Immutability Hauntings: Socioeconomic Status and Women's Right to Just Conditions of Work under section 15 of the Charter

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A. Introduction

> Haunting is one way in which abusive systems of power make themselves known and their impacts felt in everyday life, especially when they are supposedly over and done with … or when their oppressive nature is denied…. What's distinctive about haunting is that it is an animated state in which a repressed or unresolved social violence is making itself known, sometimes very directly, sometimes obliquely. I used the term *haunting* to describe those singular yet repetitive instances when … the over-and-done with comes alive, when what's been in your blind spot comes into view…The whole essence, if you can use that word, of a ghost is that it has a real presence and demands its due, your attention.[1]

Canadian feminists have been sensitive to the potential of unrecognized grounds of discrimination undermining women's right to equality by shielding government action from searching review, particularly with respect to sexual orientation.[2] However, the dwindling recognition of socioeconomic status as an analogous ground under section 15(1) of the *Canadian Charter of Rights*

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1 Avery Gordon, *Ghostly Matters: Haunting and the Sociological Imagination* (Minneapolis: University of Minnesota Press, 2008) at xvi.

2 See for example, *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*]. See also the Supreme Court of Canada Factum of the Intervenor Women's Legal and Education Action Fund, online: LEAF http://leaf.ca/wordpress/wp-content/uploads/2011/01/1998-vriend.pdf (the Women's Legal Education of Action Fund (LEAF) argued that the failure of the Alberta legislature to include "sexual orientation" as a prohibited ground meant that "some decision-makers have read out lesbians from the protective reach of 'sex', or erased one element of their identity and their disadvantage to force-fit them into the single ground, sexual orientation" at para 30); Mary Eaton, "Patently Confused: Complex Inequality and *Canada v Mossop*" (1994) 1:2 Rev Const Stud 203.

and Freedoms[3] seems to have received less sustained analysis in terms of how it might affect women's rights.[4] It is possible that this recognition was not regarded as critical to women's success in constitutional equality litigation, given instances where courts have accepted women's economic disparities as indicia of their sexual inequality.[5]

Despite the seeming integration of economic matters into analyses of sex discrimination, the success of women's claims to just working conditions under the *Charter* has been mixed. Some initial positive decisions have been overshadowed by later decisions refusing to recognize discrimination against

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[3] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (section 15(1) reads, "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] But see Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) 2:1 Rev Const Stud 76 at 110 (the author discusses the lower court decision in *Thibaudeau v The Queen,* [1994] FCJ 577, containing "the suggestion that legislation which adversely affects the poor cannot also be challenged by poor women on sex equality grounds unless they suffer some distinct gender-based harm." Citing Bruce Porter, she observes that the result is the reach of sex equality under section 15 being circumscribed "because of the complex and intersecting nature of their claims").

[5] See for example, *Moge v Moge,* [1992] 3 SCR 813 (regarding the need for spousal support to take into account women's economic inequality and the feminization of poverty); *Peter v Beblow*, [1993] 1 SCR 980 [*Peter*]; *Kerr v Baranow,* 2011 SCC 10 [*Kerr*]. In both *Peter* and *Kerr* the Court recognized the non-owning common law spouse's contribution to family property through provision of domestic services because to do otherwise "systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty … " at 993 of *Peter,* cited at para 42 of *Kerr*. See also *Falkiner v Ontario (Minister of Community and Social Services)* (2000), 212 DLR (4th) 633 (ONCA) [*Falkiner*] (one of the few *Charter* cases taking an integrated approach to women's social and economic inequality. It concerned the discriminatory impact of "spouse in the house" regulations on single mothers wherein the Ontario Court of Appeal recognized "receipt of social assistance" as an analogous ground. In part, the Court recognized this analogous ground because "the economic disadvantage suffered by social assistance recipients is only one feature of and may in part result from their historical disadvantage and vulnerability" (at para 88). Receipt of social assistance, sex, and marital status were all considered pertinent axes of discrimination for the purposes of the *Charter* analysis).

"women's work"[6] as sex discrimination. I will argue that *Charter* cases involving women's work have been haunted by court findings that socioeconomic status is not an analogous ground of discrimination under section 15(1), relying heavily on its purported lack of "immutability."[7] That is, much like the courts' claim that living in poverty or receiving social assistance is not who poor people *are* but what they *do,* similar analytic separations have been used to deny women's claims that unjust treatment of women's work constitutes discrimination, despite the explicit proscriptions in

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[6] Deanne K Hilfinger Messias et al, "Defining and Redefining Work: Implications for Women's Health" (1997) 11:3 Gender and Society 296. By women's work, I adopt the authors' definition:

> … domestic work, that is, paid or unpaid housework, child care, and elder care performed in private homes …. Women's work also commonly refers to certain occupations and professions such as nursing, teaching, social work, and clerical work … Two-thirds of the women employed in the United States work in occupations that are heavily concentrated with women workers (e.g., clerical, hospital, garment, microelectronic, private household, food service, retail trade, child care, and cosmetology). As Judith Lorber noted, despite the appearance of integration in the public workplace, there is marked segregation and stratification of specific jobs according to gender, race, and ethnicity … The distinction between "productive" (i.e., men doing real work for wages) and "nonproductive" workers (i.e., women supporting, raising, and rehabilitating those wage workers) resulted in a devaluation of women's work in the home and has also been reflected in the devaluation of women in the employed workforce [at 298, citations omitted]).

Women's work could also be considered as the particular way in which women perform paid employment in light of their role in providing care for children, spouses, and others. That is, there are gaps in paid employment due to child bearing and caregiving. Women also have constraints on their abilities to work during certain times during the day and week and they work part-time as a result of these obligations.

[7] The reference to "immutability" in relation to analogous grounds originally appears in the first section 15 case, *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 [*Andrews*] (LaForest J, dissenting in part, agreed that citizenship qualified as an analogous ground, because it was "a personal characteristic which shares many similarities with those enumerated in s. 15. The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable" at para 67).

section 15(1) and section 28 of the *Charter* against discrimination on the basis of sex and gender.[8]

I will first outline the contours of this status/conduct dichotomy in Canadian law and the use of immutability to determine the existence of analogous grounds under section 15(1), focusing specifically on grounds related to socioeconomic status. I will show that whereas the test for analogous grounds was initially sensitive to social relations of power and the need for a social and historical contextualization, the analysis eventually hardened into a status/conduct binary. Consequently, inclusion as an analogous ground was overdetermined by considerations of "immutability" and membership in a "discrete and insular" minority group. Grounds enumerated and analogous were, instead, naturalized as things that just 'are' rather than as constituted by social structures that regulate the performance of identity through their coercive power. Instead, performative behaviour of legal subjects within these regimes was deemed to be extrinsic "conduct" and thus not relevant to the notion of a ground.

Second, I will show how the language of immutability and its group descriptor, "discrete and insular minorities," haunts cases concerning women's right to just conditions of work. I will show that the courts are separating what they see as negative treatment based on the immutable "status" of biological sex (as in *Brooks v Canada Safeway Ltd,*[9] *Janzen v Platy Enterprises Ltd,*[10] and *British Columbia (Public Service Employee Relations Commission) v BCGSEU*[11]) and mutable, gendered, "conduct" (such

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8 Section 28 states: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Arguably, the reference to "female persons" in section 28 includes their gender, and in any event, the Court on many occasions, appears to use sex and gender interchangeably when referencing protection afforded under section 15(1). See for example, *Benner v Canada (Secretary of State),* [1997] 1 SCR 358; *Granovsky v Canada (Minister of Employment and Immigration),* 2000 SCC 28 [*Granovsky*] ; *Auton (Guardian ad litem of) v British Columbia (AG),* 2004 SCC 78; *Sauvé v Canada (Chief Electoral Officer),* 2002 SCC 68 [*Sauvé*]; *Egan v Canada*, [1995] 2 SCR 513 [*Egan*]; *Canada (AG) v Hislop,* 2007 SCC 10; *Gosselin v Quebec (AG),* 2002 SCC 84 [*Gosselin*]; *Reference re Same-Sex Marriage*, 2004 SCC 79; *Lavoie v Canada,* 2002 SCC 23 (the significance of the distinction between the two concepts is discussed below).

9 [1989] 1 SCR 1219 [*Brooks*].

10 [1989] 1 SCR 1252 [*Janzen*].

11 [1999] 3 SCR 3 [*Meiorin*]. *Brooks, Janzen* and *Meiorin* are not *Charter* cases, but since they represent the few cases in which "adverse effects" discrimination on the basis of sex has been recognized by the Court, I believe it is important to include them in this critical analysis. Further, *Brooks,* in particular, referenced *Charter* jurisprudence and it was evident that the Court intended the application of the principles it enunciated to the *Charter.*

as having one's paid work influenced by unpaid caregiving responsibilities or being employed in occupationally segregated workplaces, as in *Canada (AG) v Lesiuk,*[12] and *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*[13]). By recognizing discrimination only in the former cases, the courts reproduced what has become the conventional analysis: denying socioeconomic status as an analogous ground within section 15(1) and depriving section 15(1) of effective application in many of the most critical areas of inequality for women.[14]

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12 2003 FCA 3 (FCA) [*Lesiuk*], leave to appeal to SCC refused, 29642 (7 March 2003).

13 2007 SCC 27 [*BC Health Services*].

14 Some of the cases concerning analogous grounds and some of the women's work cases that I will be examining have been the subject of convincing arguments by feminist theorists that the Court is employing the notion of choice to deny women`s claims. That is, it has assumed that ability to exercise choice, any choice, is coextensive with equality. See for example, Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law*, 2002" (2003) 20 SCLR (2d) 9; Rebecca Johnson, *Taxing Choices: the Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002); and Diana Majury, "Women are Themselves to Blame" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 219. They describe how the Court's decontextualized and formalistic approach to equality elides the various gendered, racial, economic and other social constraints upon the manner in which choice is exercised and engages in blaming women for any inequality they face rather than acknowledging that true choice is only available in conditions of equality. I believe that these feminist analyses, while complimentary to mine, are not exactly the same. First, "choice" as a rhetorical construct does not exclusively map on to conduct and "no choice" on to status in the Court's framework (see Robert Leckey, "Chosen Discrimination" (2002) 18 SCLR (2d) 445 at 449). With respect to analogous grounds, the Supreme Court in *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 [*Corbiere*] defined the concept of constructive immutability (essentially a "status" designation), as based on fundamental decisions about identity and personhood. In *Corbiere,* as it did earlier in *Miron v Trudel,* [1995] 2 SCR 418 [*Miron*], the majority recognized that choice as to the status represented by the analogous ground (Aboriginality-residence and marital status, respectively) may be constrained, but it did not go so far as to say no choice was involved, nor did it say so with respect to sexual orientation in *Egan,* above note 8. With respect to the cases I will be examining below concerning women's work, "choice" does not completely explain the outcomes. For instance, it was explicitly dismissed as an applicable analytic prism in *Brooks,* above note 9 and not considered at all, even by implication, in *BC Health Services, ibid*. Therefore, I see my analysis as a supplement for previous feminist constitutional work done with respect to choice, to provide some thoughts about *why* choice is such an active factor in some women's work cases (namely, that the construction of the issue as "conduct" plays a role), and in other cases it is completely disregarded or minimized.

David Eng has observed that in the contemporary "colorblind age … race appears… as only ever disappearing"; it is acknowledged only to dismiss its relevance. He therefore asks, "As race disappears, how will the law ever come to see it?"[15] We might ask in our own country, which also purports to be colourblind (or 'multicultural'), 'tolerant' of racial, sexual, and religious difference,[16] and where feminism is "dead" because equal opportunity has triumphed[17]: how will the *Charter* know gender when it sees it? Therefore, in the third part of this paper I will seek to destabilize the status/conduct dichotomy in order to permit the law to "see gender" in the context of women's work, not only theoretically but as a practical matter. How, when, and where women perform their labour, as well as how they are perceived while working, cannot be delinked from their gender, and both are, in fact, mutually constitutive. Recognizing this ineffable reality in *Charter* law would refocus the analysis from stultifying, decontextualized examinations of how closely a legal distinction affecting women's work maps onto sex-based differences (does it affect all women and only women?), and instead focus on how systems of economic and gender subordination construct women performing gendered work as non-workers, aberrant workers, or 'undeserving' workers, and how their legal expression thus constitutes a violation of section 15 and section 28.This will necessarily require that immutability be reconsidered as a critical element in analogous grounds analyses, and that socioeconomic status be given its due.

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15 David Eng, *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy* (Durham: Duke University Press, 2010) at 33.

16 See Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (Toronto: University of Toronto Press, 2007) at 148 (the author provides a critique of tolerance as reinscribing white supremacy).

17 "Is Feminism Dead?", *Time* (29 June 1998) online: Time www.time.com. This question is a recurring theme in the Canadian media context as well. See for example, Karen von Hahn, "It's Official: Feminism is Out of Style", *Globe and Mail* (26 January 2008) online: The Globe and Mail www.theglobeandmail.com.

B. The status/conduct dichotomy in law

1) Analogous grounds generally

An often quoted passage from Professor Peter Hogg encapsulates the Manichean separation of status, characteristics thought to be fixed (immutable) and "inherent" to individuals, from conduct, expressive and performative behaviour,[18] in identifying analogous grounds:

> [The enumerated grounds] are not voluntarily chosen by individuals, but are an involuntary inheritance. They describe *what a person is rather than what a person* does. What is objectionable about using such characteristics as legislative distinctions is that consequences should normally follow *what* people do rather than what they are. It is morally wrong to impose a disadvantage on a person by reason of a characteristic that is outside the person's control.[19]

However, despite Hogg's pronouncement having a seemingly timeless and self-evident quality, this understanding of analogous grounds arose from contested judicial terrain.

Andrews v Law Society of British Columbia[20] first articulated the notion of analogous grounds as a way to limit the potentially expansive scope of section 15(1) so that it did not apply to every possible distinction made under legislation. In *Andrews*, the notion of analogous grounds was only briefly discussed, despite the fact that a non-enumerated ground was the subject of the case. Justice McIntyre, for the majority, pronounced the association of discrimination with:

> … 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 on

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18 Diana Meier, "Gender Trouble in the Law: Arguments Against the Use of Status/Conduct Binaries in Sexual Orientation Law" (2008) 15 Wash & Lee JCR & Soc Just 147 at 163 [Meier] (explains the correspondence between the immutable/mutable binary and status/conduct, although, "[c]ourts have never really explained why they associate immutability with status and mutability with conduct. It seems as if conceptually 'conduct' denotes that which is willed and thus capable of change or proscription; 'Status' denotes that which is innate and acquired").

19 *Constitutional Law of Canada, 2011 Student Edition* (Toronto: Carswell, 2011) at 55 [emphasis added].

20 *Andrews* above note 7.

> others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.[21]

In finding that citizenship is an analogous ground, he noted that: "Non-citizens, lawfully permanent residents of Canada, are—in the words of the U.S. Supreme Court in *United States v Carolene Products Co* ….. —a good example of a 'discrete and insular minority' who come within the protection of s. 15."[22] Justice Wilson elaborated in her concurring decision that "discrete and insular minorities," are "those groups in society to whose needs and wishes elected officials have no apparent interest in attending," and consequently, "will continue to change with changing political and social circumstances."[23] This seems to allow for fluidity within the grounds of discrimination and for an inquiry into the social relations of power, both historically and in present day, as well as into the relative ability of a subordinated group to marshal the will of the legislature to effect change. In contrast, La Forest J's concurring decision describes an analogous ground "as a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs," and, thus, a world apart from Wilson and McIntyre JJ's contextual notions of "discrete and insular minorities" that consider social condition.

This division was again present in *Egan v Canada,*[24] wherein L'Heureux-Dubé J, in dissent, rejected the notion of analogous grounds entirely. Instead, she advocated in favour of an approach that would evaluate the discriminatory impact of government action on the social vulnerability of groups, warning that in "looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences."[25] Justices Cory and Iacobucci, in dissent, pointed to the (still) flexible concept of "discrete and insular minorities" as one factor to be

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21 *Ibid* at 174 [emphasis added].

22 *Ibid* at 183.

23 *Ibid* at 152, citing J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

24 *Egan*, above note 8.

25 *Ibid* at 552. See also *Vriend*, above note 2 at para 186, citing *Miron*, above note 14 (Justice L'Heureux-Dubé rejected the necessity of analogous grounds being based on "innate" characteristics and instead supported the "much more varied and comprehensive approach to the determination of whether a particular basis for discrimination is analogous to those grounds enumerated in s. 15(1)").

considered in deciding analogous grounds based on personal characteristics,[26] but LaForest J now held the pen for the majority decision. While not referring to immutability directly, he indicated that sexual orientation met the test for an analogous ground on the basis that it was a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs."[27] In doing so, he cited his decision in *Canada (AG) v Ward,*[28] in which his basis for distinction in the analogous grounds approach was "what one is against what one does, at a particular time."[29]

The two camps on analogous grounds faced off again in *Miron v Trudel.*[30] Justice McLachlin (as she then was), for the majority, undertook a sensitive, contextual analysis in which the assessment of marital status as an analogous ground appeared to be wrapped into the discussion as to whether the distinction engaged the purpose behind section 15(1). She found that enumerated and analogous grounds were "ready indicators of discrimination," and that they:

> … serve as a filter to separate trivial inequities from those worthy of constitutional protection. They reflect the overarching purpose of the equality guarantee in the *Charter*— to prevent the violation of human dignity and freedom by

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26 *Egan*, above note 8 at 601. Interestingly, these two judges took the opportunity in their analysis to reject the status/conduct distinction in the determination of analogous grounds:

> [h]omosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a 'status' that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. The *Charter* protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of 'status' and 'conduct' and that both should receive protection. Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected.

27 *Ibid* at 528.

28 [1993] 2 SCR 689 [*Ward*]. See also Nicole LaViolette, "The Immutable Refugees: Sexual Orientation in *Canada (AG) v Ward*" (1997) 55 UT Fac L Rev 1 (an excellent article concerning *Ward*, challenging the appropriateness of immutability determining a refugee's membership in a particular social group. In making this argument, the author relies in part on the lack of consensus about immutability in the Supreme Court section 15(1) *Charter* jurisprudence).

29 *Ibid* at 738-39.

30 *Miron*, above note 14.

> imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance.[31]

Factors such as historical disadvantage, the group's identity as a "discrete and insular minority," distinctions made on the basis of personal characteristics, as well as immutability may all "signal an analogous ground," but McLachlin J was emphatic that none of these were necessary for such a finding. She indicated that immutability ("sometimes" associated with analogous grounds) was present only in an "attenuated" form in relation to the accepted analogous ground of marital status, noting that the "law; the reluctance of one's partner to marry; financial, religious or social constraints" may pose limitations.[32] She also sounded a warning against a discrimination analysis overdetermined by biological status: "if we are not to undermine the promise of equality in s. 15(1) of the *Charter*, we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context ..."[33] Nevertheless, Gonthier J, in dissent, advocated for an analysis of analogous grounds that was more discrete and focused on the existence of "personal differences" that were irrelevant to the "fundamental values" underlying the law and "certain biological or physical realities," relying, in part, on La Forest J's decision in *Andrews.* [34]

The focus on immutability/status appeared to solidify in *Corbiere v Canada (Minister of Indian and Northern Affairs)*,[35] now the leading case on analogous grounds. The Court stated:

> It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are

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31 *Ibid* at paras 51-52.

32 *Ibid* at paras 186-73.

33 *Ibid* at para 56.

34 *Ibid* at paras 14, 21, and 25.

35 *Corbiere*, above note 14.

> actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.[36]

While there is new recognition in *Corbiere* that some grounds, both enumerated and analogous, may be only "constructively immutable" (to account for enumerated grounds like religion),[37] this dicta has resulted in an analysis that is intensely focussed on inherent "personal" characteristics, rather than the treatment of groups and the way in which they are perceived in contemporary society. The new analysis also fuses together the (formerly)

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36 *Ibid* at 13.

37 See for example, *Multani v Commission Scolaire Marguerite-Bourgeoys,* 2006 SCC 6 (the Supreme Court has largely rejected the status/conduct distinction when it comes to religion. Religious practices that adherents sincerely believe have a nexus with their religion are protected under *Charter* section 2(a), with any variations in practices between adherents having no effect from a constitutional perspective).

socially contingent notion of a "discrete and insular minority" with this static notion of immutability.[38]

2) Socioeconomic status (not qualifying) as an analogous ground

Groups seeking remedies for economic injustices achieved some early success in having grounds based on socioeconomic status recognized, due in part to the more flexible notion of analogous grounds contained in the Court's earlier

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38 See *Corbiere,* above note 14. Nevertheless, taken as a whole, it is arguable that the decision in *Corbiere* does not lead inexorably to such a result. The case concerned the successful claim of off-reserve band members that their lack of eligibility to vote during band council elections violated their section15(1) right based on the analogous ground of Aboriginality-residence. The majority, in making the above-noted comments were attempting to foreclose possible argument that grounds could be considered analogous in some contexts and not others (thereby requiring a case-by-case determination), rather than attempting to constrain the development of new grounds. Justices McLachlin and Bastarache, for the majority, affirmed that once established, analogous grounds are a "constant marker of potential legislative discrimination" (at para 10).

It is apparent that the majority regarded an Aboriginality-residence as, essentially, a status-based designation, stating that "the distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve Aboriginal band members can change their status to on-reserve band members only at great cost, if at all" (at para 14). However, elements of their discrimination analysis suggest possibilities for a more nuanced approach to analogous grounds that need not rigidly adhere to a status-based, immutability standard. First, they were unconcerned about the fact that claimant group's identity was shaped through conduct in leaving the reserve. They recognized this act could have been seemingly voluntary or impelled by a combination of social and economic forces, as well as the discriminatory provisions of the *Indian Act* (not repealed) that stripped Aboriginal women of their status for marrying non-status men and expelled them from reserves(at para 19). These forces also affected those currently living on reserve, who themselves may have been in the claimant group at another point in their lives. As well, McLachlin and Bastarache JJ appeared to accept that Aboriginal cultural identity, whether an individual is on reserve or not, is performative in that it is maintained through a connection with ancestral lands grounded in "associated ritual, ceremony and traditions, as well as [through contact with] the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders" (at para 17, citing the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996), vol 4, *Perspectives and Realities* at 521).

dicta regarding "discrete and insular minorities."[39] However, the hardening test of analogous grounds into one focusing exclusively on inherent "personal" characteristics[40] began to move impoverished groups out of constitutional protection.[41]

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[39] *Federation Anti-Poverty Groups of British Columbia v British Columbia (AG),* [1991] 70 BCLR (2d) 325 (BC Sup Ct) (receipt of public assistance); *Schaff v Canada,* [1993] TCJ 389 (TCC) at para 52 (poverty); *Dartmouth/Halifax County Regional Housing Authority v Sparks,* [1993] 101 DLR (4th) 224 (NSCA) [*Sparks*] (public housing tenants); *R v Rehberg* (1994), 127 NSR (2d) 331 (SC) (sex and poverty as an analogous ground "in this instance"). Compare *Falkiner,* above note 6 at para 89, (wherein receipt of social assistance was recognized as an analogous ground based on what the Court viewed as the "expansive and flexible concept of immutability" in *Corbiere,* above note 14, *Granovsky,* above note 8, and *Andrews,* above note 7).

[40] See also *Sauvé,* above note 8 at paras 195 and 202. The dissenting judges found that prisoners do not constitute a group protected by an enumerated or analogous ground(the majority declined to pronounce on section 15(1)):

> The status of being a prisoner is brought about by the past commission of serious criminal offences, acts committed by the individual himself or herself. The unifying group characteristic is past criminal behaviour … Beyond this, I find any analysis of adverse impact or effect discrimination seems parasitic on finding that prisoner status constitutes an analogous ground, since the adverse effect or impact is allegedly upon Aboriginal prisoners; it is the prisoner status which is alleged to result in the disadvantage, something which is not furthered within the category of Aboriginal prisoner status. [emphasis in the original].

[41] Outside the context of socioeconomic claims, the Court has recognized that there may be some flexibility in the immutability requirement. See *Granovsky*, above note 8 at para 27 (the Court acknowledged, referring to temporary disabilities, that not all enumerated grounds are immutable in all circumstances).

In *Dunmore v Ontario (AG),*[42] the Ontario Court (General Division) found that "agricultural workers" who are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility" did not constitute an analogous ground, in relation to a section 15(1) challenge to legislation excluding them from collective bargaining rights. Sharpe J stated, "[T]he evidence before me indicates that agricultural workers are a disparate and heterogeneous group. There is nothing in the evidence to indicate that they are identified as a group by any personal trait or characteristic *other than that they work in the agricultural sector.*"[43]

The case of *R v Banks* relies more explicitly on the sentiment expressed by Professor Hogg regarding the status/conduct binary.[44] This case involves the constitutionality of a provincial "squeegee law" banning solicitation of people on a roadway. The Ontario Court of Appeal refused to find those who beg as a result of extreme poverty ("beggars") as an analogous ground, citing Hogg's passage. The Court indicated that while it would not go so far as to find that an "activity could *never* be used to identify a prohibited ground of discrimination," here the activity of begging was not sufficiently

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42 (1997), 155 DLR (4th) 193 (Gen Div) [*Dunmore* Gen Div], aff'd (1999), 182 DLR (4th) 471 (CA) [*Dunmore* CA], rev'd *Dunmore v Ontario (AG)*, 2001 SCC 94 [*Dunmore* SCC] (in light of its finding of a s.2(d) *Charter* violation, the majority of the Supreme Court did not find it necessary to entertain the section 15(1) argument and specifically did not adjudicate upon whether "occupational groups" constitute an analogous ground. Justice L'Heureux-Dubé, concurring, supported their inclusion based on the more flexible "discrete and insular minority" assessment that was seemingly discarded by the Court in *Corbiere*, above note 14 at para 166). See also *Guzman v Canada (Minister of Citizenship and Immigration),* 2006 FC 1134, appeal dismissed as moot 2007 FCA 358, leave to appeal to the Supreme Court of Canada refused (3 July 2008); *Bailey v Canada (AG),* 2005 FCA 25 (indicating that receipt of social assistance and (low) income level, respectively, are not sufficiently immutable to be considered analogous grounds).

By way of contrast, see *Pratten v British Columbia (AG),* 2011 BCSC 656, rev'd 2012 BCCA 480 (demonstrating the extent to which section 15(1) socioeconomic jurisprudence relies on the immutable (status)/mutable (conduct) distinction to deny claims rather than the results being attributable to findings that the claimants' personal characteristics were too diffuse amongst the population to constitute a "discrete and insular minority." This case was brought by an individual conceived by sperm donation, claiming that the destruction of relevant records regarding the donation was a violation of section 15(1), as compared to adoptees who were entitled to similar records. The Court recognized "manner of conception" as an analogous ground, and this was conceded by the Attorney General on appeal. It is difficult to imagine a group that is more diffuse than those conceived by sperm donation).

43 *Dunmore* (Gen Div)*, ibid* at 216 & 217 [emphasis added].

44 2007 ONCA 19.

immutable or constructively immutable.[45] Even the poor themselves were caught on the horns of the mutable/immutable dichotomy—the Court said, "[w]hile it is common to speak of the 'poor' collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason."[46] In other words, the poor are not the poor, they are individuals who find themselves with no money—an extreme example of inequality becoming so embedded in a subordinated identity that it is rendered invisible.[47]

This effort to disappear the poor within section 15(1) analysis continued in *Boulter v Nova Scotia Power Corporation,*[48] deciding the issue of whether power rates that did not take into account income levels were discriminatory. There, the Nova Scotia Court of Appeal distinguished earlier cases regarding socioeconomic status on the basis that they were decided before *Corbiere*, and that as a result of that case, it was evident that poverty did not meet the test for immutability or "constructive immutability." Poverty might be a "clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age. As to the second test … [e]conomic status, poverty or wealth, is not an adopted emblem of identity like religion, citizenship or marital status, that the individual observes peacefully free of government meddling."[49]

The reasoning of the Court is conduct-based—entering and leaving poverty and losing resources are all seen as mutable conduct. The "web" of poverty appears as a neutral backdrop, rather than representing ongoing conditions of domination and oppression. Following the Court's reasoning, for poverty to be considered a constructively immutable ground it must not be

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45 *Ibid* at para 99 [emphasis added].

46 *Ibid* at para 104.

47 Marcia Rioux, "Towards a Concept of Equality of Well-Being" (1994) 7 Can JL & Juris 127 at 131 (the author discusses this phenomenon with respect to persons with intellectual disabilities:

> [w]hen the source of inequality is located in the individual in this way, there is a ready rationale for social inequality and limiting social entitlement. The political and social strategies of such technocratic rationality are then presented as value free … and [reinforced] with the principle of 'desert,' measured by economic and social self-sufficiency and independence, [therefore,] it is possible to formalize inequitable social relations while still maintaining that distributive justice is being upheld and the principle of equality being met).

48 2009 NSCA 19 [*Boulter*].

49 *Ibid* at para 42.

something from which one struggles to free themselves or endures, but must be a status that the claimant feels is an "emblem" of identity, implying some sort of visibility and perhaps pride.[50] With respect to the alternate grounds of adverse-effect discrimination on the basis of sex, race, national or ethnic origin, age, disability, or marital status, the Court found that the claimant groups and any comparator groups all had "substantial numbers of persons whose power costs add to their unwieldy burden of living expenses."[51] Citing the section 15(1) reasons from *BC Health Services*[52] (discussed below), the Court found that there was no adverse-effects discrimination on the basis of any enumerated ground.[53]

Most recently, the fused immutability/ "discrete and insular minority" criteria was used by the Federal Court of Appeal in *Toussaint v Canada*

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50 See also *Sahyoun v Ho*, 2011 BCSC 567, citing *Boulter* above note 48 (the Court found that the requirement of a lawyer to act for a litigation guardian does not violate section 15 of the *Charter* because poverty is not an analogous ground).

51 *Boulter*, above note 48 at para 83 (given that the poor are being compared to the poor here, it seems that the Court is content to "cancel out" poverty and remove it from the analysis, unlike the earlier case of *Falkiner,* above note 6, in which the court considered both sex and poverty (as an analogous ground) in deciding that the legislation in question discriminated against single mothers on social assistance). See also *PD v British Columbia,* 2010 BCSC 290 (further evidence of the courts' hardening their approach towards poverty, in the context of an application to require the government to fund legal aid in a family law case. The claimant attempted to claim section 15(1) discrimination on the basis of sex and poverty as a combined ground, but the attempt to combine grounds in this way was found to be "unproven" and not accepted).

52 *BC Health Services*, above note 13.

53 See also *Arias v Canada (Minister of Citizenship and Immigration),* [1994] FCJ 1948, citing Hogg's theory of immutability, then contained in from *Constitutional Law of Canada*, 3d ed (Toronto: Carswell, 1992). The Court found that income is not an analogous ground in a section 15(1) claim by a single mother on social assistance denied admission into Canada pursuant to section 19(1)(b) of the *Immigration Act,* RSC 1985, c I-2. That provision excluded "persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support." Justice Nadon indicated that "[t]he applicant, I must assume, deliberately decided to have four children, knowing full well that she did not have an income sufficient to meet their needs" (at para 44). See also *Pleau v Nova Scotia (Prothonotary)* (1998), 186 NSR (2d) 1 (NSSC), citing the theory of immutability in Peter Hogg, *Constitutional Law of Canada*, looseleaf edition, vol II (denying a claim that court fees discriminate against indigent persons because the "[p]laintiffs are linked only by the fact they are pursuing remedies or relief in the courts" at para 51); *Polewsky v Home Hardware Stores Ltd* (2003), 66 OR (3d) 600 (Ont Div Ct), leave to appeal granted, [2004] OJ 954 (Ont CA) (also finding poverty not to be an analogous ground in a constitutional challenge to the lack of a fee waiver for indigent parties in the Small Claims Court Rules).

(Citizenship and Immigration),[54] to deny a claim that fee waivers for humanitarian and compassionate grounds applications made by poor immigration applicants were required under section 15(1). While the existence of a legislative mechanism for such a claim was found as a matter of statutory interpretation, Sharlow JA denied the *Charter* claim. She stated, "a person's financial condition is not an immutable personal characteristic. People who are poor or who are in need of social assistance are not a discrete and insular group defined by a common or shared personal characteristic."[55] Following this decision, the legislation interpreted as permitting consideration of a fee waiver was subsequently repealed by the federal government.

B. Socioeconomic status in women's work cases

Turning now to the cases relating to women's work, it should be noted that these cases are uncommon and the *Charter*'s limitations regarding the discriminatory practices of private actors are felt acutely in this area.[56] Therefore, in my analysis, I have included human rights cases that are *Charter*-like in terms of their influence on *Charter* jurisprudence.[57] As will be shown below, in the "women's work" cases where discrimination was found, the Court emphasized women's biological sex as the basis for the negative treatment, despite the obvious effects of gendered social structures. In the unsuccessful cases, the characterization of the issue as involving women's conduct (and in some cases, choice) works to deny the operation of systemic forces that regulate the way in which their labour is performed and perceived. For instance, women's unpaid caregiving work is socially constructed as something 'natural', invaluable/valueless, and beyond the purview of the law, whereas paid work is associated with what was historically done by men. This results in the devaluation of "women's work" and women who fail to conform to male patterns of work being penalized. Nevertheless, the courts have refused to see work as both "gendered" and a "gendering practice …

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54 2011 FCA 146, leave to appeal to SCC refused, 34336 (3 November 2011).

55 *Ibid* at para 59.

56 Diana Majury, "The *Charter,* Equality Rights, and Women: Equivocation and Celebration" (2002) 40:4 Osgoode Hall LJ 297 at 326.

57 See the discussion at footnote 11, as well as the following *Charter* cases citing *Meiorin* above note 11: *Gosselin*, above note 8; *Nova Scotia (Workers Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur,* 2003 SCC 54; *Granovsky,* above note 8.

constrain[ing] and enabling – i.e. construct[ing] – womanhood"[58] as it is performed and regulated within particular social and economic relations of power and inequality, rather than as simply what women do and/or what they choose.

1) Successful cases where biology (sex-based difference) governs

Brooks v Canada Safeway Ltd[59] concerned a human rights claim challenging the exclusion of women from Safeway's accident and sickness plan based on what the Court characterized as "the mere fact of pregnancy."[60] They were not entitled to access benefits for the period surrounding the birth of their children.[61] This landmark decision under Manitoba's *Human Rights Act* [62] recognized that deviation from the male model worker due to physical requirements of pregnancy was not a legitimate demarcation of difference in the workplace, nor should it be considered purely a personal choice. Safeway had argued that pregnancy was a voluntary condition and that it was entitled to provide an insurance plan that was limited to accident and sickness. However, the Supreme Court of Canada found it "indisputable" that pregnancy was a valid reason to be absent from work, and was of "fundamental importance" in society, and, therefore, equating it to voluntary medical conditions (like cosmetic surgery) was "fallacious."[63] It is a "perfectly legitimate health-related reason for not working and, as such, it should be compensated by the Safeway plan."[64] To view it otherwise would run contrary to the purpose of human rights legislation.

As the Court was able to locate the sex difference in the female body itself (the "mere fact of pregnancy"), it was easier for it to find there was discrimination, albeit acknowledging societal imperatives for women to conceive and become pregnant and the social consequences that arise from

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58 Dorothy Chunn & Dany Lacombe, "Introduction" in Dorothy Chunn & Dany Lacombe, eds, *Law as a Gendering Practice* (New York: Oxford University Press, 2000) 3 at 16 (referring to law exclusively but arguably applicable to other social structures and hegemonic discourses).

59 *Brooks*, above note 9.

60 *Ibid* at para 5.

61 *Ibid*.

62 SM 1974, c 65.

63 *Brooks*, above note 9 at para 28.

64 *Ibid*.

this physical difference.[65] The Court underscored that this reasoning was status-based, evidenced by the overruling of the *Bliss* case (finding pregnancy discrimination was not sex discrimination): "They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant."[66] It further quoted, with approval, the Appellant's factum, which stated, "The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women."[67]

The Supreme Court of Canada decision in *Janzen v Platy Enterprises Ltd* [68] was released the same day as *Brooks,* also applying Manitoba's human rights legislation to find that sexual harassment constitutes sex discrimination. It located distinctions made by the harasser in sex difference, indicating that:

> in the present sex stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female … [o]nly a woman can become pregnant; only a woman could be subject to sexual harassment by a heterosexual male…That some women do not become pregnant was no defence in *Brooks*, just as it is no defence in this appeal that not all female employees at the restaurant were subject to sexual harassment. The crucial fact is that it was only female employees who ran the risk of sexual harassment.[69]

Thus, there is some recognition that social enculturation influences the environment where sexual harassment occurs, but nevertheless, the Court, again, locates the source of the discrimination in women's bodies. Sex, and its

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65 *Ibid* at para 29 ("[i]t cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation").

66 *Ibid* at para 38.

67 *Ibid* at para 40.

68 *Janzen*, above note 10.

69 *Ibid* at para 64.

manifestation, "sexual attractiveness to the heterosexual male,"[70] are immutable, and, therefore, proscribed bases for differential treatment.[71]

Similarly, in *Meiorin,* the case of the female British Columbia firefighter who suffered from discrimination due to lung capacity tests based on male physiology, the adverse-effect analysis was squarely in the realm of immutable, biological difference. While McLachlin J made an evocative reference to the interaction of social constructions of gender with biology in discussing why the analytic distinction between adverse-effect and direct discrimination was so malleable so as to be unworkable,[72] the application of the test to the facts of the case was based exclusively on "scientific data"

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70 *Ibid* at para 60. The Court in fact associates differential treatment based on "sexual attractiveness" to gender, which is more accurate in that it relates to "discrimination aris[ing] from, belonging to or deviating from a gender stereotype." See Meier, above note 18 at 161-62. However, the distinction does not appear to be intentional. Rather, the Court appears to use sex and gender interchangeably. In fact, sexual harassment has little to do with sexual attractiveness and more to do with the vulnerabilities of the female worker (including those who do not conform to accepted gender roles relating to attractiveness) and unimpeded opportunities in the workplace for men to perform the requirements of hegemonic male masculinity (harassing to demonstrate one's difference from women, for example). See Christopher Uggen & Amy Blackstone, "Sexual Harassment as a Gendered Expression of Power" (2004) 69:1 American Sociological Review 64, and Angela Harris, "Gender, Violence, Race, and Criminal Justice" (2000) 52 Stan L Rev 777.

71 See also *Weatherall v Canada (AG),* [1993] 2 SCR 872 (a section15(1) *Charter* case relying primarily on "biological" differences between men and women's chest areas to find that permitting cross-gender searches of male prisoners and not female prisoners was non-discriminatory); *Campbell v Canada (AG)*, 2004 TCC 460 at para 45, rev'd on other grounds 2005 FCA 420 (determining that different rules for men and women to demonstrate parenting roles in order to receive the child tax credit was discriminatory, given that, unlike *Weatherall,* the differential treatment at issue was not focussed on accommodating biological difference but upon "historical sociological patterns or custom…" at para 45).

72 *Meiorin*, above note 11 at para 42 (Justice McLachlin refers generally to "the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law," which might be thought to extend to social barriers as well biological ones).

about the inaccessibility of the aerobic standard to women.[73] While *Meiorin* is a human rights case, it is now the leading case on adverse-effect discrimination in the *Charter* context. The impact of a biological status

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[73] *Ibid* at para 80. Justice McLachlin rightly refuses to consider the purported negative impact on the morale of the firefighting crew of having someone that did not meeting the aerobic standard as an "undue hardship." However, this was rejected only on the basis (assumption) that morale should not be affected if someone is otherwise able to perform their job safely and efficiently. There seems to be no interrogation as to how gendered standards in the workplace themselves might imbue biological difference with negative social meaning, which makes the morale argument tautological and would require a more complete critique of the impact of biological standards on the workplace. I acknowledge other feminist analyses that see *Meiorin* as presenting possibilities for a more contextualized equality analysis. However, it remains to be seen if *Meiorin* could successfully be applied to standards that more explicitly implicate socially constructed gender difference. See for example, Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111 at 140; Melina Buckley, "*Law v Meiorin*: Exploring the Governmental Responsibility to Promote Equality Under Section 15 of the *Charter*" in Faraday, Denike & Stephenson, eds, above note 14 at 179.

reference point for adverse-effect sex discrimination is picked up in the case law discussed below.[74]

2) Unsuccessful cases—negative distinctions against women's work not discrimination

I would like to compare the above cases to two "women's work" cases, *Lesiuk,* and *BC Health Services,* in which the section 15(1) claims were denied. While the claimants in the latter were successful in their action under *Charter* section 2(d) freedom of association due to interference with collective bargaining rights, the Supreme Court nevertheless refused to

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[74] Disability scholars and advocates have been successful in resisting adverse effects discrimination being overdetermined by biology/physical capacity. This is reflected in Supreme Court jurisprudence, which has accepted disability as a social construction rather than inherent. Rather than focusing on "accommodation" of difference, these decisions reflect a concept of equality that is dedicated to social inclusion through transformation of dominant norms. Some of this jurisprudence cites *Meiorin* in support and potentially lays the groundwork for the case to be used in a progressive way in the context of gender and social rights. See *Granovsky,* above note 8 at paras 30 and 40 ("Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself," and in relation to *Meiorin,* "[t]he 'problem' did not lie with the female applicant, but with the state's substitution of a male norm in place of what the appellant was entitled to, namely a fair-minded gender-neutral job analysis"); *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 19, citing *Meiorin*, above note 11 ("[e]mployers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" [emphasis in original]).

More recent cases demonstrate the continued tension between social construction of disability and a biologically based framework. In *Auton (Guardian ad litem of) v British Columbia (AG*), 2004 SCC 78 [*Auton*], the Court rejects the lower court's finding that British Columbia discriminated against children with autism by failing to provide funding for Applied Behavioural Therapy/Intensive Behavioral Therapy, which the British Columbia Court of Appeal found created a "socially constructed handicap." In *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, the majority , citing *Meiorin,* above note 11, found that VIA Rail's purchase of new passenger rail cars with very limited wheelchair accessibility did not satisfactorily accommodate persons with disabilities. This was notwithstanding VIA's defence that it supplied narrow wheelchairs for use in the cars and that VIA services over its entire "network," with older, more accessible cars still in operation,. Justice Abella for the majority stated: "[i]t is, after all, the 'combined effect of an individual's impairment or disability and the environment constructed by society that determines whether such an individual experiences a handicap'" (at para 181). See also *Moore v British Columbia,* 2012 SCC 61 at para 5 (finding special education as the "ramp that provides access to the statutory commitment to education made to *all* children in British Columbia") [emphasis in original].

consider the section 15(1) claim and negated any consideration of sex or gender. In these cases, we see the same issues that arise in the analogous grounds cases concerning socioeconomic status—an anxiety about considering identity as constructed through historical as well as contemporary social relations and performative activities, about taking into account power relations in the *Charter* analysis, and about populations with diffuse, invisible identity markers making economic claims.

In *Lesiuk,* the Federal Court of Appeal considered a critical challenge to systemic discrimination against women in employment insurance benefits.[75] Historically, the employment insurance system has used the male worker and his patterns of employment as the standard for determining strength of attachment to the workforce (and the resulting entitlement to benefits). It has been infused with the implicit philosophy that women worked for "pin money" (which has been reflected at times in as explicitly discriminatory provisions), whereas men were breadwinners who were supporting families. This was moderated in the 1970s when coverage was extended to most paid workers meeting minimum hours and income requirements, and the needs of working women were acknowledged through the provision of maternity benefits.[76] Kelly Lesiuk was a part-time nurse and mother who had applied for Employment Insurance (EI) after her doctor had recommended that she not work. There had been changes to the EI program in 1996, altering the eligibility requirements from a weeks-based model (with a minimum fifteen-hour work week) to one based on annual hours, resulting in a disproportionate drop in the number of women who qualified for EI. This likely had something to do with the disproportionate number of women who made up the ranks of part-time workers (and whose reasons for part-time

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75 Kerri Froc, "Commentary on *Lesiuk v Attorney General*" (Fall 2003) 22:3 Jurisfemme - Newsletter of the National Association of Women and the Law (my discussion of *Lesiuk* is derived, in part, from this brief case comment) [Froc].

76 *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56 at paras 19-23 [*EI Reference*]; Gillian Calder, "The Personal *is* Economic: Unearthing the Rhetoric of Choice in the Canadian Maternity and Parental Leave Debate" in Rosemary Hunter & Sharon Cowan, eds, *Choice and Consent: Feminist Engagements in Law and Subjectivity* (New York: Routledge-Cavendish, 2007) 125 at 132-34; Leah Vosko & Lisa Clark, "Canada: Gendered Precariousness and Social Reproduction" in Leah Vosko, Martha MacDonald & Iain Campbell, eds, *Gender and the Contours of Precarious Employment* (New York: Routledge, 2009) 26 at 35-36 [Vosko & Clark].

employment corresponded to certain gendered patterns)[77] and the number of men who worked intensively on a seasonal basis.[78] The latter were, therefore, more likely to benefit from an annual hours-based system. Indeed, the EI Umpire found that the new eligibility requirements constituted adverse-effect discrimination against women, "who predominate in the part-time labour force" and had much less time to devote to the paid work force due to their unpaid labour in the home,[79] valorizing male patterns of employment.

In the discrimination analysis, the Federal Court of Appeal refused to entertain the submissions of the Women's Legal and Education Action Fund (LEAF), as intervener, that all women should be compared to all men.[80] Instead, the Court preferred the comparison suggested by the claimant's counsel, "women in a parental status" compared to men, which meant that the Court did not have to fully consider the wealth of statistical information comparing women to men in patterns of employment and within the EI system itself. This led to a finding that there was a lack of evidentiary basis for the claim of adverse-effect discrimination, as there was little statistical information on the EI experience of mothers in particular, and therefore "the evidence show[ed] that there [was] no group which [was] uniformly adversely affected."[81] In the Court's view, the evidence also showed that the group of those who lost out under the new system was "a very special, small subset" and some actually gained eligibility.[82] In essence, those who lost eligibility as a result of working insufficient hours were too diffuse to even be considered a

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77 *Women in Canada: A Gender-based Statistical Report,* 6th ed (Ottawa: Statistics Canada, 2011) [*Women in Canada*] (provides the links between women in part-time employment, indicating that more women than men are likely to work part-time and 70 percent of part-time workers are women, a statistic that has remained stable over the last thirty years. Further, more women than men cite child care and other personal or family responsibilities as the reason for their part-time work (17.2 percent versus 2.3 percent, respectively)). See also *Lesiuk,* above note 12 (similar contemporary evidence was before the Federal Court of Appeal).

78 Shawn de Raaf, Costa Kapsalis & Carole Vincent, "Seasonal Work and Employment Insurance Use" (September 2003) 4:9 Perspectives on Labour and Income 5 at 10; Vosko & Clark, above note 76 at 31-32 (women's part-time employment also has certain "gendered patterns" of instability, including lower income and employment in smaller firms with less union coverage).

79 *In the Matter of a Claim by Kelly Lesiuk* (November, 1998) CUB 51142 at para 64.

80 In the interests of full disclosure, I was counsel for LEAF in the case.

81 *Lesiuk,* above note 12 at para 32.

82 *Ibid*.

group for the purposes of section 15(1), similar to the treatment of other socioeconomic groups under the analogous grounds test.

Nevertheless, Létourneau JA, writing for the Court, went on to accept (*arguendo*?) differential treatment of the claimant and "others who share the same characteristics," based on her status as a mother.[83] He found that the joint grounds of gender and parental status were sufficient to satisfy the *Corbiere* test because the "period of immutability … is sufficiently long."[84] In discussing the status-based claim, the Court addressed the government's contention that the Umpire erred in considering women's involvement in part-time work because "employment or occupational status is not an immutable personal characteristic."[85] Justice Létourneau characterized this reference by the Umpire as merely contextualizing the "circumstances under, or the moment at, which the respondent and members of her group are discriminated"[86] and as such, it was not an improper embellishment on the analogous grounds already accepted to formulate the claimant group (women in a parental status).

However, this finding reinforces, rather than challenges, the notion of working part-time as conduct extraneous to the equality analysis. In so doing, the Court excised working part-time from the claimant's status as a working mother in its analysis as to whether the legislation violated the claimant's human dignity according to the contextual factors outlined in *Law v Canada (Minister of Employment and Immigration)*[87]. With respect to the first factor, pre-existing disadvantage, stereotyping, prejudice, or vulnerability, it quickly mentioned and then discounted the relevance of past discrimination in eligibility under the "old system" and, instead, noted that most women with young children were able to qualify under the new system. Failing to meet the required number of hours and qualify for EI due to part-time work:

> … do[es] not create or reinforce a stereotype that women should stay home and care for children. Nor do these requirements affect the dignity of women by suggesting that their work is less

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83 *Ibid* at para 33.

84 *Ibid* at para 37.

85 *Ibid* at para 35.

86 *Ibid* at para 6.

87 [1999] 1 SCR 497 [*Law*] (the four factors are: (1) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; (2) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (3) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) The nature and scope of the interest affected by the impugned law).

> worthy of recognition. Anyone who works the requisite number of hours in their qualifying period will qualify … Rather, I would imagine that a reasonable person would simply feel that they had narrowly missed qualifying because of an unfortunate confluence of events.[88]

Thus, negative treatment of part-time work in the legislation was merely unfortunate, not a reflection on Lesiuk's status as a working mother. This would make sense only if part-time work itself was not connected to the claimant's *status*—if it was merely what she did rather than who she was. Negative treatment of part-time work says nothing about the claimant's dignity as a human being because this work is not inherent and can be changed simply by working more hours. This is reinforced by the Court's positive references to the "flexibility" afforded to women under the new system, under the contextual factor of "correspondence" between the grounds and the "actual needs, capacity or circumstances of the claimant," implying that women could simply (re)structure their work over the year to qualify.[89]

The second significant contextual factor in the analysis is the "nature and scope of the interest affected" and, in particular, whether the effects are "severe and localized."[90] This factor from *Law* draws its authority from the *Egan* decision and is meant to gauge the intensity of the infringement on the

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88 *Ibid* at para 45. See*,* regarding developments in the *Law* framework, Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis Canada, 2010) 183. While the Supreme Court has recently disavowed of the use of human dignity as a separate hurdle for equality claimants and the use of the contextual factors from *Law* as a legal test, the emphasis on stereotype and prejudice has arguably been strengthened and, therefore, the reasoning from *Lesiuk* is still just as pernicious.

89 *Lesiuk*, above note 12 at 42.

90 *Law*, above note 87, citing *Egan*, above note 8 (per L'Heureux-Dubé J).

claimants' human dignity interest.[91] However, in the hands of the Federal Court of Appeal, this contextual factor creates an onus to show that the effect is "localized," in the sense that those working part-time must prove to be a "discrete and insular minority." In that regard, the Court found that the group was too diffuse to have "statistical significan[ce] … the evidence does not bear witness to much localization at all. The differential treatment is as between those who work at or above the threshold requirement for hours and those who fall short of this threshold."[92] Thus, the eligibility requirement did not perpetuate inequality, but was instead a neutral, "administratively necessary tool tailored to correspond to the requirements of a viable contributory insurance scheme,"[93] echoing Canada Safeway's arguments in the *Brooks* case regarding its administrative decision to compensate some health risks and not others.[94] But without a (biological) status-based argument to rely on, Kelly Lesiuk failed to achieve the same result as Susan Brooks, despite the gendered nature of her part-time work.[95]

The status/conduct distinction in the treatment of women's work perhaps reached its nadir in *BC Health Services*, addressing the constitutionality of *The Health and Social Services Delivery Improvement Act* (*Bill 29*),[96] a bill that privatized services, rolled back a number of gains that

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91 Justice L'Heureux-Dubé's reasoning in *Egan, ibid*, at 555-556 addressed this contextual factor with reference to the gravity of economic consequences resulting from the differential treatment:

> As I noted earlier, the *Charter* is not a document of economic rights and freedoms. Rather, it only protects 'economic rights' when such protection is necessarily incidental to protection of the worth and dignity of the human person (i.e. necessary to the protection of a 'human right'). Nonetheless, the nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.

92 *Lesiuk*, above note 12 at para 50.

93 *Ibid* at para 51.

94 Froc, above note 75 at 12.

95 See also *Solbach v Canada (AG)* (1999), 252 NR 157; *Canada (AG) v Brown* (2001), 286 NR 395; *Miller v Canada* (2002), 220 DLR (4th) 149 (for similar rejections of equality claims regarding EI statutory caps on regular benefits after receipt of maternity benefits).

96 SBC 2002, c 2.

healthcare and social services sector workers had made in collective bargaining, and prevented their renegotiation. Members of the unions were disproportionately female—eighty-five to ninety-eight percent depending on the union.[97] They were also disproportionately older and racialized.[98] The Supreme Court's finding under *Charter* section 2(d) was hailed as a significant victory for workers,[99] as it recognized for the first time that "substantial interference"[100] with collective bargaining constitutes a violation of freedom of association. *Bill 29* met this threshold in that many of its provisions, such as those affecting seniority rights and contracting out, were "of central importance to the unions and their ability to carry on collective bargaining" and the government, by interfering with them, "disregarded the fundamental s. 2(d) obligation to preserve the processes of good faith negotiation and consultation with unions."[101]

The Appellant unions had also argued that the legislation discriminated against women, contrary to section 15(1). They argued that the provisions had the objective of turning back pay equity gains made by the unions. There was also some evidence that this sector was targeted because pay equity had resulted in higher wages for public sector employees than workers in the private sector and other jurisdictions. Thus, they maintained that the targeting of these workers as having "excessive" wages and benefits was based on the devaluation of women's work and women as workers, sending a clear message that it was not important to respect their contractual entitlements, thereby perpetuating disadvantage and stereotyping and affecting their human dignity.[102] The Court found that the legislation did not violate section 15(1) in a few scant paragraphs, indicating that the differential, adverse effects related "essentially to the type of work they do, and not to the persons they are,"[103] and was not based on stereotyping. The exact use of Hogg's terminology from his passage on analogous grounds is perhaps the

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97 *BC Health Services,* above note 13, Factum of the Appellant at para 6.

98 *Ibid*, Factum of the Appellant at para 7.

99 See for example, Buzz Hargrove, "Striking a Collective Bargain: The Supreme Court Decision in *B.C. Health Services*" (2009) 59 UNBLJ 41.

100 *BC Health Services,* above note 13 at para 129.

101 *Ibid* at paras 132 and 134.

102 *Ibid*, Factum of the Appellant at paras 129, 142-50, 162-68.

103 *Ibid* at para 165.

clearest example of the reliance on the status/conduct distinction in relation to women's work under section 15(1).[104]

The Court's failure to recognize differential treatment of "women's work" as a sex-based distinction or even to gender its section 2(d) analysis bodes trouble for new litigation arising out of measures passed along with the budget in 2009. One of these measures was the *Public Sector Equitable Compensation Act* (*PSECA*),[105] which applies to federal government workers. For these workers, pay equity complaints are taken out of the *Canadian Human Rights Act*,[106] and "pay equity" is redefined from being concerned with wage discrimination to "equitable compensation" based on market forces. Thus, existing discriminatory pay structures in the private sector are included in this evaluation. "Equitable compensation" is made a matter for collective bargaining, to be negotiated along with the myriad of other collective bargaining issues. It is not treated as a matter of human rights, and can be bargained away. Unions will be fined $50,000 if they assist any woman to make a complaint about inequitable compensation to the Public Service Labour Relations Board. Thus, women will be left individually to navigate the highly complex comparisons necessary to found an "equitable compensation" case without necessary data about pay rates or job descriptions.[107]

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104 Contra *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 [*NAPE*]. In this case, the Court seems to superficially avoid the status/conduct distinction. It found that the legislative deferral of a pay equity increase and the extinguishment of arrears were discriminatory, as it could reasonably be taken by the women, already underpaid, as confirmation that their work was valued less highly than the work of those in male-dominated jobs. This "perpetuated and reinforced the idea that women could be paid less for no reason other than the fact they are women" (at para 46). The section 1 justification of the government's decision on the basis of an economic crisis, with little evidence of either the crisis or that other options were considered (such as delaying payment of arrears rather than extinguishing them), is itself a gendered devaluation of women's work. Therefore, the potential transformative impact of this element of the constitutional analysis is extremely attenuated, and later completely eradicated by *BC Health Services* dictum. See Patricia Hughes, "NAPE: Women as Sacrificial Lambs" (2002) 11 CLELJ 383 (examining the lack of evidence of a fiscal crisis and other options available to the Newfoundland and Labrador government), and Judy Fudge, "Conceptualizing Collective Bargaining under the *Charter*: The Enduring Problem of Substantive Equality" (2008) 42 SCLR (2d) 213 at 241-43 [Fudge] (regarding the inconsistency between the treatment of women's work in *NAPE* and that in *BC Health Services*).

105 SC 2009, c 2.

106 RSC 1985, c H-6.

107 Public Services Alliance of Canada, "The end of pay equity for women in the federal public service" (February 2009), online: PSAC www.psac-afpc.com.

The *PSECA* is being challenged as a violation of freedom of association and equality under *Charter* sections 2(d) and 15;[108] however, the de-gendered analysis in *BC Health Services* may prove to be a difficult hurdle. It is questionable whether the impact on pay equity will be characterized as being "of central importance to the unions and their ability to carry on collective bargaining,"[109] given the historic devaluation of women's work. Indeed, the *Act* may be seen as enhancing the collective bargaining relationship by making pay equity an element to be negotiated. As formally applying to federal public sector workers, the section 15(1) claim would face the barrier of the reasoning of *BC Health Services,* possibly causing the legislative distinction to be characterized as based on "kind of work" rather than on sex.

C. Fallacy of the conduct/status dichotomy

As I have discussed above, in adjudicating *Charter* claims concerning women's work, courts have attempted to deny the impact of social relations on identity through analyses that are overdetermined by biology, with outright rejection of claims that they perceive as based on performative conduct rather than inherent status. However, the status/conduct distinction is highly malleable and "can thus be used even when framing rights, to define what is at stake as proscribable conduct."[110] So, in the context of enumerated and analogous grounds, religion, for example, is considered "constructively immutable" status and poverty/socioeconomic status is considered mutable and conduct driven, despite the fact that there appears to be little empirical

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108 *The Professional Institute v Attorney General of Canada*, 2012 ONSC 4764; *Gordon et al v Canada (AG)*, Toronto CV-09-377318 (Ont Sup Ct).

109 *BC Health Services,* above note 13 at para 132.

110 Meier, above note 18 at 156.

justification for treating religious affiliation[111] as less changeable than poverty.[112] Consequently, in the sex equality context, Kelly Lesiuk is excluded from EI benefits because she needs to spend more time at work, not because the EI system penalizes those who cannot conform to male employment patterns. Those in occupationally segregated workplaces, like health care or social services, who see their pay equity gains eroded through legislative action, have 'work issues', not inequality. Decided differently, these cases would have resulted in enhanced recognition of the *Charter*'s role in remedying socioeconomic injustices, a factor haunting the courts' deliberations.

As Martha McCarthy and Joanna Radbord crisply stated in relation to Canadian equality law,

> Substantive equality demands a recognition that so-called 'essential biological differences,' like sex and race, are socially constructed, not 'natural,' and are historically and culturally specific, not universal. The discourses that create

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111 The Pew Forum on Religion in Public Life, *Faith in Flux: Changes in Religious Affiliation in the U.S.* (Washington: Pew Research Center, 2009). In the US, this recent statistical report has shown that 44 percent of Americans will change their religious affiliation at least once in their lives, and many more than once. There do not appear to be similar statistics compiled for Canada, and there are admittedly differences in religiosity between the two countries. See David Rayside & Clyde Wilcox "The Difference that a Border Makes: The Political Intersection of Sexuality and Religion in Canada and the United States " in David Rayside & Clyde Wilcox, eds, *Faith, Politics, and Sexual Diversity in Canada and the United States* (Vancouver: UBC Press, 2011) 3 at 11 (showing that in comparing Canada to the US, there are less evangelical Protestants and more Catholics in Canada, half as many Canadians as Americans that consider religion as important, and church attendance is half as prevalent in Canada than in the US). However, none of these differences necessarily suggest more stability in Canadian religious affiliation over time. Arguably, diversity of religious affiliations and practices amongst residents in two closely connected countries *itself* may illuminate the mutability of religion as dependent on a whole host of social circumstances shaping one's beliefs, including the political culture of the country in which one lives, rather than an inherent status.

112 Ross Finnie & Arthur Sweetman, "Poverty dynamics: empirical evidence for Canada" (May 2003) 36:2 Canadian Journal of Economics 291 at 322, 316 and 323 (finding "[t]he always poor make up 40% of the low-income population in any given year and this rises to 75% if those poor four years out of five are also included." Further, they found that "past low-income status also has a strong predictive impact on current low-income status" and "increases substantially" with the number of years previously spent poor. Even one year spent in poverty in the past five has a dramatic effect on the likelihood that one is currently poor). Miles Corak, "Do Poor Children Become Poor Adults? Lessons from a Cross-Country Comparison of Generational Earnings Mobility" in John Creedy & Guyonne Kalb, eds, *Dynamics of Inequality and Poverty* (Oxford: Elsevier Ltd., 2006) 143 at 144 (finding one-third of low income Canadian children do not escape low income in adulthood).

> 'sex' are a major structural support for patriarchy and heterosexism; those that create 'race' buttress racism. Accordingly, the language of 'biological realities' is not descriptive, but prescriptive; it enforces relations of inequality … In other words, 'biological realities' are socially constructed as rationalization for the established power structure, so that what we perceive to be natural and essential differences are in fact historically and culturally rooted .... [113]

Thus, within the very structure of the status/conduct dichotomy is the notion that inequality is grounded in biological and inherent differences (and the solution is to root out "irrational" responses thereto), rather than a more pervasive social process in which the very notion of difference is created and regulated by systems of subordination. It ignores decades of academic scholarship that argues that status and conduct are mutually constitutive[114] — we cannot apprehend sex difference and sexuality outside of hegemonic cultural frameworks (including patriarchy, capitalism, racism) that give rise to hierarchical constructions of difference as "natural" and "inherent," and further, in navigating these coercive structures, they regulate our behaviour as we adhere to or resist prescribed identities.

In feminist theory, the concept of gender "gradually came to be understood as referring to the historically specific, socially constructed, subject positions, relationships, and language codes by which biological sex differences are rendered materially, culturally, psychologically, and socially

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113 Martha McCarthy & Joanna Radbord, "Foundations for 15(1): Equality Rights in Canada" (1999) 6 Mich J Gender & L 261 at 280-81.

114 Douglas Kropp, " 'Categorical' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) Queen's LJ 201 at 203. The author makes a similar argument in the Canadian context that the enumerated and analogous grounds framework, with its focus on immutable personal characteristics, is based on an "antiquated notion of the self that is traceable to eighteen-century 'Enlightenment' thought." He argues that a categorical analysis based on grounds relies on the fallacy of stable identity binaries to determine who falls within the scope of a category, resisting the notion that the binaries are actually dependent on one another for meaning and that "people seldom experience themselves to be fully in or fully out of any particular category"(at 218). The result is a focus on whether a claimant can conform to dominant understandings of what "difference" represented by a particular ground "looks like" and complex experiences of subordination failing to be recognized. Instead, much like L'Heureux-Dubé J advocated in *Egan,* above note 8, Kropp's approach would be focussed on discrimination, rather than on attaching experiences of subordination to grounds, and "would explore the social construction of [group] identities as well as their relation to background norms" (at 228).

significant."[115] With the recognition of gender as socially constructed came a further recognition that sex could not exist outside this framework, with theorists like Judith Butler maintaining that sex difference is always being observed, perceived, and regulated in a social milieu. In fact, sex/gender are fused, with gender "performatively produced and compelled by the regulatory practices of gender coherence."[116] Thus, despite the fact that gender is constantly being performed, it is not negotiated by individual women completely "free form"—there are coercive normative systems based on socially constructed notions of biological sex difference within which performances of gender are confined. In other words, "conduct creates status; that is, conduct defines who one is in the real world."[117]

Butler's work is supported by other feminist theorists who note the importance of keeping gendered regulation by institutional structures at the forefront of the analysis. To maintain this focus, Iris Marion Young indicates that she prefers to theorize "gender as an attribute of social structures more than of persons,"[118] and that these gender structures operate to constrain and direct one's decisions about the extent to which to conform or transgress their conventions. She identifies the sexual division of labour as one "axis" of gender structures along with normative heterosexuality and gendered hierarchies of power.

Meg Luxton recounts how feminist political economy evolved from socialist feminist theory in the 1970s, initially bringing to light how the sexual division of labour and women's reproductive work served the needs of capitalism, and then moving to a contemporary recognition of "social reproduction as a way of conceiving how states, markets, and households all interact in the daily and generational reproduction of an international labour force" as "interdependent processes of production and consumption" of paid

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115 Meg Luxton, "Feminist Political Economy and Social Reproduction" in Kate Bezanson & Meg Luxton, eds, *Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism* (Montreal: McGill-Queen's University Press, 2006) 11 at 30 [Luxton].

116 Judith Butler, *Gender Trouble* (New York: Routledge, 1990) at 24 & 25. The author also addresses inherent constrains on sex/gender despite its social construction:

> [t]his is not to say that any and all gendered possibilities are open, but that the boundaries of analysis suggest the limits of a discursively conditioned experience. These limits are always set within the terms of a hegemonic cultural discourse predicated on binary structures that appear as the language of universal rationality. Constraint is thus built into what that language constitutes as the imaginable domain of gender (at 12).

117 Meier, above note 18 at 180.

118 Iris Marion Young, "Lived Body vs. Gender: Reflections on Social Structure and Subjectivity" in Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essays* (New York: Oxford University Press, 2005) at 22.

and unpaid labour. [119] These processes constitute sex/gender, race, and geopolitical relations of privilege and subordination between the global north and the global south, among others. Sexual divisions of labour, with "feminized" work associated with domestic caregiving carried out in private —socially devalued and unpaid or underpaid—correspond to and reinforce various gendered dichotomies.[120] Law is intimately involved in these relations.[121] For instance, governmental decisions to privatize or to refrain from implementing public programs for family care implicitly rely on the notion that women's unpaid labour is available as a replacement, "exacerbat[ing] the sexual division of labour by shifting more work to women while asserting this is merely a side effect of individual choice."[122] Fudge and Cossman argue that "law plays a central role in the project of privatization,"[123] inscribing women's labour as extraneous to the state and the market in a myriad of ways (not only in equality law, labour law, and family law) and, therefore, as both invaluable (as a "labour of love") and without (much) value.

Further, in the contemporary Canadian dual income-earning family, the devalued gender role of women as caregivers is stabilized despite the presence

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119 Luxton, above note 115 at 35.

120 Susan Williams, "Feminist Legal Epistemologies" (1993) 8 Berkeley Women's LJ 63 (outlining the various dichotomies of Enlightenment thought, including private/public, emotion/reason, and body/mind, with women and other subordinated groups affiliated with the former in each).

121 See for example, *Bradwell v Illinois* 16 Wall 130, 141 (1872) (providing one example from the United States Supreme Court of the naturalization of gender inequalities in law:

> … [t]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood).

122 Judge Fudge & Brenda Cossman, "Introduction: Privatization, Law, and the Challenge to Feminism" in Judge Fudge & Brenda Cossman, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 1 at 29-30.

123 *Ibid* at 34. See also Martha McClusky, "Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform" in Linda McClain & Joanna Grossman, eds, *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge: Cambridge University Press, 2009) 267 at 269.

of a female income-earner by unequal racial and class divisions and uneven global relations. Female transnational migrant domestic workers are pushed by global disparities and the stringency of domestic immigration laws to leave their own families in the global south and perform private caregiving duties for western families in low paid, poorly regulated employment:

> What makes a female employer appear manlike and 'independent' – that is, of family responsibilities – in her own workplace is precisely her dependency on a female worker. Migrant workers are ideally suited to support this labour-market participation, since they can be (made to be) more flexible than citizen-workers … Instead of being transformed, [gender relations in the home and larger society] are merely reproduced with only some changes in the cast.[124]

That the social and legal regulation of women's work is part of the gendering process may be shown by the statistical evidence strongly identifying gender with economic stratification, [125] as manifested by a gender wage gap, occupational segregation by race and sex, [126] and patterns of part-time and other precious forms of employment.[127] As Fudge points out, "Since specific kinds of jobs are readily available to specific types of workers, such workers tend to 'choose' these jobs."[128] Further, "the burden of inequality falls

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124 Sedef Arat-Koç, "Whose Social Reproduction? Transnational Motherhood and Feminist Political Economy" in Kate Bezanson & Meg Luxton, eds, *Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism* (Montreal: McGill-Queen's University Press, 2006) 75 at 88-89. See also Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) 23 CJWL 235.

125 Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 CJWL 186 at 190-92.

126 *Women in Canada*, above note 77. The report shows that in 2009, 67 percent of all employed women were working in teaching, nursing, and related health occupations, as well as clerical or other administrative positions or sales and service occupations. Only thirty-one percent of employed men worked in these occupations. As well, 87.1 percent of nurses and health-related therapists, 75.5 percent of clerks and other administrators, 65.9 percent of teachers, and 56.9 percent of sales and service personnel were women. See Leah Vosko, "Rethinking Feminization: Gendered Precariousness in the Canadian Labour Market and the Crisis in Social Reproduction" (Paper delivered at the Robarts Canada Research Chairholders Series, 11 April 2002) at 14, online: YORKU www.yorku.ca/robarts/projects/lectures [Vosko, "Rethinking Feminization"] (with respect to racial occupational segregation).

127 Vosko & Clark, above note 76 at 32-33.

128 Fudge, above note 104 at 236-37.

greatest on women workers where poverty, the informal economy, weak employment regulation, racial and disability discrimination and subjection to gender-based violence are most pronounced."[129] Women's economic disparity is strongly association with the sexual division of labour and devaluation of women's work, with women performing two-thirds of unpaid household labour and still unable to access affordable child care.[130] With respect to entrepreneurship, women are less likely to be self-employed than men[131] and when they are self-employed, they face discrimination and cannot count on the assistance of their spouse in the business to the same extent as men, nor does their unpaid labour in the home change significantly.[132]

Feminist understandings have exposed law as not only "gendered," in that it "insists on a specific version of gender differentiation," but also as a "gendering strategy," in which "[w]oman/women are brought into being."[133] We saw in *Lesiuk* the trope of a mother working for "pin money," attempting to draw on EI benefits without being securely attached to the workforce, for example. This understanding of gender makes the status/conduct dichotomy incoherent, as gender is not located merely in the conduct of a sexed subject, but also in larger social structures that participate in gendering the subject.

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129 Mary Cornish & Fay Faraday, "Using the *Charter* to Redress Gender Discrimination in Employment" (Presentation to the Summer Law Institute for Secondary School Teachers, 31 August 2005) at 2-3, online: OJEN www.ojen.ca.

130 Vosko, "Rethinking Feminization," above note 126 at 20.

131 *Women in Canada,* above note 77 (showing 11.9 percent women are self-employed, versus 35.5 percent of men).

132 Lisa Phillips, "Sketching a Portrait of 'Unpaid Market Labour': Statistical Silences and Narrative Noise" (Paper presented at the Gender & Work: Knowledge Production in Practice Conference, York University, 1-2 October 2004), at 37-38, online: Gender & Work Database www.genderwork.ca; Monica Belcourt, Ronald Burke & Hélène Lee-Gosselin, *The Glass Box: Women Business Owners In Canada* (Ottawa: The Canadian Advisory Council on the Status of Women, 1991) at 39-42. See also Mary Condon, "Limited by Law? Gender, Corporate Law and the Family Firm" in Dorothy E Chunn & Dany Lacombe, eds, above note 58, 181 at 190 & 191 (describing how women's participation in family businesses is governed by the "intractability of traditional familial roles," and that they have little decision-making power despite day-to-day involvement in the business and sometimes formal positions in the corporate governance hierarchy).

133 Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: SAGE Publications, 1995) at 191 and 193.

Deconstructing the status/conduct binary reveals the law itself as unable to stand "outside" of gender to passively observe and adjudicate.[134]

1) Putting the status/conduct binary to rest

If we accept the fallacy of the status/conduct distinction, how can we work to eradicate it in Canadian law? The first step is to challenge immutability as a critical element in the assessment of analogous grounds. What we know about social constructions of identity reveals the inherent instability of notions of immutability and "constructive immutability" as organizing principles for analogous grounds. The current fusion of immutability with "discrete and insular minority" has calcified into a test that starts by examining all those affected by a law, requiring them to have an identifiable and visible status as a group, bound together by their inherent personal characteristics. This removes the focus from the impact of law on groups that suffer under the same relations of subordination and completely eviscerates adverse-effect discrimination. This is so because systemic discrimination is seldom so efficient that it affects an identifiable subordinated group and only that group.

Work, in particular, has long been accepted as a critical constitutive element of identity, to the extent that one author has maintained that "'jobs create people because they shape individuals' behaviour and self-identification."[135] This has also been a consistent theme running through the Supreme Court's jurisprudence outside the section 15(1) *Charter* context,[136] and in particular, women's contribution to social reproduction has been singled out for its special social significance and its connection to women's

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134 See for example, Fudge, above note 104 at 241 (critiquing *BC Health Services:* "the Court's analysis ignores the extent to which labour legislation reflects and reinforces historical patterns of labour market discrimination and segregation").

135 Joanna Grossman, "Pregnancy and Social Citizenship" in Linda McClain & Joanna Grossman, eds, *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge: Cambridge University Press, 2009) 233 at 237 (citing Vicki Shultz, "Life's Work" (2001) 100 Columb L Rev 1881 at 1890 and sociological evidence).

136 See for example, *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368 ("[w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is *an essential component of his or her sense of identity*, self-worth and emotional well-being" [emphasis added]). See also *Dunmore* SCC*,* above note 42 at para 167 (per L'Heureux-Dubé, concurring); *Delisle v Canada (Deputy AG),* [1999] 2 SCR 989 at para 44.

subordinated social identity.[137] However, for an equality analysis to properly address gender and work as mutually constitutive, a different framework may be required that does not focus on identity but rather systems of oppression. In a previous article, I discussed the difficulty of courts addressing sexual inequality in isolation from other systems of oppression. Attempting to cabin sexual hierarchy from other related hierarchies of race, indigeneity, class, etc., in the constitutional analysis often results in courts finding no rights violation at all, thus leading to the "perverse result of rights violations going unrecognized and unremediated, the more complex and intractable the claimant's oppression." [138] As post-intersectionality theory explains, addressing one system of subordination results in the operation of other systems being obscured and, in the absence of critical attention, strengthened. Given gendered and racial patterns of employment and economic disparity, "what one does," whether it be engaging in low-income work[139] or negotiating the intractable social assistance bureaucracy,[140] is critically linked to the operations of patriarchal capitalist white supremacy. Recognizing socioeconomic status as an analogous ground would ensure that discriminatory treatment is not shielded from a searching, contextual analysis under section 15 as a result of the intimate connection between systems of economic domination and other forms of oppression (such as sexism or racism).

Women in particular are affected by economic disparity to a greater extent than men and for reasons highly associated with their gender. Excising

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137 See *Brooks,* above note 9 at paras 29 and 40 ("That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious"); *EI reference*, above note 76 at para 66 ("[a] growing portion of the labour force is made up of women, and women have particular needs that are of concern to society as a whole. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility"); *NAPE*, above note 104 at paras 45 and 49 (recognizing that women's jobs are "chronically underpaid" and that "[l]ow pay often denotes low status jobs, exacting a price in dignity as well as dollars"). See also above note 5 and accompanying cases.

138 "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination" (2010) 25 Can J L & Soc 21 at 24.

139 *Kearney v Bramalea Ltd* (No 2) (1998), 34 CHRR D/1 (Ont Bd Inq), aff'd *Shelter Corp v Ontario (Human Rights Comm)* (2001), 39 CHRRD/111 (Ont Sup Ct) (one of the few cases having already made this connection in the human rights context. The Board recognized the use of minimum income criteria as a screening mechanism for apartment rentals constituted systemic discrimination on the basis of sex, family status, marital status, race, and citizenship. This was based on exhaustive statistical evidence regarding the incidence of low incomes amongst equality seeking groups identified by these characteristics).

140 *Falkiner*, above note 6; *Sparks*, above note 39.

these considerations from the equality analysis on the basis that they involve "conduct" is arguably a violation of section 28, which guarantees rights equally to "male and female persons," as this results in substantively unequal access to the section 15(1) right.[141] Similarly, it may be considered a section 28 violation for civil liberties that have traditionally been associated with men's interests, including freedom of thought and religion, to gain protection for practices closely associated with one's social identity, at the same time as the court has insisted on a rigid adherence to "status" in women's equality claims. Until these issues are taken seriously by courts, the injustice will haunt us still.

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141 As I maintained in my unpublished paper, "Will 'Watertight Compartments' Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms," complex violations of rights require different analytic tools to reveal them, the same way as intersectional identities require different analyses of discrimination which recognize, for example, that racism and sexism is experienced by black women differently than racism is experienced by black men and sexism is experienced by white women (LLM Thesis, Faculty of Law, University of Ottawa, 2008). Women's lack of equal access to section 15(1) may be seen, in part, by virtue of the fact that they have never had a successful sex discrimination case at the Supreme Court of Canada, with several of their cases raising issues of economic injustice. See for example, *Gosselin,* above note 8; *Hodge v Canada (Minister of Human Resources Development),* 2004 SCC 65; *Nova Scotia (AG) v Walsh,* 2002 SCC 83. Further, Bruce Ryder and Taufiq Hashmani show that many cases raising these issues have been turned down for leave to appeal. See "Managing Charter Equality Rights: The Supreme Court of Canada's Dispositions of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) SCLR (2d) 505 (especially their discussion of leave being turned down in *Boulter,* above note 48, despite unresolved issues remaining about poverty as an analogous ground). Fudge in fact attributes the finding of a section 15(1) violation in *NAPE* to Binnie J being able to position the claim as a dignity (identity) claim rather than a claim to economic justice. See above note 104 at para 235.