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Substantive Equality As Equal Recognition: A New Theory of Section 15 of the Charter

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Substantive Equality As Equal Recognition: A New Theory of Section 15 of the Charter

Abstract

This article presents a novel theory of the concept of substantive equality under section 15(1) of the Canadian Charter of Rights and Freedoms called Substantive Equality as Equal Recognition. This contribution is timely in light of the Supreme Court of Canada's recent disagreement over the proper jurisprudential approach to interpreting section 15(1) in the 2013 case of *Quebec v A*. Substantive Equality as Equal Recognition holds that the purpose of section 15(1) is to ensure that the law's application does not reflect, through its impact or effects, hierarchies of status that exist between citizens within Canadian society. The article argues that the theory is disclosed by the doctrinal principles laid down by Justice McIntyre in *Andrews v Law Society of British Columbia*, the first decision on section 15(1) of the Charter. It also argues that the account of the wrongfulness of discrimination generated by Substantive Equality as Equal Recognition is preferable to other accounts and that the theory can help navigate the disagreement between the judges in *Quebec v A*.

Keywords

Canada. Canadian Charter of Rights and Freedoms. Section 15; Equality before the law; Civil rights; Canada

Substantive Equality As Equal Recognition: A New Theory of Section 15 of the *Charter*

ANTHONY ROBERT SANGIULIANO*

This article presents a novel theory of the concept of substantive equality under section 15(1) of the *Canadian Charter of Rights and Freedoms* called Substantive Equality as Equal Recognition. This contribution is timely in light of the Supreme Court of Canada's recent disagreement over the proper jurisprudential approach to interpreting section 15(1) in the 2013 case of *Quebec v A*. Substantive Equality as Equal Recognition holds that the purpose of section 15(1) is to ensure that the law's application does not reflect, through its impact or effects, hierarchies of status that exist between citizens within Canadian society. The article argues that the theory is disclosed by the doctrinal principles laid down by Justice McIntyre in *Andrews v Law Society of British Columbia*, the first decision on section 15(1) of the *Charter*. It also argues that the account of the wrongfulness of discrimination generated by Substantive Equality as Equal Recognition is preferable to other accounts and that the theory can help navigate the disagreement between the judges in *Quebec v A*.

Cet article propose une théorie novatrice pour expliquer le concept de l'égalité réelle selon l'article 15(1) de la *Charte canadienne des droits et libertés*, qui assimile l'égalité réelle à une reconnaissance égale. Cette contribution arrive en temps voulu alors que la Cour suprême du Canada se trouvait en 2013 en désaccord relativement à l'approche jurisprudentielle à adopter pour interpréter l'article 15(1) dans l'affaire *Québec v A*. L'égalité réelle assimilée

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à une reconnaissance égale prétend que l'objectif de l'article 15(1) consiste à faire en sorte que l'application de la loi ne reflète pas, par son impact ou ses effets, une hiérarchisation du statut des citoyens dans la société canadienne. L'article prétend que cette théorie découle des principes doctrinaux établis par le juge McIntyre dans la cause *Andrews c. Law Society of British Columbia*, premier verdict s'appuyant sur l'article 15(1) de la *Charte*. Il prétend également que le rapport de discrimination illicite découlant de l'égalité réelle assimilée à une reconnaissance égale est préférable à d'autres rapports et que cette théorie peut permettre d'aplanir le désaccord des juges dans *Québec v A*.

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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?

—Chief Justice McLachlin and Justice Abella¹

Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. *The worst oppression will result from discriminatory measures having the force of law*. It is against this evil that s. 15 provides a guarantee.

—Justice McIntyre²

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1. *Withler v Canada (Attorney General)*, 2011 SCC 13 at para 2, [2011] 1 SCR 396 [*Withler*] [emphasis added].
 2. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 35, 56 DLR (4th) 1 [*Andrews*] [emphasis added].

THE HISTORY OF THE SUPREME COURT OF CANADA'S interpretive approach to section 15(1) of the *Canadian Charter of Rights and Freedoms*³ has been characterized by continual reinvention.⁴ The test for whether a law is discriminatory within the meaning of section 15(1) has been in flux since its inception in *Andrews v Law Society of British Columbia*,⁵ as the Court has struggled to achieve consensus on the best doctrinal methodology for identifying the type of inequality that the provision aims to prevent.⁶

This struggle is exemplified by the recent case of *Quebec (Attorney General) v A*.⁷ Justice LeBel wrote the dissenting opinion on the section 15(1) infringement issue in that case.⁸ He began his reasons by explicating what he took to be the

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3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*]. Section 15(1) of the *Charter* 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."
 4. Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 [Koshan & Watson Hamilton, "Continual Reinvention"].
 5. *Andrews*, *supra* note 2.
 6. Koshan and Watson Hamilton identify three divergent approaches to interpreting s 15(1). Koshan & Watson Hamilton, "Continual Reinvention," *supra* note 4 at 19. After it agreed on the s 15(1) test in the 1989 *Andrews* case, the Court was severely fractured in the 1995 Equality Trilogy—*Miron*, *Egan*, and *Thibaudeau*. See *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron*]; *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan*]; *Thibaudeau v Canada*, [1995] 2 SCR 627, 124 DLR (4th) 449. A unanimous Court reinvented the test in *Law* in 1999, only to alter it again in *Kapp* in 2008. See *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR]; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*]. See also The Constitutional Law Group, *Canadian Constitutional Law*, 4th ed, by Patrick Macklem et al (Toronto: Emond Montgomery, 2010) at 1237-1335.
 7. 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*].
 8. Readers may find it curious that I begin by discussing the dissenting opinion in *Quebec v A*. LeBel J's reasons on how to determine whether s 15(1) is infringed, with which Fish, Moldaver, and Rothstein JJ concurred, in fact formed part of the majority judgment. For LeBel J, s 15(1) was not infringed in the case. It was therefore not necessary to determine whether the infringement was justified under s 1 of the *Charter*, which provides that *Charter* rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." McLachlin CJ concurred with the reasons of Abella J, discussed below, to form a majority on how to determine whether s 15(1) is infringed. The majority on s 15(1) found that s 15(1) was indeed infringed, which necessitated an analysis of the infringement's justification under s 1 of the *Charter*. However, McLachlin CJ disagreed with the majority position on the infringement of s 15(1) when she considered the s 1 analysis, holding that the infringement was justified. The result of this change of position was that the view of LeBel J that s 15(1) was not infringed and the view of McLachlin CJ that any infringement was justified generated the final disposition of *Quebec v A*, according to

underlying values of section 15(1). While he endorsed the prevailing view that section 15(1) guarantees substantive equality rather than mere formal equality in the law's application, he added that the provision's purpose is to protect the value of human dignity, to which the principle of personal autonomy is linked.⁹ He affirmed the two-step test developed in *R v Kapp* for whether a law discriminates against a claimant under section 15(1):

- Does the law create a distinction based on an enumerated or analogous ground of discrimination?
- Does the distinction discriminate by imposing disadvantage through the perpetuation of prejudice or stereotyping?¹⁰

He also affirmed the four contextual factors developed in *Law v Canada (Minister of Employment and Immigration)* to aid in identifying discrimination.¹¹ More contentiously, however, he insisted that a law is not discriminatory unless it involves prejudice or stereotyping against the claimant, even if it imposes a disadvantage on the claimant. Proof of disadvantage is insufficient because prejudice or stereotyping is a "crucial, although not the only, factor to be considered"¹² when a court analyzes an equality claim.

which the impugned law at issue was constitutionally valid. For a discussion of the difficulties involved in identifying the ratio of *Quebec v A*, see Michelle Biddulph & Dwight Newman, "Equality Rights, Ratio Identification, and the Un/Predictable Judicial Path Not Taken: *Quebec (Attorney General) v. A* and *R. v. Ibanescu*" UBC L Rev [forthcoming in 2015].

9. LeBel J wrote that "[s]afeguarding personal autonomy implies the recognition of each individual's right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices." *Quebec v A*, *supra* note 7 at para 139. His additional appeal to human dignity is contentious because, in *Kapp*, the Court appeared to remove the violation of human dignity as an independent factor to be considered when determining whether a law infringes s 15(1). *Kapp*, *supra* note 6 at paras 21-25. LeBel J's claim in *Quebec v A* is not that human dignity is part of the legal test under s 15(1) but that it informs the purpose of the provision. Nevertheless, given that the Court has distanced itself from the concept of human dignity when it comes to the constitutional protection of equality, the claim might still be met with some suspicion. I return to this issue in Part III(B)(1), below.
10. *Kapp*, *supra* note 6 at para 17.
11. These contextual factors are: (a) the presence or absence of pre-existing disadvantage experienced by the claimant; (b) the correspondence or lack thereof between the ground on which the discrimination claim is based and the actual needs, capacity, or circumstances of the claimant or affected group; (c) whether the impugned law has an ameliorative purpose or effect for certain members of society; and (d) the nature of the interest of the claimant affected by the law. *Law*, *supra* note 6 at para 88.
12. *Quebec v A*, *supra* note 7 at para 185.

Justice Abella wrote the majority opinion on the section 15(1) infringement issue.¹³ She likewise endorsed the *Kapp* test and the *Law* contextual factors in her majority judgment. Unlike Justice LeBel, she did not articulate the core values of section 15(1) beyond holding that the purpose of the provision is to protect the norm of substantive equality. She rejected the view that prejudice or stereotyping are necessary elements which the claimant is obligated to demonstrate, preferring to regard them as indicia that help determine whether a law violates substantive equality.¹⁴ Since prejudice and stereotyping are disadvantaging attitudes, a requirement that the claimant demonstrate them would be unduly formalistic and contrary to a substantive equality approach, which focuses on discriminatory effects.¹⁵ For Justice Abella, rejecting the dissent's view led to "a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant."¹⁶ Hence, section 15(1) is infringed if a law that makes a distinction on a prohibited ground violates substantive equality, no matter which factors are used to identify the violation and, specifically, whether or not the violation takes the form of prejudice or stereotyping against the claimant.

My interest in canvassing the disagreement between the judges in *Quebec v A* is not to assess the factual outcome of the case (others have ably undertaken this task¹⁷), but to highlight the ambiguity in the conceptual trajectory of the *Charter's* constitutional guarantee of equality.¹⁸ Justice LeBel tried to secure a degree of certainty for the section 15(1) test by thoroughly articulating the provision's purposes and solidifying prejudice or stereotyping as critical factors that make a law discriminatory. Justice Abella, however, preserved a flexible approach to section 15(1) that enables judges to identify the disadvantaging impact of a law and avoids imposing additional burdens of proof on equality

13. Abella J's reasons, however, formed part of the dissent in the result of *Quebec v A*. See *supra* note 8 and accompanying text.

14. *Quebec v A*, *supra* note 7 at para 325.

15. *Ibid* at para 329. Such rejection is similar to how the human dignity test was rejected by the Court in *Kapp*. See *supra* note 9 and accompanying text.

16. *Quebec v A*, *supra* note 7 at para 331.

17. See e.g. Robert Leckey, "Strange Bedfellows" (2014) 64:5 UTLJ 641; Sonia Lawrence, "Quebec v. A roundtable: Leckey on the Symbiosis of Law and Social Forces" *Institute for Feminist Legal Studies at Osgoode* (6 June 2013), online: <ifs.osgoode.yorku.ca/quebec-v-a-roundtable-leckey-on-the-symbiosis-of-law-social-forces>.

18. For similar conceptual diagnoses of the *Quebec v A* decision, see Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63 Sup Ct L Rev (2d) 261 at 285-91; Jennifer Koshan, "Under the Influence: Discrimination under Human Rights Legislation and Section 15 of the *Charter*" (2014) 3:1 Can J Hum Rts 115 at 134-37.

claimants.¹⁹ *Quebec v A* therefore indicates that the tension the Court must navigate to avoid ambiguity in its equality jurisprudence is the tension between certainty and flexibility. As Colleen Sheppard argues, the injunction to examine the discriminatory impact of a law using any relevant factors does not provide sufficient guidance to litigants and adjudicators in equality cases. But the Court must also avoid retreating to the certainty afforded by formalism, as this does not generate equitable outcomes or allow for an appreciation of the complex structural and systemic inequalities in society.²⁰

Sheppard's own suggestion for navigating the tension between certainty and flexibility is to insist on clarifying the promise of substantive equality.²¹ This article takes inspiration from Sheppard's suggestion. It is indeed essential to frame a conceptually rigorous understanding of substantive equality as it operates in Canadian equality jurisprudence. The protection of this value has been explicitly regarded as a central objective of section 15(1) ever since the 1997 case of *Eldridge v British Columbia (Attorney General)*,²² and important subsequent cases affirm this idea.²³ Both the majority and dissent in *Quebec v A* relied on a commitment to substantive equality. This commitment is clearly evinced in *Withler v Canada (Attorney General)*, where the Court stated that "the central issue in this and other s. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality."²⁴ The Court has also consistently emphasized that substantive equality mandates a contextual

19. *Quebec v A*, *supra* note 7 at para 329.

20. Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 61.

21. *Ibid.* Sheppard defends a concept called "inclusive equality," which "emphasizes the integral connection between process and substance" (*ibid* at 61). For another example of a scholar who pursues the goal of clarifying the promise of substantive equality, see Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 *Sup Ct L Rev* (2d) 183 at 190-99.

22. [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge* cited to SCR]. In *Eldridge*, LaForest J stated that the provision is "intended to ensure a measure of substantive, and not merely formal equality" (*ibid* at para 61). See also *Vriend v Alberta*, [1998] 1 SCR 493 at para 83, 156 DLR (4th) 385 [*Vriend*]; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 92, 173 DLR (4th) 1 [*Corbiere*]; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 82, 175 DLR (4th) 193.

23. *Law*, *supra* note 6 at para 25; *Kapp*, *supra* note 6 at paras 14-16.

24. *Withler*, *supra* note 1 at para 2. See also Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 *Rev Const Stud* 31 at 44, 49 [Koshan & Watson Hamilton, "Meaningless Mantra"].

approach to analyzing equality claims that focuses on identifying an impugned law's discriminatory effects.²⁵

In addition to informing the purpose of section 15(1), substantive equality now forms the essential element of the legal test for whether a law is discriminatory.²⁶ In *Withler*, the Court stated that, while it did not wish to restrict the factors that may aid in assessing a claim of discrimination, inquiries into the perpetuation of prejudice and stereotyping are specifically directed towards ascertaining whether an impugned law violates the norm of substantive equality.²⁷ Justice Abella relied on this dictum in *Quebec v A* when she argued that a violation of substantive equality, no matter how it is identified, is what causes a law to conflict with the *Charter*.²⁸ Hence, as stated in this article's first epigraph, to determine whether a law violates section 15(1), there is only one question: Does the law violate the norm of substantive equality?

In this article, I intend to contribute to the goal that Sheppard and others have pursued of clarifying the concept of substantive equality. These introductory remarks have shown that the Court's recent section 15(1) judgments in *Quebec v A* are strongly indicative of a need for the contribution, at least on one reading of that decision.

I. A JURIDICAL CONCEPTION OF SUBSTANTIVE EQUALITY

Substantive equality is widely seen as a methodological principle directing courts to analyze section 15(1) in a way that invokes "the contextualization of equality claims" and ensures "equality of results or outcomes."²⁹ Despite recent descriptions of substantive equality as a norm, there has been no comparable agreement

25. See especially *Law*, *supra* note 6 at para 55; *Withler*, *supra* note 1 at paras 45-54.

26. As early as *Law*, Iacobucci J held that "the existence of a conflict between an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim." *Law*, *supra* note 6 at para 41.

27. *Withler*, *supra* note 1 at para 39.

28. *Quebec v A*, *supra* note 7 at para 327.

29. Beverley Baines, "Is Substantive Equality a Constitutional Doctrine?" in Ysolde Gendreau, ed, *La doctrine et le développement du droit/Developing Law with Doctrine* (Montreal: Les Éditions Thémis, 2005) 59 at 79. See also Young, *supra* note 21 at 196; Sheppard, *supra* note 20 at 39-40, 47, 51-52; Koshan & Watson Hamilton, "Meaningless Mantra," *supra* note 24 at 44; Koshan & Watson Hamilton, "Continual Reinvention," *supra* note 4 at 25-26; *R v Turpin*, [1989] 1 SCR 1296 at 1328, 69 CR (3d) 97; *Law*, *supra* note 6 at para 25; *Kapp*, *supra* note 6 at paras 18-20; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at para 194, [2009] 1 SCR 222; *Withler*, *supra* note 1 at para 2; *Quebec v A*, *supra* note 7 at para 342.

on substantive equality as a state of affairs, *i.e.*, what a situation in which the ideal is instantiated through law would look like, as opposed to the ideal's methodological dimension. Nor has substantive equality been given a positive definition by the Court.³⁰ Rather, it has been defined negatively as an approach to section 15(1) contrasting with a formal equality approach.³¹ Formal equality itself is construed both methodologically, as the “decontextualized application of objectified rules and definitions,”³² and positively, as a state of affairs in which those similarly situated are treated alike.³³

Elucidating in positive terms the distinctive state of affairs that substantive equality represents is a key element of my ambition to clarify substantive equality in this article. To realize this ambition, I propose to develop a juridical conception of substantive equality. A juridical conception of a normative ideal such as substantive equality seeks to disclose the latent normative presuppositions of law's internal doctrinal principles and to bring them to the surface through a process of abstraction.³⁴ The doctrinal principles that I analyze are those outlined by Justice McIntyre in *Andrews*, the first decision on section 15(1) of the *Charter*. I select this route because the Court has continually referred to *Andrews* to substantiate assertions about the correct way to analyze equality claims and about the purpose of section 15(1).³⁵ In *Kapp*, the Court stated: “*Andrews* set the template for this Court's commitment to substantive equality—a template which subsequent decisions have enriched but never abandoned.”³⁶ In *Withler*,

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30. Baines, *supra* note 29 at 91; Koshan & Watson Hamilton, “Meaningless Mantra,” *supra* note 24 at 32; Koshan & Watson Hamilton, “Continual Reinvention,” *supra* note 4 at 21. Margot Young describes the Court's use of the concept as an “unelaborated, cryptic guidepost.” Young, *supra* note 21 at 185.
31. See *e.g.* *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 91, [2004] 1 SCR 76; *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 15, [2005] 1 SCR 238 [*Gosselin*]; *Kapp*, *supra* note 6 at para 15; *Withler*, *supra* note 1 at paras 39, 41-42.
32. Sheila McIntyre, “Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination” in Fay Faraday, Margaret Denike & Kate M Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 99 at 105.
33. Sheppard, *supra* note 20 at 39.
34. See Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 9-15. Weinrib elucidates a juridical conception of the normative ideal of corrective justice that underlies private law. For the Court's acknowledgement of corrective justice, see *Clements v Clements*, 2012 SCC 32 at para 7, [2012] 2 SCR 181.
35. See generally *Law*, *supra* note 6 at paras 23-30, 40-44. Iacobucci J stated that *Andrews* “articulates many of the basic principles which continue to guide s. 15(1) analysis to the present day” (*ibid* at para 22).
36. *Kapp*, *supra* note 6 at para 14.

the Court cited Justice McIntyre's reasons to reject a formalistic approach to comparator groups under section 15(1)³⁷ and to vindicate the assertion that substantive equality is an essential element of the legal test for discrimination.³⁸ Justice Abella and Justice LeBel each explicitly relied on *Andrews* in penning their divergent reasons in *Quebec v A*.³⁹

As I will explain more fully below, the juridical conception of substantive equality I espouse in this article draws upon a distinction between (i) the vertical application of the law by the state to citizens' activities and (ii) horizontal relations among citizens within society that make up the context within which the law's vertical application is embedded.⁴⁰ I construe the horizontal inequalities that obtain within citizens' social relations by reference to patterns of what the American constitutional theorist Jack Balkin calls "status hierarchy."⁴¹ Patterns of status hierarchy obtain not just when there are material disparities in wealth within society, but primarily when some social groups are perceived as having higher or lower degrees of symbolic prestige relative to others.⁴² Accompanying these hierarchies are structures of domination and oppression: Members of groups with lower status are subordinated to members of groups with higher status in that the identity associated with the former is defined as it is constructed by the latter. The cultural values of subordinate groups are hence labelled as deviant relative to the norm controlled by dominant groups. I claim that the wrong produced by status hierarchies consists in the negation of recognition for members of subordinate groups.⁴³ That is, it consists in a denial of subordinate

37. *Withler*, *supra* note 1 at para 42. For discussion and critique of the role of comparator groups in the Court's s 15(1) jurisprudence, see *e.g.* Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dumps 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 31.

38. *Ibid* at para 2.

39. For Abella J's reliance on *Andrews*, see *Quebec v A*, *supra* note 7 at paras 319-25. For LeBel J's reliance on *Andrews*, see *Quebec v A*, *supra* note 7 at paras 137, 142-45.

40. I adapt this distinction from a similar formulation made by Sophia Moreau. See Sophia R Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291 at 317 [Moreau, "Wrongs of Unequal Treatment"].

41. JM Balkin, "The Constitution of Status" (1996) 106:8 Yale LJ 2313 at 2321.

42. While status hierarchies are often intertwined with economic inequalities in the distribution of material resources, such as wealth and property, economic and status inequalities are nevertheless analytically distinct. Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age" (1995) 1:212 New Left Rev 68 at 72-73. See also Balkin, *supra* note 41 at 2322.

43. See generally Fraser, *supra* note 42; Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 25.

groups' ability to view their own identities authentically and as worthy starting points from which to formulate and pursue a conception of the good life.

My thesis is that the state of affairs of substantive equality is a condition in which the law does not transmit horizontal status hierarchies, and the systems of oppression attached to them, through its vertical impact. In the terms of this article's second epigraph, the purpose of section 15(1) is to ensure that the oppression constitutive of horizontal inequalities is not imbued with the force of law. Discrimination under section 15(1) of the *Charter*—the negation of recognition—occurs when this transmission occurs. I call the theory produced by conjoining these two claims Substantive Equality as Equal Recognition.⁴⁴

As we shall see, Substantive Equality as Equal Recognition generates a unitary account of the wrong of discrimination that treats the negation of recognition

44. The theory rests on the idea that discrimination is substantive inequality, or the denial of the norm of substantive equality. See *e.g.* *Law*, *supra* note 6 at para 84; *Withler*, *supra* note 1 at para 35; *Quebec v A*, *supra* note 7 at paras 192, 201; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 79, [2013] 1 SCR 467. I would not be the first to explain the purpose of s 15(1) by appealing to recognition theory or to the goal of combatting the legal transmission of social and cultural subordination. For authors that appeal to subordination, oppression, and domination, see *e.g.* Baines, *supra* note 29 at 79; Young, *supra* note 21 at 195-96; McIntyre, *supra* note 32 at 103. See also Avigail Eisenberg, "Rights in the Age of Identity Politics" (2013) 50:3 Osgoode Hall LJ 609. For an author who appeals to recognition theory, see Luc B Tremblay, "Promoting Equality and Combatting Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm" (2012) 60:1 Am J Comp L 181. None of these authors, however, inquire into the relation between s 15(1) and subordination using recognition theory as comprehensively as I attempt to do. Tremblay is concerned not only with the purpose of s 15(1), but also with the relationship between this provision and s 15(2) of the *Charter*, which states: "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." Appeals to status harms have, however, been comprehensively discussed in the American literature on the Fourteenth Amendment of the US Constitution. See Owen M Fiss, "Groups and the Equal Protection Clause" (1976) 5:2 Phil & Public Affairs 107; Jack M Balkin & Reva B Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination?" (2003) 58:1 U Miami L Rev 9. My goal in this article can be understood as an attempt to conceptualize status harms in the context of Canadian constitutional law to the same degree of comprehensiveness as they have been conceptualized in the American context. Will Kymlicka and Alan Patten undertake deeper, philosophical explorations of the concept of recognition in relation to the ideal of equality and multiculturalism. See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York, NY: Oxford University Press, 1995); Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton, NJ: Princeton University Press, 2014).

as “explanatorily basic.”⁴⁵ In this sense, it contrasts with pluralist theories of the wrong of discrimination, which posit multiple factors that make discrimination wrong, none of which are reducible to others.⁴⁶ It also contrasts with unitary theories that posit factors other than the negation of recognition as the sole explanation for the wrong of discrimination, such as violations of human dignity or autonomy. To support my thesis, I argue that other factors that pluralist theories might posit to explain the wrong of discrimination are either reducible to the negation of recognition or implausible as they stand. I also criticize unitary theories based on human dignity and autonomy.

In Part II, I develop with greater precision the theory of Substantive Equality as Equal Recognition. In Part III, I argue that the theory can be abstracted from the foundational legal principles articulated in *Andrews* concerning the proper approach to analyzing equality claims. I concentrate especially on Justice McIntyre’s rejection of the formal equality paradigm in that case. The central line of thought in Part III incorporates novel explanations of what formal equality amounts to, what makes it unacceptable, and what it means to reject it, as these explanations emerge from the *Andrews* decision. In Part IV, I support the unitary account of the wrong of discrimination that Substantive Equality as Equal Recognition generates by arguing against pluralist accounts and other unitary accounts.

II. SUBSTANTIVE EQUALITY AS EQUAL RECOGNITION

Let us begin by exploring the theory of Substantive Equality as Equal Recognition. I have mentioned that the theory employs a distinction between the vertical application of the law by the state and horizontal social relations among citizens. The rationale for drawing this distinction is that it captures how we can think about the law’s application by the state in isolation from the social context in which the law applies, about social conditions in isolation from the law’s application, and, moreover, about the interaction between these two variables. To think about this interaction is to consider whether—and the degree to which—the law has the effect of mirroring the patterns of social relations that form when citizens congregate in a political community and shape their cultural identities through public life.

45. For use of this term see Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 314, n 44.

46. For an example of a pluralist theory, see *ibid.*

Substantive Equality as Equal Recognition regards horizontal social relations as unequal because they are characterized by status hierarchies. Balkin argues that some social groups (groups organized around common lifestyles and cultural values) have more “approval, respect, admiration, or positive qualities” attached to them, while others are imputed with “corresponding disapproval and negative qualities.”⁴⁷ The dominant groups in such relations oppress the subordinate groups in the sense that the “identity of one is defined in part by its relationship to the identity of the other.”⁴⁸ Such oppression consists in what Iris Marion Young refers to as “cultural imperialism.”⁴⁹ Dominant groups’ cultural values and life styles are privileged over those of subordinate groups because dominant groups have primary access to social patterns of representation, interpretation, and communication.⁵⁰ Their life experiences and values are expressed in the cultural conceptions of social prestige, honour, and moral approval⁵¹ that are the most widely disseminated in society and, as such, they are established as normal and unremarkable.⁵² Given the normality of its own identity, Young writes, “the dominant group constructs the differences which some groups exhibit as lack and negation. These groups become marked as Other.”⁵³ In being marked as deviant in relation to the life styles of dominant groups, subordinate groups’ identities and cultural values are conceived as lacking in social prestige, honour, and moral approval.

In contemporary society, a status hierarchy exists, for example, between heterosexuals as the dominant group and homosexuals as the subordinate group.⁵⁴ Homosexuals’ ways of being are conceived as deviant relative to heterosexuals’ ways of being. Oppression in this relation takes the form of the construction of norms that privilege heterosexuality and devalue homosexuality.⁵⁵ A status hierarchy also exists between men and women. Oppression between these groups involves the construction of norms that privilege masculinity and that promote what Nancy Fraser refers to as “subjection to androcentric norms in

47. Balkin, *supra* note 41 at 2321.

48. *Ibid* at 2323.

49. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 59 [Young, *Politics of Difference*].

50. Fraser, *supra* note 42 at 71.

51. Balkin, *supra* note 41 at 2331.

52. Young, *Politics of Difference*, *supra* note 49 at 59.

53. *Ibid*.

54. Sexual orientation has been named an analogous ground of discrimination by the Court. See *Egan*, *supra* note 6.

55. Fraser, *supra* note 42 at 77.

relation to which women appear lesser or deviant.”⁵⁶ Finally, there is a racial status hierarchy between white people as the dominant group and people of colour as subordinate groups. Racism consists in the construction of norms that privilege traits associated with whiteness and the subjection of non-whites to Eurocentric norms relative to which other races appear deviant.⁵⁷

The wrong suffered by members of subordinate social groups is a negation of recognition. The concept of recognition, as articulated in the work of Charles Taylor,⁵⁸ is rooted in the ideal of authenticity. Authenticity means being true to oneself and living one’s life in accordance with one’s own particular viewpoint on what it is like to be-in-the-world: “Being true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I am also defining myself.”⁵⁹ Taylor writes that we define ourselves “dialogically,” meaning that we formulate our own authentic identity through public intercourse with others.⁶⁰ Our identity is our conception of “‘where we’re coming from’ ... the background against which our tastes and desires and opinions and aspirations make sense.”⁶¹ Our authentic understanding of our identity as a worthy starting point from which to pursue a conception of the good depends on its recognition by others as similarly worthy simply due to its particularity to ourselves. It is disrupted when it is defined in juxtaposition to the identity and life style of others.

The life styles of subordinate social groups in status hierarchies are denied recognition because they are publicly conceived through precisely this sort of juxtaposition. The dialogical construction of subordinate groups’ identities is disrupted, and their members are unable to authentically conceptualize their way of being-in-the-world in positive terms.⁶² Axel Honneth remarks:

If [the] hierarchy of societal values is structured so as to downgrade individual forms of living and convictions for being inferior or deficient, then it robs the subjects in

56. *Ibid* at 79.

57. *Ibid* at 81.

58. Taylor, *supra* note 43.

59. *Ibid* at 31.

60. *Ibid* at 32-34.

61. *Ibid* at 33-34.

62. This “identity model” has been the dominant way to understand the wrong of the negation of recognition in the literature. Fraser, who held this view initially, has criticized and moved away from it to develop a different view. See Nancy Fraser, “Rethinking Recognition” (2000) 2:3 *New Left Rev* 107. An examination of the debate raised by Fraser’s work is beyond the scope of this article. For a summary of both Fraser’s views and arguments against her revisionist position, see Christopher F Zurn, “Identity or Status? Struggles over ‘Recognition’ in Fraser, Honneth, and Taylor” (2003) 10:4 *Constellations* 519.

question of every opportunity to accord their abilities social value. Once confronted with an evaluation that downgrades certain patterns of self-realization, those who have opted for these patterns cannot relate to their mode of fulfillment as something invested with positive significance within their community. The individual who experiences this type of social devaluation typically falls prey to a loss of self-esteem—that is, he is no longer in a position to conceive himself as a being whose characteristic traits and abilities are worthy of esteem.⁶³

Since the negation of recognition consists in a failure to recognize the particularity of a group's life style, instead defining the group as Other relative to established normalcy, remedying it requires promoting the differentiation of that group. The remedy takes the form of emphasizing the specificity of a social group and affirming the value of that specificity.⁶⁴

According to Substantive Equality as Equal Recognition, substantive equality is a norm regulating the interaction between a law's vertical application and horizontal social inequalities. It is instantiated if a law's vertical effects do not transmit status hierarchies, that is, if the oppression of subordinate social groups by negative characterizations of their identity is not given the force of law.⁶⁵ The state therefore uses a law to discriminate if the law's vertical effects reproduce horizontal status hierarchies. Because the inequality constitutive of status hierarchies negates the recognition of subordinate groups' authentic identities, the wrong of state-perpetrated discrimination can be described as the negation of the recognition of the authentic identities of citizens belonging to those groups.⁶⁶

63. Axel Honneth, "Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition" (1992) 20:2 *Pol Theory* 187 at 191-92.

64. Fraser, *supra* note 42 at 74.

65. This is similar to how US anti-subordination theorists contend that "guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification" and argue that "law should reform institutions and practices that enforce the secondary social status of historically oppressed groups." See Balkin & Siegel, *supra* note 44 at 9. Owen Fiss has also written that the constitutional protection of equality under the US Constitution's Fourteenth Amendment requires that laws do not "impair or threaten or aggravate" the "subordinate position of a specially disadvantaged group." Fiss, *supra* note 44 at 157.

66. For authors who also apply recognition theory to conceptualize the protection of equality under s 15(1) of the *Charter*, see Tremblay, *supra* note 44 at 190-91; Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, Keith Ewing & Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335 at 340-52. I have described the wrong of state-perpetrated discrimination as a wrong against individuals, but it is important to note that Substantive Equality as Equal Recognition entails that discrimination is also wrongful in relation to the public value of equality governing state-citizen interaction. According to one conception of this public value that is receiving widespread acceptance, for a state to be egalitarian is for it to oppose hierarchies of power, to abolish oppression, to repudiate

III. SUBSTANTIVE EQUALITY AS EQUAL RECOGNITION IN *ANDREWS*

Having articulated Substantive Equality as Equal Recognition more carefully, I now turn to discussing *Andrews*. In that case, the Court found that the Law Society of British Columbia's requirement that lawyers be Canadian citizens was discriminatory. Justice McIntyre's highly influential majority judgment on section 15(1) outlined four principles concerning the provision's purpose and the proper method for analyzing equality claims.

Before proceeding to the discussion of *Andrews*, I note a caveat about my presentation of Justice McIntyre's reasons in the case. Justice McIntyre engaged extensively with pre-*Charter* jurisprudence on the concepts of equality and discrimination. A conceptually rigorous understanding of what Justice McIntyre accomplished in the case (when he broke from the pre-*Charter* jurisprudence, and thereby set the stage for subsequent interpretations of section 15(1) of the *Charter* that so frequently cite *Andrews*), requires an appreciation of his reasons on their own terms. The ensuing discussion's construction of the pre-*Charter* jurisprudence, while perhaps not providing an entirely accurate depiction outside of the context of *Andrews*, proceeds through the lens of Justice McIntyre's own construction of that jurisprudence. In my view, it is necessary to treat the pre-*Charter* jurisprudence in such a manner to properly attend to the heritage of the constitutional equality guarantee in Canada and the principled foundations of the modern juridical conception of substantive equality laid down in *Andrews*.⁶⁷

distinctions of moral worth based on social identity, and to create a social order in which citizens may live together in a democratic community, rather than a hierarchical one. This conception of equality has been called "democratic equality" by Elizabeth Anderson and the "social and political ideal of equality" by Samuel Scheffler. See Moreau, "Wrongs of Unequal Treatment," *supra* note 40 at 292, n 4; Elizabeth S Anderson, "What is the Point of Equality?" (1999) 109:2 *Ethics* 287 at 312-15; Samuel Scheffler, "What is Egalitarianism?" (2003) 31:1 *Phil & Public Affairs* 5 at 21-24.

67. Readers may also find it objectionable that I leave out of my summation of the important principles articulated in *Andrews* the claim by McIntyre J that the "promotion of equality entails 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." *Andrews*, *supra* note 2 at para 34. It is true that this has been an influential claim. See especially *Law*, *supra* note 6 at para 51. I would construe it as a nascent claim about the state of affairs of substantive equality under s 15(1) that has not received concerted development (outside of the attempt by Iacobucci J in *Law* to define substantive equality in terms of human dignity, an attempt repudiated in *Kapp*). On my Substantive Equality as Equal Recognition view, I would explain the claim as reaching towards the account of substantive equality developed in this article wherein the law does not reflect through its vertical impact

A. FOUR PRINCIPLES FROM *ANDREWS*

The most important principle emerging from *Andrews* for the purposes of this argument is Justice McIntyre's rejection of a formal equality approach to analyzing section 15(1) claims. Justice McLachlin of the British Columbia Court of Appeal (as she then was) recommended this approach at the time *Andrews* was litigated.⁶⁸ According to Justice McIntyre, the approach holds that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood."⁶⁹ Thus, those who are similarly situated should be treated similarly.⁷⁰

Justice McIntyre held that "mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights."⁷¹ Two reasons he gave for this holding were that a "similarly situated test" would justify the odious Nuremberg laws of Nazi Germany, which contemplated similar treatment for all Jews,⁷² and the notorious separate but equal treatment doctrine applied by the US Supreme Court in the *Plessy v Ferguson*.⁷³

Additionally, prior to the *Charter's* introduction, formal equality and the similarly situated test informed Canadian courts' interpretations of section 1(a) of the *Canadian Bill of Rights*.⁷⁴ These concepts were relied on by the British

horizontal social inequalities. Indeed, it could be explained as an account of the wrong of discrimination in terms of the public value of equality with which Substantive Equality as Equal Recognition accords. See *supra* note 66 and accompanying text.

68. See *Andrews v Law Society of British Columbia* (1986), 27 DLR (4th) 600 at para 16, 2 BCLR (2d) 305 (CA).

69. *Andrews*, *supra* note 2 at para 27. McIntyre J notes that the McLachlin J, writing in the British Columbia Court of Appeal, derived the formal equality principle from an influential article written by the American scholars Joseph Tussman and Jacobus tenBroek. See "The Equal Protection of the Laws" (1979) 37:3 Cal L Rev 341. It is interesting to note that Tussman and tenBroek referred to the substantive equal protection principle in their article, but concluded that the US Supreme Court had never adopted it (*ibid* at 346). See also Baines, *supra* note 29 at 79.

70. Young, *supra* note 21 at 191; Sheppard, *supra* note 20 at 40.

71. *Andrews*, *supra* note 2 at para 28.

72. *Ibid* at para 28.

73. *Plessy v Ferguson*, 163 US 537, 16 S Ct 1138 (1896) [*Plessy*].

74. RSC 1970, c 44 [*Bill of Rights*]. Section 1(a) of the *Canadian Bill of Rights* provides:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ... the right of the individual to equality before the law and the protection of the law.

Columbia Court of Appeal in *R v Gonzales*,⁷⁵ which decided that the provision of the *Indian Act* making it a criminal offence for Aboriginals to possess intoxicants off reserve was not discriminatory. In *The Queen v Drybones*, which involved a similar *Indian Act* prohibition making it an offence for an Aboriginal to be intoxicated off reserve, the Supreme Court of Canada criticized the approach in *Gonzales*. Justice Ritchie, in a dictum endorsed by Justice McIntyre in *Andrews*, stated that formal equality is iniquitous because it would permit discriminatory legislation as long as all those to whom the legislation applies are discriminated against in the same way.⁷⁶

Justice McIntyre also stated that the Court applied a similarly situated test in the pre-*Charter* cases of *Bliss v Canada (Attorney General)*⁷⁷ and *Attorney General of Canada v Lavell*.⁷⁸ The claimant in *Bliss*, a pregnant woman, argued that unemployment insurance legislation discriminated against her on the basis of sex by denying her benefits to which she would have been entitled had she not been pregnant. The Court rejected her claim because the class into which she fell under the legislation was that of pregnant persons, and, within that class, all persons were treated equally.⁷⁹ Formal equality also justified the *Lavell* decision, wherein the Court held that a statute depriving women, but not men, of membership in Aboriginal groups if they married non-Aboriginals was not discriminatory.

Justice McIntyre held that these adherences to formal equality produced unacceptable outcomes for equality claimants. He maintained that while section 15(1) of the *Charter* is concerned with a law's application, "a bad law will not be saved merely because it operates equally upon those to whom it has application."⁸⁰ Rather, consideration must be given to a law's impact upon those to whom it applies and those it excludes from its application. In contrast with the formalistic similarly situated test, the proper approach to determining whether a law is discriminatory under section 15(1) must be contextual and consider a law's effects.⁸¹ The paradigm of substantive equality thus grew out of this rejection of formal equality in *Andrews*.

The second legal principle articulated in *Andrews* is that section 15(1) prevents adverse effects discrimination, which occurs where a law that does not

75. (1962), 32 DLR (2d) 290, 37 CR 56 (BC CA) [*Gonzales* cited to DLR].

76. *The Queen v Drybones*, [1970] SCR 282 at para 40, 9 DLR (3d) 473 [*Drybones*].

77. [1979] 1 SCR 183, 92 DLR (3d) 417 [*Bliss* cited to SCR].

78. [1974] SCR 1349, 38 DLR (3d) 481 [*Lavell* cited to SCR].

79. *Andrews*, *supra* note 2 at para 29.

80. *Ibid* at para 28.

81. *Ibid* at para 30.

create a distinction on its face (*i.e.*, is facially neutral) discriminates in its effects.⁸² Justice McIntyre acknowledged that discrimination under the *Charter* need not be intentional but could be the unintentional by-product of innocently motivated rules or standards.⁸³ The third principle is that equality under the *Charter* is a comparative concept. Equality requires courts to compare the conditions of various groups in the social context in which an equality claim arises.⁸⁴

The final principle is that not every legislative distinction infringes section 15(1). The state must be allowed to treat different groups of citizens in different ways in order to govern effectively: “The classifying of individuals and groups, the making of different provisions respecting such groups, and the application of different rules, regulations and qualifications to different persons is necessary for the governance of modern society.”⁸⁵ Indeed, laws will often have to make distinctions for the state to accommodate differences among citizens and to ameliorate the positions of disadvantaged groups through affirmative action.⁸⁶ Hence, Justice McIntyre rejected the suggestion offered by Professor Peter Hogg that every distinction made by a law constitutes discrimination.⁸⁷ He instead held that a distinction infringes section 15(1) only if it is based on enumerated or analogous grounds⁸⁸ and has a discriminatory impact.⁸⁹

I argue that Substantive Equality as Equal Recognition is latent in these four legal principles articulated in *Andrews*. My focus is predominantly on Justice McIntyre’s rejection of formal equality. I contend that once we understand precisely what formal equality amounts to and what makes it unacceptable, we are

82. See *Eldridge*, *supra* note 22 at paras 60-61.

83. *Andrews*, *supra* note 2 at para 37, citing *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139, 40 DLR (4th) 193. See also *O’Malley v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 551, 23 DLR (4th) 321. In an oft-quoted passage, Justice McIntyre wrote:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Andrews, *supra* note 2 at para 37.

84. *Ibid* at para 26.

85. *Ibid*.

86. *Ibid*. See also McIntyre, *supra* note 32 at 100.

87. *Andrews*, *supra* note 2 at para 44.

88. *Ibid* at para 43.

89. *Ibid* at para 46.

compelled to embrace Substantive Equality as Equal Recognition as an attractive juridical conception of substantive equality under section 15(1) of the *Charter*.

B. SUBSTANTIVE EQUALITY AS EQUAL RECOGNITION IS DISCLOSED BY THE FOUR *ANDREWS* PRINCIPLES

1. THE IDEA OF FORMAL EQUALITY

What does formal equality amount to? I claim that it attends only to equality in the law's vertical application by the state to citizens independently of the law's effects. As Justice McIntyre noted in *Andrews*, state governance consists in using laws to classify general categories of citizens in society and to carve them out for certain kinds of treatment different from the treatment given to those excluded from the categorization.⁹⁰ Citizens caught within these categories are deemed to be similarly situated. Formal equality requires only that the vertical application of a law must affect equally each member of a group carved out by a legislative classification. Thus, those similarly situated must be treated similarly.

Formal equality in pre-*Charter* interpretation of the *Bill of Rights* grew out of a Diceyan view of the rule of law, which requires "the equal subjection of all classes to the ordinary law of the land."⁹¹ Justice Rand famously expressed this view in *Roncarelli v Duplessis*.⁹² In that case, Quebec Premier Maurice Duplessis had revoked Frank Roncarelli's liquor licence for posting bail for a group of Jehovah's Witnesses. The statute pursuant to which he acted allowed him to revoke licences at his discretion. Justice Rand wrote that, as regards public officials, "there is no such thing as absolute and untrammelled 'discretion,' that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator."⁹³ For Justice Rand, the law as a totality must apply equally to all members of society, regardless of whether they hold public office.⁹⁴ Premier Duplessis's conduct offended the rule of law because he exempted himself as a public official from the law's application through an exercise of discretion

90. For a philosophical discussion of this matter, see WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007) at 194-97.

91. Walter S Tarnopolsky, "The Equality Rights (Ss. 15, 27 and 28)" in Walter S Tarnopolsky & Gérald A Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) 395 at 399, citing AV Dicey, *Introduction to the Law of the Constitution*, 10th ed, ed by ECS Wade (London, UK: Macmillan, 1961) at 202-203.

92. [1959] SCR 121, 16 DLR (2d) 689.

93. *Ibid* at para 41.

94. Tarnopolsky, *supra* note 91 at 400.

unrestrained by law.⁹⁵ Dicey's view of the rule of law was also adopted in *Lavell* by Justice Ritchie, who wrote that "equality before the law' as recognized by Dicey as a segment of the rule of law, carries the meaning of equal subjection of all classes to the ordinary law of the land."⁹⁶

Formal equality, or the similarly situated test, amounts to a microcosmic version of Dicey's view of the rule of law. Dicey's view is that the law in toto must apply equally to all citizens in society, regardless of whether they wield public power. Formal equality holds that a particular law must apply equally to all citizens carved out and classified into a particular category by the law.

We can find this understanding of formal equality in *Gonzales*. Justice Tysoe wrote that there exists in Canada "a right in every person to whom a particular law relates or extends ... to stand on an equal footing with every other person to whom that particular law relates or extends."⁹⁷ He reasoned that the prohibition against Aboriginals possessing intoxicants off reserve was not racially discriminatory because every Aboriginal person to whom the law creating the offence extended was equally subject to the offence.

Although Justice Ritchie putatively rejected this reasoning in *Drybones*, his decision in *Drybones* was still influenced by the similarly situated test. He held that the *Bill of Rights* required that all laws enacted by the federal government be applied equally to all those to whom they extend.⁹⁸ The combination of the federally-enacted *Indian Act*, which prohibited Aboriginals from being intoxicated off reserve, and the federally-enacted *Criminal Code*, which contained no similar prohibition for non-Aboriginals, entailed that federal laws in toto did not apply equally to all those to whom they extend. In other words, an expansive construction of the category of citizens demarcated by federal law, which contemplated all Canadian citizens subject to the *Criminal Code* and, within that category, Aboriginals subject to the *Indian Act*, meant that those who were similarly situated under federal law as a totality were not treated similarly.⁹⁹ Justice Ritchie therefore held that the prohibition in *Drybones* was discriminatory.¹⁰⁰

95. This view of the rule of law was affirmed more recently in the *Secession Reference*, where the Court claimed that "the law is supreme over the acts of both government and private persons." See *Re Secession of Quebec*, [1998] 2 SCR 217 at para 71, 161 DLR (4th) 385.

96. *Lavell*, *supra* note 78 at 1366.

97. *Gonzales*, *supra* note 75 at para 23 [emphasis in original].

98. *Drybones*, *supra* note 76 at 297.

99. This was essentially how Ritchie J understood *Drybones* when referring to it in *Lavell*. *Lavell*, *supra* note 78 at 1372.

100. Ritchie J stated that a person is denied equality "if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence." *Drybones*, *supra* note 76 at 297.

This covert acceptance of formal equality in *Drybones* might explain why its connection with the rule of law was implicitly reinforced in *Bliss* and *Lavell*. In *Bliss*, Justice Ritchie defined equality as the equal administration and enforcement of the law.¹⁰¹ He also accepted the Federal Court of Appeal's definition of the right to equality as "the right of an individual to be treated as well by the legislation as others who ... would be judged to be in the same situation."¹⁰² In finding that the law in the instant case, which denied unemployment insurance to pregnant women, did not discriminate against women, he agreed with the Court of Appeal that the law did not treat unequally those to whom it applied. Those similarly situated under the law (both men and women) were treated similarly; those excluded from the law's classification (all pregnant persons) were equally denied insurance benefits.¹⁰³

In *Lavell*, Justice Ritchie explicitly connected equality under the *Bill of Rights* to the rule of law, stating that equality is "frequently invoked to demonstrate that the same law applies to the highest official of government as to any other ordinary citizen."¹⁰⁴ He found that the law requiring Aboriginal women to forfeit their Aboriginal status if they married a non-Aboriginal was not racially discriminatory. When combined with other federal laws, it did not treat Aboriginals differently from those situated similarly to them. It concerned "the internal regulation of the lives of Indians on Reserves,"¹⁰⁵ while other federal laws governed the Canadian citizenry generally. The claimant, who was subject to the impugned law when she was on reserve, was situated differently from non-Aboriginal Canadians, who were not subject to the law. Thus, she did not fall into the same legal category as non-Aboriginals, and it was not necessary that she be treated similarly to them under the federal laws applicable within that category. The claimant in *Lavell* was therefore distinguishable from the claimant in *Drybones*. Recall that in *Drybones* the claimant, when off reserve, was subject to the same federal laws governing the Canadian citizenry generally, including the *Criminal Code*, and fell into the same legal category as non-Aboriginals. Once he became similarly situated with non-Aboriginals in this way, it became necessary that he be treated similarly to them by the criminal prohibitions contained in the *Indian Act*.¹⁰⁶

101. *Bliss*, *supra* note 77 at 192.

102. *Ibid.*

103. *Ibid.* at 190-91. This is also McIntyre J's interpretation of *Bliss* in *Andrews*. *Andrews*, *supra* note 2 at para 29.

104. *Lavell*, *supra* note 78 at 1366.

105. *Ibid.* at 1367.

106. See *ibid.* at 1372.

Lastly, the US Supreme Court in the objectionable *Plessy* case also drew upon a construction of formal equality in terms of a Diceyan view of the rule of law. *Plessy* upheld a law requiring railway companies to provide separate but equal accommodations for white and black persons. Justice Brown stated that a law does not violate the constitutional guarantee of equality unless it confers on public authorities “arbitrary power,” such as the power to give or withhold licences “at their own will, and without regard to discretion, in the legal sense, of the term.”¹⁰⁷ He held that the impugned statute was not unreasonable on this standard.¹⁰⁸ This line of thought parallels that of Justice Rand in *Roncarelli* in that it contains vestiges of the account of the rule of law developed in that case.

2. WHAT MAKES FORMAL EQUALITY UNACCEPTABLE?

What is it then that makes formal equality unacceptable? To be sure, a construction of formal equality in terms of a Diceyan view of the rule of law may be essential to promoting the ideal of equality, as it appeared to be in *Roncarelli*.¹⁰⁹ However, borrowing from the writing of Sheila McIntyre, I claim that the formal equality paradigm frequently involves the “application of the law with one’s eyes shut.”¹¹⁰ In attending only to equality in the law’s application by the state, rather than the social context in which the law’s application takes place, the paradigm ignores how similar treatment of those similarly situated under a law can reflect, through the law’s vertical effects, horizontal inequalities among citizens in society. For example, the equal vertical application of the Nuremberg laws to all those they carved out for similar abhorrent treatment transmitted the subordinate status of Jewish identity and culture that existed horizontally within Nazi Germany society.

In *Gonzales* and *Lavell*, the law’s vertical application transmitted the horizontal status hierarchy existing between subordinate Aborigines and dominant non-Aborigines. In denying Aborigines the ability to possess intoxicants off reserve, the law in *Gonzales* in effect treated Aborigines as unworthy of doing what non-Aborigines were able to do with widespread public social approval, implying that the Aboriginal life style was deficient relative to that of non-Aborigines. The law in *Lavell* produced an outcome that deprived Aboriginal women of their cultural identification. In requiring Aboriginal women to forfeit their

107. *Plessy*, *supra* note 73 at 550.

108. *Ibid.*

109. I am indebted to an anonymous reviewer for prompting me to acknowledge this point. For further discussion, see Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 302, n 26.

110. McIntyre, *supra* note 32 at 103.

Aboriginal status if they married non-Aboriginals, it gave the force of law to the subordination of both Aboriginal identity to non-Aboriginal identity and female identity to male identity.¹¹¹ It therefore reflected the oppression that characterizes the horizontal status hierarchies between these groups by transmitting an image of Aboriginal culture and femininity as Other relative to non-Aboriginal culture and masculinity, respectively. Finally, in denying insurance benefits to pregnant women, the law in *Bliss* failed to respect women's particular way of being-in-the-world, mirroring how women's values and ways of being are subordinated by being defined as deviant relative to the values and ways of being of men. This is all true despite how the law in these cases applied equally to subordinated social groups by treating similarly all those it classified for similar treatment.

It is also instructive to observe that in *Plessy*, unlike in the pre-*Charter* equality cases, Justice Brown examined the interaction between the law's vertical application and the horizontal status hierarchy in American society whereby blacks are subordinated by whites. However, he found that the former did not transmit the latter. He rejected the argument that "the enforced separation of the two races stamps the colored race with a badge of inferiority" even though he implicitly recognized that blacks are in an "inferior position" while whites hold a position of "dominant power."¹¹² Justice Harlan, who dissented, argued that the statute was discriminatory because its vertical impact reflected the American black-white status hierarchy. He wrote:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power ... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.¹¹³

Thus, Justice Harlan denounced the separate but equal doctrine associated with formal equality for failing to attend to the social context in which a law applies.

111. This statement draws upon the idea that discrimination can occur on the basis of the multiple, intersecting grounds of race and sex. For further discussion of this concept of intersectionality, see 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; Nita Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" in David Dyzenhaus, Sophia Reibetanz Moreau & Arthur Ripstein, eds, *Law and Morality: Readings in Legal Philosophy*, 3d ed (Toronto: University of Toronto Press, 2007) 480.

112. *Plessy*, *supra* note 73 at 551.

113. *Ibid* at 559.

Putting all this together, a conception of formal equality rooted in Dicey's view of the rule of law unacceptably ignores the transmission of horizontal status hierarchies through a law's equal vertical application to all those it classifies for similar treatment. Hence, Justice McIntyre's rejection of formal equality in *Andrews* in favour of a substantive equality approach to section 15(1) of the *Charter* laid down the principle that a law is discriminatory when it reflects, through its vertical impact, horizontal status hierarchies in society. This is, I submit, the exact claim made by Substantive Equality as Equal Recognition.

This submission is capable of further support. Consider that a common admonition of the formal equality paradigm is that its recommendation of rigid proceduralism when analyzing equality claims fails to consider the substantive social outcomes of a law's formal application.¹¹⁴ The state of affairs of formal equality (wherein those similarly situated are treated similarly) tends to be realized by a methodology that privileges the decontextualized application of rules to facts. I have claimed that formal equality rests on a Diceyan view of the rule of law. Notice that the Supreme Court of Canada has invoked such a view when developing the rules of procedural fairness in constitutional and administrative law.¹¹⁵ This affinity between the doctrine of procedural fairness in public law and the Diceyan view of the rule of law explains why formal equality has a distinctive yet unacceptable procedural nature.

Additionally, some Supreme Court of Canada decisions since *Andrews* have closely approximated Substantive Equality as Equal Recognition. In *Vriend v Alberta*, the Court held that Alberta's human rights legislation infringed section 15(1) by not including sexual orientation as a prohibited ground of discrimination.¹¹⁶ Justice Cory indicated how the effects of the legislative omission reflected the subordinate status of homosexuals and depicted their identity as less worthy of approval relative to that of heterosexuals: "Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection."¹¹⁷ In *M v H*, the Court held that Ontario's *Family Law Act* was discriminatory because it excluded same-sex couples from its spousal

114. See e.g. Sheppard, *supra* note 20 at 39; McIntyre, *supra* note 32 at 105.

115. See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 53, 174 DLR (4th) 193. See also David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27:2 Queen's LJ 445 at 447-48.

116. Judy Fudge also explains the *Vriend* decision in terms of recognition theory. See Fudge, *supra* note 66 at 341.

117. *Vriend*, *supra* note 22 at para 102.

support provisions. The exclusion promoted the view that individuals in same-sex relationships are “less worthy of recognition and protection” and “incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples.”¹¹⁸ The congruency of these dicta with Substantive Equality as Equal Recognition supports the theory’s viability as a juridical conception of substantive equality under the *Charter*.

Finally, one clear ambition of Canadian constitutional equality jurisprudence since *Andrews* has been to repudiate the separate but equal treatment doctrine of *Plessy*. It is therefore important to appreciate how the US Supreme Court itself repudiated that doctrine in *Brown v Board of Education of Topeka*.¹¹⁹ Chief Justice Warren’s judgment in that case closely approximated Substantive Equality as Equal Recognition by holding that “it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”¹²⁰ *Brown* struck down laws in four US states that required segregation of black and white children in public schools because the laws were racially discriminatory contrary to the US Constitution’s equality guarantee. Chief Justice Warren stated that separating black children from others of similar age and qualifications solely because of their race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹²¹ Echoing the judgement of Justice Harlan in *Plessy*, this statement expresses the view that the impugned laws were discriminatory because their vertical application reflected the black-white status hierarchy in American society. They did this by giving the force of law to the subordinate status of black persons and to the oppressive characterization of their identity and worth as inferior relative to white persons’ identity and worth.

The rationale animating *Brown*’s rejection of the separate but equal treatment doctrine was carried forward in the 1967 case of *Loving v Virginia*,¹²² in which the US Supreme Court invalidated a law prohibiting interracial marriage because it enforced a racial status hierarchy.¹²³ Chief Justice Warren wrote that there was no purpose other than “invidious racial discrimination” which justified the impugned law: “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on

118. *M v H*, [1999] 2 SCR 3 at para 73, 171 DLR (4th) 577.

119. 347 US 483, 74 S Ct 686 (1954) [*Brown* cited to US].

120. Reva B Siegel, “Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*” (2004) 117:5 Harv L Rev 1470 at 1472-73, 1484-89.

121. *Brown*, *supra* note 119 at 494.

122. 388 US 1, 87 S Ct 1817 (1967) [*Loving* cited to US].

123. Siegel, *supra* note 120 at 1503.

their own justification, as measures designed to maintain White Supremacy.”¹²⁴ In carrying *Brown’s* reasoning forward in this way, the US Supreme Court again closely approximated Substantive Equality as Equal Recognition.

3. OTHER PRINCIPLES FROM *ANDREWS*

Before concluding Part III, and for the sake of completeness, I will briefly show how Substantive Equality as Equal Recognition is also disclosed by the other three legal principles articulated in *Andrews*. Doing so is necessary to fully demonstrate the credentials of the theory as a juridical conception of substantive equality.

First, Justice McIntyre’s acknowledgment of adverse effects discrimination in *Andrews* supports the theory by demonstrating that a statute could reflect horizontal status hierarchies through its vertical outcomes even if the legislature does not intend to do so or if the law is facially neutral. In fact, this was precisely the situation in *Vriend v Alberta*, where a legislative omission in Alberta’s human rights legislation reflected the subordinate status of homosexual persons.

Second, Substantive Equality as Equal Recognition mandates a comparative approach to analyzing equality claims under section 15(1). That is, determining whether a law transmits status hierarchies requires examining the relations of oppression and subordination that constitute such hierarchies. The theory is thus consistent with academic endorsement of the comparative nature of substantive equality. Beverley Baines’s remarks provide a fine example of this endorsement. She writes:

the main task of this principle is not classification of harms, but comparison of those who are harmed with those who harm. In effect, the substantive equality principle exposes the relations of power between those who are privileged and those who are not, between oppressors and the oppressed, and between dominance and subordination.¹²⁵

In mandating a comparative approach to equality claims in this fashion, Substantive Equality as Equal Recognition presupposes a relational conception of

124. *Loving*, *supra* note 122 at 11.

125. Baines, *supra* note 29 at 81. See also McIntyre, *supra* note 32 at 103; Young, *supra* note 21 at 197-98.

the self.¹²⁶ This is because, given its incorporation of the concept of recognition, it holds that a person's authentic identity is constructed in comparison with social groups other than her own. It is worth noting that this presupposition gives the theory added ammunition against the formal equality paradigm, as the Diceyan view of the rule of law on which formal equality rests presupposes an individualistic conception of the self. An individualistic conception of the self sees personal identity as a product of rational free choice unencumbered by relations with others and political liberty as organized around the need to preserve individual autonomy.¹²⁷ By insisting on the equal formal application of the law to those similarly situated, the Diceyan view of the rule of law regards the conferral of untrammelled discretion on public officials as unjustifiably subjecting citizens to arbitrary coercion by the state. That is, official discretion undermines citizens' expectations about the limits of the state's ability to interfere with their liberty and about the parameters within which they may make choices and pursue their life plans free from such interference.¹²⁸ According to D.J. Galligan's description:

Coercion of this kind is a deprivation of liberty in a special and negative sense; that is, the liberty that results from having a sphere of activity protected by rules, and within which officials may not interfere except in accordance with the rules. ... Where power is exercised according to known and general rules, the individual is able to live within those roles, and will be coerced only if by his own choice he puts himself in violation. In such a situation he is free in so far as there are parameters within which he must live, and within those parameters he may make choices, and he is free from official interference in doing so. Conversely, where officials are given powers which may be exercised in ways which interfere with the individual and his private interests, and where it is left to officials to decide in their discretion under

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126. For discussion of the relational conception of the self, see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012) ch 1; John Christman, "Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves" (2004) 117:1-2 *Phil Stud* 143 at 144-56. Richard Moon explicitly ties a relational theory of the self into the protection of equality under s 15(1) of the *Charter* in the context of discussing the constitutional protection of freedom of expression in Canada. See Richard Moon, "Accommodation without Compromise: Comment on *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 51 *Sup Ct L Rev* (2d) 96 at 113.
127. See Catriona Mackenzie & Natalie Stoljar, "Introduction: Autonomy Refigured" in Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000) 3 at 4-5.
128. See the discussion in Gus Van Harten, Gerald Heckman & David J Mullan, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Emond Montgomery, 2010) at 951-57.

what circumstances and in what ways interference may occur, then the individual is threatened with a form of coercion that infringes his liberty.¹²⁹

The problem for formal equality is that the Supreme Court of Canada has eschewed reliance on an individualistic conception of the self to resolve constitutional challenges.¹³⁰ Most importantly, it did so in *Quebec v A*.¹³¹ In that case, Justice Abella explicitly adopted the relational conception of the self, individual choice, and autonomy defended by such theorists as Margot Young.¹³² I shall return to the notions of choice and autonomy below.

Third, Substantive Equality as Equal Recognition allows that not every legislative distinction is discriminatory under the *Charter*. According to the theory, subordinate groups are disadvantaged in that the particularity of their identity is obscured by being defined as deviant relative to the identities of dominant groups. The remedy for this disadvantage is a measure that emphasizes the group's differentiation and specificity rather than its juxtaposition with other groups. In this sense, the remedial measure is ameliorative. It is therefore consistent with the assertion that it is permissible for the state to create some non-discriminatory distinctions among citizens.¹³³

129. DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, UK: Clarendon Press, 1990) at 202-203.

130. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 85-92, [2013] 3 SCR 1101 [*Bedford*].

131. *Quebec v A*, *supra* note 7 at paras 336, 338-347, Abella J.

132. *Ibid* at para 342; Young, *supra* note 21 at 193-94.

133. For these reasons, Substantive Equality as Equal Recognition could potentially ground a theory of ameliorative programs under s 15(2) of the *Charter*. The Court has stated that s 15(2)

is aimed at permitting governments to *improve* the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality. It does this by affirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of s. 15(1) by excluding other groups. It is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at para 40, 2 SCR 670 [emphasis in original]. For recent insightful academic discussion of s 15(2), see Tremblay, *supra* note 44; Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2010) 47:4 *Alta L Rev* 927; Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013) 63 *Sup Ct L Rev* (2d) 521.

IV. DISCRIMINATION AS THE NEGATION OF RECOGNITION: RESPONSES TO OBJECTIONS

I now respond to objections to Substantive Equality as Equal Recognition's account of the wrong of discrimination, *i.e.*, discrimination as the negation of recognition. As explained above, on this account the wrong of discrimination consists in the disruption of individuals' dialogical construction of their identity, a disruption that is brought about by their identities' negative juxtaposition as Other relative to those of dominant social groups. This juxtaposition obscures oppressed groups' authentic self-conceptualization of their own particular life styles.

The two kinds of objections that this account must confront are posed by pluralist theories and competing unitary theories of the wrong of discrimination. I will first discuss pluralist theories.

A. RESPONSES TO PLURALISM

The account of discrimination that appeals to the negation of recognition posits exactly one factor that makes discrimination wrong. It thus invites the objection that many factors make discrimination wrong, with no one factor being reducible to another. Sophia Moreau argues in favour of such a pluralist view of discrimination.¹³⁴ On her argument, stereotyping, prejudice, the denial of access to basic goods, and the perpetuation of oppressive power relations are all explanations of the wrong of discrimination that “are not reducible to a single, unifying explanation.”¹³⁵

The factor of the perpetuation of oppressive power relations is similar to the account of the wrong of discrimination as the negation of recognition produced by status hierarchies. Therefore, to defend the account from pluralist objections, I will focus on the other three factors articulated by Moreau—stereotyping, prejudice, and the denial of access to basic goods.

1. STEREOTYPING IS REDUCIBLE TO THE NEGATION OF RECOGNITION

Moreau describes stereotyping as a generalized depiction of a social group that is treated by another group as capturing an essential feature of individuals

134. Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 294.

135. *Ibid.* Moreau also seems to suggest that the diminishment of individuals' feelings of self-worth is also a *sui generis* wrong of discrimination. However, she states that “this way of understanding the wrong of unequal treatment cannot stand on its own as a complete explanation of why certain forms of differential treatment are unacceptable” (*ibid* at 313). For this reason, I do not include it in my discussion of pluralism in this article.

belonging to the first group. Stereotypes are wrong because they “have been adopted by one group as a description of other individuals, rather than derived from these individuals’ own attempts at self-definition.”¹³⁶ Rather than being allowed to present her identity as she conceptualizes it, the stereotyped individual is presented in a manner of another’s choosing.¹³⁷

I contend that the plight of the stereotyped individual on Moreau’s description is identical to that of members of subordinate groups in status hierarchies posited by Substantive Equality as Equal Recognition. The cultural values and life styles of subordinate groups in status hierarchies are characterized in a manner of another’s choosing; they are defined as deviant relative to the cultural values and life styles of dominant groups. In this sense, the identities of subordinate groups’ members are conceived of as juxtaposed to the identities of dominant groups, rather than as authentically self-defined through their dialogical recognition by others living in their social community. Indeed, Iris Marion Young explicitly appeals to stereotyping to articulate the phenomenon of cultural imperialism that Substantive Equality as Equal Recognition draws upon: “As remarkable, deviant beings, the culturally imperialized as stamped with an essence ... These stereotypes so permeate the society that they are not noticed as contestable.”¹³⁸

Hence, stereotypes permeate the structures of oppression found within status hierarchies. Because discrimination produced by a law that reflects status hierarchies is wrongful because it negates individuals’ recognition, the wrong of stereotyping is reducible to the wrong of the negation of recognition.

2. PREJUDICE IS REDUCIBLE TO THE NEGATION OF RECOGNITION

For Moreau, prejudice is a belief in the inferiority of another that “involves a malicious desire to ... cause harm to him.”¹³⁹ When perpetrated by the state, it involves the active setting out by the government to harm citizens. The wrong of prejudice thus amounts to an abuse of government power.¹⁴⁰

An intuitively plausible story can be told about how prejudice, understood in terms of attitudes of animus or contempt towards an individual, is an outgrowth

136. *Ibid* at 298.

137. *Ibid* at 299.

138. Young, *Politics of Difference*, *supra* note 49 at 59.

139. Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 302. For a similar view of prejudice, see Denise Réaume, “Dignity and Discrimination” (2003) 63:3 Louisiana L Rev 646 at 679. Réaume, however, argues that the wrong of prejudice is explicable in terms of the way it attacks others’ human dignity. I address her views in Part III(B)(1), below. LeBel J cites her definition of prejudice in *Quebec v A*. *Supra* note 7 at para 195.

140. Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 302-303.

of horizontal status hierarchies. Status hierarchies involve the negative characterization of the life styles of subordinate groups as deficient, inferior, and unworthy of moral approval. This manner of oppression by dominant groups can become compounded and magnified through time as it becomes further entrenched and invisible. It can thereby transform beyond mere belief in the inferiority of subordinate groups relative to established social norms into an active desire to harm members of subordinate groups simply because they are conceived as deviant or Other.

In this way, the negation of recognition produced by status hierarchies can legitimize in the minds of dominant groups acts of violence towards subordinate groups. Such violence is systemic in nature: “it is directed at members of a group simply because they are members of that group.”¹⁴¹ The systemic legitimation of violence leaves members of subordinate groups in a further state of oppression. This further oppression takes the form of a constant threat of harm that subordinate groups may face because, due to their group membership, they are constantly liable to be harmed without concomitant social and moral disapproval. For example, systemic animus towards women can leave them persistently liable to acts of rape, harassment, or attack that are publicly conceived as normal or acceptable.

According to Substantive Equality as Equal Recognition, if a law transmits status hierarchies it is discriminatory in that it negates the recognition of the authentic identities of subordinate groups. The law thus potentially transmits the systemic violence that can accompany status hierarchies. If it does so, it amounts to state action that transmits the animus held by dominant groups towards subordinate groups. It then constitutes an abuse of state power. Since these features of the law describe its prejudicial quality on Moreau’s view, her account of the wrong of prejudice is reducible to the wrong of the negation of recognition.

3. THE DENIAL OF ACCESS TO BASIC GOODS DOES NOT EXPLAIN THE WRONG OF DISCRIMINATION

A third factor that makes discrimination wrong on Moreau’s view is that it denies citizens access to basic goods. These goods are deemed to be important because of their contribution to an individual’s wellbeing, or because having them is a

141. Young, *Politics of Difference*, *supra* note 49 at 62-63.

necessary condition to function as an equal in society.¹⁴² Moreau writes that “if the government wishes to legislate over a certain matter and to provide certain benefits, it must do so in a way that does not leave the most disadvantaged groups in our society without access to the relevant basic goods.”¹⁴³ Hence, for Moreau the wrong of discrimination has a redistributive dimension beyond the symbolic, representational, and cultural dimension exclusively ascribed to discrimination when it is construed as the negation of recognition.¹⁴⁴

There are, however, two difficulties with the idea that the wrong of discrimination derives from a redistributive concern about access to basic goods. First, the Supreme Court of Canada has historically been reticent to find violations of section 15(1) of the *Charter* when equality claimants challenge laws on the basis that they deny access to basic goods. Judy Fudge claims: “The closer an equality claim is pitched to the recognition pole of the injustice spectrum, the more likely that the Supreme Court of Canada will uphold it.”¹⁴⁵ Similarly, Ran Hirschl argues that despite Canada’s strong commitment to Keynesian welfare state values, section 15(1) of the *Charter* has not been interpreted to protect subsistence rights to basic goods. The Court “has repeatedly rejected claims that would have required the state to provide benefits to rights holders, either directly through a social program (*e.g.*, health care, unemployment benefits) or indirectly

142. Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 307-308. Réaume similarly argues that the denial of benefits makes discrimination wrong, but reduces this factor to its infringement of human dignity, writing that it is wrongful “only if the benefit at stake is important to a life of dignity.” Réaume, “Dignity and Discrimination,” *supra* note 139 at 687. For other authors who interpret the concept of equality in terms of sufficient access to important basic goods, see Derek Parfit, “Equality or Priority?” (1997) 10:3 *Nous* 202; Harry Frankfurt, “Equality as a Moral Ideal” (1987) 98:1 *Ethics* 21.

143. Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 309 [original emphasis removed].

144. On the difference between recognition and redistribution, see Fraser, *supra* note 42 at 68-75; Fudge, *supra* note 66 at 339-50; Sujit Choudhry, “Distribution vs. Recognition: The Case of Antidiscrimination Laws” (2000) 9:1 *Geo Mason L Rev* 145.

145. Fudge, *supra* note 66 at 341. See also Andrée Lajoie, Éric Gélinau & Richard Janda, “When Silence is no Longer Acquiescence: Gays and Lesbians under Canadian Law” (1999) 14:1 *CJLS* 101, cited in Fudge, *supra* note 66 at 341. Lajoie, Gélinau and Janda argue that “[t]o the extent that Charter claims brought by lesbians and gay men cleave closely to the recognition pole of injustice claims and do not involve redistribution they are likely to be upheld” (*ibid* at 342).

through legislation that imposes obligations on private actors.”¹⁴⁶ These observations suggest that an account of the wrong of discrimination that appeals to the negation of recognition—such as the account generated by Substantive Equality as Equal Recognition—is a more viable candidate for a juridical conception of substantive equality under the *Charter* than an account which appeals to redistributive concerns, such as the denial of access to basic goods.

The second difficulty with an access to basic goods approach is found at a deeper conceptual level. The difficulty is that our intuitions about discrimination and the denial of access to basic goods seem to come apart too easily for the former to be a plausible explanation of the latter.

On the one hand, a citizen can be denied access to basic goods by the state without intuitively being (at least directly) discriminated against. The state might deny her unemployment insurance for reasons concerning redistributive policy and fiscal responsibility that are not intentionally discriminatory. Alternatively, a state official could deny certain benefits to a politically antagonistic group of physically disabled individuals, not because of their membership in that group but simply to seek revenge for such political antagonism. To fix ideas we could further imagine that if the antagonistic group was characterized by a different prohibited ground of discrimination, for example, age, the official would still have denied it benefits out of a vengeful motive without regard for the group’s characteristics. The denials of goods in these situations might of course be wrongful, but that does not seem to be because they are discriminatory.

On the other hand, we can imagine a situation in which members of a group of citizens are directly discriminated against because of their membership in that group, but where these citizens are not denied access to basic goods. Consider a society containing a status hierarchy between speakers of English as the dominant group and speakers of French as the subordinate group. English-speakers oppress French-speakers by defining the French linguistic heritage as deviant relative to the English linguistic heritage. Suppose that the state in this society enacts a law that prohibits the use of the French language in the public sphere. According to Substantive Equality as Equal Recognition, this law is discriminatory because its

146. Ran Hirschl, “Canada’s Contribution to the Comparative Study of Rights and Judicial Review” in Linda A White et al, eds, *The Comparative Turn in Canadian Political Science* (Vancouver: UBC Press, 2008) 77 at 84-85. Among the cases that Hirschl cites to support this claim are *Gosselin*, in which the Court decided that s 15(1) does not entail substantive obligations to provide adequately for disadvantaged groups relying on social assistance, and *Auton*, in which the Court held that provincial health care plans are not required to fund special treatment regimes for autistic children. See *Gosselin*, *supra* note 31; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657.

vertical application reflects the English-French status hierarchy that exists horizontally in the hypothesized society. Its outcome is the negation of the recognition of French-speakers' authentic self-conceptualization of their own identities.

It might be argued that what makes this scenario discriminatory is not the negation of recognition of French-speakers' identity, but the fact that the prohibition of the French language in the public sphere denies French-speakers access to certain basic goods, such as the court system or other mechanisms of government. We can, however, modify the scenario by supposing further that, whenever a French-speaker applies to engage the courts or for access to a particular benefit conferred by the state, she is given a French-English interpreter that allows her to navigate the system designed to confer the benefit notwithstanding her inability to understand English. We can then see that the scenario contains discriminatory treatment explicable by the negation of recognition even though it allows for subordinate groups to have comprehensive access to basic goods.

These difficulties lead to the conclusion that the denial of access to basic goods is not a plausible explanation of the wrong of discrimination. Moreover, an account of the wrong of discrimination in terms of the negation of recognition succeeds where the account in terms of access to basic goods fails.

It is important to note, however, that it does not follow from this conclusion that a wrongful consequence of the negation of recognition could be a distributive injustice whereby subordinate groups are denied access to basic goods. Indeed, one effective way to ameliorate the condition of those who suffer a negation of recognition that is given the force of law could be to redistribute economic resources to them.¹⁴⁷ Furthermore, it does not follow that redressing the situation of those who lack access to basic goods, such as the homeless and indigent, is not an important public goal to be pursued. The above conclusion only entails that such a goal is not identical to the goal of eliminating discrimination against subordinate groups. The former goal responds to the interest in satisfying basic human needs, rather than the interest in anti-discrimination. In Iris Marion Young's words, the moral obligation to improve the material situation of the least well-off "derives not from the fact of inequality as such, but from the fact of need. It is wrong for some people to lack what they need to live a minimally decent life when others are able to contribute to meeting those needs at relatively little costs to themselves."¹⁴⁸

147. Fraser, *supra* note 42 at 72-73; Balkin, *supra* note 41 at 2322.

148. Iris Marion Young, "Equality of Whom? Social Groups and Judgments of Injustice" (2001) 9:1 *Pol Theory* 1 at 7.

B. RESPONSES TO COMPETING UNITARY THEORIES

In positing the negation of recognition as explanatorily basic, the account of the wrong of discrimination generated by Substantive Equality as Equal Recognition also invites the objection that other singular factors besides the negation of recognition constitute the basic explanation of the wrong of discrimination. Such competing unitary theories might alternatively appeal to either the wrong of violating human dignity or the wrong of violating autonomy as the sole wrong of discrimination. I will consider and criticize these two contentions in what follows.

1. HUMAN DIGNITY-BASED THEORIES

It is well known that in *Law*, Justice Iacobucci identified the purpose of section 15(1) of the *Charter* as the protection of human dignity.¹⁴⁹ Despite acknowledging the indeterminacy and abstractness of the concept of human dignity,¹⁵⁰ he defined it in terms of the values of individual self-worth, self-respect, and physical and psychological integrity and empowerment. In a manner that tellingly mirrors the importance of subordinate social groups' recognition under the theory of Substantive Equality as Equal Recognition, Justice Iacobucci wrote that human dignity is infringed "when individuals and groups are marginalized, ignored, or devalued," and is enhanced "when laws recognize the full place of all individuals and groups within Canadian society."¹⁵¹ As we shall see momentarily, this parallel is far from coincidental.

It is also well known that the human dignity approach to section 15(1) was repudiated in *Kapp*. In that case, Chief Justice McLachlin and Justice Abella, relying on voluminous academic criticism, offered three reasons for this repudiation. First, human dignity is an "abstract and subjective notion" that makes it "confusing and difficult to apply."¹⁵² Second, its adoption as a legal test in *Law* imposed an additional burden of proof on equality claimants instead of providing enhanced protection against discrimination. Third, the legal test from *Law* permitted a formalistic approach to analyzing equality claims resembling the similarly situated test when used to identify relevant comparator groups.¹⁵³

The view that the violation of human dignity explains the wrong of discrimination under section 15(1) has survived notwithstanding its repudiation in

149. See *Law*, *supra* note 6 at para 51.

150. *Ibid* at para 52.

151. *Ibid* at para 53.

152. *Kapp*, *supra* note 6 at para 22.

153. *Ibid*.

Kapp. Justice LeBel adopted it in his dissenting judgment on how to interpret section 15(1) in *Quebec v A*. He wrote that “[the] value of substantive equality at the heart of s. 15 is closely tied to the concept of human dignity,” and that the purpose of section 15(1) is “to eliminate any possibility of a person being treated in substance as ‘less worthy’ than others.”¹⁵⁴ However, I contend that the view cannot ground a plausible juridical conception of the wrong of discrimination under section 15(1). This is partly because the protection of human dignity underlies *all* the rights within the *Charter* as a whole.

Chief Justice Dickson first stated that the protection of human dignity underlies all *Charter* rights in *R v Oakes*.¹⁵⁵ Chief Justice McLachlin and Justice Abella adopted his reasoning when they rejected a human dignity-based account of the wrong of discrimination in *Kapp*.¹⁵⁶ Indeed, the Court has held that a violation of human dignity explains the wrong of being deprived of life, liberty, and security of the person in a manner that does not accord with the principles of fundamental justice, contrary to section 7 of the *Charter*¹⁵⁷ and the wrong of unreasonable search and seizure under section 8 of the *Charter*.¹⁵⁸ Furthermore, in *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*,¹⁵⁹ the Court held that collective bargaining is constitutionally protected as an incident of the fundamental freedom of association guaranteed by section 2(d) of the *Charter*. The majority judgment in that case argued that the protection of collective bargaining promotes the constellation

154. *Quebec v A*, *supra* note 7 at para 138, citing *Gosselin*, *supra* note 31 at para 138.

155. [1986] 1 SCR 103 at para 64, 26 DLR (4th) 200.

156. McLachlin CJ and Abella J wrote: “the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity.” See *Kapp*, *supra* note 6 at para 21.

157. See *e.g. R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385, Wilson J; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 21, 107 DLR (4th) 342. For discussion of the general point made in this sentence, see Donna Greschner, “The Purpose of Canadian Equality Rights” (2002) 6:1 Rev Const Stud 291 at 302. It has even been claimed that the protection of human dignity is a principle that has been adopted to explain the underlying values of constitutional rights in other jurisdictions, such as Germany and South Africa. See *e.g.* Lorraine E Wienrib, “Human Dignity as a Rights-Protecting Principle” (2004/2005) 17 NJCL 325; 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 249; Dennis M Davis, “The Underlying Theory that Informs the Wording of Our Bill of Rights” (1996) 113:3 SALJ 385 at 385. See also Baines, *supra* note 29 at 74.

158. See *e.g. R v Edwards*, [1996] 1 SCR 128 at para 50, 132 DLR (4th) 31; *R v Godoy*, [1999] 1 SCR 311 at para 19, 168 DLR (4th) 257.

159. 2007 SCC 27, [2007] 2 SCR 391.

of values underlying the *Charter* as a whole, which includes first and foremost human dignity.¹⁶⁰

The value of human dignity therefore cannot explain the wrong of discrimination under section 15(1) in a way that is unique to and characteristic of the *Charter's* guarantee of equality.¹⁶¹ By contrast, Substantive Equality as Equal Recognition's explanation, which appeals to the negation of recognition, can do so because, as I have argued, it is disclosed by the foundational legal principles of equality outlined by Justice McIntyre in *Andrews*.

The inability of human dignity to uniquely demarcate the territory of section 15(1) evinces a second difficulty with using the concept to explain the wrong of discrimination. As was pointed out in *Kapp*—and, as mentioned earlier, even to some extent by Justice Iacobucci in *Law*—human dignity is too vague, malleable, abstract, and indeterminate a value to ground a conceptually rigorous understanding of the wrong of discrimination.¹⁶² While specifying the meaning of human dignity is a subject of controversy, a common starting point is the notion that for the state to treat all its citizens with equal dignity is to treat them with equal concern, respect, and consideration.¹⁶³ Since a human being has incomparable worth, she may be treated only as an end in herself, rather than a means for achieving some other desirable end.

Now, to be sure, this definition of human dignity might also be seen as underlying *Charter* rights other than section 15(1), such as the right against self-incrimination guaranteed by section 13.¹⁶⁴ Setting this difficulty aside, it is not surprising that agreement should coalesce around what is still an overly abstract definition of human dignity.¹⁶⁵ The problem is that, even if this definition

160. *Ibid* at paras 81-82.

161. Greschner, *supra* note 157 at 317.

162. For authors who argue along these lines, see Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law*, 2002" (2002) 20 Sup Ct L Rev (2d) 93 at 96-100 [Lawrence, "Developments in *Law*"]; Moreau, "Wrongs of Unequal Treatment," *supra* note 40 at 296; McIntyre, *supra* note 32 at 102.

163. For the classic statement of this notion, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977) at 272-73. It was adopted by Iacobucci J in *Law* as a definition of when the state treats all citizens with equal dignity. See *Law*, *supra* note 6 at para 51. For discussion of how the theory of Substantive Equality as Equal Recognition would interpret this abstract notion of human dignity that runs through the equality jurisprudence, see *supra* note 67 and accompanying text.

164. The idea is that requiring an individual to furnish evidence herself is to treat her as a mere means for achieving the end of crime control. See Hamish Stewart, "The Confessions Rule and the *Charter*" (2009) 54:3 McGill LJ 517 at 520-21.

165. Greschner, *supra* note 157 at 317, n 99.

is accepted, the notion that the state should treat all citizens as ends does not have sufficient explanatory content to tell us what kinds of state treatment fail to show respect for a human being's incomparable worth. One would therefore expect that any attempt to clarify the abstract notion would collapse it into a more determinate ideal that can better explain the nature of state action that treats citizens as means. The upshot would be that any appeal to human dignity itself is redundant.¹⁶⁶

To take an illustrative example, Denise Réaume's sustained attempt to elucidate a human dignity-based conception of the wrong of discrimination succumbs to precisely this problem. Réaume highlights two reasons why human beings have inherent dignity. First, we are capable of having a conception of the self, which makes respect for our identity essential to our dignity. Second, we are capable of choosing and pursuing a conception of the good, which makes respect for our plans and projects essential to our dignity.¹⁶⁷ However, the link between human dignity and identity makes Réaume's human dignity-based account collapse into an account premised on the negation of recognition, which, as I have argued, is wrong because of how it obscures the authentic identity of members of subordinate groups in horizontal status hierarchies. Furthermore, the link between human dignity and the ability to choose and pursue a conception of the good collapses Réaume's account into one premised on the values of self-determination and individual autonomy. This latter conflation is shared by the definition of human dignity espoused by Justice LeBel in *Quebec v A*:

The principle of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, is an integral part of the values of dignity and freedom that underlie the [*Charter's*] equality guarantee ... Safeguarding personal autonomy implies the recognition of each individual's right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices.¹⁶⁸

Because a human dignity-based conception of the wrong of discrimination is liable to collapse into competing accounts when one tries to define human dignity, it is preferable to discard that value and adopt one of the competing accounts. This approach is more likely to yield a conceptually rigorous understanding of the wrong of discrimination.

166. Moreau, "Wrongs of Unequal Treatment," *supra* note 40 at 296.

167. Réaume, "Dignity and Discrimination," *supra* note 139 at 677.

168. *Quebec v A*, *supra* note 7 at para 139.

In summary, I maintain that the concept of human dignity is, under closer inspection, an empty vessel that must be filled with the values countenanced by competing theories of the wrong of discrimination, in particular the value of authentic identity countenanced by recognition theory. Human dignity is “a jurisprudential Legoland—to be used in whatever form and shape is required by the demands of the judicial designer.”¹⁶⁹ The position I maintain is, however, compatible with regarding human dignity, which is after all one of the organizing principles of the *Charter* as a whole, as an abstract regulative ideal in which more precise theories of the wrong of discrimination ought to participate.¹⁷⁰ Indeed, when elucidating the theory of recognition that he defends, Taylor himself seems to suggest that this is the proper way to situate the value of recognition in relation to the concept of human dignity.¹⁷¹

2. AUTONOMY-BASED THEORIES

I have touched on the autonomy-based conception of the wrong of discrimination several times. Justice LeBel appeared to have this conception in mind in *Quebec v A* when he advanced the view that human dignity is the animating norm of section 15(1) of the *Charter*. Here, I shall criticize the autonomy-based account and, in the process, defend the account of the wrong of discrimination as the negation of recognition.

What does it mean to say that discrimination is wrong because of the wrong of violating individual autonomy? To be autonomous is to be self-determining, and to be self-determining is to be able to choose and pursue a conception of the good life free from interference by others, particularly the state. The importance of free and independent choice therefore lies at the heart of the protection of autonomy.¹⁷² Autonomy is violated by the state if the state treats citizens in a way that does not accord with the choices they have made. Treatment of this sort is wrong because it violates the general moral principle that the state’s treatment of citizens should not be based on factors that are “arbitrary from a moral point of view,”¹⁷³ such as the personal characteristics, attributes, and circumstances of individuals that are not chosen.

169. DM Davis, “Equality: The Majesty of Legoland Jurisprudence” (1999) 116:1 SALJ 398 at 413. See also Lawrence, “Developments in *Law*,” *supra* note 162 at 96-100.

170. Moreau, “Wrongs of Unequal Treatment,” *supra* note 40 at 296.

171. Taylor, *supra* note 43 at 37-41. See also Réaume, “Dignity and Discrimination,” *supra* note 139 at 677, n 106.

172. Mackenzie & Stoljar, *supra* note 127 at 5.

173. This phrase of course is borrowed from John Rawls. See John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) at 15.

The view that the violation of autonomy is what makes discrimination wrong under section 15(1) of the *Charter* receives support from the Supreme Court of Canada's decision in *Corbiere v Canada (Minister of Indian and Northern Affairs)*. The majority in that case stated that the prohibited grounds of discrimination under section 15(1) are immutable or constructively immutable personal characteristics; that is, either they are unchosen or to choose to change them is unfeasible because of the severe damage to individuality that such a choice would cause.¹⁷⁴ Following *Corbiere*, one might argue that to be discriminated against on the basis of a prohibited ground by the state is to have one's autonomy violated, since it is to be treated arbitrarily in a way that does not reflect one's choices.¹⁷⁵ On this argument, the prohibited grounds represent instances of personal characteristics that are likely to be arbitrary.¹⁷⁶ The wrong of discrimination therefore stems from the wrong of arbitrary state treatment that violates autonomy.

It might appear that, on the understanding of individual autonomy employed by this argument, the value of recognition collapses into that of autonomy. I hold that a person's self-understanding of her authentic identity as a worthy starting point from which to pursue a conception of the good depends on its recognition as similarly worthy simply because of its particularity to herself. The importance of recognition of a person's identity is, however, not identical to the importance of her ability to choose a conception of the good. Recognition is conceptually prior to autonomy. Our authentic identity is the "background against which our tastes and desires and opinions and aspirations make sense."¹⁷⁷ Choosing a conception of the good requires a person to have a background set of values and preferences in terms of which a conception of the good seems attractive or worthwhile to her. My authentic identity constitutes the dialogically constructed framework that I bring to bear on choosing between different conceptions of the good. From the perspective of this framework, I can regard a particular life project as worth choosing, given my life style and cultural context. Or, indeed, if the project is marked by high social prestige but I cannot regard my identity with similar esteem due to its denial of social recognition as worthy of the project, I may regard it as something that *I am not worthy of pursuing*. For recognition

174. *Corbiere*, *supra* note 22 at para 13.

175. But see Moon, *supra* note 126 at 113.

176. Choudhry, *supra* note 143 at 154 [emphasis in original]. Choudhry does not necessarily endorse the autonomy-based account of the wrong of discrimination. In his article he simply describes the account.

177. Taylor, *supra* note 43 at 33-34.

theory, a person strives not only for an autonomously chosen life but also for an individuated life that makes sense to her given her socially-situated identity.¹⁷⁸

This distinction between recognition and autonomy is significant when we consider a first problem for autonomy-based conceptions of the wrong of discrimination. The problem is that there can be situations where a person is denied autonomy but is not intuitively suffering discrimination and, conversely, situations where a person is intuitively suffering discrimination but is not denied autonomy. Paralleling the deficiency in an access-to-basic-goods approach to the wrong of discrimination, autonomy and discrimination seem to come apart too easily for the denial of the former to be a plausible explanation for the wrong of the latter.

To appreciate this problem, we must note that the protection and promotion of autonomy within a society requires the state to establish what Joseph Raz refers to as the “conditions of autonomy.”¹⁷⁹ Among these conditions is the provision of an adequate range of options from which citizens can choose and pursue a conception of the good. Without adequate options, an individual may be forced by circumstance or the acts of others to adopt a particular life plan. If that occurs, she does not genuinely choose that life plan but is rather coerced into it.¹⁸⁰

Now, the state can deny a person’s autonomy by revoking the adequate range of options necessary for her to exercise her free choice without intuitively discriminating against her in the process. For example, the state might imprison a citizen who has been convicted of a criminal offence. The imprisoned criminal does not suffer discrimination due to the simple fact of having been deprived of the range of options from which to choose a conception of the good. To consider a more fanciful example, the state might close all institutions of post-secondary education within its jurisdiction. In this situation, an individual citizen loses the option of acquiring post-secondary education, and therefore has her autonomy is diminished, but she is not intuitively discriminated against.

Conversely, the state might successfully provide a citizen with an adequate range of options to choose a conception of the good, but the citizen could still suffer from discrimination. Consider a patriarchal society where women have historically experienced oppression and subordination in the form of being legally denied access to certain high-prestige and high-paying occupations and positions of political power. Over time, the male-dominated controlling powers of the state in this society realize the error of their ways and formally open all

178. Honneth, *supra* note 63 at 195.

179. Joseph Raz, *The Morality of Freedom* (Oxford, UK: Clarendon Press, 1986) at 425.

180. *Ibid* at 425, 155-56, 369.

careers and positions to women. In this society, despite the removal of barriers that have historically diminished the range of options and life projects open to women, women may have internalized a self-understanding of inferiority relative to men. If so, as Taylor writes, “even when some of the objective obstacles to their advancement fall away, they may be incapable of taking advantage of the new opportunities.”¹⁸¹

By hypothesis, in the society just described there is an adequate range of options for women to choose a conception of the good. The autonomy of women is therefore protected. Nevertheless, the women’s internalization of their inferiority, stemming from the society’s history, intuitively moves us to view the society as deeply discriminatory. Discrimination against a particular woman in this society would then not be explicable by violations of her autonomy.

The story told of this society need not be restricted to the predicament of women. It could be applied to different racial or cultural groups. Such groups may be historically denied the range of options needed to possess autonomy. However, if they have internalized their historical inferiority, they may be unable to take advantage of the opportunities opened to them when adequate options are finally provided by the state. This self-deprecation then becomes “one of the most potent instruments of their own oppression.”¹⁸² We intuitively think that there is discrimination in such societies. This is so even though the groups who are discriminated against do not lack adequate options and, hence, have not been denied autonomy.

The account of discrimination as the negation of recognition can explain the wrong of discrimination occurring in the societies described above. There are status hierarchies existing horizontally within these societies. The life styles of subordinate groups—whether such groups are comprised of women, indigenous peoples or other groups of minority status—are interpreted as deviant or Other relative to the life styles of dominant groups. Subordinate groups are denied recognition of their authentic identities because their identities are constructed in juxtaposition to those of dominant groups. Historically, this situation has made subordinate groups internalize a negative self-understanding of their identities, cultural values, and life styles that persists even when the state in their society enhances their autonomy by creating an apparently adequate range of options for them. Members of subordinate groups do not see options that were once highly prestigious and exclusive to dominant groups as representing genuine life plans for

181. Taylor, *supra* note 43 at 25.

182. *Ibid* at 26.

them to choose. This is because the historical negation of the subordinate group's recognition has made them see themselves as unworthy to choose these options.

There is a second problem for the autonomy-based account of the wrong of discrimination. In emphasizing the centrality of choice and self-determination, the account presupposes what I earlier referred to as an individualistic conception of the self. This supposition contrasts with the negation of recognition account, which assumes a relational conception of the self. There are, however, strong reasons to doubt the philosophical tenability and jurisprudential acceptability of an individualistic conception of the self.

At the philosophical level, the autonomy-based account's notion that the state should treat citizens only in accordance with their choices, and not arbitrarily on the basis of unchosen factors, presumes that we can easily separate out what is chosen in a person's identity from what is not. But such a task might be prohibitively difficult. As Samuel Scheffler writes:

In any sense of identity that actually matters to people, unchosen personal traits and the social circumstances into which one is born are importantly, albeit not exclusively, constitutive of one's distinctive identity. And, in any ordinary sense of "voluntary," people's voluntary choices are routinely influenced by unchosen features of their personalities, temperaments, and the social contexts in which they find themselves.¹⁸³

Similarly, the choices a person has made sometimes seem morally irrelevant to whether that person should receive certain benefits or shoulder certain burdens. For example, we do not withhold medical treatment from persons in desperate need of attention if they have an unchosen illness caused by congenital disease. Nor do we do so if they have sustained an injury from a foolhardy risk they have chosen to take.¹⁸⁴

On the jurisprudential point, I have mentioned above that the Supreme Court of Canada has recently rejected an individualistic conception of the self in *Quebec v A*¹⁸⁵ and, more recently still, in *Canada (Attorney General) v Bedford*. *Quebec v A* established the (near) irrelevance of individual choice in section 15(1) cases.¹⁸⁶ *Bedford* was not an equality case. It concerned the constitutional validity of *Criminal Code* prohibitions on communicating in public for the purposes of prostitution, operating a common bawdyhouse, and living on the avails of prostitution. A unanimous Court held that these prohibitions violated

183. *Supra* note 66 at 18.

184. *Ibid* at 19.

185. *Quebec v A*, *supra* note 7 at para 342.

186. *Ibid* at paras 333, 335, 343. See also *Miron*, *supra* note 6 at para 153.

prostitutes' section 7 *Charter* right to life, liberty, and security of the person in a manner that did not accord with the principles of fundamental justice. Chief Justice McLachlin rejected the government's argument that it was prostitutes' free choice, not the impugned provisions, that posed the risks to prostitutes' life, liberty, and security of the person complained of in the case. She wrote that "while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so."¹⁸⁷ She added: "Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money."¹⁸⁸

In this way, the Court in *Bedford* ostensibly confirmed Scheffler's claim that unchosen features of individuals' personalities, temperaments, and the social contexts in which they find themselves routinely influence their choices. There is therefore good reason to doubt whether an autonomy-based account of the wrong of discrimination can effectively ground a juridical conception of substantive equality and the wrong of discrimination.

V. CONCLUSION: THE IMPLICATIONS OF SUBSTANTIVE EQUALITY AS EQUAL RECOGNITION FOR THE TENSION BETWEEN CERTAINTY AND FLEXIBILITY IN *QUEBEC VA*

Where does Substantive Equality as Equal Recognition leave us as regards the tension between certainty and flexibility that divided the judges in the recent Supreme Court of Canada case of *Quebec v A*? Recall that Justice LeBel's dissenting judgment in the case attempted to secure a measure of certainty for section 15(1) of the *Charter*. He offered a thorough articulation of the provision's underlying values and insisted that prejudice and stereotyping are crucial factors that make a law discriminatory. Justice Abella, in her majority judgment, held simply that the purpose of section 15(1) is to protect the norm of substantive equality. A law's inconsistency with that norm is what makes it discriminatory, no matter how that inconsistency is identified.

I began this article by discussing *Quebec v A* to suggest that clarifying the concept of substantive equality would be a significant contribution to the scholarship on the constitutional right to equality in Canada. I will conclude by discussing briefly how Substantive Equality as Equal Recognition might provide

187. *Bedford*, *supra* note 130 at para 86.

188. *Ibid.*

a way to navigate the judges' disagreement in *Quebec v A*. I suggest that the theory presents a thorough articulation of the underlying value of section 15(1) and that it does so in a way that directs adjudicators to examine the impact or effects of a law's formal application within the social context in which the law is applied.

Substantive Equality as Equal Recognition clarifies what the state of affairs of substantive equality is supposed to be by describing what the world and the law should look like when the ideal is instantiated. In doing so, this approach clarifies what kind of value adjudicators ought to be sensitive to when they determine whether legislation is discriminatory within the meaning of section 15(1). It maintains that the state of affairs of substantive equality is a condition in which a law does not transmit through its vertical impact horizontal inequalities that take the form of status hierarchies. Moreover, the wrong of discrimination consists in the negation of the value of recognition for members of subordinate social groups in society. Hence, the theory advances beyond an impoverished construction of substantive equality as a mere methodological principle. It aspires to achieve the certainty for the Court's equality jurisprudence that Justice LeBel tried to secure by articulating in considerable detail the values of human dignity and personal autonomy that underlie section 15(1).

Nonetheless, the theory is consistent with the flexible approach to section 15(1) that won over a majority of the judges in *Quebec v A*. It maintains that a law is discriminatory not because of its form, *i.e.*, its equal vertical application to all those who it catches within its ambit, but because of its context, *i.e.*, how it transmits patterns of horizontal inequality existing in the social structure within which it formally applies. The manner in which a law could reflect status hierarchies is diverse and multifaceted, as we have seen *inter alia* in the pre-*Charter Bill of Rights* cases. Hence, there can be no definitive rule, no "doctrinal formulation or carefully enumerated series of steps and questions,"¹⁸⁹ to dictate how such reflection must be identified. Rather, what is required is a contextual approach that, following the prevalent methodological construction of substantive equality, draws on a non-exhaustive¹⁹⁰ set of indicia of this reflection, such as prejudice, stereotyping, and the *Law* contextual factors, to examine the outcomes or effects of a law's vertical application on horizontal social relations. On the view of substantive equality defended in this article, what makes a law discriminatory is, above all else, its transmission of unequal status hierarchies, no matter how this transmission is identified.

189. Young, *supra* note 21 at 198.

190. For examples of other potential factors, see Sheppard, *supra* note 20 at 51-52.

The approach recommended by Substantive Equality as Equal Recognition does not, however, disregard Sheppard's caution that a proposal to use any relevant factors to identify a law's discriminatory effects fails to provide adequate guidance to adjudicators and litigants in equality cases. To come full circle, this is because the theory thoroughly articulates the state of affairs of substantive equality that the *Charter* requires a law to instantiate and the value of recognition that is infringed by state-perpetrated discrimination. Together, these ideas constitute the norm towards which adjudicators and litigants are to be guided when they employ multiple indicia to identify a law's discriminatory impact in the context in which the law applies.