Three Models of (In)Equality

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The author explains how the Supreme Court of Canada, in interpreting section 15 of the *Canadian Charter of Rights and Freedoms*, is developing simultaneously three distinct conceptions or models of inequality. The Court is attempting to come to grips with the problem of identifying the holders of the rights recognized in the section.

One model, which the author constructs from passages in leading cases, ties the concept of discrimination to membership in society. According to this model, only members of a society have a right to be recognized at law as equals who deserve the state's concern, respect and consideration. A second approach to discrimination and equality sees the purpose of section 15 as being the eradication of entrenched and systemic forms of social disadvantagement. This model focuses on group equalization rather than individual rights. Since this suggests a redistributive purpose, it may allocate to the judiciary a function for which it is ill-equipped. The author's third model equates section 15 rights with human dignity. While recognizing varying degrees of membership in society, this model assumes one can identify the interests that give rise to self-respect and personhood. The author points out, however, that these interests are determined in reference to dominant conceptions of what is integral to one's dignity, creating a tension between those dominant views and views that are self-defined by individuals.

The author concludes that the Supreme Court has not yet determined which approach it will take with respect to the definition of equality. The Court has recognized the tension between cultural diversity and uniformity, a tension that has important consequences for those seeking protection under the rights guaranteed by section 15, but whether this tension can be resolved remains to be seen.

Dans son interprétation de l'article 15 de la *Charte canadienne des droits et libertés*, la Cour suprême du Canada, nous dit l'auteur, est en train de développer trois modèles distincts de la notion d'inégalité. La Cour s'efforce d'identifier les détenteurs des droits énoncés dans cet article.

À partir de passages tirés de la jurisprudence, l'auteur construit un premier modèle, selon lequel la notion de discrimination est liée à celle du statut de membre dans la société: seuls les membres à part entière de la société auraient droit à la reconnaissance et à l'égalité juridiques. Le second modèle que nous propose l'auteur voit dans l'article 15 de la *Charte* l'instrument privilégié pour l'élimination de toute forme de discrimination endémique et systémique. Ce modèle vise l'égalité dans la collectivité plutôt que les droits individuels. Dans la mesure où ce modèle peut comporter certaines redistributions, l'auteur explique qu'il est peut-être mal adapté au contexte judiciaire. Le troisième modèle de l'article 15 s'appuie sur la notion de dignité humaine. Tout en reconnaissant les divers degrés dont le statut de membre est susceptible, ce modèle présume qu'il est possible d'identifier les facteurs qui sous-tendent l'estime de soi et les qualités essentielles de l'être humain. L'auteur constate que ces facteurs sont toutefois déterminés à partir des idées communément reçues sur la dignité, ce qui crée une tension entre ces idées et celles qui sont purement personnelles.

L'auteur conclut que la Cour suprême du Canada n'a pas encore opté pour l'un ou l'autre de ces modèles de la définition de l'égalité. Elle a reconnu la tension qui existe entre la diversité culturelle et l'uniformité, une tension qui est lourde de conséquences pour ceux qui espèrent trouver dans l'article 15 une source de protection. Mais on ne saurait dire si cette tension peut être résolue.

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Synopsis

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Introduction

In this paper, I argue that the Supreme Court of Canada, in its interpretations of subsection 15(1) of the *Canadian Charter of Rights and Freedoms*,[1] has been developing simultaneously three distinct and self-contained models of equality and discrimination. I refer to these as the *equal membership* model, the *social disadvantagement* model and the *human dignity* model. As yet, the Court has neither stated definitively its opinion of which model best captures the aims and underlying values of the section, nor confirmed whether it is going to commit itself exclusively to one. While each model possesses elements which are compatible with some of those found in the others, the models, when considered as three separate packages, point the Court in different directions. This lends a certain amount of ambiguity and lack of clarity to the opinions of the justices. Moreover, as I shall show in this paper, each model, when considered in isolation, commits the Court to principles for which justification is difficult to find. Perhaps the best explanation for the coexistence of three separate models within the Court's judgements is that, in the absence of a single unproblematic model, the Court is more willing to live with the contradiction and inconsistency among the models than to commit itself to the underlying values of any single one of the three. The Court's position is similar to that of modern scientists who, in the absence of a single unifying theory, find themselves relying on both quantum

[1]Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. S. 15(1) of the *Charter* reads as follows:

> 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 pbysical disability.

theory and the theory of general relativity, despite the inconsistencies between the two.[2]

This paper has developed out of a more theoretical project in which I have been examining the obligations of the liberal state towards aliens. Part of that project has involved asking whether there is an obligation to treat aliens as equals and if so, what concrete commitments this could entail.[3] The influence of the more general and abstract work can be felt in this, its more doctrinal offspring. I believe that liberal political theorists and jurists have been lax in their references to "citizens,"[4] "members" or "Canadians"[5] when identifying the holders of constitutional rights. Moreover, neither group has given sufficiently serious thought to the question of which constitutional rights apply to foreigners.[6] One effect of this laxity is that the interests of some marginalized groups have been ignored or undervalued in the articulation of abstract theory and constitutional doctrines. While members of disadvantaged groups *within* a society have often been regarded as the beneficiaries of equality guarantees, those who have no connection or tenuous links with a society are by and large forgotten. It is concern for the interests of these individuals which is the propelling force behind this paper, and which colours my reading of the legal texts. More specifically, it is because the different models of equality which I locate in the judgements of the Supreme Court have a significantly different impact on these individuals, that I draw attention to their existence and raise questions about their acceptability.

I proceed as follows. First, I examine the texts of recent Supreme Court decisions concerning discrimination and equality and highlight and scrutinize the ambiguities therein. This necessitates the re-tilling of some well-worked ground. The small number of cases which I examine have already been under the microscope of several critically-minded legal scholars. Nevertheless, I believe that I add an original and fruitful slant by examining the relationship between discrimination and community membership and by taking into account the situation of those who may not be regarded as full members. Subsequently, in the course of identifying the different frameworks which the Court develops, I make assessments of each.

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[2]The most popular, recent account of this tension is found in S.W. Hawking, *A Brief History of Time* (London: Bantam Press, 1988).

[3]See D. Galloway, "Strangers and Members: Equality in an Immigration Context" Can J. Law & Jur. [forthcoming].

[4]For example, in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 357-58, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to S.C.R.], Wilson J. states that "those who enacted the *Charter* ... [set] out basic constitutional norms rooted in a concern for individual dignity and autonomy which government should be compelled to respect when structuring important aspects of *citizens*' lives." [emphasis added]

[5]For example, in *Canadian Council of Churches* v. *Canada (M.E.I.)*, [1992] 1 S.C.R. 236 at 250, 88 D.L.R. (4th) 193, Cory J. states that "[t]he Charter enshrines the rights and freedoms of Canadians." In the context of a case brought by an organization which pursues the interests of refugees, the choice of the word "Canadians" appears significant.

[6]See D. Galloway, "The Extraterritorial Application of *Charter* Rights to Visa Applicants" (1991) 23 Ottawa L. Rev. 335.

I. The Supreme Court's Analysis of Equality and Discrimination

Perhaps the most troublesome aspect of the Supreme Court's analysis of subsection 15(1) of the *Charter* is its failure to make clear whether, in its view, equality and discrimination are conceptually independent. Initially, the Court sets up a three-part process[7] for determining whether the rights recognized in the section have been infringed, with equality issues being entertained at the first stage and discrimination issues at the second.[8] However, when all is said and done, the Court may, in fact, be holding that equality and discrimination are not conceptually separate. This is most clearly revealed in a statement by Wilson J. in *McKinney* v. *University of Guelph*, in which she states: "[i]t is, I think, now clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations."[9]

Another statement by Wilson J. in *R.* v. *Turpin* makes a similar point. She identifies the purposes of subsection 15(1) to be "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[10]

In fact, the Court could justifiably be interpreted as holding that subsection 15(1) is propounding a single right — the right not to suffer the negative effects of discrimination. This is because, in the last instance, the concept of discrimination operates as the single fulcrum which bears the full burden of the Court's argumentation, while the concept of equality is identified by the Court as a woolly and unattainable ideal which takes on the appearance of a fifth wheel. A close examination of the text of the opinion of McIntyre J. in *Andrews* confirms this critique and reveals the full extent of the Court's conceptual tangle.

In *Andrews*, McIntyre J. admits that "it [equality] is an elusive concept .. [which] lacks precise definition."[11] He then goes on to say that it is a comparative concept, "the condition of which may only be attained or discerned by

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[7]See *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 182, 56 D.L.R. (4th) 1, McIntyre J. [hereinafter *Andrews* cited to S.C.R.]:

> A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory ... [A]ny consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1.

In *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1325-1335, 69 C.R. (3d) 97, 48 C.C.C. (3d) 8 [hereinafter *Turpin* cited to S.C.R.], Wilson J. emphasizes with clarity and precision the tripartite nature of the Court's analysis, suggesting that one must first determine whether any of the four basic equality rights have been denied, then decide whether there has been any discrimination, and then turn to s. 1 considerations.

[8]The third question is whether the discriminating infringement of an equality right is justifiable under s. 1 of the *Charter*. The Court has made it clear that questions of "reasonableness" or "fairness" are material only at the third stage, and ought not to be raised while the earlier questions are being considered (*Andrews*, *ibid.* at 177-83).

[9]*McKinney*, *supra* note 4 at 387.

[10]*Turpin*, *supra* note 7 at 1333.

[11]*Andrews*, *supra* note 7 at 164.

comparison with the condition of others in the social and political setting in which the question arises."[12]

But although comparative in nature, McIntyre J. states unequivocally that cquality does not demand that all individuals be accorded the same treatment.[13] One must take into account the consequences of the treatment to ensure that the impact of a law on all individuals, each of whom will stand in unique social circumstances, will be equivalent:

> To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, *there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.* In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another. [emphasis added][14]

McIntyre J. is pointing out that any balance or scale which is used to adjudge whether social benefits and burdens are divided equitably will never be sufficiently accurate to ensure that the impact of a law will be the same for everyone. Even a seemingly neutral law, such as one which turns a thoroughfare into a one way street, will have a differential impact on those who use the street. (A person who approaches the street from one direction will have more driving to do to reach a particular location than another person who approaches it from the opposite direction.)

Nevertheless, the ideal of equality demands that the legislature use the most accurate gauge available. McIntyre J. stresses that we must accord "as nearly as may be possible" equal benefits and disadvantages. Our concern with gauging the impact of a law accurately is similar to our concern to have the most accurate timepiece available in some circumstances. A clock which could not

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[12]*Ibid.* In passing, it is worth noting that in this statement we have the first intimation that judgements of equality and inequality are all made relative to other members of a social and political group, with the implication that questions of equality cannot arise when one is considering the treatment of those who do not belong within a particular social or political setting. In order to determine whether a person has been treated unequally, one must first specify the dimensions of the social order within which she or he is being considered. The identification of the relevant social and political setting is of paramount significance. For example, as far as the applicant for entry into Canada is concerned, one could hold that she is not protected by the equality provisions, because she does not belong within the relevant social and political group; or, one could make determinations of equality of treatment by comparing her situation with that of other applicants, or with that of people who are already members of Canadian society. In the following pages, I consider the question whether membership in our society should be regarded as a prerequisite to possessing equality rights.

[13]McIntyre J. categorically rejects the "similarly situated" test as a test of equality. However, in actuality he is merely making the point that two individuals will *always* be found in differing social and economic situations. He is only rejecting the idea that two people who share a characteristic or a number of characteristics will, for that reason, be similarly situated. See *Andrews*, *ibid.* at 165-68.

[14]*Ibid.* at 165.

distinguish events which occurred one second apart should not be used as the sole device by which to judge which athlete won a world class 100 metre race. We would also criticize the use of a stopwatch which was calibrated in seconds if one which measured in tenths of seconds were available; and likewise, this latter device would be unacceptable if a watch calibrated to hundredths of a second were available. If determining who won the race is adjudged to be an important goal, then the most accurate available timing device should be used. Similarly, if ensuring that all individuals experienced the same impact of the law is important, then the most accurate gauge of impact should be employed in any distribution.

From this perspective, a person could justifiably claim unequal treatment if a legislature had been inadequately precise in attempting to ensure that the impact of the law on each person was equivalent to that on each other person. A legislature which espoused equality as an ideal or aspiration could be called to account if it did not make inquiries into the individual impact, or projected impact of a law, much as an athletic association which promoted the need to identify winners could be faulted for not investing in accurate chronometers.

Nevertheless, McIntyre J. makes it clear that a person cannot justify a challenge to a law under subsection 15(1) merely on the ground that there is a differential impact effected by it, or merely because the legislature would have been able to avoid a differential impact had it chosen to do so. As noted, it must also be shown that the law in question *discriminates* against an individual or group. The important question is whether a person or group has been singled out by the law for discriminatory treatment which in fact causes relative disadvantage to the litigant.

The introduction of the concept of discrimination at the second stage of the inquiry gives a new shape to McIntyre J.'s train of thought. His early statement, emphasized above, that "there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another,"[15] created the impression that he was contending that the legislature engaged in presumptive wrongdoing every time it did not use the most accurate mechanism to ensure that the impact of a law be equal. But, at the second stage of his inquiry, this is seen not to be the case. In those cases in which it does not discriminate against an individual or group, the legislature will not have done wrong even where there is a clear differential impact. It appears that McIntyre J. intends to distinguish between ideals or aspirations on the one hand, and duties on the other. A legislature's failure to meet an ideal (that of equal impact) does not entail that it has breached a duty (the duty not to discriminate). However, this distinction is rendered opaque by references to the denial of "equality rights" which are made before the issue of discrimination is raised. If there exists only a duty not to cause disadvantage by discrimination, then it is confusing to refer to rights to equality, rather than a right not to suffer the negative impacts of discrimination. If the legislature does not engage in presumptive wrongdoing when laws have a differential impact,

[15] *Ibid.*

then one can question the prudence of contending that a person's "equality rights" are shaped by the different ways by which a person can be disadvantaged.[16] By locating the concept of equality within a morality of aspiration, and the concept of discrimination within a morality of duty, McIntyre J. renders redundant the former when allegations of rights violations are being examined. For all practical purposes, the concept of discrimination will swallow up the concept of equality, and a two-part analysis will replace the tripartite framework articulated by the Court. Clarity is better served by referring to a right not to suffer disadvantage through discrimination, a right which is subject to the considerations mentioned in section 1 of the *Charter*.

However, McIntyre J.'s definition of discrimination is also problematic. He contends that

> discrimination 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.[17]

This definition is a fountainhead of confusion. Without doubt, it is presented as a definition of a concept which is wholly distinct from the concept of equality, yet it seems to be doing no more than expressing the negation of the "unattainable ideal" which McIntyre J. cited in his analysis of equality. If equality is a condition that, were it attainable, would obtain where laws do not have a more burdensome impact because of irrelevant personal differences, then *every* law which prevents this condition from pertaining will also, according to the definition, be discriminatory. McIntyre J. uses the phrase "irrelevant personal differences" when pointing to the factor which prevents an impossible ideal of equality from being attained, but he also uses the phrase "personal characteristics of the individual or group" when defining what counts as discrimination. Conceptual independence cannot be founded on these factors alone.

McIntyre J. attempts to circumvent the critique that his analysis is confusing by pointing to a distinction which would allow us to identify those personal characteristics the use of which would amount to discrimination. It becomes very clear that he believes that not every distinction based on personal characteristics will count as discrimination. He writes:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[18]

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[16]Thus, one can question the wisdom of Wilson J. when, in *Turpin*, she states that "[i]n defining the scope of the four basic equality rights it is important to ensure that each right be given its full independent content ..." (*Turpin*, *supra* note 7 at 1325). Once the point has been made that inequality is judged by the impact of a law on a person, rather than on the intent of the legislature or on the failure to accord identical benefits or disadvantages, it becomes superfluous to distinguish the ways in which the disadvantage is caused, and to suggest that it is important to delineate the borders which allow one to distinguish four independent equality rights.

[17]*Andrews*, *supra* note 7 at 174.

[18]*Ibid.* at 174-75.

He also reverts to the unhelpful and potentially misleading[19] idea articulated by the U.S. Supreme Court that "discrete and insular minorities" are protected by subsection 15(1) of the *Charter*,[20] thereby suggesting that the personal characteristic of belonging to such a group is a sufficient (although, as will be seen, not a necessary) condition for discrimination. However, these points do little to relieve the general confusion since they fail to offer a set of specific conditions or criteria from which one can construct a general principle.

The definition of "discrimination" is confusing on a second count because it suggests, in its final words, that one can discriminate only amongst those who are already members of a society, by dividing resources and advantages amongst such members in an inequitable way. This seems to exclude categorically the possibility of discriminating against non-members. Nevertheless, immediately prior to the reference to members of society, the more general term "others" is used, which does leave open the possibility that the term is intended to have a wider ambit.[21] The appellant in *Andrews* was a person who was unquestionably a member of Canadian society. This ensured that this point was not raised and, as a result, was left open.

II. The Three Models of (In)Equality

A. *Equality, Discrimination and Social Membership*

At this point, I want to try to relieve the confusions in McIntyre J.'s judgement by exploring the idea that he is attempting to articulate the view that the concept of discrimination is tied to the concept of membership in society, and that distinctions are discriminatory if they treat an individual as something less than a full member.

From this perspective, the message is not that every individual in the world has a right against the government to be treated as an equal. Instead, it is members of society who have this right. Each person who is a member of a society committed to equality has the same right to concern, respect and consideration as each other member. Once we have identified a person as a member of society, we are committed to the view that she should be accorded the respect that is fitting of a person holding that status. It will be wrongful for the government to treat any such individual as less than a full member. However, this view does not lead ineluctably to the conclusion that every law which has a differential impact upon members treats those affected negatively as less than full members. Only in some circumstances can we infer that the individual or group in question is being accorded an inferior status. Hence, McIntyre J. writes:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a soci-

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[19]See D. Gibson, "Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing" (1991) 29 Alta. L. Rev. 772.

[20]*Andrews*, *supra* note 7 at 183.

[21]See *supra* note 17 and accompanying text.

> ety in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.[22]

This statement contains the seeds of an answer both to the criticism that McIntyre J.'s judgement does not adequately specify which personal characteristics can be the basis of discriminatory treatment, and to the criticism that his judgement is unclear insofar as it does not specify those who can be the objects of discrimination. In answer to the first of these, he can be interpreted to be stating that differentiation on the basis of those characteristics on which a person's equal status as member depends, will amount to discrimination; in answer to the second, only those people who are already members of society can suffer discrimination within the *Charter* definition, by being treated as inferior members. One way to grasp the nub of this reading of McIntyre J.'s position is to conceive it as a "swings and roundabouts" approach to equality. A particular law may have a differential impact on different individuals but nevertheless, other differential laws may on other occasions negate this effect. What one person or group loses on one occasion, he, she or it may regain on another occasion. This is the key to understanding why the mere fact that a law has a differential impact does not, by itself, entail that a person has had her status as equal member violated. The person who suffers as a result of the creation of a one way road, may make a comparative gain from another traffic or zoning regulation. In the last instance, equality will be achieved not through uniformity of impact of each law, but through systematic equalization by means of many differential impacts. As long as one believes that "it will all come out in the wash," one will not regard differentiation as being an attack on an individual's status.

McIntyre J.'s conclusion that subsection 15(1) will be violated only if a law which has a differential impact is discriminatory, can be interpreted to mean that a particular disadvantageous impact (a loss on the swings) will, in most cases, be held to be a violation of a right if the individual who suffers the loss belongs to a group which is known to be already losing on the roundabouts. It is well known that certain groups have suffered, and are still suffering such consistent losses, which knowledge explains the list of grounds specified in subsection 15(1). Moreover, we may yet discover that other groups have suffered consistent losses in the past, and hence the need to allow for the consideration of grounds analogous to those identified explicitly in section 15.[23]

This analysis hangs on the claim that differentiation does not *per se* amount to an attack on a person's equal status, but differentiation which disadvantages people who belong to an already disadvantaged group does. However, the fact that the government has allowed the development and entrenchment of inferior statuses within society is not, by itself, the reason for judicial interference; it merely provides evidence that a particular individual is on a particular occasion not being treated as an equal member of society. A court will only intervene when an individual has shown, first, that she or he has suffered relative disad-

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[22]*Andrews*, *supra* note 7 at 171.

[23]Compare the statement of Wilson J. in *Andrews*, that "it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances" (*Andrews*, *supra* note 7 at 152).

vantage on a particular occasion, and second, that the disadvantage can be traced to government action. Where this individual is part of a group which has suffered and continues to suffer disadvantage, this is regarded as probative evidence which provides a reason to believe that the loss suffered will not be offset by future gains; that "it will not all come out in the wash." The suspicion that the particular law is contributing to the individual's subordination will be sufficient to justify its invalidation.

In the recent case of *R.* v. *Hess*,[24] Wilson J. has qualified this view by suggesting that the inference from negative disadvantagement of an individual who belongs to a subordinated group to proscribed discrimination will not be automatic. A mere suspicion created by the entrenched subordination of a group will be insufficient to invalidate a law. When tackling the problem of differential criminal laws dealing with sexual attacks, she states:

> In my view, it is not this Court's role under s. 15(1) of the *Charter* to decide whether a female who chooses to have intercourse with a boy under fourteen merits the same societal disapprobation as a male who has intercourse with a girl under fourteen. These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution to Parliament. ... I think it important to bear in mind that the legislature has chosen to punish a male who engages in a form of penetration to which only a male and a female can be parties. The legislature has concluded that sodomy or buggery are forms of penetration that should be dealt with separately: see, for example, s. 155 of the *Code*. Once again we are faced with distinctions aimed at biologically different acts that go to the heart of society's morality and involve considerations of policy. They are, in my view, best left to the legislature.[25]

While this discussion focuses on laws which single out men for special treatment, Wilson J. makes it clear that she considers that a similar argument would apply if women were singled out for negative treatment, by for example a law which proscribed self-induced abortions. In the ensuing discussion of sex discrimination, she contends that if a distinction can be traced to "ill-conceived notions about a given sex's strengths and weaknesses or abilities and disabilities,"[26] it will be condemned as discriminatory. If, on the other hand, a provision reflects a dominant moral judgement that is untainted by such considerations, the court will deny that the distinction is discriminatory. The fact that a law differentiates between members of a subordinated group and others does not entail that the government has necessarily become an accessory to the subordination. According to this view, the evidence can be ambiguous and the Court's assessment may be that an added loss suffered by a disadvantaged group is not an attack on the status of those who are affected, but is rather the application of an "untainted" moral judgement. The example offered in *Hess* of a hypothetical criminal provision which proscribes self-induced abortion is particularly telling. Wilson J. states categorically that it would be absurd to characterize this provision as discriminatory.[27] It is most significant that Wilson J. does not hold that

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[24][1990] 2 S.C.R. 906, [1990] 6 W.W.R. 289 [hereinafter *Hess* cited to S.C.R.].
[25]*Ibid.* at 930-31.
[26]*Ibid.* at 929.
[27]*Ibid.*

the provision would be discriminatory but justifiable under section 1 of the *Charter*.

This analysis is consistent with the belief that it is not the judiciary's task to identify and implement ways of eradicating inferior statuses within society. While it may be proper to leave such matters to democratically elected officials, it is well within the judiciary's power to prevent the government from enacting a law when there is a good reason to believe that its direct effect will be to condemn a person to a subordinate social position, or to prevent a person from removing herself from such. Judicial intervention is particularly apposite when the government arouses the suspicion that it has a hidden agenda which involves an individual being sacrificed for the social good or being required to bear an inordinate proportion of the society's disadvantages. The evidence of entrenched past disadvantage to those who share a characteristic with this individual provides solid, although in the light of *Hess* not conclusive, grounding for this suspicion.

The swings and roundabouts analogy is a useful device by which to get to the heart of the Supreme Court's understanding of equality and discrimination. In particular, it offers a key by which to explain Wilson J.'s insistence that

> it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.[28]

It also allows us to understand which groups are covered by the vague Americanism "discrete and insular." In the *Andrews* case itself, the Court is able to identify non-citizen residents of Canada as such a group. As Wilson J. explains:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated ... Non-citizens, to take only the most obvious example, do not have the right to vote ... While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.[29]

However, an account of discrimination which stresses that an individual must belong to a disadvantaged or relatively powerless group before she can avail herself of subsection 15(1), would not capture all the intricacies of the Supreme Court's perspective. The opinions which have defined the current Supreme Court position are all couched carefully in qualified and non-absolute terms. For example, as quoted above, McIntyre J. in *Andrews* states that *rarely* will distinctions attributed to a person by virtue of association with a group be non-discriminatory, while *rarely* will a distinction based on merit be discriminatory.[30] Likewise, in *Turpin*, Wilson J. states:

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[28]*Turpin*, *supra* note 7 at 1331-32.
[29]*Andrews*, *supra* note 7 at 152.
[30]*Supra* note 18 and accompanying text.

> I would not wish to suggest that a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination. I simply say that it is not so here.[31]

These two examples show an unwillingness to rely on a simple unidimensional test for determining what counts as discrimination. Nevertheless, they should not be interpreted as revealing an unprincipled or haphazard approach to the problem, inconsistent with the general approach previously outlined. As I shall now try to show, they confirm rather than deny the belief that the analogy of swings and roundabouts is useful.

One can elicit from the opinions of Wilson J. in particular, an account of how to deal with these examples which fits snugly with the general idea that this section of the *Charter* aims to ensure that each member of society is treated as a full member. Wilson J. shows herself to be sensitive to the need to leave open the option of declaring a law to be discriminatory solely on the ground that it places an intolerable burden on an individual or group whether or not they have suffered previous disadvantage. For example, in *Hess*, she suggests that a law which defined first degree murder in such a way that only men could commit it, would not escape the charge of being discriminatory, even though men are not a group which has suffered consistent social disadvantage.[32] A similar conclusion would be reached if the same law were defined so that only people from Alberta could commit it. Underlying these examples is the premise that, in the light of such a law, no one who fell into these groups could possibly regard himself or herself as still being a full member of the community, and therefore as a person deserving respect and concern, no matter how many benefits were accorded by other legislation. A sacrifice demanded of some groups or individuals by a piece of legislation can be so onerous that it should be regarded as being, in itself, an attack on the equal status of the individuals affected. Hence, if men or residents of Alberta were being used as scapegoats and singled out for severe penalty, when no rational grounds for such special treatment could be identified, the fact that neither group had suffered inordinate burdens in the past would not need to be raised. Underlying the equality provisions of the *Charter* is a principle which demands that individual members of society be treated with equal respect.

According to this account of the Supreme Court judgements, the important idea underlying subsection 15(1), initially de-emphasized by the Court,[33] is that it accords to each person a particular *status* in a non-hierarchical social system and attempts to ensure that no group or individual shall be accorded a lesser status by the law. A law which places burdens on individuals who belong to groups which already carry relatively heavy social burdens and which experience more than their share of disadvantage, will fail to meet the demand. But so will a law

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[31]*Turpin*, *supra* note 7 at 1333.

[32]*Hess*, *supra* note 24 at 928.

[33]In interpreting the phrase, "Every individual is equal before and under the law," the Court has declined the opportunity to hold that s. 15(1) recognizes that everyone has equal status, and instead, reads the section to be granting four equality rights, of which one is the right to equality before the law, and another is the right to equality under the law. See *e.g.*, *Turpin*, *supra* note at 1325ff.

which places a differential burden on individuals who do not belong to such groups, when the burden is such that it cannot be adequately offset by future benefit. Such burdens must be shared by everyone, or not imposed in the first place. While it may be useful for some purposes to distinguish between these two ways in which a law can fail, my point is that the same concern underlies both — a law should not condemn individuals to a subordinate social position or reinforce any social disadvantage that some may be suffering.

I have presented the view that the Court, when articulating its theory of discrimination, is developing the idea that it is because our society is interested in creating and maintaining a community of equal members that subsection 15(1) proscribes discriminatory treatment. This suggestion premises the status of being an equal on actual membership of the community. It would follow from such a view that non-members of our community would not be protected by subsection 15(1). Because non-members do not have a social position, they cannot be accorded an inferior position. A community of equal members need have no respect for outsiders. Its primary concern may be that only its own members not suffer the ignominy of discriminatory treatment from its government. It need have no concern for those with no attachments to the community whose self-respect is attacked by its government. Only as long as a person can be identified as "one of us" will she be protected by the *Charter*'s equality provisions.

While I have demonstrated that there is textual evidence to support the view that the Supreme Court ties the harm of discrimination to social membership, and while, as I have shown, an argument can be concocted to defend this view, I believe that this linkage between membership and the harm of discrimination is weak and impolitic. As I noted earlier, the Court has not identified any criteria of membership. This omission renders problematic the whole enterprise of linking the two concepts.

The assumption behind the equal membership model is that a hierarchical society is improper *per se*, and that each person who is identified as a member should hold the same status of full member. Thus, talk of illegitimate hierarchy involves redundancy, since hierarchy is itself illegitimate. This view ignores the reality to which I alluded at the beginning of the paper, that we do have a hierarchical society in which people hold different degrees of membership. In *Andrews*, the Court considers the relatively easy case of permanent residents. Given the deep involvement and level of participation of such individuals in our society, and the emphasis on the permanent nature of the status, it is easy to understand why the Court would conclude that they are as much members as are citizens, and that, as a consequence, differential impact of the law will amount to discrimination and will have to be justified according to the terms of section 1 of the *Charter*.

However, it is by no means clear that the Court would regard visitors with employment authorizations or recently arrived refugee claimants to be members of society in the way that citizens or permanent residents are. It may be quite proper to regard them as probationary or temporary members, or even as associate members. While the citizen and the permanent resident may be immersed in social life to a similar degree, thus raising the rebuttable presumption that the

law should have an equal impact on them, the situation of those who are not similarly immersed need not raise the same inference. Their level of poverty relative to those who have more permanent links to the community does not raise the same concerns about unfairness. In particular, it does not raise the presumption that reason must be given for laws which have a more severe impact upon them. In other words, my contention is that we need not regard hierarchies of membership as troublesome features of our social order which require special justification under section 1 of the *Charter*. They may be regarded as an integral part of a society which admits strangers. An equal membership model commits us to the view that a person is either "one of us" or is not. This ignores the fact that people may have varying degrees of connection to a community. Our community may not draw a hard and fast line between insiders and outsiders. It may see mutual advantage in allowing strangers limited access to the labour market and the halls of political power. The member/non-member dichotomy may be a misleading way to conceive of the relations which an individual may have with a community. It skates over a wide range of bonds which may have been forged — some of them quite tenuous, others permanent and deep-rooted. While it may be true that a liberal democracy should be committed, *prima facie*, to each of its members holding the same status, we ought to question whether it should also be committed to a particular "all-or-nothing" definition of membership.

Michael Walzer is one theorist who has promoted a political philosophy which embraces the equal membership model of discrimination. He argues that "guest workers" should be given the opportunity to become full citizens.[34] Walzer claims that if this opportunity is not provided, the society will be creating a permanent underclass which would bear a disproportionate level of disadvantages and benefits and no political power and no representation in the legislature. He states:

> the process of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law. ... Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does.[35]

Walzer's position is not too convincing. He is not sufficiently attuned to the fact that there can be different levels of participation in a community and its economy, some of which may be quite tenuous.[36] The temporary worker may merely be spending a number of weeks in the society; a person who is spending a lengthy period of time in a country may be employed sporadically. Furthermore, even outsiders who neither live nor work within a community may be "subject to the state's authority."[37] There is no necessary connection between being subject to a state's authority and membership. Ultimately, Walzer's anal-

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[34]M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

[35]*Ibid.* at 60-61.

[36]Although he does admit that his argument takes on an implausible tone when applied to the case of the visiting professor and other privileged guests (*ibid.* at 60).

[37]See Galloway, *supra* note 6.

ysis fails because it is too hazy on the criteria by which to determine who should have the opportunity to gain full rights of membership — alternatively using life within a community, working in its labour force and being subject to the state's authority as the proper test.

Any plausibility which Walzer's views have rests on our sense that people who have participated in community life, have formed attachments and bonds, or have been led to expect a permanent status, deserve the chance to become full members. This sense is bolstered by the fact that we have witnessed many schemes wherein "guest workers" have been admitted into countries to fulfil menial tasks. Governments have taken advantage of the willingness of these individuals to accept relatively small economic rewards for their labour, and have renewed and re-renewed their visas, or failed to enforce the time limits on their entry, and have thereby created a permanent underclass without any political powers. But in these cases, it is the permanence or semi-permanence of each guest worker's status which sparks our concern, rather than the mere fact of admission in the first place, or the establishment of a "guest worker" programme. A person who is admitted into a country to join the work force for a short and clearly defined period, who is required to leave, and who is not offered a permit renewal, will have little chance to become immersed in the life of the society. The temporary nature of this person's connection with the society is a reason for not offering the opportunity of citizenship. An underclass of temporary workers will not have been created, because the temporary nature of each person's stay will ensure that they do not collectively form a social class. Only when the possibility of permanence is realized or promised should we become concerned about entrenched inferiority. Where a government admits a person for a short period and then cuts its ties with him or her, it cannot be plausibly argued that, merely by so doing, it has unconscionably exploited the individual by taking advantage of his or her position of economic need. Such a stranger, who comes to a country for a temporary and clearly defined purpose, has no cause to claim discrimination when the opportunity of citizenship, or of other social and economic benefits enjoyed by citizens, is not made available, as long as no expectations are created by the government, either explicitly or through weak enforcement.

But this conclusion should not push us towards another position which is also consistent with the equal membership model of discrimination, namely that because some people who are admitted for a limited period of time into Canada do not form established bonds with the community, they are not members, and therefore subsection 15(1) of the *Charter* should not apply to them. It would be unacceptable if such individuals could be treated with disdain by the government, or if the government were able to distribute amongst them advantages and disadvantages in such a way as to privilege some on the grounds identified in subsection 15(1), or on analogous grounds.

We should reject the idea that people are either members of a community or not, and that only the former are covered by the terms of the *Charter*. Our community admits people on different bases. To hold that some people have not formed sufficient ties with the community to justify making available the rights

of citizenship, or all the rights enjoyed by citizens, does not entail that they do not deserve to be considered members in some qualified sense. But once we have accepted those qualified forms of membership, we have reason to reject a conceptual linkage between equality and membership. We ought not to be dragooned into believing that equality means equal membership in the community.

B. Discrimination, Equalization and the Eradication of Social Disadvantage

There are strong intimations in the Supreme Court judgements that the Court identifies the purpose behind subsection 15(1) of the *Charter* to be the eradication of entrenched and systemic forms of social disadvantagement, and that the Court will use the section to ameliorate the lot of those groups within society which have been and continue to be its victims. Thus, Wilson J. in *Andrews* states: "[g]iven that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."[38]

Likewise in *Turpin*, she identifies the purposes of subsection 15(1) to be "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[39]

In a Comment on *Andrews*,[40] Colleen Sheppard picks up this theme and suggests that it is also implicit in McIntyre J.'s judgement:

> It flows from his adoption of an effects-based approach that focuses on the real social impact of law and policy, from his insistence on evidence of disadvantage and prejudice, and from his understanding of the enumerated and analogous grounds. McIntyre J.'s failure to weave together the strands of his analysis to provide a more complete delineation of s. 15's purpose accounts for some of the ambiguities and hesitations apparent in his judgment. But the threads are there, ready to be woven together into a constitutional approach to equality that focuses on identifying and remedying substantive inequalities and systemic discrimination in a meaningful way.[41]

By identifying the intended beneficiaries of subsection 15(1) to be groups who suffer systemic disadvantage within our society, one promotes the idea that the subsection is promulgating a policy of group equalization rather than promoting individual rights. It is the harm suffered by the group, rather than by any one individual member of the group, which justifies proscribing discriminatory action. Laws which single out individuals for disadvantageous treatment or consequences on the basis of a particular characteristic contribute to a comparative worsening of the lot of the whole group that is defined by that characteristic, even when only a fraction of the group is identified in the laws themselves. Thus, a law which discriminates against disabled teachers is an attack on all dis-

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[38]*Andrews*, *supra* note 7 at 154.

[39]*Turpin*, *supra* note 7 at 1333.

[40]N.C. Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews* v. *Law Society of British Columbia*" (1989) 35 McGill L.J. 206.

[41]*Ibid.* at 228-29.

abled people within society. It is but one measure which contributes to the position of inferiority suffered by the group as a whole. From this perspective, the individual who is challenging the validity of a law begins to disappear from view and the group itself takes over centre stage. The individual is but an instrument who brings the group's concerns into the courtroom. Moreover, the emphasis on equalization of the position of groups *within our society* ensures a limited ambit to the section which excludes groups and individuals who are attempting to gain entry into Canada. Within this model also, those who have no connection to the society are not protected from government discrimination.

Richard Moon has emphasized the rough and ready nature of an approach which regards the proscription against discrimination as a benefit provided by section 15 to groups which have suffered social disadvantage:

> The limited goal of review, then, is the rough equalization of the relative position of different groups in the community rather than the equalization of individual positions. The disadvantaged groups that are the focus of review may have some members who are not disadvantaged in comparison with the general population ... At best, the goal of "equality among groups" represents an imperfect form of equality of result.[42]

Moon also points out that it is the limitations of its institutional role which prevent the judiciary from tackling head-on the problem of remedying the social disadvantagement of groups, and which force it instead to promote such equalization by recognition of a right not to suffer discrimination:

> The pursuit of a full-blown equality of result is not a task the courts are well-suited to perform. The realization of equality might well require a general restructuring of our complex system of laws, and this would leave little scope for legislative judgment. However, perhaps more importantly, the adjudicative model is designed to deal with issues of corrective justice and limits the courts' ability to engage in the kind of systemic review and correction called for by this idea of equality. The courts must pursue equality awkwardly and crudely through the review of particular laws, examined in isolation from the background of other laws in the system.[43]

Moon's arrows hit their target. If the group disadvantagement model is conceived to be founded on a mode of instrumental, goal-oriented rationality, it contradicts well-entrenched principles of judicial reasoning.[44] The adjudicative forum is not one which can accommodate well — if at all — all those individuals and groups who may be affected by particular distributions. The determination and evaluation of all available means of equalizing the social position of a disadvantaged group and the implementation of the one determined to be the best, are complicated political tasks for which the judiciary is ill-equipped, ill-trained and not appointed to perform.

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[42]R. Moon, "A Discrete and Insular Right to Equality: Comment on *Andrews* v. *Law Society of British Columbia*" (1989) 21 Ottawa L. Rev. 563 at 577.

[43]*Ibid.* at 574. See also R. Moon, "Discrimination and Its Justification: Coping with Equality Rights Under the Charter" (1988) 26 Osgoode Hall L.J. 673, especially at 699-700.

[44]For arguments against instrumentalism in legal reasoning, see R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) c. 5.

Furthermore, the belief that one can achieve this aim by making particular determinations of discrimination in cases brought by single individuals, while possibly true, is nevertheless misguided. Compare using a bucket to empty a lake. Thus, we have the image of a judiciary attempting to achieve a goal — group equalization — which it is institutionally incompetent to achieve, using, as its tool, an individual right against discrimination on particular occasions, a tool which is not particularly well forged for the task.

However, one can redefine this model to avoid these problems, although in doing so, one threatens to stray quite far from the texts of the Supreme Court judgements. Subsection 15(1) can be regarded as providing a group right against discrimination, rather than aiming for social equalization.[45] One could hypothesize that the Supreme Court has not in fact jettisoned the logic of corrective justice in favour of a redistributive aim, as Moon suggests, but instead, has begun to develop the idea that subsection 15(1) recognizes that groups have the right not to suffer the effects of discrimination. The right would be vested in those groups which have suffered past and continuing social disadvantagement, that is, those groups identified by the characteristics mentioned in subsection 15(1), and groups shown to have suffered similar oppression and disadvantagement. In effect, this hypothesis suggests that it is the social oppression of the group, impeding its development as a subculture within the whole, which defines the group as a group, rather than as a motley aggregate of individuals. The purpose of the group right is to allow for the flourishing of the group, as a distinct cultural entity within the society. It is the failure to allow for the development of such distinct entities and the attempted forced assimilation of the group members into a culture defined by majority groups which amounts to discrimination. When the Court talks of eradicating social disadvantagement, it is talking about the need to recognize the relative autonomy of groups established within a society which have been unable to flourish according to their own self-definition.

There is some clear evidence in the Court's judgements that it is not adopting this view. As I argued above,[46] the clearest is perhaps that found in the statements of Wilson J. in *Hess* that suggest that the Court will defer to dominant moral judgements (as long as they are not "ill-conceived"), when deciding whether a law which differentiates between women and men will be considered discriminatory, and that it will not examine issues which go to the heart of a society's code of sexual morality. Her conclusion that it is not discriminatory and her insistence that moral debates be located in the legislature indicate clearly that she rejects the idea that the purpose of subsection 15(1) is to allow minority perspectives and cultures to prosper.

Moreover, even if the comments in *Hess* are regarded as aberrations, and the group right model can be attributed to the Court, this cannot be the whole story. Social disadvantagement may take another form entirely. It may amount

[45]See M. McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Can. J. Law & Jur. 217.

[46]See *supra* notes 25, 26 and accompanying text.

to a form of enforced segregation, whereby the law ensures that an aggregation of individuals, who do not subjectively recognize themselves as forming a cohesive unity, except insofar as they are being oppressed, is treated differently from the rest of society. Where this has happened, the aggregation may strive to eradicate its group identity and to ensure that its members are assimilated into society. The experience of being regarded and defined as different is the experience which the aggregation fights to eradicate. Where an aggregation does not regard itself as a subculture, and does not promote its own continuation, nor stress the need to make room for its difference, it is hard to see what the group interest that would underlie a duty not to discriminate could be. Where assimilation is sought by group members, it is more appropriate to conclude that individual interests ground the duty not to discriminate. The group involved in *Andrews* — permanent residents — is a good example of a group which has no self-conceived identity. The idea that permanent residents have a group right against legal discrimination is highly unpersuasive. But without the recognition of a group right, the eradication of discrimination against groups becomes a distributive goal and is covered by Moon's critique.

A separate reason for not identifying disadvantaged groups as the sole intended beneficiaries of subsection 15(1) is that this undercuts the recognition of a form of discrimination to which I adverted earlier, that is, discrimination against individuals who are not members of disadvantaged groups. Yet this possibility is canvassed and, as noted above, seemingly receives the approval of the Court in *Turpin*.[47] There is an obvious disjunction between acknowledging such a form of discrimination, while claiming that the purpose of the section is to remedy group disadvantage.

Hence, I would conclude that while there may be reason to interpret the Supreme Court to be holding that subsection 15(1) provides a group right against discrimination, it should not be read to be holding that this is the section's sole aim.

I have already adverted to the fact that the social disadvantagement model applies to all groups *within society*. It does not tie equality to membership but to *presence* within the community. However, part of the critique aimed at the equal membership model applies here too. If its central aim is the equalization of those groups which have suffered disadvantage, then the social disadvantagement model would be committed to the view that, for example, one would need to offer special justification for differentiating regulations which treated temporary visitors relatively poorly. One must conclude that they are victims of discrimination which is justifiable only on section 1 grounds. But their inferior position need not be regarded as discriminatory if one assumes that a hierarchy of membership which reflects degrees of immersion in the community is in need of no special justification; that is, if one accepts that it reflects a just way of dealing with individuals, rather than an unjust way which can be defended only on ulterior grounds. Just as the equal membership model fails because it assumes that a person is either a member or not, and that only those who are

[47]See *supra* note 31 and accompanying text.

members have equality rights under subsection 15(1), the social disadvantagement model fails by attaching the rights to all groups which are present within the community. Such a view does not take sufficient account of the myriad ways in which people can be connected to a community, nor of the widespread view that the systemic disadvantagement of those whose connection is slight needs no special justification.

C. Discrimination and Human Dignity

As already noted,[48] McIntyre J. in *Andrews* connects the concept of equality embraced in subsection 15(1) with the goal of "[promoting] 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."

In the first part of this paper, I developed an interpretation of this statement which subordinated the concept of equal respect to that of equal membership. According to that interpretation, the concern, respect and consideration that must be shown to an individual is that which is owed to a full member of society. Although there is, as I have already suggested, textual evidence which supports such a reading, there is also textual evidence to suggest that it is the broader concept of human dignity, unconnected to membership, which is the more basic concept, and that even the mention of membership is an unfortunate and distracting red herring.[49] For example, consider the blunt statement of Wilson J. in *McKinney*, that "[t]he purpose of the equality guarantee is the promotion of human dignity."[50]

If one places emphasis on dignity rather than on membership, one will avoid the blatant problem created by the fact that our society is committed to differing levels of membership, each with its own set of political, economic and social rights. A newly-arrived refugee claimant who has been granted a limited set of rights, a set much smaller than that granted to the citizen, may nevertheless not have suffered an attack on his or her self-respect or human dignity. Likewise, the group of temporary workers may not be entitled to rights and powers enjoyed by full members. Although they may be relatively socially disadvantaged, this does not in itself entail that a law which imposed burdens on them alone would be discriminatory and would be invalid unless justified according to section 1 of the *Charter*. As argued above, it is quite justifiable to have a hierarchy of membership levels with different access to the fruits of society. Hierarchy need not be inconsistent with human dignity.

According to the human diguity model, it is the individual self which is the object of protection against discrimination, rather than the individual in society. Personhood rather than membership is the salient concept. A dignity-based

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[48]*Supra* note 22 and accompanying text.

[49]One can account for the introduction of the term "member" by referring to the fact that in *Andrews* itself, the criterion of membership was sufficient to decide the case, given that the appellant was a permanent resident. The fact that the appellant's connection to the community was not more tenuous ensured that the applicability of this term was not raised.

[50]*McKinney*, *supra* note 4 at 391.

approach is premised upon the idea that one can identify aspects of being on which one's self-respect or personhood hinge. By disregarding or neglecting these aspects of being, a government will show disdain or lack of concern for the person. Three examples can help concretize this abstract analysis.

One aspect of being which gives rise to a duty of concern is the fact that people have needs.[51] When developing the distinction between treating people as equals (a dignity-based approach) and treating people equally, Ronald Dworkin makes the point that one would fail to show adequate concern for an individual when distributing a benefit if one failed to take into account the urgency and the basic nature of his need for it.[52] If one ignored these factors and treated people as mere want-satisfiers, each of whom is as entitled as each other to satisfaction, one would reveal a callous disregard for the tragedy of the needy individual's predicament.[53] It is a sympathetic appreciation of another's distress which grounds this aspect of treating others as equals. As Michael Ignatieff writes:

> The language of human needs is a basic way of speaking about this idea of a natural human identity. We want to know what we have in common with each other beneath the infinity of our differences. We want to know what it means to be human, and we want to know what that knowledge commits us to in terms of duty. What distinguishes the language of needs is its claim that human beings actually feel a common and shared identity in the basic fraternity of hunger, thirst, cold, exhaustion, loneliness or sexual passion. The possibility of human solidarity rests on this idea of natural human identity.[54]

A second example is also provided by Dworkin. He makes a case for the claim that disappointing a person's expectations can be a way of failing to take the person seriously.[55] Retroactive laws, for example, show a lack of respect for an agent's capacity of choice, and a willingness to exploit a person for possible social gains. Similarly, a state which creates the impression that it will give permanent protection to an individual can be faulted when it fails to fulfil the induced expectation.

A third example is where the government relies on stereotype in its treatment of individuals. The reason for regarding discriminatory disadvantagement as wrongful is not that it attacks the social status of the individual but that it attacks the individual's personal identity. The fact of past and continuing group disadvantagement will be evidence that powerful groups and individuals within society have not in the past regarded, and do not now regard the members of the group as worthy of the same respect as others, that they regard them as a lower class of person. If the government further disadvantages members of this group, it participates in the process. The government becomes an accessory to

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[51]For an analysis of claims of need, see D. Wiggins, *Needs, Values, Truth*, 2d ed. (Oxford: Basil Blackwell, 1991).

[52]R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 227.

[53]On the difference between needs and wants, see L. Doyal & I. Gough, *A Theory of Human Need* (London: MacMillan, 1991) at 35-45.

[54]See M. Ignatieff, *The Needs of Strangers* (London: Chatto and Windus — The Hogarth Press, 1984) at 28.

[55]R. Dworkin, *Law's Empire*, *supra* note 44 at 141.

this stereotyping by defining a person in terms of the relevant characteristic, whether it be skin colour, physical disability, gender or some other factor which can be associated with social disadvantage. It collaborates in the powerful attacks perpetrated against those who are defined by a single feature. The pre-existing social disadvantagement suffered by the group of people who share this characteristic provides strong evidence that this single characteristic is operating as a barrier which is preventing the government from seeing the individual as a full person when the law impacts negatively on those who possess it. The government is reducing an individual's humanity to a single non-essential characteristic. Herein lies the affront.

This account explains McIntyre J.'s point in *Andrews*, when he states that differentiation on the basis of capacity or merit has a different cultural meaning than differentiation on the basis of groups with whom one associates.[56] Our concept of personal identity is tied closely to an idea of agency and responsibility for our talents and achievements.[57] Because of this connection the differentiation is not in normal circumstances a way of expressing disdain and is not likely to be regarded as such by the recipient.

Similarly, disadvantage suffered by those whose connection with the community is tenuous, such as visitors or refugee claimants, will not give rise to an inference that a government which imposes the extra burden is discriminating. In the same way that considerations of equality do not require a parent to extend the same level of concern to a child who is a stranger as to his own child, they do not require a government to extend the same level of concern to people with differing links to the community. Our idea of what it means to treat a person as an equal is qualified by considerations of partiality.[58] In fact, it would not be inaccurate to say that one treats one's own child and the stranger as equals by showing preference to the former. To treat people as equals means to treat seriously the nature of the moral bond which links a person to you. As a prerequisite to identifying the requirements of equality, one must probe the nature of the relationships which one has formed with different people.

Conversely, although the links between temporary workers and the community are less solid and permanent than those between citizen and community, a government is nevertheless constrained by considerations of equality from *always* showing preference to the latter. For example, if the government failed to provide for the needs of temporary workers while providing for the trivial wants of others, a strong claim could be made that such a use of resources was discriminatory. The relative powerlessness of a group such as temporary workers may convince the judiciary that it is necessary to scrutinize a law which prejudices them, in order to ensure that their needs are being met, and that their expectations are not being disappointed. And the deeper a person's participation in a community, the more expectations a person will have.

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[56]See *supra* note 18 and accompanying text.

[57]Doyal and Gough suggest that needs are the preconditions for human action and interaction (*supra* note 53 at 50-55).

[58]See T. Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991).

In making a determination that an act of differentiation amounts to a discriminatory attack, there are two variables of which account must be taken — the grounds for the differentiation, and the intensity of the impact on the individual. The more serious the attack, the easier it is to see it as an attack on the victim's dignity. Thus, one can express disdain or hatred by prejudicing people who are already experiencing social disadvantagement, or by subjecting a person to egregiously disparate treatment which severely curtails her or his autonomy or capacity to lead a fruitful life. These two variables explain the Supreme Court's tentative remarks to the effect that it is not only members of disadvantaged groups who can suffer discrimination and its willingness to leave open the possibility that individuals who do not belong to relatively powerless groups can also be victims. The Court can be interpreted to be recognizing both these variables when it identifies the relevance of group membership but also when it shows an unwillingness to hold that only disadvantaged groups are protected by subsection 15(1). Thus the human dignity model exhibits some of the same explanatory strengths as the equal membership model without relying on a non-hierarchical vision of social ordering.

As well as avoiding the problems faced by the equal membership model, the human dignity model escapes the pitfalls to which the social disadvantagement model falls prey. Unlike this latter model, the human dignity model is not committed to equalizing the position of all groups which hold socially inferior positions. It sidesteps Moon's critique of judicial redistribution. Instead, its aim is to ensure that the government does not treat an individual to a level of concern and respect less than that which she or he deserves as a human being.

This analysis of subsection 15(1) is not unproblematic. Perhaps the greatest difficulty is that it assumes that a court can readily identify when there is an attack on a person's self-respect or dignity. That is to say, it assumes that there are objective indicia of advantage and disadvantage which can be discovered and identified by a court when it is deciding whether a person's dignity has been subject to attack. This assumption is shaky in that subgroups within a culture may adhere to nonconformist values, and different individuals may choose to base their identity or self-worth on idiosyncratic factors. I made reference to this in the earlier discussion of group rights, when I alluded to the possibility of subgroups within a society self-identifying as being apart from the social mainstream on account of basic differences in outlook or in determinations of value.[59]

The assumption of objective indicia of what is and is not advantageous to an individual is clearly visible in the dissenting opinion of Dickson C.J. in *Reference Re Public Service Employee Relations Act (Alta.)*, where he states: "[w]ork is one of the most fundamental aspects in a person's life ... A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."[60]

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[59]See text accompanying note 45.

[60][1987] 1 S.C.R. 313 at 368, 38 D.L.R. (4th) 161.

The Chief Justice then goes on to quote a less essentialist passage from an article by David Beatty, which states "[i]t is this institution through which *most of us* secure much of our self-respect and self-esteem." [emphasis added][61]

What Beatty notices but Dickson C.J. seems to ignore is that the connection between self-worth and work is contingent. Not everyone chooses to see it as a factor which is central to their very identity. The fact that large numbers of people do make the connection may justify legislative protection but does not entail that the connection is necessary or natural. On the other hand, there are grave dangers in embracing a relativistic position according to which subjective choice and preference are the sole hooks on which to hang a person's self-worth and identity. An admission that the concept of dignity is susceptible to being realized (or attacked) in an infinite number of ways will not allow room for a concept of discrimination. If dignity is self-defined by the individual, all legislation will have the potential of discriminating merely by making a distinction which a particular individual identifies as going to the very heart of her or his personality. Likewise, a non-conforming minority may claim that it is discriminated against because its conception of human dignity is not, and has never been, recognized by the law. It may argue that its conceptions of what is important in human relations and individual development cannot prosper in the current social milieu, and that a court which was truly sensitive to individual self-fulfilment or self-realization would recognize the play of hegemonic social forces which prevent substantive equality from being attained. When such claims are made by groups which are well entrenched in the community, they produce difficult problems. The violence of the law becomes more visible.[62] A palpable tension is created when a political theory which is grounded on allowing individuals to define for themselves a conception of the good life, confronts a theory of equality which presupposes a univocal account of human dignity and the ways in which it can be violated. As Thomas Nagel notes,

> the history of liberalism is a history of gradual growth in recognition of the demands of impartiality as a condition on the legitimacy of social and political institutions. As these impersonal demands achieve broader and broader scope, they gradually come to seem overwhelming, and it becomes progressively harder to imagine a system which does justice to them as well as to the demands of individuality.[63]

I believe that this difficult issue has been addressed, albeit indirectly, by the Supreme Court. It has attempted to cope with it in a familiar way — by declaring that this is not a proper matter for the Court to resolve. In the passage from her judgement in *Hess*, quoted above,[64] Wilson J. suggests that courts should not question moral principles which are widely held within a community. The legislature is the proper forum in which to examine and scrutinize the ethical norms of a society. The sole job for the Court is to ensure that these norms are not informed by "ill-conceived notions." This position is based on the view that it

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[61]*Ibid.*, quoting from D.M. Beatty, "Labour is Not A Commodity" in B.J. Reiter & J. Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 313 at 324.

[62]See R.M. Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601.

[63]See Nagel, *supra* note 58 at 57-58.

[64]*Supra* note 25 and accompanying text.

is appropriate for a court to recognize dominant conceptions of what interests are central to a person's self-respect, and to insist that the question of whether these interests should continue to dominate be raised in another forum in which competing voices can be heard and in which consensus and compromise can be formed. Wilson J. seems not to countenance the possibility of moral principles themselves being a function of the social position of their adherents, such that the moral beliefs of subordinated minority groups are ignored or considered irrational by those in dominant positions. She rejects the radically relativistic view that the definition of something as not "ill-conceived" may itself be tainted by the entrenched relations of subordination outside of which the Court may not be able to stand.

Wilson J. seems to assume that determinations of equality can only be made against a background of common, but untainted, understandings of what can amount to an attack on a person's dignity. While the Court assumes for itself the task of ensuring that individuals do not suffer attacks by the government on their self-respect, it will identify what counts as such an attack by referring to the dominant moral perspective. Any complaint that this perspective is discriminatory in itself must be directed towards the legislature, whose determination will not be subject to review. From this vantage point, the Court's function is to prevent the law from having an impact on individuals which, according to currently dominant views, would be assessed as an attack on their very identity and status as human, as opposed to social, equals. It is not its function to inquire into the origin and underpinnings of these views.

As Doyal and Gough have argued at length, relativists of every variety have problems discarding the notion of human needs.[65] However, problems of equality transcend issues of need and arise in situations where benefits and advantages are being allocated, where wants are being satisfied and where forms of life conflict with each other. What counts as a benefit will vary in different communities. Relativism does have solid roots in our culture, as evidenced by the differing forms of life in which local groups engage. As Nagel has pointed out:

> The world as a whole contains cultural and national communities representing such radically diverse values that no conception of a legitimate political order can be constructed under which they could all live — a system of law backed by force that was in its basic structure acceptable to them all. Unfortunately this can also happen within the boundaries of a single state ...[66]

The social disadvantagement model attempts to address this problem of social diversity. Its greatest strength is that it represents well our widespread experience that in democratic societies, minority subcultures and value systems conflict with those which define the social ethos and do not prosper and are not well represented in institutions in which decisions are made by majority vote. Wilson J.'s argument about limitations on the judicial function ignores these experiences, and assumes that legislative institutions are adequate to settle

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[65]*Supra* note 53 at 29-30.

[66]Nagel, *supra* note 58 at 170.

issues that "go to the heart of a society's morality" and to allow meaningful compromises to emerge. Whereas the group right model of social disadvantagement recognizes the importance of maintaining cultural diversity within our society, the human dignity model recognizes that the idea of equality is only meaningful in a society in which there is a convergence in perspective on questions of value. The Court's assumption that there is such a convergence is questionable.

The human dignity model also differs from the equal membership and the social disadvantagement models in the way in which it deals with those seeking admission into the country. From the point of view of a person seeking admission into Canada, the human dignity model offers benefits which are absent in the other two models. The fact that such a person is neither a member nor even present in the country is not a bar to raising questions of equality. If one can show that the government has treated an applicant for admission as less than a person, there is no reason for withholding the protection of the *Charter*. Furthermore, the applicant for admission is usually attempting to assimilate into the Canadian mainstream. Such a person would rarely have grounds for complaint against the dominant views of that society being applied when admissibility is being assessed.

Conclusion

I have identified three models of discrimination which can be extracted from recent judgements of the Supreme Court of Canada. None of them is unproblematic. The equal membership model cannot take account of the indistinct nature of the line which divides members and strangers. The social disadvantagement model either commits the Court to the goal of redistribution with inadequate tools, or to the recognition of a group right for subordinated social groups whose culture, ethos and mode of self-definition are threatened by oppressive social forces. Because some groups of disadvantaged individuals seek assimilation into the larger group, the idea that subsection 15(1) recognizes a group right is at most incomplete. The human dignity model is problematic for complementary reasons. It vests the right not to suffer the negative effects of discrimination in the individual, but appears to defer to dominant conceptions of what counts as an interest which is integral to one's dignity and which consequently requires judicial protection.

I believe that there is evidence in the judgements to which I have referred which reveals that the Court is attempting to come to terms with this tension between cultural diversity and uniformity, but I have declined to address the question whether the tension can be resolved. Instead, I have tried to show merely that the meaning of subsection 15(1) is as fluid now as it was when the section came into force. Within each model one can find a different explanation for the Court's emphasis on the evil of stereotyping, and a different account of what it means to treat people as equals. One of the consequences of this fluidity is that it pits potential litigants against each other. For example, members of subcultures who are attempting to gain social recognition for their different value systems will identify their cause to be incompatible with that of, say, ref-

ugee claimants or visa applicants who will attempt to ground issues of equality on universal principles of human dignity. While the human dignity model offers the most effective critical tool for measuring the moral acceptability of the government's treatment of strangers, the social disadvantagement model aims to preserve diversity and difference. The interests of the two groups directly conflict at this point. Those who are intent on promoting the interests of strangers and those with little connection to Canada would do well to emphasize the human dignity model and downplay the importance of the social disadvantagement model. Contrariwise, those intent on promoting the interests of groups which define themselves apart from the mainstream by adhering to different systems of value and forms of life, will have reason to attack the human dignity model and highlight its shortcomings, while advocating that subsection 15(1) aims to protect groups within society which have lived in the shadow of the majority and as a result have failed to prosper.

It would be ironic and unfortunate if subsection 15(1) served as a conduit to increase tensions between groups which experience a significant proportion of society's ills. By allowing the different models to coexist, and by avoiding a choice amongst them, the Supreme Court has so far succeeded in preventing any such escalation.