et rend compte de leurs différents préjudices psychologiques. J'explique également pourquoi le droit à l'égalité peut demander à l'État de rendre compte de la discrimination—et exiger de l'État qu'il justifie la disparité de traitement—d'une manière qui n'est pas possible pour d'autres droits protégés par la constitution. Enfin, je propose une voie à suivre pour élargir le droit à l'égalité afin de contrecarrer l'inconstitutionnalité du droit à l'égalité.*

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Introduction

Section 15 of the Canadian *Charter* confers a right to substantive equality—a right to be treated with equal concern and respect.[1] This right protects individuals against direct and indirect forms of discrimination.[2] Direct discrimination implies that a law is discriminatory on its face, and indirect discrimination implies that a neutrally-worded law disparately impacts individuals.[3] However, the s. 15 *Charter* right to equality is

1. *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*]; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, 1989 CanLII 2 (SCC) [*Andrews*].
2. *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 25-53 [*Fraser*].
3. Oran Doyle, "Direct Discrimination, Indirect Discrimination and Autonomy" (2007) 27:3 Oxford J Leg Stud 537 at 537-538, DOI: <10.1093/ojls/gqm008>; Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191 at 192, online: <www.constitutionalstudies.

interpreted restrictively in certain respects, which limits its potential to prevent and remedy unconstitutional discrimination.[4]

Consider this: for decades, empirical research has demonstrated the pervasiveness of racial discrimination in the criminal justice system.[5] Yet, the s. 15 *Charter* right to equality is largely absent from the Supreme Court of Canada's criminal law and procedure jurisprudence.[6] Take also the example of the Supreme Court of Canada case law related to discrimination against women. The s.15 *Charter* right to equality came into force in 1985—three years after the Canadian *Charter'*s enactment.[7] Yet it took until 2018 for the Court to rule in favour of women regarding gender-based discrimination that violated s. 15 of the *Charter*.[8]

Scholars criticize the right to equality framework on various grounds. Some contend that the Supreme Court of Canada's approach to s. 15 of the *Canadian Charter* fails to address systemic discrimination adequately.[9] Others note that the Court interprets the right to equality so restrictively that claimants increasingly invoke other constitutional rights to remedy discrimination.[10] Others posit that the Court has modified the s. 15 *Charter* test on several occasions since its inception, which has introduced uncertainty and unpredictability for claimants and lawyers.[11]

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ca/wp-content/uploads/2019/08/19RevConstStud191.pdf> [perma.cc/H8H2-38C3].

4. See e.g. Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 SCLR (2nd) 183 at 184-185, online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1351&context=fac_pubs> [perma.cc/8CE2-VS7E]; Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Const F Const 53 at 54-55, 62, DOI: <10.21991/cf29422> (describing the narrow scope of equality rights). The term "unconstitutional discrimination" implies a law that violates s. 15 of the *Canadian Charter.*

5. Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2022) 99:2 Can Bar Rev 429 at 436-438, DOI: <10.2139/ssrn.3721754> [Skolnik, "Racial Profiling"].

6. Terry Skolnik, "Rééquilibrer le rôle de la Cour suprême du Canada en procédure criminelle" (2022) 67:3 Rev Droit de McGill 259 at 290, online: <lawjournal.mcgill.ca/article/reequilibrer-le-role-de-la-cour-supreme-du-canada-en-procedure-criminelle/#:~:text=La%20Cour%20a%20affirm%C3%A9%20que,et%20cela%2C%20%C3%A0%20plusieurs%20%C3%A9gards.> [perma.cc/BM9P-9AJB] [Skolnik, "Rééquilibrer le rôle"]. Furthermore, certain recent s 15 *Charter* claims in criminal law have failed. See e.g. *R v Sharma*, 2022 SCC 39 [*Sharma*].

7. WR Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985) 11:1 Queen's LJ 1 at 17.

8. Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94 SCLR (2d) 301 at 301, DOI: <10.60082/2563-8505.1385>, citing *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.

9. Mary Eberts & Kim Stanton, "The Disappearance of Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89 at 91.

10. Kimberly Potter, "The Role of Choice in Claims under Section 15 of the *Charter*: The Impact of Recent Developments in Section 7 Jurisprudence" (2016) 35:2 NJCL 181 at 191; C Tess Sheldon, Karen Spector & Mercedes Perez, "Re-Centering Equality: The Interplay Between Sections 7 and 15 of the *Charter* in Challenges to Psychiatric Detention" (2016) 35:2 NJCL 193 at 197-198.

11. Alicja Puchta, "*Quebec v A* and *Taypotat*: Unpacking the Supreme Court's Latest Decisions

This article argues that the s. 15 *Charter* framework is interpreted restrictively in three ways, which limits its capacity to counteract unconstitutional discrimination. First, by rejecting certain analogous grounds, the s. 15 *Charter* framework does not protect some marginalized groups against obvious forms of direct discrimination.[12] Second, the s. 15 *Charter* framework cannot thwart discrimination based on quasi-immutable traits, which are personal traits that are relatively stable and difficult to change, such as poverty and homelessness.[13] Third, the right to equality is largely absent from areas of law where discrimination is ubiquitous, such as criminal law and procedure.[14] The concluding parts of this article demonstrate the value of a more expansive right to equality framework and highlight its potential implications.

The structure of this article is as follows. Section I sets out the legal framework that currently governs the s. 15 *Charter* right to equality. Section II explains why this framework cannot redress obvious forms of direct discrimination. Section III demonstrates why the Supreme Court of Canada should recognize discrimination based on quasi-immutable traits that are neither immutable nor constructively immutable.[15] Section IV highlights how the right to equality is largely absent in areas of the law where it is most needed, especially criminal law and procedure. Section V offers a more expansive right to equality framework and explores its implications in criminal law and procedure. Ultimately, this article provides a new and more robust approach to the right to equality that can combat various kinds of discrimination more effectively than the current model.

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on Section 15 of the Charter" (2018) 55:3 Osgoode Hall LJ 665 at 670, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3350&context=ohlj> [perma.cc/9WCT-SBLP].

12. Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2 Can J Poverty L 1 at 15-23, DOI: <10.2139/ssrn.4007645>.

13. This argument was first advanced in: Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equality 69 at 90, online: <jps.library.utoronto.ca/index.php/utjle/article/view/30069/25284> [perma.cc/2ULS-P2AH] [Skolnik, "Homelessness"]; Jessica Clarke, "Against Immutability" (2015) 125:1 Yale LJ 2 at 53-85, online: <www.yalelawjournal.org/pdf/a.2.Clarke.102_soghpowr.pdf> [perma.cc/YM58-7WLP] [Clarke, "Against Immutability"].

14. This argument was first advanced in: Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 290.

15. Skolnik, "Homelessness," *supra* note 13 at 90; Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 at 51-62, DOI: <10.32920/22057217.v1> [Sealy-Harrington, "Assessing Analogous Grounds"] (describing the need to recognize discrimination based on a multi-variable approach).

I. *Overview of the constitutional right to equality*

1. *The right to equality and its legal framework*

Section 15 of the *Canadian Charter* provides the constitutional right to equality.[16] The provision states that individuals enjoy the law's equal protection and equal benefit without discrimination.[17] Although the Supreme Court of Canada has modified the legal test applicable to s. 15 of the *Charter* several times since the provision's enactment, the current framework is as follows.[18]

Claimants must satisfy a two-part test to establish a prima facie case of unconstitutional discrimination.[19] First, they must prove that "the law on its face or in its impact, creates a distinction based on enumerated or analogous grounds" of discrimination.[20] Second, they must prove that the law "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[21]

Certain aspects of this two-part test require further explanation. Begin with the requirement that the unconstitutional discrimination be based on an enumerated or analogous ground.[22] Enumerated grounds of discrimination are listed in s. 15 of the *Charter* and include, for instance, race, national or ethnic origin, and religion.[23] Analogous grounds of discrimination, for their part, are not mentioned in s. 15's list of prohibited grounds of discrimination but are akin to them.[24] Such judicially recognized analogous grounds include citizenship, sexual orientation, marital status, and Aboriginal residency status.[25] Courts conduct a contextual analysis

16. *Canadian Charter*, *supra* note 1, s 15.

17. The provision states "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." See *ibid*.

18. *Sharma*, *supra* note 6 at para 28; *Fraser*, *supra* note 2 at paras 25-53; *R v CP*, 2021 SCC 19; Sonia Lawrence, "Critical Reflections on *Fraser*: What Equality Are We Seeking?" (2021) 30:2 Const F 43 at 43-44, DOI: <10.21991/cf29421> (noting the doctrinal changes in the Court's s 15 legal framework); Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const Stud 191 at 208-215, online: <www.constitutionalstudies.ca/wp-content/uploads/2019/08/19RevConstStud191.pdf> [perma.cc/JX5N-XNDC] (noting the doctrinal changes in the Court's s 15 legal framework).

19. *Sharma*, *supra* note 6 at para 28.

20. *Ibid*.

21. *Ibid*; *Fraser*, *supra* note 2 at para 27.

22. *Ibid*; Colleen Sheppard "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80(3) Can Bar Rev 893 at 906-907.

23. *Canadian Charter*, *supra* note 1, s 15.

24. Dale Gibson, "Analogous Grounds of Discrimination under the *Canadian Charter*: Too Much Ado about Next to Nothing" (1991) 29 Alta L Rev 772 at 772, DOI: <10.29173/alr1532>.

25. Robert Mason & Martha Butler, *Section 15 of the Canadian Charter of Rights and Freedoms: The Development of the Supreme Court of Canada's Approach to Equality Rights Under the Charter*

and consider various factors to recognize new analogous grounds of discrimination.[26] These factors include whether the relevant group has suffered from prejudice, stereotyping, vulnerability, or historical disadvantage.[27] Drawing on US case law, courts have also considered whether the relevant group constitutes a "discrete and insular minority."[28]

In identifying new analogous grounds of discrimination, the Supreme Court of Canada has held that discrimination must be based on an immutable or constructively immutable personal characteristic.[29] The term "immutable trait" implies traits that individuals did not choose and cannot change, such as age and national origin.[30] The prohibition against discrimination based on immutable traits protects individuals against disparate treatment based on chance.[31] Constructively immutable traits, for their part, are personal traits that are central to identity or personhood and that individuals cannot change without unacceptable personal cost (citizenship and religion are examples).[32] The prohibition against discrimination based on constructively immutable traits protects individuals against disparate treatment based on fundamental choices associated with their personhood.[33]

Notice two important things. First, a s. 15 *Charter* claim will succeed only if the claimant proves that discrimination is based on an enumerated or analogous ground of discrimination.[34] These enumerated and analogous

(Ottawa: Library of Parliament Hill Studies, 2021).

26. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para 13 [*Corbiere*].

27. *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 144, 156 [*Quebec (Attorney General)*]; *Miron v Trudel*, 1995 CanLII 97 (SCC) at para LXVIII (per L'Heureux-Dubé).

28. *Ibid*; *Corbiere*, *supra* note 26 at para 13.

29. *Quebec (Attorney General), supra* note 27 at paras 144, 156*;* Jennifer Koshan, "Inequality and Identity at Work" (2015) 38:2 Dalhousie LJ 473 at 477, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2066&context=dlj> [perma.cc/27PJ-K9Q9] [Koshan, "Inequality and Identity"]; Edward J Erler, "Equal Protection and Personal Rights: The Regime of the Discrete and Insular Minority" (1982) 16:2 Ga L Rev 407 at 409, 412 (describing the "discrete and insular minority" requirement in U.S. equal protection jurisprudence).

30. Sharona Hoffman, "The Importance of Immutability in Employment Discrimination Law" (2011) 52:5 Wm & Mary L Rev 1483 at 1509, 1511-1512, online: <scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1010&context=faculty_publications> [perma.cc/3R52-BYBH]; *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 30.

31. Clarke, "Against Immutability," *supra* note 13 at 13.

32. *Quebec (Attorney General)*, *supra* note 27 at para 335.

33. Clarke, "Against Immutability," *supra* note 13 at 23-24; Skolnik, "Homelessness," *supra* note 13 at 87.

34. *Fraser*, *supra* note 2 at para 27; Jessica Eisen, "Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory" (2016) 42:2 Queen's LJ 41 at 82-83, online: <journal.queenslaw.ca/sites/qljwww/files/Issues/Vol%2042%20i2/2.%20Eisen.pdf> [perma.cc/8J6R-EPC7]; *Corbiere*, *supra* note 26 at paras 5-12; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court (2010) 50 SCLR (2d) 297 at 322-323, online: <socialrightscura.ca/documents/

grounds thus fulfil a screening function within the right to equality's legal framework.[35] Second, courts recognize new analogous grounds of discrimination only when they are based on immutable or constructively immutable traits.[36] To date, courts have rejected various grounds of unconstitutional discrimination because the relevant trait is not immutable or constructively immutable, or because claimants could not limit the scope of the analogous ground with sufficient precision.[37] Examples of rejected analogous grounds of discrimination include residency, homelessness, poverty, membership in the military, and employment or occupational status.[38] As discussed more below, this narrow interpretation of analogous grounds results in a restrictive equality framework and engenders important theoretical and practical consequences.

2. *Calling the State to account for unconstitutional discrimination*

The right to equality calls the State to account for unconstitutional discrimination in ways that other rights cannot.[39] Section 15 claims require the State to publicly justify the harms and wrongs of unconstitutional discrimination that undermine equality interests, rather than justify the harms and wrongs that undermine other interests. This consideration provides a strong argument for why the right to equality—rather than other rights—should play a more fundamental role to counteract discrimination. The Constitution's structure, limitation clause, and burdens of proof underscore this point.

publications/Jackman%20Castaways.pdf> [perma.cc/4FX4-HUAS].

35. Eisen, "Grounding Equality," *supra* note 34 at 82-83.

36. *Ibid*; *Quebec (Attorney General)*, *supra* note 27 at paras 194, 335.

37. Joshua Sealy-Harrington, "Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the *Charter*" (19 December 2013), online (blog): <ablawg.ca/2013/12/19/should-homelessness-be-an-analogous-ground-clarifying-the-multi-variable-approach-to-section-15-of-the-charter/> [perma.cc/SZR9-X5LX]; Skolnik, "Homelessness," *supra* note 13 at 70.

38. See e.g. *R v Turpin*, 1989 CanLII 98 (SCC) (rejecting residency); *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 48 (rejecting residency); *R v Banks*, 2007 ONCA 19 at paras 89-106 (rejecting poverty) [*Banks*]; *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410 at paras 122-137 (rejecting homelessness) [*Tanudjaja*]; *Scott v Canada (Attorney General)*, 2017 BCCA 422 (rejecting membership in the military). But see *R v Généreux*, 1992 CanLII 117 (SCC) (leaving open the possibility that membership in the military can potentially constitute an analogous ground of discrimination). See e.g. *Reference Re Workers' Compensation Act, 1983* (Nfld), 1989 CanLII 86 (SCC) (rejecting employment status); *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (rejecting employment status); *Baier v Alberta*, 2007 SCC 31 (rejecting employment status). These latter three cases are cited in Koshan, "Inequality and Identity," *supra* note 29.

39. On the notion of calling the State to account, see e.g. François Tanguay-Renaud, "Criminalizing the State" (2013) 7 Crim L & Phil 255 at 266-268, DOI: <10.1007/s11572-012-9181-x>; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (London: Palgrave MacMillan, 2003) at 9-10.

Canadian courts employ a two-step process to determine whether *Charter* right infringements are justifiable.[40] First, the claimant must demonstrate that the State violated their constitutional right.[41] Second, once the claimant meets that burden, the State must justify the violation and demonstrate that it was reasonable in a free and democratic society according to s. 1 of the *Charter* (the limitation clause).[42] To do so, the State must satisfy the proportionality test set out in *R v Oakes*.[43] It must prove that the violation is justified by a pressing and substantial objective, that the restriction is rationally connected to the State's objective, that the violation impacts constitutional rights as little as possible to achieve the objective effectively, and that the violation's benefits outweigh its burdens.[44] If the State fails at any of these steps, the violation of rights is not justified and the impugned law or State action is unconstitutional.

As part of this second step—where the government must justify the infringement of a constitutional right under s. 1 of the *Charter*—the State is publicly called to account for its conduct.[45] The State must provide reasons for limiting a certain right, and a court evaluates the legitimacy of these reasons given the circumstances.[46] To do so, courts examine the purpose of the right and the interests that it protects.[47] Courts determine which reasons for restricting rights are legitimate in a liberal democracy—for instance, to ensure public safety or to safeguard public health—and which are not—for example, because it is politically popular or divinely ordained.[48]

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40. Paul Carr-Rollitt, "The Burden of Proof, the *Charter*, and a Hierarchy of Legal Norms" (1995) 6:3 Const F 96 at 96-97, DOI: <10.21991/C95376>.

41. *Ibid*; Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 SCLR 469 at 472.

42. *R v Oakes*, 1986 CanLII 46 (SCC) at para 66 [*Oakes*].

43. *Ibid* at paras 69-71. See also *R v Chaulk*, 1990 CanLII 34 (SCC) at paras 60-66 (modifying the minimal impairment test set out in *R v Oakes*).

44. *Oakes*, *supra* note 42 at paras 69-71.

45. See e.g. Colin Scott, "Accountability in the Regulatory State" (2000) 27:1 JL & Soc'y 38 at 40, citing EL Normanton, "Public Accountability and Audit: A Reconnaissance" in Smith & Hague, eds, *The Dilemma of Accountability in Modern Government: Independence versus Control* (London: MacMillan, 1971) at 311.

46. Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4:2 L & Ethics Human Rights 141 at 157-159, DOI: <10.2202/1938-2545.1047>; Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59:2 Am J Comp L 463 at 488, DOI: <10.5131/AJCL.2010.0018>.

47. Aharon Barak, "Proportionality and Principled Balancing" (2010) 4:1 L & Ethics Human Rights 3 at 12, DOI: <10.2202/1938-2545.1041>.

48. Kumm, *supra* note 46 at 150, 158-159. Kumm's entire quote is: "The proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy." See *ibid* at 150.

The structure of proportionality analysis—the need for a pressing and substantial objective, rational connection, minimal impairment, and balancing—requires the State to connect its publicly provided reasons to the factual context regarding the law's application.[49] Furthermore, the State must tailor the nature and strength of this reasoning to the type of infringement and its gravity.[50] The State partly legitimizes its authority by whether and how it justifies limiting rights.[51] The specific constitutional right infringement—and the individual interest that is centred in the constitutional analysis—dictates for what the State is called to account and shapes the justifications tthat the State must provide to limit that right (more on this below).

In the context of unconstitutional discrimination, the State must justify that it imposed disadvantages or denied benefits based on an individuals' personal characteristics—a particularly onerous burden.[52] The State cannot easily justify discrimination because many personal traits are morally irrelevant reasons to impose burdens or deny benefits.[53] It is also difficult for the State to legally justify conduct that treats individuals as inferior, subordinate, or less worthy of concern, or to provide legitimate legal reasons for why such treatment is reasonable and justified in a constitutional democracy.[54] Such determinations risk normalizing discrimination and expressing the unequal worth of different individuals.[55]

To be clear, this does not mean that personal traits are never morally relevant, or that the State cannot make legitimate distinctions based on personal characteristics. For instance, governments impose minimum age requirements for alcohol consumption, voting, sexual activity, and marriage.[56] These restrictions recognize that children and adolescents have

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49. Pierre Blache, "The Criteria of Justification under Oakes: Too Much Severity Generated through Formalism" (1991) 20:2 Man LJ 437 at 439; Vicki Jackson, "Constitutional Law in the Age of Proportionality" (2015) 124 Yale LJ 3094 at 3100, online: <www.yalelawjournal.org/pdf/h.3094.Jackson.3196_fteiok9v.pdf> [perma.cc/F27Q-FA5A].

50. Jackson, *supra* note 49 at 3098.

51. Moshe Cohen-Eliya & Iddo Porat, "Proportionality and Justification" (2014) 64:3 UTLJ 458 at 462, DOI: <10.3138/utlj.020614RA> (discussing the culture of justification in constitutional democracies).

52. *Ontario (Attorney General) v G*, 2020 SCC 38 at para 71 [*Ontario*] (describing the framework to justify s 15 *Charter* violations using the *Oakes* test).

53. Michael Foran, "Grounding Unlawful Discrimination" (2022) 28:1 Leg Theory 3 at 20, DOI: <10.1017/S1352325221000264>; Meital Pinto, "Arbitrariness as Discrimination" (2021) 34 Can JL & Jur 391 at 408-410, DOI: <10.1017/cjlj.2021.8>.

54. Note, however, that the State can justify distinctions that confer advantages to some or deny benefits to others in the context of ameliorative programs. See e.g. *R v Kapp*, 2008 SCC 41 at para 3.

55. See e.g. Foran, *supra* note 53 at 20; Pinto, *supra* note 53 at 408-410.

56. See e.g. Bernice Neugarten, "Age Distinctions and Their Social Functions" (1981) 57:4 Chicago-Kent L Rev 809 at 822-823; Nina Kohn, "Rethinking the Constitutionality of Age Discrimination:

not yet developed their decision-making capacities and may not understand the full implications of certain choices.[57] Furthermore, certain age-based restrictions can be justified because they protect vulnerable children and adolescents against harm or exploitation.[58] A government that is called to account for drawing age-based distinctions can provide compelling and legitimate reasons for doing so.

This account highlights the value of calling the State to account for violating the right to equality versus other rights and requiring the State to justify discrimination. When the State engages in unconstitutional discrimination, it must provide reasons for such disparate treatment and justify the legitimacy of such treatment in a free and democratic society. And courts, in turn, publicly express that certain reasons for such disparate treatment are not legitimate in a democracy. Through this dialogic process, the various branches of government contribute to the right to equality's evolution and remedial role within society.

Admittedly, in many contexts, courts reject claims of unconstitutional discrimination and decide that the State's conduct does not violate s. 15 of the *Charter*.[59] In such contexts, courts will not conduct a proportionality analysis, and the State will not be called to account to justify unconstitutional discrimination. However, as discussed more below, a more expansive right to equality could broaden the scope of s. 15 of the *Charter,* and ultimately, impose more stringent justificatory burdens on the State.

Part of the reason why courts reject s. 15 *Charter* claims is that the constitutional right to equality has been interpreted narrowly in three principal respects. The following sections show how the right to equality fails to address certain obvious forms of direct discrimination, overlooks discrimination based on quasi-immutable traits, and is largely absent from criminal law and procedure where discrimination is prevalent. Each of these limitations is examined in turn.

A Challenge to a Decades-Old Consensus" (2010) 44:1 UC Davis L Rev 213 at 276-277, online: <lawreview.law.ucdavis.edu/issues/44/1/articles/44-1_kohn.pdf> [perma.cc/V5YJ-GLQ8].

57. See e.g. Jonathan Herring, *Vulnerability, Childhood and the Law* (New York: Springer International, 2018) at 4-5; Jane Rutherford, "One Child, One Vote: Proxies for Parents" (1997) 82:6 Minn L Rev 1463 at 1471.

58. See e.g. Gottfried Schweiger & Gunter Graf, "Ethics and the Dynamic Vulnerability of Children" (2017) 12:2 Les ateliers de l'éthique 243 at 253-4.

59. See e.g. *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at para 110; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 84; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 29; *Sharma*, *supra* note 6 at para 36; *Banks*, *supra* note 38 at para 107; *Tanudjaja*, *supra* note 38.

II. *Restrictive equality rights and direct discrimination*

1. *Justifications for rejecting certain analogous grounds of discrimination*

The first reason why the right to equality framework is interpreted restrictively is that it fails to capture clear cases of direct or indirect discrimination. The framework's loopholes allow the State to impose burdens or deny benefits to disadvantaged persons and groups who do not fall within enumerated or analogous grounds of discrimination. To illustrate this point, consider why courts reject certain grounds of discrimination, such as poverty, homelessness, residency, and occupational status. These grounds of discrimination have been rejected for the three following reasons—each of which is critiqued in the following subsection.

First, courts conclude that traits such as poverty or homelessness are vague, such that it is difficult to objectively determine which individuals fall within the definitional scope of these grounds.[60] Courts have noted that the definition of homelessness is ambiguous and may include individuals without access to housing and those with access to inadequate housing.[61] For this reason, courts cannot circumscribe the scope of the proposed ground of discrimination with precision.[62] Other courts note that poverty does not constitute an analogous ground of discrimination because impecunious persons are an amorphous group who are not united by a single shared personal characteristic.[63]

Second, courts have decided that these characteristics are neither immutable nor constructively immutable.[64] Some decisions note that an individuals' socioeconomic situation can change and thus falls into neither category of immutability.[65] Others observe that the condition of poverty or homelessness is not a personal characteristic akin to race, religion, national origin, or other personal traits—a necessary component of enumerated and analogous grounds of discrimination.[66]

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60. *Tanudjaja*, *supra* note 38 at paras 129-134; *Banks*, *supra* note 38 at para 104.
61. *Tanudjaja*, *supra* note 38 at para 125.
62. *Ibid* at para 136.
63. *Banks*, supra note 38 at para 104; Colleen Sheppard, '"Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Oñati Socio-Leg Series 225 at 236.
64. Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50:3 Osgoode Hall LJ 637 at 654-655, DOI: <10.60082/2817-5069.1019>; *Banks*, *supra* note 38 at paras 100-106; *Boulter v Nova Scotia Power Incorporation,* 2009 NSCA 17 at paras 42-43 [*Boulter*]; *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2009 FC 873 at paras 73-90; *NM v Canada Employment Insurance Commission*, 2021 SST 499 (CanLII) at paras 59-60; *Tanudjaja*, *supra* note 38 at paras 122-137; *Begum v Canada (Citizenship and Immigration)*, 2017 FC 409 at para 125; *R v Ferkul*, 2019 ONCJ 893 at para 30.
65. *Boulter*, *supra* note 64 at paras 42-43; *Tanudjaja*, *supra* note 38 at para 129.
66. *Tanudjaja*, *supra* note 38 at para 130.

Third, there are concerns about the distributive implications of recognizing new analogous grounds of discrimination, especially those related to individuals' socio-economic plight.[67] Courts note that the judiciary lacks the institutional competence to reallocate public resources or engage in complex public policy decision-making, both of which may be necessary to remedy certain forms of socio-economic discrimination.[68] Furthermore, judges worry that such conduct is inconsistent with the separation of powers.[69]

2. *Direct discrimination and rejected analogous grounds*

This restrictive approach to analogous grounds of discrimination generates significant consequences. By rejecting certain analogous grounds of discrimination, courts indirectly affirm that certain historically marginalized groups cannot suffer unconstitutional discrimination based on their personal traits.[70] The result is that the State can impose disadvantages against such groups that perpetuate prejudices and stereotypes, and that exemplify the wrongfulness of direct discrimination.[71] To illustrate this point, suppose the State enacts a law that reads "poor persons and unhoused persons cannot frequent public parks."[72] The current s. 15 *Charter* framework would permit such discrimination because poverty and homelessness are not recognized grounds of discrimination for the reasons discussed above.[73]

This example highlights certain consequences of rejecting proposed analogous grounds of discrimination. Begin with vagueness and lack of objectively verifiable criteria to circumscribe the discriminated class and identify its members. The current s. 15 *Charter* framework overlooks how the State can leverage vagueness and breadth to maximize discrimination

67. *Ibid* at para 147; Judy Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) 23:2 SAJHR 235 at 236-237, DOI: <10.1080/19962126.2007.11864922>.

68. Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14:1 CJWL 185 at 195-196, DOI: <povertyandhumanrights.org/docs/11_DAY_BRODSKY.pdf> [perma.cc/G98J-3EVC]; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 93; Sandra Fredman, "Redistribution and Recognition: Reconciling Inequalities" (2007) 23:2 SAJHR 214 at 217. DOI: <10.1080/19962126.2007.11864923>; *Andrews*, *supra* note 1 at 190-191; *Boulter*, *supra* note 64 at para 43.

69. Cass Sunstein, "Public Values, Private Interests, and the Equal Protection Clause" (1982) 1982 Sup Ct Rev 127 at 142, DOI: <10.1086/scr.1982.3109555>; *Tanudjaja*, *supra* note 38 at para 140.

70. Skolnik, "Homelessness," *supra* note 13 at 70; Jessica Clarke, "Protected Class Gatekeeping" (2017) 92 NYUL Rev 101 at 129, online: < https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1936&context=faculty-publications.

71. Skolnik, "Homelessness," *supra* note 13 at 70.

72. This example was initially provided in Skolnik. See *ibid.*

73. *Ibid*.

against marginalized groups.[74] More specifically, the State can discriminate against a group more effectively by defining it vaguely, broadly, or imprecisely.

Vagueness is a particularly effective means to maximize discrimination for a simple reason: it increases enforcement discretion.[75] Vague laws and policies require front-line actors—police officers, bus drivers, healthcare providers—to routinely interpret their scope.[76] The low-visibility of discretionary enforcement actions—and the fact that most of these actions escape judicial review—means that courts will rarely assess whether a statute was enforced lawfully.[77] These concerns highlight why a purported analogous ground's vagueness can worsen discrimination.

Courts have also rejected proposed analogous grounds because, in their view, it is not possible to circumscribe the parameters of the analogous ground or objectively determine who falls within its scope.[78] For this reason, judges have accepted being a recipient of social assistance as an analogous ground of discrimination but rejected poverty and homelessness as constitutionally protected classes.[79]

But existing parameters can define certain analogous grounds and identify the individuals that fall within them. Canada established its first ever Official Poverty Line in 2019—an objective criterion that can be used to circumscribe the scope of poverty as an analogous ground and determine which individuals experience that condition.[80] Similarly, scholars have argued that homelessness can be defined as a legal condition

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74. John Calvin Jeffries Jr, "Legality, Vagueness, and the Construction of Penal Statutes" (1985) 71:2 Va L Rev 189 at 197, 213-214, DOI: <10.2307/1073017>; Tammy W Sun, "Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine" (2011) 46:1 Harv CR-CLL Rev 149 at 154, DOI: <journals.law.harvard.edu/crcl/wp-content/uploads/sites/80/2009/06/149-194.pdf> [perma.cc/28YF-P7LN].

75. Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97:3 Colum L Rev 551 at 560, online: <scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1126&context=faculty_scholarship> [perma.cc/EEC5-LDKR].

76. Jeffries Jr, *supra* note 74 at 218, citing *Kolender v Lawson*, 461 US 352 (1983).

77. James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process versus Crime Control" in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) at 196.

78. *Tanudjaja*, *supra* note 38 at para 130-131.

79. *Ibid*; *Falkiner v Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ONCA); Martha Jackman & Bruce Porter, "Socio-Economic Rights under the *Canadian Charter*" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) at 224 (providing an overview of the decision in *Falkiner*).

80. National Advisory Council on Poverty, *Building Understanding: The First Report of the National Advisory Council on Poverty* (Ottawa: Employment and Social Development Canada, 2020) at 15; *Poverty Reduction Act*, SC 2019, c 29, s 315, s 7 (establishing the Official Poverty Line).

where individuals lack private property rights—a definition that offers workable parameters and objective criteria to identify its members.[81] To be clear, these are not the only possible legal definitions of poverty or homelessness. Yet these definitions illustrate how these analogous grounds can be circumscribed by workable definitions that allow the group's members to be ascertained.

The second justification for rejecting some analogous grounds of discrimination—the requirement that personal traits are immutable or constructively immutable—also allows the State to impose disadvantages that perpetuate prejudices and stereotypes against marginalized groups that have not been recognized as a constitutionally protected class. Recall how courts conclude that poverty and homelessness are neither immutable nor constructively immutable traits because individuals can escape these socio-economic conditions.[82] But traits such as poverty and homelessness can be relatively stable and difficult for individuals to change.[83] The problem is that individuals can experience direct and indirect discrimination precisely because their personal traits are sticky and persistent.[84] If these traits could be changed with relative ease, individuals could avoid discrimination based on these traits more easily. Later sections demonstrate why the concept of quasi-immutable traits can capture the wrongfulness of discrimination based on personal characteristics that are stable and difficult to change.[85]

There are also important counterarguments to the third justification for rejecting certain analogous grounds of discrimination: that courts who recognize these grounds must necessarily reallocate public resources and exceed their institutional competence.[86] For one, certain foundational judicial decisions require the State to directly or indirectly reallocate public resources to ensure that *Charter* rights are respected. Courts have

81. Christopher Essert, "Property and Homelessness" (2016) 44:4 Philosophy & Pub Affairs 266 at 266, DOI: <10.1111/papa.12080>; Andy Yu, "Equity and Homelessness" (2020) 33:1 Can JL & Jur 245 at 246, DOI: <10.1017/cjlj.2019.37>; Terry Skolnik, "Homeless Encampments: A Philosophical Justification" (2023) 36 JL & Soc Pol'y 97 at 99, DOI: <10.60082/0829-3929.1453>; Jane Baron, "Homelessness as a Property Problem" (2004) 36:2 Urban Lawyer 273 at 273.

82. *Boulter*, *supra* note 64 at paras 42-43; *Tanudjaja*, *supra* note 38 at para 129.

83. Sara Greene, "A Theory of Poverty: Legal Immobility" (2019) 96:4 Wash UL Rev 753 at 759-760, online: <scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6484&context=faculty_scholarship> [perma.cc/KA9U-6NSZ]; Skolnik, "Homelessness," *supra* note 13 at 88; Sealy-Harrington, "Assessing Analogous Grounds," *supra* note 15 at 48.

84. Skolnik, "Homelessness," *supra* note 13 at 88.

85. *Ibid* at 90.

86. William Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction" (2001) 69:5 Fordham L Rev 1821 at 1878-1879, online: <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3710&context=flr&sei> [perma.cc/P45L-Q6EV] (providing an overview of these concerns); Bradley Hogin, "Equal Protection, Democratic Theory, and the Case of the Poor" (1989) 21:1 Rutgers LJ 1 at 40.

ordered the State to build French language schools to fulfil minority language education rights and have retained supervisory jurisdiction over that order's implementation.[87] The Supreme Court of Canada's *Jordan* framework—which imposed presumptive ceilings that apply to a defendant's right to be tried within a reasonable time —required the State to reallocate resources to prevent an influx of stays of proceedings.[88] Even the judiciary's recognition that officers generally require a warrant to search a dwelling house requires the State to spend more time and resources on police investigations.[89] The search warrant requirement obliges officers to do more thorough investigations, interview witnesses or conduct surveillance, and spend time in court to obtain a warrant—all of which cost more money than warrantless searches.[90] Furthermore, the judiciary can strike down laws that are discriminatory on their face without generating any redistributive implications.[91] A declaration of constitutional invalidity would not require judges to engage in complex redistributive schemes. Nor would such a declaration violate the separation of powers or exceed the judiciary's institutional competence. Rather, judges would do what they typically do in contexts where a statute violates a constitutional right: strike it down.[92] Lastly, judges can also allocate *Charter* damages—meaning damages that compensate for constitutional right infringements—to remedy unconstitutional discrimination without having to engage in significant public resource reallocation or overstep their constitutional role.[93]

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87. See e.g. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 87-88.

88. See e.g. *R v Jordan*, 2016 SCC 27 at para 5. The Court held that cases tried in a provincial court result in a presumptively unreasonable delay when the actual or anticipated end of the trial exceeds eighteen months. The presumptive ceiling is thirty months for cases in a superior court, or, for cases tried in a provincial with a preliminary inquiry. For an overview, see Terry Skolnik, "Precedent, Principles, and Presumptions" (2021) 54:3 UBC L Rev 935 at 964-966. See also Olivia Stefanovich, "Justice Minister Says He's Ready to Legislate if Pandemic Delays Lead to Charges Being Tossed," *CBC News* (15 July 2020), online: <www.cbc.ca/news/politics/stefanovich-jordan-decision-covid19-cases-delay-1.5638893> [perma.cc/TW8R-8XWK].

89. See e.g. *Hunter et al v Southam Inc*, 1984 CanLII 33 (SCC) at 161-162 [Hunter]; *R v Feeney*, 1997 CanLII 342 (SCC) at paras 43-44.

90. See e.g. William J Stuntz, "Race, Class, and Drugs" (1998) 98:7 Colum L Rev 1795 at 1820-1821, DOI: <10.2307/1123466> (noting that traffic stops are relatively cheap for the police compared to obtaining search warrants).

91. For an example of such laws that were struck down as unconstitutional in the United States, see *Parr v Municipal Court*, 479 P (2d) 353 at 353-360 (CA Sup Ct 1971); Miranda Oshige McGowan, "From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition" (2004) 88:5 Minn L Rev 1312 at 1340-1341, online: <scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1730&context=mlr> [perma.cc/5YF3-3DU4].

92. Kent Roach, "Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience" (2005) 40:3 Tex Intl LJ 537 at 546, DOI: <10.2139/ssrn.621245>; *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at paras 13-22.

93. *Vancouver (City) v Ward*, 2010 SCC 27 (discussing *Charter* damages as a remedy for

To be clear, this does not mean that considerations such as justiciability and institutional competence are irrelevant to s. 15 *Charter* claims. Rather, in contexts that do engage redistributive concerns more directly, a claim's justifiability and the judiciary's institutional competence factor more heavily into the appropriateness of the remedy.[94]

These considerations highlight one way in which the current s. 15 *Charter* framework is interpreted narrowly because it fails to protect certain marginalized groups against some forms of direct discrimination. The next section highlights how the right to equality fails to protect individuals against discrimination based on quasi-immutable traits.

III. *Restrictive equality rights and quasi-immutability*

The second reason why the right to equality is interpreted narrowly is because it fails to recognize discrimination based on quasi-immutable traits.[95] The term quasi-immutable trait implies a personal characteristic that is relatively stable and difficult to change.[96] Examples of quasi-immutable traits include poverty, homelessness, having a criminal record, and being overweight.[97] The previous section showed that the current right to equality framework permits direct discrimination against groups that have not been recognized as a constitutionally protected class. That section highlighted how groups can experience obvious forms of direction discrimination based on personal traits that lack constitutional protection. But what explains this? This section argues that the s. 15 *Charter* right to equality fails to protect groups against direct and indirect discrimination based on quasi-immutable traits; a form of discrimination against which individuals should be constitutionally protected. And as discussed more below, once we recognize that individuals can suffer direct discrimination

constitutional rights violations).

94. C Edwin Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection" (1983) 131:4 U Pa L Rev 933 at 986-987, DOI: <10.2307/3311988>.

95. Skolnik, "Homelessness," *supra* note 13 at 86-88.

96. *Ibid* at 87-88.

97. These examples are taken directly from Skolnik. The original quotation is: "Those personal characteristics include traits such as poverty, homelessness, being overweight, or possessing a criminal record." See *ibid*. For examples of how courts have either rejected or not recognized these analogous grounds, see e.g. *Tadros v Peel Regional Police Service*, 2007 CanLII 41902 (ONSC) at para 40 (rejecting criminal record as an analogous ground); *R v Boudreau*, 2002 NSSC 236 at paras 12-26 (rejecting criminal record as an analogous ground); *Banks*, *supra* note 38 at paras 89-106 (rejecting poverty as an analogous ground); *Tanudjaja*, *supra* note 38 at paras 122-137 (rejecting homelessness as an analogous ground). See also Emily Luther, "Justice for All Shapes and Sizes: Combatting Weight Discrimination in Canada" (2010) 48:1 Alta L Rev 167 at 167-168, DOI: <10.29173/alr167> (highlighting how courts have not yet recognized weight as an analogous ground of discrimination under s 15 of the *Charter).*

based on quasi-immutable traits, we understand that they can experience indirect discrimination based on these same traits.

Although quasi-immutable traits can be changed, they are different from constructively immutable traits in important respects.[98] First, individuals may wish to change a quasi-immutable trait because it is the reason why they experience discrimination.[99] In contrast, individuals generally wish to maintain a constructively immutable trait—such as religion or marital status—because it is deeply associated with personhood or individual identity.[100]

Second, the stereotypical assumptions associated with discrimination based on quasi-immutable personal traits is also unique. The trait's stickiness and persistence account for why the individual both suffers discrimination *and* is blamed for their condition.[101] Discrimination based on quasi-immutable traits typically involves generalizations regarding a person's laziness, poor choices, or weakness of will.[102] These assumptions go something like this: impecunious persons could escape poverty if they worked harder and picked themselves up by their bootstraps.[103] Others may posit that individuals would not be overweight if they could get their act together—if they ate less or exercised more.[104] These generalizations blame the individual both for the trait that results in discrimination and for not changing it.

Third, discrimination based on quasi-immutable traits attempts to shift the locus of moral wrongdoing away from the discriminator and towards the discriminated. The rejection of quasi-immutable traits conceptualizes

98. Skolnik, "Homelessness," *supra* note 13 at 87-88.
99. *Ibid*.
100. *Ibid*; Samuel Marcosson, "Constructive Immutability" (2001) 3:2 U Pa J Const L 646 at 682-683, online: <scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1428&context=jcl> [perma.cc/AM2J-257Z].
101. Margot Young, "Context, Choice, and Rights: *PHS Community Services Society v Canada (Attorney General)*" (2011) 44:1 UBC L Rev 221 at 242-243, 250-251, 253, online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1352&context=fac_pubs> [perma.cc/ZD3Q-UCNT].
102. See e.g. Danieli Evans Peterman, "Socioeconomic Status Discrimination" (2018) 104:7 Va L Rev 1283 at 1311, online: <www.virginialawreview.org/wp-content/uploads/2020/12/Evans_Online%20Revised.pdf> [perma.cc/4VVN-KJGB]; Joel F Handler & Yeheskel Hasenfeld, *Blame Welfare, Ignore Poverty and Inequality* (Cambridge: Cambridge University Press, 2007) at 70; Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 209-210, 220-221.
103. Michele Estrin Gilman, "The Poverty Defense" (2013) 47:2 U Rich L Rev 495 at 540, online: <scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1257&context=all_fac> [perma.cc/RNB5-65VX] (describing this stereotypical claim made by others).
104. J Paul R Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17:3 Adv Q 338 at 347 (describing this stereotypical claim made by others), cited in Luther, *supra* note 97 at 183; Sealy-Harrington, "Assessing Analogous Grounds," *supra* note 15 at 51.

the victim's personal responsibility as a form of contributory negligence or assumption of risk that bars a successful anti-discrimination claim.[105] This conceptualization imports evaluative judgments regarding culpability for one's plight.[106]

The quasi-immutable traits described above—such as poverty, homelessness, and having a criminal record—share many of the same hallmarks of other analogous grounds of discrimination. These quasi-immutable personal traits tend to be highly stigmatized and involve a history of marginalization, stereotyping, and prejudice.[107] These same traits can limit a person's access to housing or employment opportunities, or subject them to other forms of social, economic, or political exclusion.[108] Furthermore, as discussed above, these quasi-immutable personal characteristics can be defined with adequate precision and have objective parameters to identify their members.[109]

IV. *Restrictive equality rights in criminal justice contexts*

1. *Discrimination in the criminal justice system*

The third reason why the s. 15 *Charter* right is interpreted restrictively is because it is largely absent from areas of the law where discrimination is ubiquitous, such as criminal law and procedure.[110] Discrimination is

105. David Hamilton, "The Paper War on Poverty" (1971) 5:3 J Econ Issues 72 at 73, DOI: <10.1080/00213624.1971.11502987>.

106. See e.g. Tiffany Graham, "The Shifting Doctrinal Face of Immutability" (2011) 19:2 Va J Soc Pol'y & L 169 at 181-182 (discussing the connection between equal protection doctrine, choice, and blameworthiness).

107. See e.g. Devah Pager, "The Mark of a Criminal Record" (2003) 108:5 Am J Sociology 937 at 960-962, DOI: <10.1086/374403> (criminal records); Stephanie Papadopoulos & Leah Brennan, "Correlates of Weight Stigma in Adults with Overweight and Obesity: A Systematic Literature Review" (2015) 23:9 Obesity 1743 at 1744, DOI: <10.1002/oby.21187> (weight); Wendy Williams, "Struggling with Poverty: Implications for Theory and Policy of Increasing Research on Social Class-Based Stigma" (2009) 9:1 Analyses Soc Issues & Pub Pol'y 37 at 39-42, DOI: <10.1111/j.1530-2415.2009.01184.x> (poverty and socio-economic status).

108. See *Fraser*, *supra* note 2 at para 76; Pager, "The Mark of a Criminal Record," *supra* note 178 (describing the impact of a criminal record on employment opportunities); Rebecca Puhl & Kelly Brownell, "Bias, Discrimination, and Obesity" (2001) 9:12 Obesity Research 788 at 789-80, DOI: <10.1038/oby.2001.108> (summarizing studies that explore employment discrimination related to obesity); Sarah Golabek-Goldman, "Ban the Address: Combating Employment Discrimination Against the Homeless" (2017) 126:6 Yale LJ 1788 at 1791-1792, 1796-1809, online: <yalelawjournal.org/pdf/h.1788.Golabek-Goldman.1868_9wo15f6u.pdf> [perma.cc/53DS-FUAD].

109. *Supra*, notes 80 and 81, Section II(2).

110. Other scholars have raised this point decades ago. See e.g. Rosemary Cairns Way, "An Opportunity for Equality *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61:4 Crim LQ 465 at 466-467 [Cairns Way, "Opportunity for Equality"]; Rosemary Cairns Way, "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible" (2005) 4 JL & Equal 203 at 203-204; Rosemary Cairns Way, "Attending to Equality: Criminal Law, the *Charter* and Competitive Truths" (2012) 57 SCLR (2d) 39 at 49, DOI: <10.60082/2563-8505.1231>, citing Christine Boyle, "The Role of Equality in the Criminal Law" (1994) Sask L Rev 203 at 207.

easy to find in the criminal justice system.[111] Compared to white persons, Black persons are more likely to be pulled-over by the police,[112] frisk-searched,[113] arrested and charged with certain crimes,[114] detained pending trial,[115] subject to use of force,[116] and incarcerated.[117] Black persons and Indigenous persons are also more likely to be carded by the police, meaning that officers order individuals to identify themselves even though they did not engage in actual or suspected wrongdoing.[118] They are also disproportionately incarcerated.[119]

Despite these realities, and despite calls for a more express incorporation of the right to equality within the criminal law, the constitutional right to equality has played little to no role in Canadian criminal law and procedure jurisprudence.[120] This omission can be surprising given the Court's increasing recognition of systemic racism and racial profiling in the criminal justice system.[121] Admittedly, there are some exceptional

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111. Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2023) 13:4 Race & Justice 530 at 531-3, DOI: <10.1177/215336872110064>; Skolnik, "Racial Profiling," *supra* note 5 at 436-438.

112. Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (Halifax: Nova Scotia Human Rights Commission, 2019) at 33; Lorne Foster, Les Jacobs & Bobby Siu, *Race data and traffic stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts* (Ottawa: Ottawa Police Service, 2016) at 3-5.

113. Steven Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 Can J Corr 322 at 325, DOI: <10.3138/cjccj.2014.E32>.

114. Ontario Human Rights Commission, *A Disparate Impact: A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: OHRC, 2020) at 4-7.

115. Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42:1 Brit J Crim 186 at 187, DOI: <10.1093/bjc/42.1.186> (highlighting disparities in remand in custody rates); Anna Mehler Paperny, "Exclusive: New Data Shows Race Disparities in Canada's Bail System," *Reuters News* (19 October 2017), online: <www.reuters.com/article/us-canada-jails-race-exclusive-idUSKBN1CO2RD> [perma.cc/5KBB-AFK4] (highlighting disparities in remand in custody rates). Note that both of these sources are cited in Owusu-Bempah et al, *supra* note 111. See also Julian Roberts & Anthony Doob, "Race, Ethnicity, and Criminal Justice in Canada" (1997) 21 Crime & Justice 469 at 498, 502-503 (also highlighting disparities in remand in custody rates).

116. Toronto Police Service, *Race & Identity Based Data Collection Strategy: Understanding Use of Force & Strip Searches in 2020* (Toronto: Toronto Police Service, 2022) at 48-50, 53-55, 61-62; Terry Skolnik, "Use of Force and Criminalization" (2022) 85:3 Alb L Rev 663 at 673.

117. Owusu-Bempah et al, *supra* note 111 at 533.

118. Victor Armony, Mariam Hassaoui & Massimiliano Mulone, "Les interpellations policières à la lumière des identités racisées des personnes interpellées Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial" (Montreal: CRIDAQ, 2019) at 8-11.

119. Jamil Malakieh, *Adult and Youth Correctional Statistics in Canada, 2017/2018* (Ottawa: Statistics Canada, 2019) at 5; Owusu-Bempah et al, *supra* note 111 at 533.

120. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 290. See also Cairns Way, "Opportunity for Equality," *supra* note 110 at 466-467.

121. Amar Khoday, "Ending the Erasure? Writing Race into The Story of Psychological Detentions—

criminal law decisions where s. 15 of the *Charter* was invoked successfully. Recently, the Supreme Court of Canada held that it is unconstitutionally discriminatory to require defendants to register in a sex-offender registry when they were declared not criminally responsible for a sexual offence.[122] The Court decided that the provision discriminated against individuals with mental disabilities.[123] But this type of case is far removed from the types of routine discrimination that pervades the criminal justice system and that s. 15 of the *Charter* does little to remedy.[124] What explains this?

Scholars have offered various explanations. First, lawyers can overlook the right to equality in criminal justice contexts. David Tanovich notes that white defense lawyers may not consider the importance of raising s. 15 *Charter* claims in criminal cases that involve discrimination or racial profiling.[125] Second, in contexts where the defendant is white and courts apply the ancillary powers doctrine—which the judiciary uses to create new common law police powers—judges may not consider the prospect that the new police power will be applied discriminatorily against racialized persons.[126] Third, some argue that s. 15 *Charter* claims require substantial (and expensive) evidence to demonstrate a law's discriminatory impact, which can act as a barrier to equality claims in criminal justice contexts.[127] Although courts can take judicial notice of systemic racism, disparate impact claims tend to be supported by expert evidence, access to information requests, and an empirical analysis of statistical data.[128] Fourth, the right to equality is relatively absent in criminal law jurisprudence due to path dependence in adjudication.[129] The phenomenon of path dependence

Examining *R. v. Le*" (2021) 100 SCLR (2d) 165 at 166, DOI: <10.60082/2563-8505.1416>; *R v Chouhan*, 2021 SCC 26 at paras 57-80; *R v Le*, 2019 SCC 34 at paras 89-97 [*Le*]; *R v Ahmad*, 2020 SCC 11 at para 25; *R v Ipeelee*, 2012 SCC 13 at para 67.

122. *Ontario*, *supra* note 52.

123. *Ibid* at paras 50, 57-70.

124. Terry Skolnik, "Criminal Justice Reform: A Transformative Agenda" (2022) 59:3 Alta L Rev 631 at 633-636, online: <albertalawreview.com/index.php/ALR/article/view/2689/2637> [perma.cc/6GHF-GB4V].

125. David Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR (2d) 655 at 674-683, DOI: <10.60082/2563-8505.1128 >.

126. *Ibid* at 675; Skolnik, "Racial Profiling," *supra* note 5 at 454.

127. David Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 at 179-180, DOI: <10.60082/2817-5069.1446>.

128. Nicholas Stephanopoulos, "Disparate Impact, Unified Law" (2019) 128:6 Yale LJ 1566 at 1615, online: <www.yalelawjournal.org/pdf/Stephanopoulos_3rua1o85.pdf> [perma.cc/9K8A-NLMT]; R v Morris, 2021 ONCA 680 at para 123 (discussing how courts can take judicial notice of systemic racism).

129. Oona Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86:2 Iowa L Rev 601 at 604-605 (describing path dependence in

is deeply rooted in the common law and refers to how past decisions and adjudicative approaches become "locked in and resistant to change."[130] Various factors reinforce path dependence in adjudication: adherence to precedent, stare decisis, analogical reasoning, a commitment to judicial minimalism, the correctness standard for pure errors of law, and more.[131] Judges adjudicate present legal disputes in a certain way because that is what they have done in the past.[132] Even in cases where defendants do advance s. 15 *Charter* claims in criminal justice contexts, courts tend to either address equality rights briefly, or summarily dismiss discrimination arguments.[133] Unconstitutional discrimination claims have also failed in contexts where courts engaged more fully with s. 15 *Charter* arguments in criminal law cases.[134]

These considerations partly explain why the right to equality continues to play a minimal role within criminal law and procedure jurisprudence. For reasons like these, lawyers turn to other *Charter* rights to advance the right to equality in criminal law contexts, and courts rely on rights other than s. 15 of the *Charter* to decide cases that involve unconstitutional discrimination—an approach that is critiqued in the next subsection.

2. *Restrictive equality rights and the wrongfulness of discrimination*

The absence of s. 15 of the *Charter* in criminal justice jurisprudence results in significant consequences. Unlike s. 15 of the *Charter,* other constitutional rights fail to capture the distinct moral wrongfulness of discrimination.[135] To paraphrase Tarunabh Khaitan, discrimination is wrong because individuals suffer due to their morally irrelevant personal

adjudication).

130. *Ibid* at 605.

131. *Ibid* at 622; Alec Stone Sweet, "Path Dependence, Precedent, and Judicial Power" in Martin Shapiro & Alec Stone Sweet, eds, On Law, Politics, and Judicialization (Oxford: Oxford University Press, 2002) at 122-124.

132. See e.g. Skolnik, "Racial Profiling," *supra* note 5 at 455; Eugene Volokh, "The Mechanisms of the Slippery Slope" (2003) 116:4 Harv L Rev 1026 at 1035-1036, online: <www2.law.ucla.edu/Volokh/slippery.pdf> [perma.cc/B7UC-ESM6]; Hathaway, *supra* note 129 at 627-8.

133. Julie Jai & Joseph Cheng, "The Invisibility of Race in Section 15: Why Section 15 of the *Charter* Has Not Done More to Promote Racial Equality" (2006) 5:1 JL & Equality 125 at 127-129, citing *R v Williams*, [1998] 1 SCR 1128 at paras 40, 47-48; *R v Spence*, 2005 SCC 71 (the Court did not mention s. 15 of the *Charter*); *R v S (RD)*, 1997 CanLII 324 at para 46 (the Court briefly mentioned s. 15 of the *Charter* but did not apply it). For more recent examples, see e.g. *R v Kokopenace*, 2015 SCC 28 at para 37 (briefly rejecting s. 15 *Charter* argument); *Le*, *supra* note 121 (not mentioning s 15 of the *Charter*).

134. See e.g. Sharma, *supra* note 6 at paras 27-82.

135. Larry Alexander, "What Makes Wrongful Discrimination Wrong Biases, Preferences, Stereotypes, and Proxies" (1992) 141:1 U Pa L Rev 149 at 218-219, online: <scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3635&context=penn_law_review> [perma.cc/KY44-R5V2].

traits.[136] Unconstitutional discrimination characteristically involves a form of rank-ordering, whereby the State treats certain individuals and groups as subordinate, inferior, less worthy, or undeserving based on their personal traits.[137]

Discrimination can exist in various forms, such as stereotyping, making decisions based on prejudice, marginalizing others, depriving others of basic resources, and robbing individuals of their dignity and self-respect.[138] These forms of discrimination violate substantive equality and fail to treat individuals with equal concern, consideration, and respect.[139]

Discrimination's wrongfulness is different from the wrongfulness of other constitutional rights infringements, such as arbitrary detentions or unlawful searches.[140] Arbitrary detentions principally undermine liberty interests.[141] These detentions limit a person's freedom to move, act, or make basic choices without interference by the State.[142] Similarly, unconstitutional searches principally invade an individual's privacy interests.[143] These unconstitutional searches may infringe a person's right

136. This definition is taken directly from Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford U Press, 2015) at 194, "The primary wrongfulness of discriminatory conduct lies in the fact that it makes a person suffer because of her morally irrelevant or even valuable membership of a group."

137. Catherine MacKinnon, "Substantive Equality: A Perspective" (2011) 96:1 Minn L Rev 1 at 11-12, online: <www.feministes-radicales.org/wp-content/uploads/2012/06/Catharine-MacKinnon-Substantive-Equality-A-Perspective-Copie.pdf> [perma.cc/YE6F-4GHH]; Denise Reaume, "Discrimination and Dignity" (2003) 63:3 La L Rev 645 at 678-679, online: <digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5984&context=lalrev> [perma.cc/UW96-M475]; Sophia Moreau, "What is Discrimination?" (2010) 38:2 Philosophy & Pub Affairs 143 at 154, DOI: <10.1111/j.1088-4963.2010.01181.x>; Sophia Moreau, "Discrimination and Subordination" in David Sobel, Peter Vallentyne & Steven Wall, eds, *Oxford Studies in Political Philosophy,* vol 5 (Oxford: Oxford University Press, 2019) at 117-119; Deborah Hellman, *When is Discrimination Wrong?* (Cambridge: Harvard University Press, 2008) at 34-36.

138. Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291 at 297-314, DOI: <10.2139/ssrn.535622>.

139. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 218-220; *Andrews*, *supra* note 1 at 165.

140. Richard J Arneson, "What Is Wrongful Discrimination?" (2006) 43:4 San Diego L Rev 775 at 779, online: <philosophyfaculty.ucsd.edu/faculty/rarneson/documents/writings/what-is-wrongful-discrimination.pdf> [perma.cc/R8GD-BKLS] (noting that the wrongfulness of discrimination is rooted in differential treatment based on animus or prejudice).

141. James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48:2 McGill LJ 225 at 268-269, online: <lawjournal.mcgill.ca/wp-content/uploads/pdf/2684732-Stribopoulos.pdf> [perma.cc/ETE6-HGH8]; *R v Grant*, 2009 SCC 32 at paras 19-21; *R v Therens*, 1985 CanLII 29 (SCC) at paras 50-51.

142. James Stribopoulos, "A Failed Experiment - Investigative Detention: Ten Years Later" (2003) 41:2 Alta L Rev 335 at 338, 353, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3313&context=scholarly_works> [perma.cc/AX7V-PKG4].

143. *Hunter*, *supra* note 89 at 159-160, 167-168; William J Stuntz, "Privacy's Problem and the Law of Criminal Procedure" (1995) 93:5 Mich L Rev 1016 at 1016, DOI: <10.2307/1289989>; Tim Quigley, "The Impact of the Charter on the Law of Search and Seizure" (2008), 40 SCLR (2d) 117 at 123, DOI:

to be left alone, intrude upon their seclusion, undermine their decisional autonomy, or humiliate them—all of which exemplify different ways in which privacy interests are infringed.[144]

The wrongfulness of unconstitutional discrimination—and the violation of substantive equality interests—is thus distinct from the wrongfulness of other constitutional rights violations. An unlawful search that was motivated by racial animus involves rank-ordering that demeans individuals based on morally irrelevant personal characteristics—a wrong that is fundamentally distinct from restricting liberty or invading privacy.[145] Arbitrary detentions based on racial profiling subject individuals to additional dignitary and psychological harms—such as humiliation, prejudice, and a feeling of being targeted rather than protected—that other arbitrary detentions do not.[146]

Discrimination's unique wrongfulness highlights several disadvantages of using rights other than the s. 15 *Charter* right to equality (hereafter, non-equality rights) to counteract unconstitutional discrimination. Notably, courts that rely on non-equality rights to counteract discrimination overlook or minimize its wrongfulness.[147]

Expressive theories of law elucidate how unconstitutional discrimination constitutes a distinct moral wrong that is different from other types of unlawful State action.[148] These theories recognize that legislation and State action communicate messages to the public.[149] Elizabeth Anderson and Richard Pildes note that discriminatory laws

<10.60082/2563-8505.1112>. Note that unconstitutional searches may undermine other interests, such as dignity or bodily integrity. See *Hunter*, *supra* note 89 at 168; *R v Golden*, 2001 SCC 83 at paras 76, 87.

144. Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4:5 Harvard L Rev 193 at 205, DOI: <10.2307/1321160> (describing the right to be left alone); William Prosser, "Privacy" (1960) 48:3 Cal L Rev 383 at 389, DOI: <10.15779/Z383J3C> (describing these types of invasions of privacy).

145. I Bennett Capers, "Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle" (2011) 46:1 Harv CR-CLL Rev 1 at 3, 44, online: <journals.law.harvard.edu/crcl/wp-content/uploads/sites/80/2009/06/1-50.pdf> [perma.cc/CZ5S-H65R].

146. Susan Bandes et al, "The Mismeasure of *Terry* Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities" (2019) 37:4 Behav Sci & Law 176 at 181, 183-184, DOI: <10.1002/bsl.2401>; Jack Glaser*, Suspect Race: Causes and Consequences of Racial Profiling* (Oxford: Oxford University Press, 2015) at 125-126; Terry Skolnik & Fernando Belton, "*Luamba* et la fin des interceptions routières aléatoires" (2023) 101 Rev Barreau Can 671 at 686.

147. Khaitan, *A Theory of Discrimination Law*, *supra* note 136 at 194 (describing the primary wrongfulness of discrimination).

148. Elizabeth Anderson & Richard Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148:5 U Pa L Rev 1503, DOI: <10.2307/3312748> (describing expressive theories of law); Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous nor a Panacea" (2012) 32:1 Oxford J Leg Stud 1 at 5-9, DOI: <10.1093/ojls/gqr024> (discussing expressive theories of law related to discrimination).

149. Anderson & Pildes, *supra* note 148 at 1520.

express sentiments such as contempt, hostility, and disrespect towards certain individuals and groups.[150]

Constitutional decision-making also fulfils an important expressive function.[151] Through constitutional adjudication and reasoned decisions, courts communicate that the State violated a particular constitutional right, identify the interests that the State harmed, and acknowledge the specific wrongfulness of unlawful State action.[152] While discriminatory laws express contempt, judicial decisions that strike down such laws on s. 15 *Charter* grounds express that the State engaged in a particular type of wrongdoing: treating individuals as inferior, subordinate, or lesser-than.[153]

Expressive theories of law demonstrate why s. 15 *Charter* violations communicate that the State committed a particular type of wrong that is different than other constitutional rights violations. By using non-equality rights to counteract discrimination, courts neither acknowledge the unique wrong of discriminatory treatment nor call the State to account for the specific harms of discrimination.

The expressive value of constitutional adjudication matters for other reasons. Reasoned constitutional decisions cabin the role and purpose of various rights and the principal interests that they protect.[154] In doing so, constitutional decision-making—and the reasoned decisions that flow from it—maintain the *Charter*'s internal structure and coherence.[155] Furthermore, constitutional adjudication validates how claimants suffered a particular harm and affirm that the State engaged in a particular wrong—an approach that unifies the moral connection between the wrongfulness of State action and the particular harm that claimants suffer from such conduct.[156]

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150. *Ibid* at 1521.

151. Cass Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2024-2025, 2028, DOI: <10.2307/3312647>.

152. Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80:1-2 Can Bar Rev 699 at 737; Reva B Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown" (2004) 117:5 Harv L Rev 1470 at 1480-1481, 1484-1485, DOI: <10.2307/4093259> (describing how the Court identified equality interests and the nature of the State's wrongdoing in *Brown*).

153. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 291-292.

154. Peter Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 820-821, DOI: <10.60082/2817-5069.1759>.

155. Benjamin Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the Canadian Charter of Rights and Freedoms" (2015) 65:3 UTLJ 239 at 259, DOI: <10.3138/UTLJ.2660>, citing *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 337-338.

156. Reaume, *supra* note 137 at 672-673, 678-679 (highlighting the connection between the wrong of demeaning human dignity and the harms of stereotyping and prejudices).

3. *Restrictive equality rights in criminal law and procedure*

The use of non-equality rights to counteract discrimination raises an important concern. Notably, courts do not acknowledge the unique wrongfulness of unconstitutional discrimination—and fail to express that the State treated individuals with less concern and respect—when they use non-equality rights to counteract discrimination. Two examples illustrate this point: s. 7 *Charter* claims that minimize the harms and wrongs of indirect discrimination and s. 9 *Charter* claims that fail to address racial profiling adequately.

Consider first how claimants have turned to s. 7 of the *Canadian Charter* to remedy indirect discrimination.[157] The BC Court of Appeal decision in *Vancouver (City) v Adams*—which involved a constitutional challenge to a municipal ordinance that was backed by quasi-criminal penalties—highlights the shortfalls of this approach. S. 7 of the *Charter* protects the right to life, liberty, and security of the person—rights that cannot be deprived except in accordance with the principles of fundamental justice.[158] In *Adams,* a group of unhoused persons challenged the constitutionality of municipal ordinances that prohibited persons from erecting temporary shelters on public property.[159] At the time of the constitutional challenge, there were too few shelter spaces to accommodate the city's unhoused population.[160] The prohibition placed the claimants in an untenable position. If they did not erect temporary shelters, they risked suffering physical and psychological harm due to the elements.[161] If they erected shelters and disobeyed the law, they risked fines, arrest, and other forms of coercion.[162]

The Court decided that the ordinances were unconstitutional. By prohibiting temporary shelters at all times, unhoused persons were required to risk their physical and mental well-being to obey the law, which limited

157. Marie-Eve Sylvestre, "The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2011) 42:3 Ottawa L Rev 389 at 401-402; *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at paras 128-130 [*Waterloo*].

158. *Canadian Charter,* s 7; Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at 578-579, DOI: <10.7202/1032679ar>

159. *Victoria (City) v Adams*, 2009 BCCA 563 at paras 21-24 [*Adams* BCCA]; Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 Queen's LJ 297 at 316 [Skolnik, "Regulated Differently"].

160. *Adams BCCA*, *supra* note 159 at para 28; Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43 Fordham Urb LJ 741 at 756-757, online: <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2662&context=ulj> [perma.cc/MS6G-UKR6] [Skolnik, "Impossibility to Obey the Law"].

161. *Adams BCCA*, *supra* note 159 at paras 39, 102.

162. *Victoria (City) v Adams*, 2008 BCSC 1363 at para 32 [*Adams* BCSC] (mentioning that the bylaw and *Provincial Offences Act* imposed penalties).

their s. 7 *Charter* right to life, liberty, and security of the person.[163] The Court decided that the ordinances were unconstitutionally overbroad and thus infringed unhoused persons' rights for no reason.[164] Notably, the State could maintain the use of public parks—and achieve its regulatory objective—if it required unhoused persons to remove their temporary shelters during the day.[165] The Court decided that certain portions of the ordinances were constitutionally inoperative insofar as they contravened s. 7 of the *Charter*.[166]

But the ordinances' impact on the claimants' equality rights—and the indirect discrimination they suffered from these ordinances—was barely addressed in the decision.[167] As the trial decision noted, the claimants did not pursue a s. 15 *Charter* claim.[168] Yet a more expansive equality framework could have recognized that the ordinances subjected unhoused persons to the unique harm of unconstitutional discrimination—suffering based on their personal traits—and that the State committed a particular wrong—treating unhoused persons as less worthy of concern and respect in various ways. Admittedly, a successful s. 15 *Charter* claim may not have changed the outcome of the case. But it would have set an important precedent. In the future, claimants could bring *Charter* challenges based on laws or policies that discriminate against unhoused persons as a constitutionally protected class.

The ordinances failed to treat unhoused persons with equal concern and respect for various reasons. The ordinances required unhoused persons—and only unhoused persons—to risk their life and security of the person to obey the law.[169] The State expressed less concern for unhoused persons' shared interests in physical and psychological well-being.[170] Furthermore, the State disregarded the fact that only a third of unhoused persons had access to shelter and could obey the urban camping ban simultaneously

163. *Adams* BCCA, *supra* note 159 at paras 82-89, 102-110; Sarah E Hamill, "Private Property Rights and Public Responsibility: Leaving Room for the Homeless" (2011) 30 Windsor Rev Legal Soc Issues 91 at 92 (providing an overview of the decision).

164. *Adams* BCCA, *supra* note 159 at paras 112-126; Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Showdown" (2013) 22:1 Const F Const 31 at 37-38, DOI: <10.21991/C9D962>.

165. *Adams* BCCA, *supra* note 159 at paras 112-116.

166. *Ibid* at para 166.

167. Note that the Court did summarize the intervenor Poverty and Human Rights Centre's arguments related to equality and unconstitutional discrimination. But the Court did not engage with equality rights or unconstitutional discrimination in the decision.

168. *Adams* BCSC, *supra* note 162 at para 28.

169. Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 Windsor YB Access Just 226 at 241, DOI: <10.22329/wyaj.v35i0.5690>.

170. *Ibid*.

and avoid coercion.[171] The ordinances were more than unconstitutionally overbroad. They also treated unhoused persons—a group that has experienced historical and contemporary disadvantage—as second-class citizens and in a manner that exacerbated their marginalized status.[172]

Consider next how the absence of the right to equality in criminal law fails to acknowledge the harms and wrongs of racial profiling. The police power to conduct random traffic stops is an example. In the 1990 *Ladouceur* decision, the majority of the Supreme Court of Canada upheld the constitutionality of random traffic stops.[173] The Court decided that officers can pull-over motorists at random to verify the validity of their driver's license, evaluate their sobriety, or assess the vehicle's mechanical fitness.[174] Although random traffic stops result in arbitrary detentions that violate s. 9 of the *Charter*, the majority decided that the violation is justified in a free and democratic society.[175] In their view, random traffic stops are a proportional means to protect public safety on roadways and to deter illegal driving-related activities.[176] Yet the majority's analysis barely considered how such stops could result in racial profiling that undermines the right to equality. For over three decades, officers have been constitutionally authorized to exercise this power,[177] and racialized persons have been disproportionately subject to such stops.[178]

Scholars note how discriminatory traffic stops perpetuate prejudice and stereotypes, exacerbate historical marginalization and disadvantage, and result in subordination and domination. For instance, Bennett Capers notes that these stops are stigmatizing and humiliating, and "ascribe negative meanings to racial difference."[179] Highlighting the connection between such stops and historical marginalization, David Harris observes

171. *Adams* BCCA, *supra* note 159 at para 28. The court noted that there were 1,000 unhoused persons in Victoria yet only 141 shelter beds that expanded to 326 beds during extreme weather conditions.
172. Jennifer Watson, "When No Place Is Home: Why the Homeless Deserve Suspect Classification" (2003) 88 Iowa L Rev 502 at 518-523.
173. *R v Ladouceur*, [1990] 1 SCR 1257, 1990 CanLII 108 (SCC) [*Ladouceur* cited to SCR]; Steven Penney, "Driving While Innocent: Curbing the Excesses the 'Traffic Stop' Power" (2019) 24 Can Crim L Rev 339 at 344-345.
174. *Ladouceur*, *supra* note 173 at 1287.
175. *Ibid* at 1288-1289; Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29:2 Osgoode Hall LJ 329 at 359-360, DOI: <10.60082/2817-5069.1749>.
176. *Ladouceur*, *supra* note 173 at 1278-1288.
177. Note that the Superior Court of Quebec recently struck down a law that authorized random traffic stops for various reasons, one of which was that the law resulted in unconstitutional discrimination. See *Luamba c Procureur général du Québec*, 2022 QCCS 3866 at paras 777-832 [*Luamba*].
178. Wortley, *supra* note 112 at 33; Foster, Jacobs & Siu, *supra* note 112 at 3-5; Lorne Foster & Les Jacobs, *Traffic Stop Race Data Collection Project II Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa* (Ottawa: publisher unknown, 2019) at 4.
179. Capers, *supra* note 145 at 23-24.

that such stops are degrading, "use blackness as a surrogate indicator or proxy for criminal propensity," and "aggravate years of accumulated feelings of injustice."[180] Similarly, Ekow Yankah remarks that traffic stops reinforce negative stereotypes regarding race and criminality, and reinforce racial subordination and domination.[181]

These concerns highlight how random traffic stops do not merely restrict freedom arbitrarily—they undermine equality and treat individuals as inferior based on morally irrelevant personal traits. The claim that random traffic stops only limit freedom overlooks the wrongfulness of racial profiling and the harms that individuals experience from it—harms and wrongs that s. 15 of the *Charter* can acknowledge in ways that s. 9 of the *Charter* cannot.

V. *Expansive equality and its implications*

1. *Towards a more expansive right to equality and applicable framework*

The previous sections elucidated how the right to equality's legal framework is interpreted narrowly in three principal ways. The s. 15 *Charter* framework fails to counteract direct discrimination against certain marginalized groups. It overlooks how discrimination can be based on quasi-immutable personal traits. Section 15 of the *Charter* is also largely absent from criminal law and procedure where discrimination is ubiquitous. Yet a more expansive s. 15 *Charter* framework—and a more robust right to equality—could have significant implications. There are several ways in which s. 15 can be interpreted more purposively and the right to equality framework can be modified to redress discrimination more effectively. These proposals address the three ways in which s. 15 of the *Charter* is interpreted restrictively as discussed in previous sections.

First, courts should recognize that discrimination can be based on quasi-immutable traits that are relatively stable and difficult to change.[182] This approach favors the judicial acceptance of new analogous grounds of discrimination that courts have either rejected or have yet to recognize, such

180. David Harris, "The Stories, the Statistics, and the Law: Why Driving While Black Matters" (1999) 84:2 Minn L Rev 265 at 268, 289, 291, online: <scholarship.law.umn.edu/cgi/viewcontent.cgi?article=2132&context=mlr> [perma.cc/KRG9-59VB].

181. Ekow Yankah, "Pretext and Justification: Republicanism, Policing, and Race" (2019) 40 Cardozo L Rev 1543 at 1560, 1572, online: <cardozolawreview.com/pretext-and-justification-republicanism-policing-and-race/> [perma.cc/A3WC-7H4A].

182. See e.g. Skolnik, "Homelessness," *supra* note 13 at 88-90; Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994) 2:1 Rev Const Stud 76 at 95 (highlighting how poverty is stable and difficult to change for many individuals).

as poverty, homelessness, or having a criminal record. This more flexible analogous grounds framework is consistent with Justice L'Heureux-Dubé's concurring opinions in the *Corbière* and *Dunmore* decisions.[183] In those cases, L'Heureux-Dubé J acknowledged that discrimination can be based on personal characteristics that are "difficult to change."[184] This approach would more clearly prohibit direct and indirect discrimination based on quasi-immutable traits and address the first way in which equality rights are interpreted narrowly.

The recognition that individuals can suffer direct discrimination based on quasi-immutable traits results in an important consequence: it acknowledges that individuals can also face indirect discrimination based on quasi-immutable traits. Laws that regulate unhoused persons disparately provide an example. Recall how a law that expressly prohibits unhoused persons from frequenting parks results in direct discrimination.[185] Yet unhoused persons suffer indirect discrimination when neutrally worded laws prohibit everyone from erecting temporary shelters on public property despite a lack of available shelter spaces.[186] Previous sections showed how such laws require unhoused persons alone to sacrifice their basic interests in physical and psychological well-being to obey the law.[187] Both laws exemplify the wrongfulness of discrimination: treating unhoused persons as subordinate and conceptualizing their shared interests as less worthy of concern. A more expansive right to equality could capture both forms of discrimination in ways that s. 15 of the *Charter*'s current framework does not.

This more flexible approach to the right to equality offers a compelling justification to revisit potential analogous grounds of discrimination based on quasi-immutable traits – grounds that courts have rejected previously but merit reconsideration under a more expansive right to equality framework. Admittedly, many of the examples above analyze discrimination in criminal or quasi-criminal contexts. Yet once one accepts that certain

183. *Corbiere*, *supra* note 26 at para 60, l'Heureux-Dub); *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 166 [Dunmore]; Sealy-Harrington, "Assessing Analogous Grounds," *supra* note 15 at 38, 43.

184. *Corbiere*, *supra* note 26 at para 60, l'Heureux-Dubé; Dunmore, *supra* note 186 at para 166.

185. Skolnik, "Homelessness," *supra* note 13 at 69.

186. Terry Skolnik, "Impossibility to Obey the Law," *supra* note 160 at 750-755. See e.g. *Pottinger v City of Miami*, 810 F Supp 1551 (SD FL 1992); *Jones v City of Los Angeles*, 444 F (3d) 1118 (9th Cir 2006); *Adams* BCCA, *supra* note 159; *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Shantz*]; Jeremy Waldron, "Homelessness and Community" (2000) 50:4 UTLJ 371 at 397, "[The law's] impact is so qualitatively different from the impact of the regulation on the person who has a home to return to that it amounts almost to the application of a quite different set of laws."

187. Skolnik, "Regulated Differently," *supra* note 159 at 323; Adams BCCA, supra note 159 at paras 28, 102.

marginalized groups can—and do—suffer discrimination based on quasi-immutable traits in criminal justice contexts, it becomes clear that they can face discrimination outside of these contexts, too. A judicial expansion of the right to equality's role within criminal law and procedure—and defense lawyers and interveners' greater willingness to invoke this right in criminal law cases—can generate important spill-over effects into other legal domains.

For this same reason, courts could also catalyze a shift in socio-economic rights jurisprudence by recognizing discrimination based on quasi-immutable traits.[188] By affirming that individuals can suffer indirect discrimination based on quasi-immutable traits such as poverty or homelessness, the judiciary may revisit the appropriate remedies to counteract this discrimination.[189] Although judicial concerns regarding institutional competence and redistribution will not disappear, courts may reexamine whether the State must allocate certain resources—or take reasonable steps to do so – to counteract discrimination.[190]

This account highlights the connection between the three ways in which the right to equality is interpreted restrictively: its inability to remedy some forms of direct discrimination, its failure to counter discrimination based on quasi-immutable traits, and its absence within criminal law and procedure. This account also illustrates why certain marginalized groups should be recognized as a constitutionally protected class under this more expansive right to equality framework. The concept of quasi-immutable traits, in turn, illustrates why marginalized individuals and groups can be treated as second-class citizens based on personal characteristics that are neither immutable nor constructively immutable. Section 15 of the *Charter*'s current restrictive interpretation of personal traits shows why the right to equality must protect individuals against discrimination based on quasi-immutable traits. And analyzing the right to equality's considerable absence in certain legal domains establishes that marginalized groups who

188. Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?" (2016) 25 JL & Soc Pol'y 78 at 83, DOI: <10.60082/0829-3929.1225> (noting the connection between discrimination and socio-economic rights).

189. Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40:3-4 Osgoode Hall LJ 297 at 330-331, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1438&context=ohlj> [perma.cc/75FM-AMKG] (noting how courts have not engaged with socioeconomic rights claims meaningfully because they reject socio-economic status as an analogous ground).

190. Sandra Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 22:3 Stellenbosch L Rev 566 at 581-584 (noting that such concerns persist even if courts recognize poverty as an analogous ground).

suffer unconstitutional discrimination in criminal law and procedure can face discrimination outside of these contexts.

2. *Expansive equality in criminal law and procedure*

Second, courts should expand the right to equality's role in criminal law and procedure.[191] This expanded approach would recognize the unique harms and wrongs of discrimination in the criminal justice system, call the State to account for these wrongs, and require the State to justify them. But a more expansive right to equality could also re-orient certain aspects of criminal law and procedure in the following ways.

To begin, a more expansive right to equality could justify striking down police powers that have previously been upheld as constitutional.[192] Recall how the Supreme Court of Canada upheld the random traffic stop power in the 1990 decision *R v Ladouceur*.[193] Since then, human rights commissions, scholars, and judicial decisions have highlighted how this power is exercised disproportionately against racialized persons—a case of indirect discrimination.[194] A s. 15 *Charter* claim could justify striking down this police power because of its disparate impact, the dignitary harms that it inflicts, and that it engenders a loss of confidence in the criminal justice system, especially amongst racialized persons who are over-policed.[195] These considerations can also demonstrate why the burdens of this police power outweigh its benefits.

Section 15 of the *Charter*'s increased role in criminal law also provides a compelling justification for courts to reassess the constitutionality of judicially created police powers that lack adequate transparency and oversight mechanisms.[196] For instance, the Supreme Court of Canada created common law police powers to detain individuals for investigative purposes and to stop-and-frisk them.[197] Yet the Court did not require officers to document these detentions or searches, gather race and ethnicity-based data regarding their use, or provide individuals with receipts of such

191. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 290-293.
192. *Ibid*.
193. *Ladouceur*, *supra* note 173.
194. *Supra* note 112 and accompanying text.
195. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 292-293; Terry Skolnik, "Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades" (2023) 60 Osgoode Hall LJ 505 at 538-539 [Skolnik, "Policing in the Shadow of Legality"]. On overruling *Ladouceur* more generally, see also David Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905 at 928-929, DOI: <10.29173/alr1313>. See more recently *Luamba*, *supra* note 177 at paras 777-832 (striking down a provision of the *Quebec Highway Safety Code* that authorized random traffic stops because it violated s 15 of the *Charter*); Skolnik & Belton, "*Luamba* et la fin des interceptions routières aléatoires," *supra* note 146 at 706.
196. Skolnik, "Racial Profiling," *supra* note 5 at 459-462.
197. *R v Mann*, 2004 SCC 52 at para 45.

encounters.[198] Some empirical studies indicate that Black adolescents are disproportionately searched—and subject to a greater number of searches—compared to their white counterparts.[199] By expanding s. 15 of the *Charter*'s role within the criminal law, courts may revisit these powers to ensure that they impose proper transparency and oversight measures that better prevent discrimination.[200]

The right to equality can also be used to challenge discriminatory police practices that have not been prohibited expressly by the Supreme Court of Canada. Carding is an example.[201] The term "carding" implies that officers require a person to identify themselves when the officers do not suspect or believe that the person committed an offence.[202] The police then store that information in a database, notably for intelligence purposes.[203] Research studies demonstrate that racialized and Indigenous persons are disproportionately carded by the police.[204] Yet even in contexts when the Supreme Court of Canada recognized that the police engaged in carding—and noted its disparate impact on racialized persons—the Court did not expressly strike down that practice as unconstitutional or dictate when officers have the lawful power to identify persons.[205] Today, a patchwork of provincial statutes, regulations, and internal police directives continue to govern carding and its applicable legal framework varies between jurisdictions.[206]

Claimants could constitutionally challenge the practice of carding on the grounds that it discriminatorily impacts Indigenous and racialized persons, and thus, violates the s. 15 *Charter* right to equality. The Supreme

198. Skolnik, "Racial Profiling," *supra* note 5 at 451.
199. Steven Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 Can J Corr 322 at 332, DOI: <10.3138/cjccj.2014.E32>.
200. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 287-288.
201. Anita Lam & Timothy Bryan, "Documenting Contact and Thinking with Skin: A Dermatological Approach to the Study of Police Street Checks" (2021) 36:3 Can JL & Soc'y 359 at 360-361, DOI: <10.1017/cls.2020.39> (providing an overview of carding and street checks); Skolnik, "Policing in the Shadow of Legality," *supra* note 201.
202. The Honourable Michael Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen's Printer, 2018) at 4; Heston Tobias & Ameil Joseph, "Sustaining Systemic Racism through Psychological Gaslighting: Denials of Racial Profiling and Justifications of Carding by Police Utilizing Local News Media" (2020) 10:4 Race & Justice 424 at 426, DOI: <10.1177/2153368718760969>.
203. Tulloch, *supra* note 208 at xi.
204. See e.g. Armony, Hassaoui & Mulone, *supra* note 118 at 8-11; Wortley, *supra* note 96 at 104; Ruth Montgomery et al, *Vancouver Police Board Street Check Review* (Vancouver: PYXIS Consulting Group, 2019) at 108-109.
205. *Le*, *supra* note 121 at paras 10, 94-97; Skolnik, "Policing in the Shadow of Legality," *supra* note 201 at 540-541.
206. See e.g. Montgomery et al, *supra* note 210 at 23-24; Dean Bennett, "Alberta Bans Police Carding Immediately; Street Checks Will Have New Rules," Global News (20 November 2022), online: <globalnews.ca/news/7472347/alberta-policing-reform-announcement/> [perma.cc/PB9X-E4M7].

Court of Canada may potentially invalidate this practice, provide clearer guidance on when the police can lawfully order individuals to identify themselves, and determine the transparency and oversight mechanisms that are necessary to satisfy constitutional safeguards.

These are just some examples of how a more expansive right to equality can influence criminal law and procedure. But there are many others. A broader right to equality holds the potential to better redress discrimination in the jury selection process. For instance, it could expand the scope of challenges for cause that screen out potential jurors who harbour racial animus or bias.[207] The right to equality may provide additional justifications to strike down mandatory minimum sentences that contribute to the over-incarceration of Indigenous and racialized persons. More generally, the right to equality may constitutionally invalidate discriminatory algorithmic decision-making in the criminal justice system, including predictive policing and risk assessments in bail and in sentencing.[208]

Conclusion

This article argued that the constitutional right to equality is interpreted restrictively in various respects. It showed why the current s. 15 *Charter* right to equality framework cannot counteract obvious forms of direct discrimination. It highlighted how courts overlook how discrimination can be based on quasi-immutable traits that are relatively stable and difficult to change. It demonstrated how successful s. 15 *Charter* claims are largely absent from criminal law and procedure jurisprudence. It also explained why the right to equality is necessary to recognize the unique harms and wrongs associated with discrimination, and to call the State to account for these wrongs. In doing so, this article set out why discrimination based on quasi-immutable traits constitutes a unique form of wrongdoing; one that incorporates stereotypes and prejudices regarding individuals' culpability for their own plight.

Section 15 of the *Charter*'s potential expanded role within the criminal law also elucidated why courts should recognize new analogous grounds based on quasi-immutable traits, such as poverty, homelessness,

207. Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after Parks" (2013) 92:2 Can Bar Rev 267 at 297-299; Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case" (2018) 65:3-4 Crim LQ 271 at 273-274. Although both scholars highlight the need to expand challenges for cause, a successful s. 15 *Charter* challenge may provide the basis to do so.

208. Nye Thomas et al, *The Rise and Fall of AI and Algorithms in American Criminal Justice* (Toronto: Law Commission of Ontario, 2020) at 20-22; Aziz Huq, "Racial Equity in Algorithmic Criminal Justice" (2019) 68:6 Duke LJ 1043 at 1053-1054.

or having a criminal record. A more expansive equality framework could better protect unhoused persons who suffer discrimination based on urban camping laws or injunctions to clear homeless encampments.[209] This same framework could lead courts to strike down laws that permit defendants to be cross-examined on their criminal records at trial—a prejudicial practice that increases the likelihood of conviction, dissuades defendants from testifying in their own defense, and contributes to wrongful convictions.[210] A broader right to equality could lead courts to strike down excessive financial penalties that disproportionately impact impecunious persons and entrench them in poverty—equality claims that could be combined with the s. 12 *Charter* right to be free from cruel and unusual punishments.[211] And a more inclusive s. 15 *Charter* framework could invalidate discriminatory police practices such as random traffic stops that disproportionately impact racialized persons.[212]

The fact that individuals can face direct discrimination in criminal justice contexts based on quasi-immutable traits means that they can face indirect discrimination based on these same traits. Yet acknowledging that poverty and homelessness can constitute analogous grounds of discrimination within the criminal law suggests that these same traits can constitute analogous grounds of discrimination in other areas of the law, too.

This article's core arguments also offer a new way to think about the right to equality's evolution within Canadian law and the ways in which it is interpreted narrowly. On its face, it seems that s. 15 of the *Charter* plays a minimal role within the criminal law because it has been interpreted restrictively in other areas of the law. But the reverse may be true. The right to equality may be interpreted narrowly *because* it has played virtually no role within the criminal law and has had little opportunity to counteract indirect discrimination in a manner that could spill-over into other legal areas—a line of inquiry that should be explored in future research. Ultimately, this article showed how a broader right to equality

209. See e.g. *Adams* BCCA, *supra* note 159; *Shantz*, *supra* note 189; *Waterloo*, *supra* note 157; *British Columbia v Adamson*, 2016 BCSC 584.

210. Terry Skolnik, "Two Criminal Justice Systems" (2023) 56:1 UBC L Rev 285 at 316-322; John Blume, "The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted" (2008) 5:3 J Empirical Leg Stud 477 at 479, 481, 491, DOI: <10.1111/j.1740-1461.2008.00131.x>.

211. See e.g. Terry Skolnik, "Beyond Boudreault: Challenging Choice, Culpability, and Punishment" (2019) 50 Crim R (7th) 283 at 289-291; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 New Crim L Rev 73 at 81-84, DOI: <10.1525/nclr.2019.22.1.73>.

212. See Skolnik & Belton, "*Luamba* et la fin des interceptions routières aléatoires," *supra* note 146 at 706 (striking down s. 636 of Quebec's Highway Safety Code on s. 15 *Charter* grounds).

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can catalyze a new era of anti-discrimination law both inside and outside the criminal justice system.

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Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective

Ben Smith[1]

Introduction

"[O]ur struggle for liberation has significance only if it takes place within a feminist movement that has as its fundamental goal the liberation of all people."[2]

Intersectionality has been described as "the most important theoretical contribution that women's studies (…) has made so far",[3] and is, in brief, an approach to identity that recognises that different identity categories can intersect and co-exist in the same individual in a way which creates a qualitatively different experience when compared to any of the individual characteristics involved. Intersectionality shows us how:

> *Gender reaches into disability; disability wraps around class; class strains against abuse; abuse snarls into sexual orientation; sexual orientation folds on top of race (…) everything finally piling into a single human body.*[4]

Kimberlé Crenshaw, who originated the term, focused her attention on the position of black women in US society. She noted that black women were failed by anti-racist campaigns that focused on the experiences and needs of black men, and feminist campaigns led by and focused on the experiences of white women. As a result, discrimination law using a "single-axis" model of identity failed black women, as their experiences of oppression were rendered invisible by the dominant narrative within the categories "woman" and "black".[5] Much of the

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2 hooks, b., *Ain't I a Woman: Black Women and Feminism*, Pluto Press, 1982, p. 13.

3 See McCall, L., "The complexity of intersectionality", *Signs: Journal of Women in Culture and Society,* Vol. 30, 2005, p. 1771.

4 Clare, E., *Exile and Pride: Disability, Queerness and Liberation,* South End Press, 1999.

5 See Crenshaw, K., "Demarginalizing the intersection of race and sex: a black feminist critique of anti-discrimination doctrine, feminist theory, and anti-racist policies", *University of Chicago Legal Forum*, Vol. 4, 1989.

academic discussion continues this focus on the intersection of race and gender, but the potential of intersectionality allows it to go further, showing how *all* identities interact to create complex identities. Writers have highlighted the intersections of disability with race[6] or the intersectional experiences within the category sexual orientation,[7] and it is this generality which is intersectionality's greatest strength as a tool for reforming discrimination law.

However, though intersectionality is "fast becoming common parlance among policy-making circles",[8] the law, in most cases, still clings resolutely to "single-axis" models of discrimination law and therefore fails to address the lived experiences of those who experience discrimination on multiple grounds.[9] The "single-axis" approach is the product of several aspects of the historical development of discrimination law. In large part it is due to the origins of the "traditional" protected grounds in political liberation struggles that have been focused on a single characteristic,[10] such as feminism, queer liberation, and anti-racist movements. The limitations of these movements in responding to intra-category diversity and advocating for more than the needs of a relatively privileged minority within a category are well documented.[11] The adoption of these liberation struggles by law in the form of discrimination law serves only to exacerbate the tendency of these movements to formulate identity as totemic, homogenous categories that render invisible minority experiences. Another element is arguably the influence of liberalism on equality law,[12] with its approach to the legal subject as an atomistic, abstract individual who can be stripped of "extraneous" identity categories to point to some common core. This lineage is seen in the centrality of comparators and comparison to discrimination law, as well as the adversarial, individualised model of litigation.[13]

6 Ontario Human Rights Commission, *An Intersectional approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, 2001, p. 2.

7 Bilge, S., "Developing Intersectional Solidarities: A Plea for Queer Intersectionality" in Smith, M. and Jafer, F. (eds.), *Beyond the Queer Alphabet*, 2012.

8 Ruwanpura, K., "Multiple identities, multiple discrimination: A critical review", *Feminist Economics*, Vol. 14, 2008, p. 77.

9 Solanke, I., "Infusing the Silos in the Equality Act 2010 with Synergy", *Industrial Law Journal*, Vol. 40, 2011, p. 330.

10 *Ibid.*, p. 331.

11 See above, note 5, pp. 139–167.

12 See Hunter, R. (ed.), *Rethinking Equality Projects in Law: Feminist Challenges*, Hart Publishing, 2008; Lacey, N., *Unspeakable subjects: feminist essays in legal and social theory*, Hart Publishing, 1998, Introduction; and Munro, V., *Law and politics at the perimeter: re-evaluating key debates in feminist theory,* Hart Publishing, 2007, Chapter 2.

13 See Fredman, S., *Discrimination Law*, Oxford University Press, 2010, Chapter 1; and Hunter, R., "Introduction: Feminism and Equality", in Hunter, R. (ed.), *Rethinking Equality Projects in Law: Feminist Challenges*, Hart Publishing, 2008.

Despite the rapid expansion of equality and discrimination law in recent years – equality and non-discrimination provisions are a common feature of national constitutional orders[14] and of international and regional human rights documents[15] – equality remains out of reach for many. In order to address this persistent inequality, we must set substantive equality as our goal. Doing so allows us to approach inequality as a problem of structural power, which creates and perpetuates systems of privilege and disadvantage in society. These systems have a pervasive effect on both private and public life: they affect the distribution of basic goods, such as access to healthcare and housing; they create negative myths and stereotypes which operate to disadvantage certain groups. By developing an understanding of intersectionality, particularly through the recognition of intersectional discrimination, law will be able to better identify and eliminate the power dynamics perpetuating patterns of privilege and disadvantage.

In section one, I outline the development of the concept of intersectionality, from its beginnings in the work of Crenshaw, to more recent critiques of its scope and potential. By constructing intersectionality as a general theory of identity, I show that it has the potential to realign the focus of discrimination law from difference to domination, exposing the structural problems that perpetuate discrimination and allowing political and legal processes to work towards substantive equality.

Section two applies intersectionality to law, explaining how it addresses the problems of "single-axis" models. I address criticisms of intersectionality as applied to law, arguing that far from creating a post-modern splintering of identity to a point of solipsism, recognition of intersectional discrimination is necessary to ensure equality for all, rather than just the relatively privileged minority within a category. I also argue that as well as addressing theoretical flaws with discrimination law, an understanding of intersectionality allows courts to respond to the realities of discrimination.

Section three reviews the response to intersectional discrimination claims by courts in the UK and Canada, as well as the European Court of Human Rights (ECtHR). Experiences from these legal systems expose the difficulties related to the recognition of intersectional discrimination in law, but also provide important guidance for reform. A common thread across all of these jurisdictions is that despite equality activists and organisations calling for recognition of intersectional discrimination, and some recognition of the need to address it at policy level, the law tends to resist movement away from a "single axis" model. In section four, I offer some preliminary thoughts on what substantive equality requires beyond recognition of intersectional discrimination, indicating that a much wider-ranging reform is needed.

14 The Constitution of the Republic of South Africa, Section 9; Canadian Charter of Fundamental Rights, Section 15; Constitution of the Republic of Ireland, Article 40(1); and Constitution of India, Article 15.

15 European Convention on Human Rights, Article 14; European Union Charter of Fundamental Rights, Articles 20, 21 and 23; and American Convention on Human Rights, Article 24.

1. Intersectionality Theory

Intersectionality is, when reduced to its core, a relatively simple concept: it denies that identity can be dissected into "mutually exclusive categories of experience and analysis",[16] instead asserting that identity is a complex amalgamation of different categories.[17] Therefore, a truly intersectional approach states that, for example, the discrimination that a gay woman experiences is different from that faced by other women and different from that suffered by other gay people. Much of the academic discussion of intersectionality centres on the interaction of race and gender, specifically the experiences of black women, and argues that the oppression and discrimination black women face is distinct from other forms of oppression.[18] However, intersectionality has the potential to go further than merely examining the interaction of any particular dyadic grouping of identity categories to provide a general theory of identity.

For all its apparent simplicity, however, intersectionality can be difficult to define and it has certainly not been accepted without question. Much like equality,[19] it can be seen to have very little substantive content of its own. For Jennifer Nash, intersectionality provides important insights that "identity is complex, subjectivity is messy, and that personhood is inextricably bound up with vectors of power"[20] but the paradoxes within the theory have yet to be addressed. Nash makes much of an apparent paradox in Crenshaw's work, where the experience of black women is central, yet Crenshaw claims that her focus on race and gender "highlights the need to account for multiple grounds of identity when considering how the social world is constructed".[21] This paradox seems to be a false one: Crenshaw focuses on the experience of black women because she is a black woman, responding in part to the litigation strategies of black women, but there is nothing in her writing that precludes the expansion of intersectionality. No one writer can address all identities directly in a single piece of work, what is needed is recognition of a plurality of voices in mainstream scholarship.

16 See above, note 5, p. 139.

17 *Ibid.*, pp. 139–167.

18 Ashiagbor, D., "The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-Discrimination Law" in Morris, A. and O'Donnell, T. (eds.), *Feminist Perspectives on Employment Law*, Cavendish Publishing, 1999; Ashiagbor, D., "Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance", *Current Legal Problems*, Vol. 61, 2008, pp. 265–288; see above, note 5, pp. 139–167; Crenshaw, K., "Mapping the margins: Intersectionality, identity politics, and violence against women of color", *Stanford Law Review*, Vol. 43, 1991, pp. 1241–1299; and Harris, A., "Race and Essentialism in Feminist Legal Theory", *Stanford Law Review*, Vol. 42, 1990, p. 581.

19 Westen, P., "The Empty Idea of Equality", *Harvard Law Review*, Vol. 95, 1985, pp. 539–596.

20 Nash, J., "Re-thinking intersectionality", *Feminist Review,* Vol. 89, 2008, p. 13.

21 See above, note 18, Crenshaw, "Mapping the margins: Intersectionality, identity politics, and violence against women of color", p. 1245.

For Joanne Conaghan,[22] "intersectionality has reached the limits of its potential".[23] She states that it can do nothing more "to advance the feminist project, whether in law or more broadly".[24] At the core of Conaghan's rejection of intersectionality is a belief that intersectionality scholarship focuses on identity, at the expense of analysing "the many ways in which inequality is produced and sustained".[25] Conaghan is highly critical of the way intersectionality scholarship sees its "energy (…) directed towards the infinite elaboration of inequality subgroups"[26] rather than using equality categories to "explain or elaborate structures, relations, and/or processes of inequality".[27] However, this seems to misstate the issue, intersectionality is a tool which can be used for precisely the examination of the root causes of inequality that Conaghan calls for – the language of identity is just the way that the inquiry into the power structures operating beneath discrimination is articulated.

Conaghan further decries the individualism of intersectional politics and movements, which "acts as an aid in the excavation of inequity experiences at a local level"[28] but cannot challenge the structures which create equality. Conaghan cites materialist feminist and second wave feminist recognition to argue that intersectionality creates the focus on identity, stating that "some form of collective organisation was viewed as a necessary condition of any strategy of emancipation emancipation".[29] However, as Lara Karaian notes, there is potential for "an intersectional approach to coalition building"[30] wherein a plurality of voices are able to join together to work toward common goals. Therefore, to recognise intersectional experience is not necessarily to promote a paralysing insularism in activism, and indeed it can produce broader, more diverse communities working towards common goals.

22 Conaghan, J., "Intersectionality and the Feminist Project in Law", in Grabman, E.D., Herman, D., and Krishnadas, J., (eds.) *Intersectionality and beyond: law, power and the politics of location,* Routledge-Cavendish, 2009.

23 *Ibid.*, p. 21.

24 *Ibid.*, p. 21.

25 *Ibid.*, p. 7.

26 *Ibid.*, p. 31.

27 *Ibid.*, p. 31.

28 *Ibid.*, p. 29.

29 *Ibid.*, p. 29.

30 Karaian, L., "The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory, Praxis, Queer Porn, and Canadian Anti-Discrimination Law" in Fineman, M., Jackson, J. E. and Romero, A. P. (eds.), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, Ashgate, 2011, p. 392.

a. Intersectionality as General Theory of Identity

There has been much debate in the scholarship as to whether intersectionality operates as a general theory of identity or if it is merely a way of describing multiple marginalised experiences.[31] Naomi Zack, for instance, argues that intersectionality refers not just to the way that race and gender interact but "more generally to all women, because differences in sexual orientation, age, and physical able-ness are all sites of oppression".[32] However, this seems an arbitrary limitation. It is true that intersectionality began in feminist discourse but to allow its expansion is not to deny the centrality of women, or to sideline their oppression. Indeed, one of the key advantages of intersectionality as it pertains to law lies in its potential to offer an all-inclusive theory of identity.

To formulate intersectionality as a general theory of identity would be to recognise a hypothetical uber-privileged white, able bodied, heterosexual, cisgender, upper class man as an example of an intersectional identity, but this is not to cede power to the privileged. Privilege will not and should not become the central point of our analysis by recognising this. Intersectionality is a general theory of identity but it is a theory that highlights oppression, and a tool to be used in remedying that oppression.

The fear of recognising typically privileged people as having a complex, intersectional identity seems to derive from a belief that intersectionality will become co-opted by the privileged and used for their advantage, by challenging perceived "special advantages" of minorities such as positive action. This is not entirely unwarranted: Catharine MacKinnon notes that "the sameness standard [of gender equality] has mostly gotten men the benefit of the few things women have historically had"[33] and that all the sex equality cases argued successfully before the US Supreme Court have been brought by men. Nevertheless, a commitment to examining the structural power creating inequality and discrimination minimises the risk of the privileged taking advantage. The work of Davina Cooper on the relationship between social asymmetry and social inequality is illustrative here.[34] For Cooper, it is "necessary – but not sufficient" to show unequal treatment based on conduct, beliefs or social location as a guiding principle of social inequality.[35] A claim to inequality as manifesting in a claim under discrimination law requires two additional components.

31 For a discussion, see, Kwan, P., "Jeffrey Dahmer and the cosynthesis of categories", *Hastings Law Journal*, Vol. 48, 1996, pp. 1257–1292; and see above, note 20, pp. 1–15.

32 Zack, N., *Inclusive Feminism: A Third Wave Theory of Women's Commonality,* Rowman & Littlefield Publishers Ltd., 2005, p. 7.

33 MacKinnon, C., *Feminism Unmodified: Discourse on Life and Law,* Harvard University Press, 1987, p. 35.

34 Cooper, D., *Challenging Diversity: rethinking equality and the value of difference*, Cambridge University Press, 2004.

35 *Ibid.*, p. 195.

Firstly, it requires that the social asymmetry is capable of shaping other social dimensions and becoming pervasive and secondly, that it can significantly impact social dimensions such as the intimate/impersonal or capitalism. This analysis allows the law to focus on the way that inequality "is not symmetrical: it operates to cease or entrench domination by some over others".[36]

The benefit of configuring intersectionality as a general theory of identity is that it allows the focus of discrimination law to shift from difference to domination. By exposing that everyone has an identity, it breaks down the dominant paradigm of equality law wherein there is a norm from which "difference" is measured. To use Simone de Beauvoir's language, it moves equality law on from a paradigm of the "Subject" and the "Other".[37] This approach allows us to formulate "equality questions [as a question of] power and powerlessness",[38] not difference and sameness. In doing this, law's response can be tailored to the historical and social facts of oppression and domination. While MacKinnon saw domination running along a single axis – gender – what intersectionality as general theory of identity reveals is something closer to Patricia Hill Collins' "matrix of domination".[39] While black women were Collins' focus, she recognised:

> *[A] more generalised matrix of domination. Other groups may encounter different dimensions of the matrix, such as sexual orientation, religion, and age, but the overarching relationship is one of domination and the types of activism it generates.*[40]

Nash writes that if intersectionality is to be a general theory of identity then scholarship "must (…) broaden its reach to theorise an array of subject experience(s)".[41] It is precisely this broadening that I examine in the next section. Though mainstream scholarship remains focused on the race/gender interaction, empirical studies show that experiences of intersectional identity extend beyond this, implicating all identity categories.

36 Fredman, S., "Positive Rights and Positive Duties: Addressing Intersectionality" in Schiek, D. and Chege, V. (eds.), *European Union non-discrimination law: comparative perspectives on multidimensional equality law*, Routledge-Cavendish, 2009, p. 74.

37 de Beauvoir, S., *The Second Sex,* translation by Borde. C. and Malovany-Chevallier, S., 2011, Vintage, p. 6.

38 See above, note 33, p. 123.

39 Collins, P. H., *Black Feminist Thought: Knowledge Consciousness and the Politics of Empowerment,* Unwin Hyman, 1990, pp. 221–238.

40 See above, note 39, p. 230.

41 See above, note 20, p. 10.

2. Intersectionality and Discrimination Law

In discussing the application of intersectionality to discrimination law, it is important firstly to clarify the nature of intersectional discrimination. Intersectional discrimination is one form of multiple discrimination,[42] the other being additive discrimination. Both examples of multiple discrimination are concerned with experiences of discrimination based on more than one ground but only intersectional discrimination is able to offer an adequate analysis of the lived experiences of intersectional identity.

Additive discrimination occurs where a person suffers discrimination on multiple grounds, but each element making up this discrimination can be kept separate. These instances of discrimination can be experienced at distinct times or concurrently, but the key is that the multiplicity of the discrimination only has a quantitative effect – it increases in size but not in nature. For example, in *Perera v Civil Service Commission,*[43] the appellant had been turned down for a job due to several characteristics, including nationality, age, and his command of English. Gay Moon notes that "the lack of one factor did not prevent [the applicant] getting the job but it did make it less likely, and the lack of two factors decreased yet further his chances of selection for the job",[44] meaning that though the applicant experienced multiple discrimination, it had a cumulative, rather than a synergistic effect. Intersectional discrimination on the other hand "creates a new compound subject".[45] In moving beyond the additive model which "remains on one level of analysis, the experiential",[46] we reveal discrimination as a "many layered blanket of oppression".[47]

Additive discrimination poses little difficulty for existing equality law,[48] as it simply requires that each element be proven independently. It maintains the mutually-exclusive nature of protected grounds that constructs the "singular and discrete examples of disadvantage which may, at most be experienced cumulatively".[49] Nevertheless, a particular problem of additive multiple discrimination is that it:

42 Intersectionality scholarship is beset by terminological confusions. Multiple discrimination can be used to mean either additive or intersectional discrimination or as an umbrella term covering both. It is used only in the latter sense in this article, except when quoting other sources.

43 *Perera v Civil Service Commission* [1983] IRLR 166, discussed by the Equality and Diversity Forum, "Memorandum submitted by the Equality and Diversity Forum (E 09)", June 2009.

44 Moon, G., "Multiple discrimination – problems compounded or solutions found?", *Justice Journal,* Vol. 3, 2006, p. 89.

45 See above, note 9, p. 340.

46 Yuval-Davies, N., "Intersectionality and Feminist Politics", *European Journal of Women's Studies*, Vol. 13, 2006, p. 197.

47 *Ibid.*, p. 196.

48 Monaghan, K., *Monaghan on Equality Law,* Oxford University Press, 2013, Para. 5.12.

49 See above, note 18, Ashiagbor, "The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-Discrimination Law", p. 1.

> *[R]eflect[s] hegemonic discourses of identity politics that render invisible experiences of the more marginal members of that specific social category and construct[s] a homogenised 'right way' to be its member.*[50]

For this reason, additive discrimination only goes so far in addressing the reality of intersectional discrimination.

a. How Intersectionality Addresses Problems of "Single-Axis" Models of Discrimination Law

There are several problems with "single-axis" models of discrimination law which make these models particularly ill-suited to bringing about substantive equality. Intersectionality is able to address these problems, and so ensure discrimination law is able to address substantive inequality. "Single-axis" models are predicated on a model of procedural fairness that approaches the legal subject as something which can be abstracted, stripped of "extraneous" characteristics to reveal a "sameness" that facilitates comparisons. It creates a fiction of uniformity, which states that the problems of a particular, generally dominant, sub-group are the only issues affecting the group as a whole. This is not to deny that common problems do not and cannot exist. Not having the vote affected all women, yet there were problems affecting black women particularly which were ignored by the feminist movement, even after suffrage was gained.[51]

Perhaps the greatest of the problems of the single-axis model is the way that it tends to essentialise the experiences of identity groups. Essentialism affects how individual claimants interact with discrimination law, as the law assumes individuals can be characterised by one dominant ground, leaving those with complex identities outside the scope of protection. This entrenches particular expectations of individuals who fall within a particular identity category. As Iyer notes, "it is assumed that everyone in a particular pocket [i.e. protected ground] has no other relevant characteristics, it is not possible to articulate differences between those within a pocket".[52] Even where law appears to look beyond this essentialism to recognise that a person has been the victim of discrimination on multiple grounds, this recognition will only be of discrete operations of different discriminations. This simply makes it more difficult for individuals claiming discrimination to get an effective remedy, as they must prove that two or more discrete discriminations have occurred.[53] Evidence of discrete discrimination may simply not exist where intersectional discrimination has occurred.

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50 See above, note 46, p. 195.

51 See above, note 2; and see above, note 5, pp. 139–167.

52 Iyer, N., "Categorical Denials: Equality Rights and the Shaping of Social Identity", *Queen's Law Journal,* Vol. 19, 1993–1994, p. 193.

53 See *Bahl v Law Society*, [2004] EWCA Civ 1070, discussed further in section 3.

Essentialism also affects the way that identity categories are constructed, as it constructs a fiction of a singular experience of what it is to be, for example, a woman, or disabled. This denies the existence of meaningful connections between identity categories. Sarah Hannett, for instance, discusses how equal pay legislation focused on gender ignores intersectional variations *within* gender.[54] Therefore, laws that only see the claimants' gender cannot adequately address the particular vulnerability of black women to unequal pay where the vulnerability results from a complex interplay of sexism and racism.

Overlying this trend towards essentialism is the way in which difference is defined by its distance from entrenched norms which are set by those with greater power in society. These entrenched norms operate to create the categories of difference themselves, as they are defined by their opposition to the white, male, heterosexual, able-bodied, cisgender, etc., norm, but also the scope of the categories themselves. A key tenet of feminist legal theory is that law's claim to objectivity is simply a screen for male subjectivity, which allows male privilege to become invisible and normalised.[55] A similar mechanism arguably operates across all identity categories to make privilege invisible. Much as de Beauvoir noted that women were defined by their difference from men – "He is the Subject, he is the Absolute – she is the Other"[56] – so too are all identities delineated by their opposition from the privileged norm. This creates problematic binaries that attempt to neatly package the complex, multifarious nature of identity.

Essentialism is not entirely without value in political and legal struggles for recognition and equality. Gayatri Chakravorty Spivak coined the term "strategic essentialism" to refer to the way that subordinated groups can put aside intra-categorical variations to stress commonalty, in order to create a collective identity that can be used in political movements.[57] Similarly, Martha Minow has argued that "cognitively we need simplifying categories, and the unifying category of 'woman' helps to organise experience, even at the cost of denying some of it".[58] Even scholars typically considered radical have given some credence to the value of essentialism in political campaigns. Judith Butler, for instance, has written that it may be necessary to "invoke the category and hence, provisionally (…) institute the identity" – which she terms "learning the double movement" – in order to achieve political objectives.[59]

54 Hannett, S., "Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination", *Oxford Journal of Legal Studies*, Vol. 23, 2003, p. 77.

55 See above, note 12, Hunter; see above, note 33; MacKinnon, C., *Toward A Feminist Theory of the State,* Harvard University Press, 1989; and Smart, C., *Feminism and the Power of Law*, Routledge, 1989.

56 See above, note 37, p. 6.

57 Spivak, G., "'Subaltern Studies: Deconstructing Historiography", in Spivak, G. and Guha, R. (eds.), *In Other Worlds: Essays in Cultural Politics*, Oxford University Press*,* 1988, p.197–221.

58 Minow, M., "Feminist reason; getting it and losing it", *Journal of Legal Education*, Vol. 38, 1988, p. 47.

59 Butler, J., "Contingent Formations: Feminism and the Question of "Postmodernism"" in Butler, J. and Scott, J. W., *Feminists Theorise the Political,* Routledge, 1992, p. 15.

The value of essentialism to law lies primarily in its ability to transform treatment that might otherwise be seen as the mere vicissitudes of life into a wrong that law should remedy. The apparent clarity that monistic identity categories provide in law allows legal analysis to abstract an individual claiming discriminatory treatment from the particular ground and say they are the same as a comparator "but for" that identity, and therefore their differential treatment was irrational and unjustified. However, a willingness to examine the reality of discrimination and how structures of disadvantage are created and operate in society is also able to expose the wrong of discrimination that law should remedy. The essentialism of discrete categories operates merely as clumsy shorthand for this process, and moving to an intersectional approach allows law to respond more effectively to discrimination.

It is important to note that Spivak warned of the dangers of strategic essentialism becoming a cover for actual essentialism. She argued that subordinated groups utilising strategic essentialism must continue to "criticis[e] the category as theoretically unviable".[60] Butler too argues that even in invoking problematic categories, we should continue to "open the category as a site of permanent political contest".[61] There seems a clear difference between members within a category utilising identity categories, however generalised they may be, to serve their own liberation. It is something akin to efforts to reclaim slurs, a way for subordinated groups to take back power from their oppressors. For all that intersectionality serves as a force for "mediating the tension between assertions of multiple identity and the ongoing necessity of group politics",[62] we should be wary of an uncritical reliance on strategic essentialism.[63]

There is a particular fear that embracing intersectionality will open a "Pandora's Box"[64] of identity, resulting in an indefinite proliferation of identity categories, the process Butler refers to as "the illimitable process of signification".[65] This has consequences for the way that identity is constructed as well as serious practical consequences if intersectionality it to be operationalised in discrimination law. It is arguable that this expansionist trend leads to a point of solipsism, where communities are denied and the bonds of solidarity that sustain identity categories break down. In doing so, it makes it more difficult to show that a practice or law is discriminatory and merits the law's interference: it is crude, but numbers make a difference. However, as Sandra Fredman notes, this is not inevitable, as intersectional discrimination only occurs when "a group experiences discrimination from several different di-

60 Phillips, A., "What's wrong with essentialism?", *Distinktion: Scandinavian journal of social theory*, Vol. 11, 2010, p. 49.

61 Butler, J., *Bodies That Matter: On the Discursive Limits of Sex,* Routledge*,* 2011*,* p. 168.

62 See above, note 18, Crenshaw, "Mapping the margins: Intersectionality, identity politics, and violence against women of color", p. 1296.

63 See above, note 30.

64 Fredman, S., "Double Trouble: Multiple discrimination and EU Law", *European Anti-Discrimination Law Review*, Vol. 2, 2005, p. 14.

65 Butler, J., *Gender Trouble: Feminism and Subversion of Identity*, Routledge, 1990, p. 143.

rections", creating something new, therefore not all intersectional identities will necessarily suffer intersectional discrimination.[66] What an intersectional approach to discrimination law would result in is not the creation of endless new discrete identity categories for every possible permutation of identity, but rather an open-textured legal approach that would examine underlying structures of inequality when assessing discrimination claims.

Conaghan criticises intersectionality for failing to grapple with the underlying inequalities that create patterns of discrimination.[67] However, this criticism seems mistaken. A legal recognition of intersectionality in discrimination law arguably requires that in assessing discrimination courts *must* examine the structural disadvantages operating in the background. This is because the complexity of intersectional identity and the insidious nature of intersectional discrimination means that clear evidence of discrimination will be, in most cases, unavailable. Courts will then have to engage in an examination of the "nature and situation of the individual or group at issue" as well as the "social and legal history of (…) society's treatment of that group", in order to determine the existence of discrimination.[68] Of course this may require changes to current legal forms and the way discrimination law is litigated in practice, but these difficulties are no reason to discard intersectionality as incompatible with law.

b. The Empirical Case for Addressing Intersectional Discrimination

Evidence of the qualitative difference that intersectional identity makes to experiences of discrimination can be seen in a number of empirical studies. Studies conducted by the Joint Equality and Human Rights Forum (JEHRF)[69] and the Advisory, Conciliation and Arbitration Service (ACAS)[70] examined a range of intersectional identities and how these affect experiences in the workplace and other areas of public life. Though both of these studies are rather limited in terms of the number of respondents interviewed, they clearly show that identity categories intersect to create unique stereotypes and myths that underpin discrimination. This perspective is borne out in the work of writers such as Iyiola Solanke, Crenshaw, and Diamond Ashiagbor. The picture that emerges clearly shows how a failure to address intersectional discrimination in law fails a substantial number of people.

The JEHRF, a body which brought together various human rights and equality organisations operating in the UK and Ireland including the Disability Rights Commission[71] and the Irish

66 See above, note 64, p. 18.

67 See above, note 22.

68 Aylward, C. A., "Intersectionality: Crossing the Theoretical and Praxis Divide", *Journal of Critical Race Theory,* Vol. 1, 2008, p. 39.

69 Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF, 2003.

70 Hudson, M., *ACAS Research Paper 01/12: The experience of discrimination on multiple grounds,* 2012, available at: http://www.acas.org.uk/media/pdf/0/3/0112_Multidiscrim_Hudson-accessible-version-Apr-2012.pdf.

71 The Disability Rights Commission was replaced by the Equality and Human Rights Commission in October 2007.

Human Rights Commission, in 2003 published their findings on identity and multiple discrimination. Intended to "open a debate on the practical implications for effective equality strategies that flow from the specific experience, situation and identity of particular groups of people holding multiple identities",[72] the report looks at particular combinations of identity taken in pairs, including race/gender, disability/sexual orientation, and race/disability. A key finding of the study is that it was no longer sufficient "to develop policies and strategies that promote greater access to and benefit from society's resources for *homogeneous* groupings of (...) people".[73]

The study highlights a particular problem where disabled lesbian, gay and bisexual (LGB) people occupy an interstitial space between the categories of sexual orientation and disability, where they are denied healthcare because of their sexual orientation,[74] or perceptions about their disability render their sexual orientation invisible. For instance, Michael Brothers notes how "society perceives disabled people to be asexual",[75] a stereotype which compounds with the stigma LGB people face to deny disabled LGB people valuable services. One respondent noted that a women's reproductive clinic "assumed that [she] didn't have sex" due to her disability and she felt unable to inform the clinic of her sexual orientation as the clinic was "known to be homophobic".[76] Brothers highlights how LGB disabled people are failed by both the disability and LGB communities, with "widespread homophobia and prejudice in the disability movement" and "prejudice toward disability" still evident within the LGB community.[77]

This synergy between two identities can be seen in the study's exploration of the experiences of disabled women in Northern Ireland. Women with disabilities face particular stigmatisation and oppression related to the tension between their disability and their womanhood, as they are "not expected by wider society to become mothers, and when they do they face criticism",[78] With most participants feeling they "need[ed] to ask for permission to have children".[79] Women with disabilities also face particular discrimination in the workplace, as they are "less likely to be in paid employment than either disabled men or

72 See above, note 69, p. 1.

73 Zappone, K., "Conclusion: The Challenge of Diversity" in Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF, 2003, p. 132.

74 Brothers, M., "It's Not Just About Ramps and Braille: Disability and Sexual Orientation" in Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF, 2003, p. 54.

75 *Ibid.*, p. 62.

76 *Ibid.*, p. 55.

77 *Ibid.*, p. 56.

78 See above, note 73, p. 135.

79 Breslin, N., "Situation, Experience and Identity of Disabled Women in Northern Ireland" in Zappone, K. (ed.), *Rethinking identity: the challenge of diversity*, JEHRF, 2003, p. 80.

women who are not disabled" and are more likely to be in unskilled work than both men with a disability and able-bodied women.[80] The research shows that women with disabilities are a particularly vulnerable group within the category of persons with disabilities, with their status as "women, [rendering them] more vulnerable than disabled men to the role of dependent and helpless victim".[81]

Similarly, ACAS's research on experiences of multiple discrimination reveals the reality of lived experiences of multiple discrimination. ACAS is an independent public body in the UK which works to prevent and resolve employment disputes, by providing guidance on the law and best practice to employees and employers as well as mediation and conciliation services when employment disputes arise. A large part of their mandate is discrimination at work. The study drew participants from ACAS's databases, focusing on claims based on multiple equality grounds that had progressed to the Employment Tribunal or which had been settled privately or by ACAS. Though the study is very limited in its scope, having only been intended to develop an exploratory report that would act as a foundation piece for deeper research, it clearly shows that multiple discrimination is not so uncommon a phenomenon that policy makers can ignore it. Of the nine claimants interviewed, who were "drawn from lower and higher paid jobs across a range of sectors",[82] two had experiences which were most clearly identified as intersectional, while others suggested something closer to an additive form of multiple discrimination.[83]

One claimant commented that she frequently experienced ageist, racist and sexist comments in the workplace, noting that she felt she "ticked the wrong boxes (…) either [as] a woman or a Muslim…".[84] Another of those interviewed felt that he had been denied opportunities at work because he was an older, Asian man. He commented that he "was not sure what could be the reason because there could be [any] combination of the three reasons that I can think of and that is (…) [my] gender, my age and my race".[85]

Although both of the above studies were intended as preliminary research and as such are limited in their scope, particularly in terms of the number of people interviewed, their conclusions on the need to recognise "diversity within social groups"[86] cannot easily be dismissed.[87] The position of black and minority ethnic women has been a particular focus of intersection-

80 *Ibid.*, p. 72.

81 *Ibid.*, p. 73.

82 See above, note 70, p. 27.

83 *Ibid.*, p. 12.

84 *Ibid.*, p. 12.

85 *Ibid.*, p. 13.

86 See above, note 73, p. 132.

87 See above, note 70, p. 27.

al scholarship, with research examining how they face segregation and discrimination in the labour market,[88] and how black and minority ethnic women with disabilities are rendered invisible.[89] Solanke cites several in-depth studies of the discrimination that black women face in the United States and Britain showing how gender and race intersect to create oppression that is qualitatively unique due to its creation of "negative myths and stereotypes which (…) covertly influence decision-making".[90]

The first of these studies was the African American Women's Voices Project,[91] which examined the experiences of black women across the United States of sexism and racism. Of the 333 participants, 97% stated that they were "aware of negative stereotypes of African-American women"[92] while 80% stated they had been negatively affected by such stereotypes. A further study cited by Solanke[93] is the American Bar Association's 1994 study[94] of the position of African American women lawyers. This study found that black women are doubly disadvantaged in the legal marketplace as they "face gender discrimination in minority bar associations and race discrimination in majority bar associations".[95]

Solanke notes how African-American women are doubly stereotyped as women of colour. They suffer the stereotypes of all black people, the "myth of inferiority, of being lazy, stupid, and unmotivated" and they are also stereotyped specifically as black women.[96] They are perceived as "non-feminin[e]" and aggressive, which compounds racism to doubly stigmatise black women in the workplace, especially assertive black women.[97] This positioning of black women is borne out in the work of Crenshaw[98] and Trina Grilo.[99] One needs only to

88 See above, note 18, Ashiagbor, "The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-Discrimination Law", p. 4.

89 See above, note 64, p. 14.

90 Solanke, I., "Putting Race and Gender Together: A New Approach To Intersectionality", *Modern Law Review*, Vol. 72, 2009, p. 732.

91 Collected in Jones, C. and Shorter-Gooden, K. (eds.), *Shifting: The Double Lives of African American Women: Based on the African-American Women's Voices Project*, Harper Perennial, 2004.

92 See above, note 90, p. 732.

93 *Ibid.*, pp. 733–734.

94 American Bar Association, Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession, "The Burdens of Both, the Privileges of neither" in *Gender Fairness Task Force Report on Intersectionality,* American Bar Association, 1994.

95 See above note 90, p. 733.

96 *Ibid.*, p. 732.

97 *Ibid.*, p. 732.

98 See above, note 5, pp. 139–167; and see above, note 18, Crenshaw, "Mapping the margins: Intersectionality, identity politics, and violence against women of color", pp. 1241–1299.

99 Grilo, T., *Berkeley Women's Journal of Law,* Vol. 10, 1995, p. 16.

look at the treatment of black female athletes such as Serena Williams by certain aspects of the media to see how black women are uniquely stereotyped. They are characterised as intimidating, aggressive, and un-feminine,[100] reflecting the double burden that black women face *qua* black women.

While there is arguably limited evidence of experiences of intersectional discrimination, this is likely caused by a failure to prioritise the gathering of this evidence. Fredman notes that the invisibility of ethnic minority women with a disability is "underlined by the total absence of this group in national statistics".[101] Similarly, a report of the European Commission concludes that a "lack of research, registered complaints and cross-sectional data contribute to the continued invisibility of the phenomenon of Multiple Discrimination".[102] Related to this is the problem of under-evaluation, highlighted by the ACAS report, wherein participants in the study would initially focus on one aspect of their identity, but would go on to "explicitly or implicitly"[103] widen their discussion to other aspects of identity. This phenomenon of "suppressed identity" was also identified in the report of the JEHRF.[104] Combined with advice workers sometimes lacking a good understanding of multiple discrimination,[105] it is perhaps not surprising that recorded numbers of multiple discrimination claims are relatively low. This phenomenon of under-reporting shows how the dominance of a "single-axis" model of discrimination can become internalised, which in turn prevents people from being able to articulate their experiences of discrimination and inequality and present them in such a way that allows them to access legal redress.

3. Intersectional Discrimination in Law: Comparative Perspectives

a. UK

UK discrimination law has historically, in instruments such as the Race Relations Act 1976 and the Sex Discrimination Act 1975, taken an approach to discrimination that allows only for a single characteristic to be considered, and treats identity characteristics as discrete, homogenous groups. This trend is continued in the Equality Act 2010 where direct discrimination is defined as unfavourable treatment on the basis of "*a* protected characteristic" (em-

100 See Eddo-Lodge, R., "Calling the Williams sisters 'scary' isn't just sexist, it's racist too", *The Telegraph*, 20 October 2014, available at: http://www.telegraph.co.uk/women/womens-life/11174583/Calling-Serena-Williams-scary-isnt-just-sexist-its-racist-too.html; and Jusino, T., "Women's Sports and Sexism: Isn't Serena Williams Winning Wimbledon Enough?", *The Mary Sue*, 13 July 2015, available at: http://www.themarysue.com/sports-sexism-serena-williams-wimbledon.

101 See above, note 64, p. 14.

102 European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws*, 2007, p. 5.

103 See above, note 70, p. 11.

104 See above, note 73, p. 135.

105 See above, note 70, p. 17.

phasis added).[106] This commitment to a "single-axis" model raises obvious problems for the capacity of the law to respond to intersectional discrimination.

There was some hope at the time of the then Equality Bill's passage through Parliament that recognition of intersectional discrimination would make its way into the final Bill. The Government Equalities Office published a discussion paper when the Equality Bill was published in 2009, looking specifically at the "gap in discrimination law in relation to intersectional multiple discrimination",[107] recognising that for many who experience multiple discrimination "it is difficult, complicated and sometimes impossible to get a legal remedy".[108] The paper proposed reforms that would bring intersectional discrimination within the scope of the Bill, but these were limited in two problematic ways. Firstly, discrimination claims based on multiple characteristics would be limited to direct discrimination only[109] and secondly, only combinations of two characteristics would be covered.[110] Both of these limitations were chosen in order to ensure maximal coverage of the Bill without "unnecessarily complicating" the law.[111] This motivation does not seem entirely convincing, however. As regards the two characteristics limit, it is not made clear why further characteristics unduly complicate matters. As argued above, recognition of intersectional discrimination requires a holistic, open-textured approach by the reviewing court. This would look beyond the characteristics per se, and examine the power structures which create discrimination. Intersectional discrimination based on more than two characteristics may be harder for a claimant to provide evidence of, but that does not necessarily translate into complexity for a court.

The report cites statistics from the Citizens Advice Bureau showing that approximately 0.92%[112] of clients presented a claim based on three or more grounds, a "marginal" group, compared to 8% who presented claims based on only two grounds.[113] However, given the risks of under-identification, it is not unreasonable to speculate that this represents only a small fraction of potential claims. Ultimately, given the report's earlier recognition of the reality of complex identity and intersectional discrimination, it seems arbitrary to limit claims to two grounds.

The result of this consultation process was Section 14 of the Equality Act, which prohibits direct discrimination based on a combination of two protected characteristics. Howev-

106 Equality Act 2010, Section 13(1).

107 Government Equalities Office, *Equality Bill: Assessing the impact of a multiple discrimination provision,* 2009, Para. 3.5.

108 *Ibid.*, Para. 3.4.

109 *Ibid.*, Para. 4.5.

110 *Ibid.*, Para. 4.9.

111 *Ibid.*, Para. 4.6.

112 *Ibid.*, Para. 4.9, 119 of 13,000 clients.

113 *Ibid.*, Para. 4.9, 1,072 of 13,000 clients.

er, the Coalition Government declined to bring the provision into force, insisting that it was "costly".[114] This has left UK equality legislation at something of an impasse; while there is recognition in policymaking that intersectional discrimination exists and is not addressed adequately by existing law, it has not led to changes to the law.[115] There have nevertheless been attempts to bring about recognition of intersectional discrimination judicially, in spite of the legislative barriers.

Nwoke v Government Legal Service[116] provides a clear example of the courts endorsing additive discrimination. The claimant was a Nigerian-born woman who applied for a job with the Government Legal Service. On examining the rankings used for candidates following interviews, it was discovered that the claimant had the lowest possible ranking, with all white applicants, regardless of gender, ranking higher, even if they had a lower degree class than the claimant. The tribunal found therefore that the only reason for Nwoke's low ranking was her race and there was therefore unlawful race discrimination. In addition, it was found further that white women were less likely to be hired compared to men, and when they were hired, they were given lower salaries than men. On this evidence, the tribunal found discrimination based on sex.[117] Ms Nwoke therefore proved to the tribunal that she had suffered both race and sex discrimination independently of each other, that is, she did not suffer discrimination because she was a black woman but because she was black *and* a woman.

There is some evidence that lower tribunals are willing to consider claims that raise intersectional discrimination. In *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co*[118] the claimant was an Indian woman who had worked for a short time for the defendant company. The directors of the company were of Indian origin and a colleague had told the claimant that they did not approve of Asian women working for their company. The claimant was dismissed without reason after five months. Her claim for race and sex discrimination was successful, with the Employment Tribunal using a hypothetical comparator who was male and of an origin other than Indian. Crucially, the Tribunal found that the claimant had been treated unfavourably because she was an Indian woman, not solely because she was a woman or because she was Indian.[119]

114 Chancellor of the Exchequer, George Osborne MP Budget Statement, March 2011, available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110323/debtext/110323-0001.htm#11032368000001.

115 See above, note 107.

116 *Nwoke v Government Legal Service* and Civil Service Commissioners [1996] IT/43021/94.

117 *Ibid.*, as discussed in Solanke, I., "Putting Race and Gender Together: A New Approach To Intersectionality", *Modern Law Review*, Vol. 42(3), 2009, p. 728.

118 *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co.* Case 1806128/03, discussed in Bamforth, N., Malik, M. and O'Cinneide, C. (eds.), *Discrimination law: theory and context: text and materials*, Sweet & Maxwell, 2008, p. 526.

119 *Ibid.*, p. 526.

Despite these promising signs from the lower courts, the only case involving an intersectional discrimination claim to reach the higher courts, *Bahl v Law Society,*[120] was met with firm opposition from the Court of Appeal (CA). Ms Bahl was the first woman of colour to enter the senior management of the law society, holding the post of Deputy Vice President and then Vice President. She resigned however, in the face of allegations of aggressive and bullying behaviour, and brought a claim for discrimination on the grounds of sex and race. While successful at the Employment Tribunal,[121] Ms Bahl lost at both the Employment Appeals Tribunal (EAT)[122] and the CA. In the CA, Peter Gibson LJ held that:

> *[I]f the evidence does not satisfy the tribunal that there is discrimination on grounds of race or on grounds of sex considered independently, then it is not open to a tribunal to find either claim satisfied on the basis that there is nonetheless discrimination on grounds of race or sex when both are taken together".*[123]

Bahl highlights the constraints placed on courts by the inadequacies of legislation which confines discrimination to the single-axis mode. Gibson LJ further observed that "rare is it to find a woman guilty of sex discrimination against another woman",[124] highlighting particularly potently the essentialising trend of "single-axis" discrimination law. All women are assumed to be the same (implicitly white) with the same experiences, and intra-categorical variation is ignored.

b. Canada

The core of Canada's equality law is Section 15 of the Charter of Rights and Freedoms, which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination". While intersectionality has not been given explicit legislative recognition in Canada, the structure of Canadian equality law means that it has fared better judicially than in other jurisdictions.

Essential to Canadian equality law's capacity for acknowledging intersectional discrimination is its unwavering commitment to substantive equality, which was set out in the first case heard by the Supreme Court of Canada (SCC) under Section 15, *Andrews v Law Society of British Columbia.*[125] Per McIntyre J, substantive equality requires that all are "recognised at

120 See above, note 53.

121 *Ibid.*, Paras. 57–67.

122 *Law Society v Bahl* [2003] UKEAT 1056_01_3107.

123 See above, note 53, Para. 158.

124 *Ibid.*, Para. 137.

125 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

law as human beings equally deserving of concern, respect and consideration"[126] resulting in an approach to differential treatment which sees that "every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."[127] This view of Section 15 as "a guarantee of substantive, and not just formal, equality"[128] remains central to the Court's approach.[129] This examination of whether government action "[has] the effect of perpetuating group disadvantage and prejudice or impose[s] disadvantage on the basis of stereotyping"[130] is key to the recognition of intersectionality.

The early case of *Canada v Mossop,*[131] however, shows the SCC's failure to take advantage of this and appreciate the reality of intersectional experience, "betray[ing] a profound misunderstanding of the problem it sought to redress".[132] In this case, the applicant's employment contract stated that he was allowed one day of bereavement leave for the death of a family member. On the death of his (male) partner's father, the applicant's request to take bereavement leave was denied because his same-sex partner did not fall under the definition of "family" for the purposes of the contract.[133] Under the legislation at the time, the Canadian Human Rights Act, sexual orientation was not a protected characteristic but family status was,[134] forcing the applicant to claim discrimination on the basis of his family status. However, the SCC refused to allow this claim. The Court operated on an understanding that the applicant's identity manifested only in his sexual orientation, and not also as a "social identity (…) that manifested in his same-sex relationship".[135] There was a failure to think about the category "family status" in a way which would have broadened the category beyond perspective of the dominant heteronormative expectation of "family" and recognise the applicant's family.[136]

126 *Ibid.*, p. 171.

127 *Ibid.*, per McIntyre J, p. 163.

128 *R v Kapp* [2008] 2 SCR 483, per McLachlin C.J and Abella J, Para. 20.

129 See Faraday, F., Denike, M. and Stephenson, M. K. (eds.), *Making equality rights real: securing substantive equality under the Charter,* Irwin Law, 2006.

130 See above, note 128, Para. 25.

131 *Canada (Attorney-General) v Mossop* [1995] 2 SCR 513.

132 Eaton, M., "Patently Confused: Complex Inequality and *Canada v. Mossop*", *Review of Constitutional Studies*., Vol. 1, 1994, p. 228.

133 See above, note 131, pp. 567–569.

134 Canadian Human Rights Act 1977, Section 3.

135 Bamforth, N., Malik, M. and O'Cinneide, C. (eds.), *Discrimination law: theory and context: text and materials*, Sweet & Maxwell, 2008, p. 536.

136 For a similar failure see the judgment of the Court of Justice of the European Union in *Grant v South West Trains* (C-249/96) [1998] 1 CMLR 993.

This highlights how a "single-axis" approach elides intra-categorical difference,[137] presenting only the experiences of the dominant norm as the totemic experiences of the whole group, giving "preference to dominant forms of social identity".[138]

L'Heureux-Dube J, in *Mossop*, gave the first in a line of judgments which have called for a recognition of complex identity, arguing that "categories of discrimination can overlap and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap or some other combination".[139] In her dissenting opinion in *Egan v Canada,*[140] L'Heureux-Dubé J again pointed out the importance of recognising intersectional experience. For L'Heureux-Dubé J, discrimination law requires that courts focus "on the issue of whether [individuals] are victims of discrimination, rather than becoming distracted by ancillary issues such as 'grounds'".[141]

This call for a recognition of intersectional experience was finally echoed in a majority opinion in *Law v Canada,*[142] where Iacobucci J, writing for the unanimous Court, held that "[a] discrimination claim positing an intersection of grounds can be understood as analogous to, or as a synthesis of, the grounds listed in s.15(1)".[143] Carol Aylward notes that this recognition by the court of intersectional grounds as analogous grounds provides a "better analytical structure for multiple discrimination claims".[144]

The open-ended list of protected grounds is a particular feature of the SCC's Section 15 jurisprudence which facilities the recognition of intersectional identity. In *Corbiére v Canada,*[145] the SCC were able to create an analogous ground of "aboriginality-residence" which was a synthesis of two characteristics: being Aboriginal as well as being a band member of an indigenous community (band) who lived off-reserve, when finding that a law which prevented band members who lived off-reserve from voting in band elections violated Section 15(1) of the Charter. L'Heureux-Dubé J again expressly raised the issue of intersectionality when discussing the particular vulnerability of "[a]boriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race"[146] by laws penalising off-band members.

137 See above, note 3, pp. 1771–1800.

138 See above, note 135, p. 536.

139 *Ibid.*, p. 546.

140 *Egan v. Canada* [1995] 2 SCR 513.

141 *Ibid.*, p. 563.

142 *Law v Canada* [1999] 1 SCR 497.

143 *Ibid.*, p. 503.

144 See above, note 68, p. 14.

145 *Corbiére v. Canada* [1999] 2 SCR 203.

146 *Ibid.*, p. 259.

The prevailing approach of the SCC to section 15 has seen the Court pay attention not only to the "nature and situation of the individual or group at issue"[147] but also to the "social and legal history of Canadian society's treatment of that group",[148] allowing a focus on substantive equality. Nevertheless, despite the promise of Canadian jurisprudence, there is still a "long way to go to fulfill this vision of [substantive] equality (…) and to make section 15 meaningful to all who are disempowered",[149] particularly for victims of intersectional discrimination.

c. The European Convention on Human Rights

Article 14 of the European Convention on Human Rights provides that "[t[he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, (…) or other status." The ECtHR has never expressly used the term "intersectionality" in its Article14 jurisprudence but has nevertheless given early indications that it is willing to use Article 14 in a way which takes into account the experiences of those suffering intersectional discrimination both directly, by expressly addressing discrimination experienced on multiple intersecting grounds, and indirectly, through finding violations of the Convention's substantive provisions in cases where an intersectional identity is at the heart of the case. Though this jurisprudence on intersectional discrimination is limited, the wider jurisprudence on Article 14 reveals an approach that is attuned to the reality of structural disadvantage, and as such could be a foundation for a more thorough response to intersectional discrimination.

In *B.S. v Spain,*[150] the applicant was a woman of Nigerian origin, lawfully resident in Spain, who worked as a sex worker in Mallorca. She was harassed, racially insulted and assaulted by the police in two separate incidents.[151] After both incidents, B.S. made a formal complaint alleging racial discrimination. However, both claims were withdrawn due to a lack of evidence.[152] There was evidence of various failures by the authorities to investigate B.S.'s allegations. Following her first complaint, the police officers who were placed on trial were not those B.S. had identified,[153] and following the second complaint, the case was discontinued by the judge for lack of evidence before B.S. had been given an opportunity to identify the

147 See above, note 68, p. 39.

148 *Ibid.*, p. 39.

149 The Hon. Claire L'Heureux-Dubé in Faraday, F., Denike, M., and Stephenson, M. K. (eds.), *Making equality rights real: securing substantive equality under the Charter,* Irwin Law, 2006, p. 5.

150 *B.S. v Spain,* App. No. 47159/08, 24 July 2012.

151 *Ibid.*, Paras. 7–28.

152 *Ibid.*, Paras. 12, 26.

153 *Ibid.*, Para. 11.

police officers involved.[154] The Court found a breach of both the procedural requirements of Article 3,[155] the prohibition of torture and inhuman and degrading treatment, and Article 14, taken with Article 3.[156]

In finding a violation of Article 14, the Court seemed to give considerable weight to the applicant's intersectional identity as a black woman working as a prostitute. The Court noted that a duty to investigate "a possible link between racist attitudes and an act of violence"[157] forms part of the procedural obligation of Article 3 as well as Article 14. Therefore, the domestic courts' failure to address both the racialised language used by the police and their apparent targeting of ethnic minority women for questioning violated Article 14.[158] In finding this violation, the Court noted "that the decisions made by the domestic courts failed to take account of the applicant's *particular vulnerability* inherent in her position as an African woman working as a prostitute" (emphasis added).[159] Despite not being framed in the language of intersectionality, this is a clear recognition of the applicant's intersectional identity. Though the precise nature of this vulnerability is not expanded upon by the Court, given that the Court does not have to consider an Article 14 claim if it is prepared to find a violation of another substantive right,[160] it seems significant that the Court both considered the Article 14 claim at all and in doing so emphasised the applicant's intersectional identity.

In *N.B. v Slovakia*,[161] the Court considered a problem of intersectional discrimination, though without addressing the Article 14 claim made by the applicant. The case concerned the sterilisation of an underage Roma woman without her informed consent. The applicant was in labour when it was discovered that future pregnancies carried a high risk of mortality, and she was made to sign consent forms to the sterilisation while under the influence of medication. Despite noting that the "practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups (…) particularly (…) members of the Roma community",[162] the Court concluded that it was not necessary to examine the Article 14 issue separately, having concluded that Slovakia was in breach of Article 8.[163] This case seems clearly to involve intersectional discrimination, as the applicant

154 *Ibid.*, Para. 23.

155 *Ibid.*, Para. 46.

156 *Ibid.*, Para. 63.

157 *Ibid.*, Para. 59.

158 *Ibid.,* Para. 61.

159 *Ibid.*, Para. 62.

160 *Ibid.*, Para. 59.

161 *N.B. v Slovakia.* App. No. 29518/10, 12 June 2012.

162 *Ibid.*, Para. 121.

163 *Ibid.*, Paras. 92–99.

received particular treatment because she was a woman of Roma origin. In other words, her intersectional identity resulted in treatment that was qualitatively distinct to treatment she would have had if she were a woman of non-Roma origin or a man of Roma origin.

In a similar case, *V.C. v Slovakia,*[164] which also involved the forced sterilisation of a Roma woman, the Court again found a violation of Article 8 but did not "find it necessary" to consider the Article 14 claim. [165] However, Judge Mijovic dissented from the conclusion, arguing that the applicant had been "'marked out' (…) as a patient who had to be sterilised just because of her origin".[166] Yoshida argues that the Court's focus on the individual harm done fails to acknowledge the systemic "gender violence" against Roma women in Slovakia,[167] and therefore merely obfuscates rather than helps.[168] This seems correct. Though we can celebrate the victory of the individual applicants in *N.B.* and *V.C.,* which we can see as an *ad hoc* vindication of the applicants' individual rights not to face discriminatory ill-treatment by failing to address the structural inequalities that create and legitimise intersectional discrimination, these victories are hollow. By restricting its analysis to only violations of substantive rights, the Court cannot remedy the systemic inequality which create the conditions for these violations.

Looking beyond these rare direct and indirect recognitions of intersectional experience, the framework the Court has developed in interpreting Article 14 reveals the potential for the Court to adopt an approach that is capable of addressing claims of intersectional discrimination and offer a "successful analysis of multidimensional situations".[169] Firstly, the open ended nature of the text of Article 14 allows for an expansive approach to the grounds of discrimination, beyond the orthodox "core" of sex, race, and so on. This creates space for the recognition of intersectional identities as "other status" as in Canada[170] as well as allowing the discrimination analysis to look beyond the traditional grounds of protection to engage with the reality of inequality, regardless of its connection to a particular characteristic. In addition, the Court has taken an approach to the formation of identity categories that combines "the traditional focus on natural or immutable differences [with] an awareness of the

164 *V.C. v Slovakia*, App. No. 18968/07, 8 November 2011.

165 *Ibid.*, Para 178.

166 *Ibid.*, Dissenting Opinion of Judge Mijovic, Para. 4.

167 The structural problem is confirmed by Judge Mijovic's comment at Para. 4 in her dissent in *V.C. v Slovakia,* App. No. 18968/07, 8 November 2011, that there were many more claims pending concerning sterilisation of Roma women.

168 Yoshida, K., "Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain", *Feminist Legal Studies*, Vol. 21, 2003, p. 202.

169 Arnardóttir, M. O., "Multidimensional equality from within: Themes from the European Convention on Human Rights" in Schiek, D. and Chege, V. (eds.), *European Union non-discrimination law: comparative perspectives on multidimensional equality law*, Routledge-Cavendish, 2009, p. 66.

170 See above, note 142, per Iacobucci J, p. 503.

complexity of the social construction of identities".[171] For example in *Goodwin v UK,*[172] the Court took an expansive approach to the category of gender in order to protect trans people's rights to marry under Article 12 of the Convention. In addition, Oddný Mjöll Arnardóttir notes that this awareness of "histories of social disadvantage and marginalisation"[173] is reflected in otherwise unexplainable variations in the strictness of review applied by the Court. This leads the Court to apply a more lenient standard of review when examining alleged discrimination against a generally privileged group, and a stricter standard when examining claims by disadvantaged groups. For example, within the category of "sex", usually seen as a "suspect" category meriting strict review,[174] the claims of men[175] may be reviewed with more lenient scrutiny than those brought by women.[176] This capacity to understand the axes of privilege and disadvantage that exist within identity categories shows that the Court could develop its Article 14 jurisprudence to address intersectional discrimination in a consistent and rigorous way.

Despite this promise, a number of features of the Court's approach to Article 14 raise problems. Most notably, the tendency to avoid addressing Article 14 claims, as in *V.C., N.B.,* and a host of other decisions,[177] when the Court has found a violation of a substantive right, suggests that any progress to embracing substantive equality is hesitant, at best. This is particularly true when there is clear evidence before the Court of systemic discrimination.[178] Particularly troubling is the inconsistency in the Court's approach to the circumstances under which it will refrain from addressing an Article 14 claim. The oft-repeated refrain of the Court is that where they have found a violation of the substantive article in a claim, they will not consider Article 14 unless a "clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case".[179] However, the jurisprudence does not show the Court is following this approach. In *Dudgeon v UK*,[180] for example, a case concerned with clear and overt discrimination on the basis of sexual orientation, the Court held that they could not say that "clear inequality of treatment [was] a fundamental aspect

171 See above, note 169, p. 61.

172 *Christine Goodwin v UK,* App. No. 28957/95, 11 July 2002.

173 See above, note 169, p. 62.

174 *Ibid.*, p. 56.

175 *Rasmussen v Denmark*, App. No. 8777/79, 28 November 1984.

176 By way of example see *Schuler-Zgraggen v Switzerland*, App. No. 14518/89, 24 June 1993.

177 See *Dudgeon v United Kingdom*, App. No. 7525/76, 22 October 1981, Para. 69.

178 *N.B. v Slovakia.* App. No. 29518/10, 12 June 2012, Para. 121; and *V.C. v Slovakia*, App. No. 18968/07, 8 November 2011, Dissenting Opinion of Judge Mijovic, Para. 4.

179 *Chassagnou and Others* v France, App. Nos. 25088/94, 28331/95, and 28443/95, 29 April 1999, Para 89; *Dudgeon v United Kingdom*, App. No. 7525/76, 22 October 1981, Para 67; and *Oršuš and others v Croatia*, App. No. 15766/03, 16 March 2010, Para. 144.

180 See above, note 177.

of the case".[181] Given that *Dudgeon* involved a challenge to legislation which criminalised male same-sex acts,[182] it is difficult to see how inequality of treatment was not at the very heart of the facts in this case. Further, the variability of intensity of review depending on the protected ground at issue[183] means that the Court is sidetracked by processes of categorisation which are determinative of its approach rather than engaging fully with the realities of the (alleged) discrimination before them.

4. Substantive Equality beyond Intersectional Discrimination

Recognising intersectional discrimination allows the law to begin to respond to the full depth of discrimination as it is experienced. Nevertheless, with substantive equality as our goal, we must look beyond intersectional discrimination to other areas of potential reform. A full exploration of these reforms is outside the scope of this article, but some preliminary suggestions will be made. Pervading through all of these other suggested reforms must be an awareness of the complexities of intersectional identity if they hope to address the structural inequalities that affect the vulnerable individuals existing at the intersections of patterns of disadvantage.

Perhaps most radically, feminist legal scholar Nicola Lacey has called for the recognition of group rights and collective remedies as a means to remedy the failings of an individualistic law.[184] These rights and remedies would address what Lacey calls "cultural" rights and would operate to "protect and express respect"[185] for practices stemming from group membership, such as dress codes. A more important way that group rights and remedies operate for Lacey is as a means to remedy past and current oppressions suffered by those belonging to a particular group, including inequalities in socio-economic status and in the distribution of basic goods.[186] Lacey recognises that such rights would be a challenge to current legal remedies and would require new forms of remedial action that break the link between loss and remedy which is inherent to the individual legal form.[187] These new remedies might include such things as quotas, affirmative action, and educational reform, operating alongside orthodox damages and injunctions.[188]

181 *Ibid.*, Para. 69.

182 *Ibid.*, Para. 14.

183 See above, note 169.

184 Lacey, N., "From Individual to Group? A Feminist Analysis of the Limits of Anti-Discrimination Legislation" in Lacey, N., *Unspeakable subjects: feminist essays in legal and social theory*, Hart Publishing, 1998.

185 *Ibid.*, p. 35.

186 *Ibid.*, p. 36.

187 *Ibid.*, p. 39.

188 *Ibid.*, pp. 40–43.

Related to this recognition of group rights is an increased use of positive action and positive duties to bring about transformative equality. Both are concerned with a shift of perspective from individualised claims to a more systems-oriented, top-down approach to addressing patterns of disadvantage. Arguably, an understanding of intersectional identity is closely related to positive action. Both intersectionality and positive action in the equality context can be seen as being informed by an understanding of the ways in which disadvantage is "create[d] or perpetuate[d]",[189] the latter because it works to address in a systemic fashion inequality and the former because, as has been argued above, examining the difference within traditional categorisations reveals the truth of the "matrix of domination".[190] As well as the importance of positive action to equality in general, in Fredman's analysis, it is also key to a thorough legal recognition of intersectionality as it allows the legal analysis to move away from preoccupations with comparison to look at the substance of the "detrimental consequences attached to membership of particular groups".[191] In turn, intersectionality allows us to see the complexity within these groups, and target positive action at those who suffer intersectional discrimination and are therefore "the least advantaged in each of the (…) groups".[192]

In addition, Fredman argues that the adoption of a more expansive approach to positive action and positive duties to ensure equality opens up "many more possibilities to deal with intersectionality than a complaints-led model".[193] The complaints-led model is problematic for discrimination claims in general for a number of reasons which are compounded in the case of intersectional discrimination. Firstly, it puts an immense strain on the individual claimant, both in terms of resources, with expensive protracted litigation being unaffordable for most, and emotionally.[194] The particular vulnerability of victims of intersectional discrimination increases this strain. Individual claims can also only remedy the effects of discrimination for the claimant, rather than addressing the systemic problems that create inequality. By requiring a discriminating "actor", even if the alleged discrimination is indirect, individual claims can also only go so far in addressing inequality. Many inequalities are the result of subtle and pernicious structural problems that cannot be traced back to any one source, rather than the result of the actions of particular individuals. It is perhaps comforting to caricature the perpetrators of discrimination but in doing so we deny our own, often unconscious, complicity in the creation of disadvantage and inequality.

We must also be willing to look beyond law to recognise the importance of other forms of action, whether they are political, collective, or otherwise. Many within the field of feminist legal theory favour these forms of action, even going so far as to doubt the value of law. Carol

189 See above, note 36, p. 73.

190 See above, note 39, pp. 221–238.

191 See above, note 36, p. 81.

192 See above, note 36, p. 85.

193 *Ibid.*, p. 81.

194 See above, note 185, pp. 22, 34.

Smart, for instance, has argued that "by accepting law's terms in order to challenge law, feminism always concedes too much".[195] Smart does not believe that we can simply abolish law and rights immediately – indeed she acknowledges that rights can only be truly abandoned once they become so entrenched that they can be taken for granted, lest oppressed groups return to the "plight" of a lack of legal protection – but rather argues that there should be a gradual turning away from law.[196]

This approach seems to fall apart under the weight of its own "internal inconsistency".[197] While Smart ascribes law with great power to create, express and perpetuate patriarchal oppression, she fails to address why law cannot then be reformulated to turn this power to progressive goals. Similarly, Martha Fineman has argued that activism must focus on domains outside of law, as the ingrained patriarchal techniques of law resist progressive reform.[198] Any reform achieved in other social spheres will then be reflected in law.[199] However this approach ascribes to law a level of passivity that entirely contradicts the power attributed to it in maintaining patriarchy. It seems actively dangerous to ignore law's power as, per MacKinnon, "one consequence of this turning away, however realistic its reasons, is that male power continues to own law unopposed".[200] The "effective paralysis"[201] that this deconstruction of law creates means that while "relying on (…) rights analysis is a high-risk strategy, (…) it would be riskier still to abandon it to those unconcerned with (…) the goal of (…) equality".[202] Nevertheless, these perspectives, though hyperbolic, highlight the value of using non-legal methods alongside law to work towards substantive equality.

Conclusion

Recognising and addressing intersectional discrimination is necessary to achieving meaningful substantive equality for all. The prevalence of the single-axis model of discrimination law:

> *[R]eflect[s] hegemonic discourses of identity politics that render invisible experiences of the more marginal members of that specific social category and construct a homogenised 'right way' to be its member.*[203]

195 See above, note 55, Smart, *Feminism and the Power of Law*, p. 6.

196 *Ibid.*, pp. 138–159.

197 See above, note 12, Munro, p. 68.

198 Fineman, M., "Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship", *Florida Law Review*, Vol. 42, 1990, pp. 25–45.

199 *Ibid.*, p. 33.

200 MacKinnon, C., *Women's Lives, Men's Law*s, Harvard University Press, 2007, p. 107.

201 See above, note 12, Munro, p. 69.

202 *Ibid.*, p. 84.

203 See above, note 46, p. 195.

Intersectionality exposes the difference within categories, bringing to light the individuals at the intersections who are ignored by the current orthodoxy. In addition, as a general theory of identity, intersectionality operates to break down the dichotomies of discrimination law – the "Subject" and the "Other"[204] and shift law's focus from difference to domination, exposing the "matrix of domination".[205]

This recognition of intersectionality requires considerable analysis and research into how privilege and oppression intersect to form unique experiences. Preliminary research, as discussed above, shows the qualitative difference of intersectional discrimination, but the studies are limited in scope. Currently "[m]any national statistics do not include data de-segregated by sex or race still less by other sources of multiple discrimination"[206] and while "the synergist nature of multiple discrimination also makes it difficult to monitor",[207] it is crucial that experiences of intersectional discrimination are documented and analysed in order for law to properly address them. The focus on the intersection of race and gender is welcome, but voices examining the experiences of other intersections need to be brought into the mainstream. Trans people of colour face extraordinary risks of discrimination,[208] yet are all too often ignored by mainstream discourses on race, gender, and sexuality. Only by giving voice to a plurality of experiences can we work toward substantive equality for all.

Discrimination law in response to the challenges of intersectionality needs to undergo a radical restructuring of how it approaches discrimination questions. Lessons from Canadian Charter jurisprudence show that an open-textured, holistic approach which is able to examine and address historical, social, and political disadvantage is necessary in order to recognise the realities of intersectional discrimination and bring about substantive equality. From the jurisprudence of the ECtHR we also see the value of non-exhaustive lists of protected grounds. However, beyond these individual elements, what is required is willingness by policy-makers, legislators and courts to engage with structural axes of oppression.

There can be no illusions that intersectionality is the panacea for discrimination law's failings. Achieving true equality is a difficult goal, indeed it may be an "unattainable ideal",[209] and addressing intersectional discrimination is but one facet of the reform needed to work towards to this goal. There are many more factors that play into the reform necessary to strive for substantive equality. Recognition of the value of positive action to remedy structur-

204 See above, note 37, p. 6.

205 See above, note 39, pp. 221–238.

206 See above, note 64, p. 14.

207 *Ibid.*, p. 14.

208 Transgender Europe's "Trans Murder Monitoring Project" reports that 1,701 trans people have been murdered globally between 2008 and 2014, available at: http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/idahot-2015.htm.

209 See above, note 125, per McIntyre J, p. 165.

al oppression is important, as is recognition of the importance of socio-economic rights.[210] There must also be a willingness to look beyond law and create change through other means, political and social.

Despite these difficulties, intersectionality cannot be discarded. Charlotte Bunch, addressing the World Conference Against Racism, noted that "if the human rights of any are left unprotected – if we are willing to sacrifice the rights of any group, the human rights of all are undermined".[211] A failure to address intersectional discrimination through discrimination law does just this: it leaves the most vulnerable within minority groups struggling for protection. Only by recognising intersectional discrimination can we make progress on the road to achieving meaningful substantive equality.

210 Fredman, S., "Providing Equality: Substantive Equality and the Positive Duty to Provide", *South African Journal of Human Rights*, Vol. 21, 2005, pp. 163–190.

211 Centre for Women's Global Leadership, *A Women's Human Rights Approach to the World Conference Against Racism,* 2011, p. 111, quoted in Yuval-Davies, N., "Intersectionality and Feminist Politics", *European Journal of Women's Studies*, Vol. 13, 2006, pp. 203–204.