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Terry Skolnik*

Expanding Equality

Section 15 of the Canadian Charter *provides a constitutional right to equality. But the Supreme Court of Canada has interpreted this right restrictively. Today, the Constitution fails to protect certain individuals and groups against obvious forms of direct and indirect discrimination. This article argues that s. 15 of the* Charter *is interpreted narrowly in three respects and advances proposals to expand the right to equality. First, the right to equality framework fails to protect marginalized persons and groups against direct discrimination. Second, courts overlook how individuals can suffer discrimination based on quasi-immutable traits, which are personal characteristics that are relatively stable and difficult to change. Third, s. 15 of the* Charter *is largely absent from areas of the law where discrimination is widespread, such as criminal law and procedure. This article offers a more expansive right to equality framework that addresses these limitations. In doing so, it deepens our understanding of discrimination based on different personal traits, distinguishes their respective normative significance, and offers an account of their different psychological harms. It also explains why the right to equality can call the State to account for discrimination—and require the State to justify disparate treatment—in ways that other constitutional rights cannot. Ultimately, this article offers a path forward to broaden the right to equality in order to counteract unconstitutional discrimination more effectively.*

L'article 15 de la Charte *canadienne prévoit un droit constitutionnel à l'égalité. Mais la Cour suprême du Canada a interprété ce droit de manière restrictive. Aujourd'hui, la Constitution ne protège pas certaines personnes et certains groupes contre des formes évidentes de discrimination directe et indirecte. Dans le présent article, je soutiens que l'article 15 de* la Charte *est interprété de manière restrictive à trois égards et j'avance des propositions pour élargir le droit à l'égalité. Premièrement, le cadre du droit à l'égalité ne protège pas les personnes et les groupes marginalisés contre la discrimination directe. Deuxièmement, les tribunaux négligent la façon dont les individus peuvent subir une discrimination fondée sur des traits quasi-immuables, qui sont des caractéristiques personnelles relativement stables et difficiles à modifier. Troisièmement, l'article 15 de* la Charte *est largement absent des domaines du droit où la discrimination est répandue, tels que le droit pénal et la procédure pénale. Dans cet article, je propose un cadre plus large pour le droit à l'égalité qui tient compte de ces limites. Ce faisant, j'approfondis notre compréhension de la discrimination fondée sur différents traits personnels, je distingue leur signification normative respective et rend compte de leurs différents préjudices psychologiques. J'explique également pourquoi le droit à l'égalité peut demander à l'État de rendre compte de la discrimination — et exiger de l'État qu'il justifie la disparité de traitement — d'une manière qui n'est pas possible pour d'autres droits protégés par la constitution. Enfin, je propose une voie à suivre pour élargir le droit à l'égalité afin de contrecarrer l'inconstitutionnalité du droit à l'égalité.*

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Introduction

Section 15 of the Canadian *Charter* confers a right to substantive equality—a right to be treated with equal concern and respect.[1] This right protects individuals against direct and indirect forms of discrimination.[2] Direct discrimination implies that a law is discriminatory on its face, and indirect discrimination implies that a neutrally-worded law disparately impacts individuals.[3] However, the s. 15 *Charter* right to equality is

1. *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*]; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, 1989 CanLII 2 (SCC) [*Andrews*].
2. *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 25-53 [*Fraser*].
3. Oran Doyle, "Direct Discrimination, Indirect Discrimination and Autonomy" (2007) 27:3 Oxford J Leg Stud 537 at 537-538, DOI: <10.1093/ojls/gqm008>; Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Const Stud 191 at 192, online: <www.constitutionalstudies.

interpreted restrictively in certain respects, which limits its potential to prevent and remedy unconstitutional discrimination.[4]

Consider this: for decades, empirical research has demonstrated the pervasiveness of racial discrimination in the criminal justice system.[5] Yet, the s. 15 *Charter* right to equality is largely absent from the Supreme Court of Canada's criminal law and procedure jurisprudence.[6] Take also the example of the Supreme Court of Canada case law related to discrimination against women. The s. 15 *Charter* right to equality came into force in 1985—three years after the Canadian *Charter*'s enactment.[7] Yet it took until 2018 for the Court to rule in favour of women regarding gender-based discrimination that violated s. 15 of the *Charter*.[8]

Scholars criticize the right to equality framework on various grounds. Some contend that the Supreme Court of Canada's approach to s. 15 of the Canadian *Charter* fails to address systemic discrimination adequately.[9] Others note that the Court interprets the right to equality so restrictively that claimants increasingly invoke other constitutional rights to remedy discrimination.[10] Others posit that the Court has modified the s. 15 *Charter* test on several occasions since its inception, which has introduced uncertainty and unpredictability for claimants and lawyers.[11]

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ca/wp-content/uploads/2019/08/19RevConstStud191.pdf> [perma.cc/H8H2-38C3].

4. See e.g. Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 SCLR (2nd) 183 at 184-185, online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1351&context=fac_pubs> [perma.cc/8CE2-VS7E]; Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Const F Const 53 at 54-55, 62, DOI: <10.21991/cf29422> (describing the narrow scope of equality rights). The term "unconstitutional discrimination" implies a law that violates s. 15 of the *Canadian Charter.*

5. Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2022) 99:2 Can Bar Rev 429 at 436-438, DOI: <10.2139/ssrn.3721754> [Skolnik, "Racial Profiling"].

6. Terry Skolnik, "Rééquilibrer le rôle de la Cour suprême du Canada en procédure criminelle" (2022) 67:3 Rev Droit de McGill 259 at 290, online: <lawjournal.mcgill.ca/article/reequilibrer-le-role-de-la-cour-supreme-du-canada-en-procedure-criminelle/#:~:text=La%20Cour%20a%20affirm%C3%A9%20que,et%20cela%2C%20%C3%A0%20plusieurs%20%C3%A9gards.> [perma.cc/BM9P-9AJB] [Skolnik, "Rééquilibrer le rôle"]. Furthermore, certain recent s 15 *Charter* claims in criminal law have failed. See e.g. R v Sharma, 2022 SCC 39 [Sharma].

7. WR Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985) 11:1 Queen's LJ 1 at 17.

8. Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94 SCLR (2d) 301 at 301, DOI: <10.60082/2563-8505.1385>, citing *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.

9. Mary Eberts & Kim Stanton, "The Disappearance of Four Equality Rights and Systemic Discrimination from Canadian Equality Jurisprudence" (2018) 38:1 NJCL 89 at 91.

10. Kimberly Potter, "The Role of Choice in Claims under Section 15 of the *Charter*: The Impact of Recent Developments in Section 7 Jurisprudence" (2016) 35:2 NJCL 181 at 191; C Tess Sheldon, Karen Spector & Mercedes Perez, "Re-Centering Equality: The Interplay Between Sections 7 and 15 of the *Charter* in Challenges to Psychiatric Detention" (2016) 35:2 NJCL 193 at 197-198.

11. Alicja Puchta, "*Quebec v A* and *Taypotat*: Unpacking the Supreme Court's Latest Decisions

This article argues that the s. 15 *Charter* framework is interpreted restrictively in three ways, which limits its capacity to counteract unconstitutional discrimination. First, by rejecting certain analogous grounds, the s. 15 *Charter* framework does not protect some marginalized groups against obvious forms of direct discrimination.[12] Second, the s. 15 *Charter* framework cannot thwart discrimination based on quasi-immutable traits, which are personal traits that are relatively stable and difficult to change, such as poverty and homelessness.[13] Third, the right to equality is largely absent from areas of law where discrimination is ubiquitous, such as criminal law and procedure.[14] The concluding parts of this article demonstrate the value of a more expansive right to equality framework and highlight its potential implications.

The structure of this article is as follows. Section I sets out the legal framework that currently governs the s. 15 *Charter* right to equality. Section II explains why this framework cannot redress obvious forms of direct discrimination. Section III demonstrates why the Supreme Court of Canada should recognize discrimination based on quasi-immutable traits that are neither immutable nor constructively immutable.[15] Section IV highlights how the right to equality is largely absent in areas of the law where it is most needed, especially criminal law and procedure. Section V offers a more expansive right to equality framework and explores its implications in criminal law and procedure. Ultimately, this article provides a new and more robust approach to the right to equality that can combat various kinds of discrimination more effectively than the current model.

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on Section 15 of the Charter" (2018) 55:3 Osgoode Hall LJ 665 at 670, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3350&context=ohlj> [perma.cc/9WCT-SBLP].

12. Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2 Can J Poverty L 1 at 15-23, DOI: <10.2139/ssrn.4007645>.

13. This argument was first advanced in: Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equality 69 at 90, online: <jps.library.utoronto.ca/index.php/utjle/article/view/30069/25284> [perma.cc/2ULS-P2AH] [Skolnik, "Homelessness"]; Jessica Clarke, "Against Immutability" (2015) 125:1 Yale LJ 2 at 53-85, online: <www.yalelawjournal.org/pdf/a.2.Clarke.102_soghpowr.pdf> [perma.cc/YM58-7WLP] [Clarke, "Against Immutability"].

14. This argument was first advanced in: Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 290.

15. Skolnik, "Homelessness," *supra* note 13 at 90; Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality 37 at 51-62, DOI: <10.32920/22057217.v1> [Sealy-Harrington, "Assessing Analogous Grounds"] (describing the need to recognize discrimination based on a multi-variable approach).

I. *Overview of the constitutional right to equality*

1. *The right to equality and its legal framework*

Section 15 of the Canadian *Charter provides the constitutional right to equality.*[16] The provision states that individuals enjoy the law's equal protection and equal benefit without discrimination.[17] Although the Supreme Court of Canada has modified the legal test applicable to s. 15 of the *Charter* several times since the provision's enactment, the current framework is as follows.[18]

Claimants must satisfy a two-part test to establish a prima facie case of unconstitutional discrimination.[19] First, they must prove that "the law on its face or in its impact, creates a distinction based on enumerated or analogous grounds" of discrimination.[20] Second, they must prove that the law "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[21]

Certain aspects of this two-part test require further explanation. Begin with the requirement that the unconstitutional discrimination be based on an enumerated or analogous ground.[22] Enumerated grounds of discrimination are listed in s. 15 of the *Charter* and include, for instance, race, national or ethnic origin, and religion.[23] Analogous grounds of discrimination, for their part, are not mentioned in s. 15's list of prohibited grounds of discrimination but are akin to them.[24] Such judicially recognized analogous grounds include citizenship, sexual orientation, marital status, and Aboriginal residency status.[25] Courts conduct a contextual analysis

16. *Canadian Charter*, *supra* note 1, s 15.
17. The provision states "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." See *ibid*.
18. Sharma, supra note 6 at para 28; *Fraser*, *supra* note 2 at paras 25-53; *R v CP*, 2021 SCC 19; Sonia Lawrence, "Critical Reflections on *Fraser*: What Equality Are We Seeking?" (2021) 30:2 Const F 43 at 43-44, DOI: <10.21991/cf29421> (noting the doctrinal changes in the Court's s 15 legal framework); Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const Stud 191 at 208-215, online: <www.constitutionalstudies.ca/wp-content/uploads/2019/08/19RevConstStud191.pdf> [perma.cc/JX5N-XNDC] (noting the doctrinal changes in the Court's s 15 legal framework).
19. Sharma, *supra* note 6 at para 28.
20. *Ibid*.
21. *Ibid*; *Fraser*, *supra* note 2 at para 27.
22. *Ibid*; Colleen Sheppard "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80(3) Can Bar Rev 893 at 906-907.
23. *Canadian Charter*, *supra* note 1, s 15.
24. Dale Gibson, "Analogous Grounds of Discrimination under the *Canadian Charter*: Too Much Ado about Next to Nothing" (1991) 29 Alta L Rev 772 at 772, DOI: <10.29173/alr1532>.
25. Robert Mason & Martha Butler, *Section 15 of the Canadian Charter of Rights and Freedoms: The Development of the Supreme Court of Canada's Approach to Equality Rights Under the Charter*

and consider various factors to recognize new analogous grounds of discrimination.[26] These factors include whether the relevant group has suffered from prejudice, stereotyping, vulnerability, or historical disadvantage.[27] Drawing on US case law, courts have also considered whether the relevant group constitutes a "discrete and insular minority."[28]

In identifying new analogous grounds of discrimination, the Supreme Court of Canada has held that discrimination must be based on an immutable or constructively immutable personal characteristic.[29] The term "immutable trait" implies traits that individuals did not choose and cannot change, such as age and national origin.[30] The prohibition against discrimination based on immutable traits protects individuals against disparate treatment based on chance.[31] Constructively immutable traits, for their part, are personal traits that are central to identity or personhood and that individuals cannot change without unacceptable personal cost (citizenship and religion are examples).[32] The prohibition against discrimination based on constructively immutable traits protects individuals against disparate treatment based on fundamental choices associated with their personhood.[33]

Notice two important things. First, a s. 15 *Charter* claim will succeed only if the claimant proves that discrimination is based on an enumerated or analogous ground of discrimination.[34] These enumerated and analogous

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(Ottawa: Library of Parliament Hill Studies, 2021).

26. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para 13 [*Corbiere*].

27. *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 144, 156 [*Quebec (Attorney General)*]; *Miron v Trudel*, 1995 CanLII 97 (SCC) at para LXVIII (per L'Heureux-Dubé).

28. *Ibid*; *Corbiere*, *supra* note 26 at para 13.

29. *Quebec (Attorney General), supra* note 27 at paras 144, 156*;* Jennifer Koshan, "Inequality and Identity at Work" (2015) 38:2 Dalhousie LJ 473 at 477, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2066&context=dlj> [perma.cc/27PJ-K9Q9] [Koshan, "Inequality and Identity"]; Edward J Erler, "Equal Protection and Personal Rights: The Regime of the Discrete and Insular Minority" (1982) 16:2 Ga L Rev 407 at 409, 412 (describing the "discrete and insular minority" requirement in U.S. equal protection jurisprudence).

30. Sharona Hoffman, "The Importance of Immutability in Employment Discrimination Law" (2011) 52:5 Wm & Mary L Rev 1483 at 1509, 1511-1512, online: <scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1010&context=faculty_publications> [perma.cc/3R52-BYBH]; *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 30.

31. Clarke, "Against Immutability," *supra* note 13 at 13.

32. *Quebec (Attorney General)*, *supra* note 27 at para 335.

33. Clarke, "Against Immutability," *supra* note 13 at 23-24; Skolnik, "Homelessness," *supra* note 13 at 87.

34. *Fraser*, *supra* note 2 at para 27; Jessica Eisen, "Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory" (2016) 42:2 Queen's LJ 41 at 82-83, online: <journal.queenslaw.ca/sites/qljwww/files/Issues/Vol%2042%20i2/2.%20Eisen.pdf> [perma.cc/8J6R-EPC7]; *Corbiere*, *supra* note 26 at paras 5-12; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court (2010) 50 SCLR (2d) 297 at 322-323, online: <socialrightscura.ca/documents/

grounds thus fulfil a screening function within the right to equality's legal framework.[35] Second, courts recognize new analogous grounds of discrimination only when they are based on immutable or constructively immutable traits.[36] To date, courts have rejected various grounds of unconstitutional discrimination because the relevant trait is not immutable or constructively immutable, or because claimants could not limit the scope of the analogous ground with sufficient precision.[37] Examples of rejected analogous grounds of discrimination include residency, homelessness, poverty, membership in the military, and employment or occupational status.[38] As discussed more below, this narrow interpretation of analogous grounds results in a restrictive equality framework and engenders important theoretical and practical consequences.

2. *Calling the State to account for unconstitutional discrimination*

The right to equality calls the State to account for unconstitutional discrimination in ways that other rights cannot.[39] Section 15 claims require the State to publicly justify the harms and wrongs of unconstitutional discrimination that undermine equality interests, rather than justify the harms and wrongs that undermine other interests. This consideration provides a strong argument for why the right to equality—rather than other rights—should play a more fundamental role to counteract discrimination. The Constitution's structure, limitation clause, and burdens of proof underscore this point.

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publications/Jackman%20Castaways.pdf> [perma.cc/4FX4-HUAS].

35. Eisen, "Grounding Equality", *supra* note 34 at 82-83.

36. *Ibid*; *Quebec (Attorney General)*, *supra* note 27 at paras 194, 335.

37. Joshua Sealy-Harrington, "Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the *Charter*" (19 December 2013), online (blog): <ablawg.ca/2013/12/19/should-homelessness-be-an-analogous-ground-clarifying-the-multi-variable-approach-to-section-15-of-the-charter/> [perma.cc/SZR9-X5LX]; Skolnik, "Homelessness," *supra* note 13 at 70.

38. See e.g. *R v Turpin*, 1989 CanLII 98 (SCC) (rejecting residency); *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 48 (rejecting residency); *R v Banks*, 2007 ONCA 19 at paras 89-106 (rejecting poverty) [*Banks*]; *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410 at paras 122-137 (rejecting homelessness) [*Tanudjaja*]; *Scott v Canada (Attorney General)*, 2017 BCCA 422 (rejecting membership in the military). But see *R v Généreux*, 1992 CanLII 117 (SCC) (leaving open the possibility that membership in the military can potentially constitute an analogous ground of discrimination). See e.g. *Reference Re Workers' Compensation Act, 1983* (Nfld), 1989 CanLII 86 (SCC) (rejecting employment status); *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 (rejecting employment status); *Baier v Alberta*, 2007 SCC 31 (rejecting employment status). These latter three cases are cited in Koshan, "Inequality and Identity," *supra* note 29.

39. On the notion of calling the State to account, see e.g. François Tanguay-Renaud, "Criminalizing the State" (2013) 7 Crim L & Phil 255 at 266-268, DOI: <10.1007/s11572-012-9181-x>; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (London: Palgrave MacMillan, 2003) at 9-10.

Canadian courts employ a two-step process to determine whether *Charter* right infringements are justifiable.[40] First, the claimant must demonstrate that the State violated their constitutional right.[41] Second, once the claimant meets that burden, the State must justify the violation and demonstrate that it was reasonable in a free and democratic society according to s. 1 of the *Charter* (the limitation clause).[42] To do so, the State must satisfy the proportionality test set out in *R v Oakes*.[43] It must prove that the violation is justified by a pressing and substantial objective, that the restriction is rationally connected to the State's objective, that the violation impacts constitutional rights as little as possible to achieve the objective effectively, and that the violation's benefits outweigh its burdens.[44] If the State fails at any of these steps, the violation of rights is not justified and the impugned law or State action is unconstitutional.

As part of this second step—where the government must justify the infringement of a constitutional right under s. 1 of the *Charter*—the State is publicly called to account for its conduct.[45] The State must provide reasons for limiting a certain right, and a court evaluates the legitimacy of these reasons given the circumstances.[46] To do so, courts examine the purpose of the right and the interests that it protects.[47] Courts determine which reasons for restricting rights are legitimate in a liberal democracy—for instance, to ensure public safety or to safeguard public health—and which are not—for example, because it is politically popular or divinely ordained.[48]

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40. Paul Carr-Rollitt, "The Burden of Proof, the *Charter*, and a Hierarchy of Legal Norms" (1995) 6:3 Const F 96 at 96-97, DOI: <10.21991/C95376>.

41. *Ibid*; Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 SCLR 469 at 472.

42. *R v Oakes*, 1986 CanLII 46 (SCC) at para 66 [*Oakes*].

43. *Ibid* at paras 69-71. See also *R v Chaulk*, 1990 CanLII 34 (SCC) at paras 60-66 (modifying the minimal impairment test set out in *R v Oakes*).

44. *Oakes*, *supra* note 42 at paras 69-71.

45. See e.g. Colin Scott, "Accountability in the Regulatory State" (2000) 27:1 JL & Soc'y 38 at 40, citing EL Normanton, "Public Accountability and Audit: A Reconnaissance" in Smith & Hague, eds, *The Dilemma of Accountability in Modern Government: Independence versus Control* (London: MacMillan, 1971) at 311.

46. Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4:2 L & Ethics Human Rights 141 at 157-159, DOI: <10.2202/1938-2545.1047>; Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59:2 Am J Comp L 463 at 488, DOI: <10.5131/AJCL.2010.0018>.

47. Aharon Barak, "Proportionality and Principled Balancing" (2010) 4:1 L & Ethics Human Rights 3 at 12, DOI: <10.2202/1938-2545.1041>.

48. Kumm, *supra* note 46 at 150, 158-159. Kumm's entire quote is: "The proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy." See *ibid* at 150.

The structure of proportionality analysis—the need for a pressing and substantial objective, rational connection, minimal impairment, and balancing—requires the State to connect its publicly provided reasons to the factual context regarding the law's application.[49] Furthermore, the State must tailor the nature and strength of this reasoning to the type of infringement and its gravity.[50] The State partly legitimizes its authority by whether and how it justifies limiting rights.[51] The specific constitutional right infringement—and the individual interest that is centred in the constitutional analysis—dictates for what the State is called to account, and shapes the justifications that the State must provide to limit that right (more on this below).

In the context of unconstitutional discrimination, the State must justify that it imposed disadvantages or denied benefits based on an individuals' personal characteristics—a particularly onerous burden.[52] The State cannot easily justify discrimination because many personal traits are morally irrelevant reasons to impose burdens or deny benefits.[53] It is also difficult for the State to legally justify conduct that treats individuals as inferior, subordinate, or less worthy of concern, or to provide legitimate legal reasons for why such treatment is reasonable and justified in a constitutional democracy.[54] Such determinations risk normalizing discrimination and expressing the unequal worth of different individuals.[55]

To be clear, this does not mean that personal traits are never morally relevant, or that the State cannot make legitimate distinctions based on personal characteristics. For instance, governments impose minimum age requirements for alcohol consumption, voting, sexual activity, and marriage.[56] These restrictions recognize that children and adolescents have

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49. Pierre Blache, "The Criteria of Justification under Oakes: Too Much Severity Generated through Formalism" (1991) 20:2 Man LJ 437 at 439; Vicki Jackson, "Constitutional Law in the Age of Proportionality" (2015) 124 Yale LJ 3094 at 3100, online: <www.yalelawjournal.org/pdf/h.3094.Jackson.3196_fteiok9v.pdf> [perma.cc/F27Q-FA5A].

50. Jackson, *supra* note 49 at 3098.

51. Moshe Cohen-Eliya & Iddo Porat, "Proportionality and Justification" (2014) 64:3 UTLJ 458 at 462, DOI: <10.3138/utlj.020614RA> (discussing the culture of justification in constitutional democracies).

52. *Ontario (Attorney General) v G*, 2020 SCC 38 at para 71 [*Ontario*] (describing the framework to justify s 15 *Charter* violations using the *Oakes* test).

53. Michael Foran, "Grounding Unlawful Discrimination" (2022) 28:1 Leg Theory 3 at 20, DOI: <10.1017/S1352325221000264>; Meital Pinto, "Arbitrariness as Discrimination" (2021) 34 Can JL & Jur 391 at 408-410, DOI: <10.1017/cjlj.2021.8>.

54. Note, however, that the State can justify distinctions that confer advantages to some or deny benefits to others in the context of ameliorative programs. See e.g. *R v Kapp*, 2008 SCC 41 at para 3.

55. See e.g. Foran, *supra* note 53 at 20; Pinto, *supra* note 53 at 408-410.

56. See e.g. Bernice Neugarten, "Age Distinctions and Their Social Functions" (1981) 57:4 Chicago-Kent L Rev 809 at 822-823; Nina Kohn, "Rethinking the Constitutionality of Age Discrimination:

not yet developed their decision-making capacities and may not understand the full implications of certain choices.[57] Furthermore, certain age-based restrictions can be justified because they protect vulnerable children and adolescents against harm or exploitation.[58] A government that is called to account for drawing age-based distinctions can provide compelling and legitimate reasons for doing so.

This account highlights the value of calling the State to account for violating the right to equality versus other rights and requiring the State to justify discrimination. When the State engages in unconstitutional discrimination, it must provide reasons for such disparate treatment and justify the legitimacy of such treatment in a free and democratic society. And courts, in turn, publicly express that certain reasons for such disparate treatment are not legitimate in a democracy. Through this dialogic process, the various branches of government contribute to the right to equality's evolution and remedial role within society.

Admittedly, in many contexts, courts reject claims of unconstitutional discrimination and decide that the State's conduct does not violate s. 15 of the *Charter*.[59] In such contexts, courts will not conduct a proportionality analysis, and the State will not be called to account to justify unconstitutional discrimination. However, as discussed more below, a more expansive right to equality could broaden the scope of s. 15 of the *Charter,* and ultimately, impose more stringent justificatory burdens on the State.

Part of the reason why courts reject s. 15 *Charter* claims is that the constitutional right to equality has been interpreted narrowly in three principal respects. The following sections show how the right to equality fails to address certain obvious forms of direct discrimination, overlooks discrimination based on quasi-immutable traits, and is largely absent from criminal law and procedure where discrimination is prevalent. Each of these limitations is examined in turn.

A Challenge to a Decades-Old Consensus" (2010) 44:1 UC Davis L Rev 213 at 276-277, online: <lawreview.law.ucdavis.edu/issues/44/1/articles/44-1_kohn.pdf> [perma.cc/V5YJ-GLQ8].

57. See e.g. Jonathan Herring, *Vulnerability, Childhood and the Law* (New York: Springer International, 2018) at 4-5; Jane Rutherford, "One Child, One Vote: Proxies for Parents" (1997) 82:6 Minn L Rev 1463 at 1471.

58. See e.g. Gottfried Schweiger & Gunter Graf, "Ethics and the Dynamic Vulnerability of Children" (2017) 12:2 Les ateliers de l'éthique 243 at 253-4.

59. See e.g. Law v Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC) at para 110; Withler v Canada (Attorney General), 2011 SCC 12 at para 84; Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 29; Sharma, supra note 6 at para 36; *Banks*, *supra* note 38 at para 107; *Tanudjaja*, *supra* note 38.

II. *Restrictive equality rights and direct discrimination*

1. *Justifications for rejecting certain analogous grounds of discrimination*

The first reason why the right to equality framework is interpreted restrictively is that it fails to capture clear cases of direct or indirect discrimination. The framework's loopholes allow the State to impose burdens or deny benefits to disadvantaged persons and groups who do not fall within enumerated or analogous grounds of discrimination. To illustrate this point, consider why courts reject certain grounds of discrimination, such as poverty, homelessness, residency, and occupational status. These grounds of discrimination have been rejected for the three following reasons—each of which is critiqued in the following subsection.

First, courts conclude that traits such as poverty or homelessness are vague, such that it is difficult to objectively determine which individuals fall within the definitional scope of these grounds.[60] Courts have noted that the definition of homelessness is ambiguous and may include individuals without access to housing and those with access to inadequate housing.[61] For this reason, courts cannot circumscribe the scope of the proposed ground of discrimination with precision.[62] Other courts note that poverty does not constitute an analogous ground of discrimination because impecunious persons are an amorphous group who are not united by a single shared personal characteristic.[63]

Second, courts have decided that these characteristics are neither immutable nor constructively immutable.[64] Some decisions note that an individuals' socioeconomic situation can change and thus falls into neither category of immutability.[65] Others observe that the condition of poverty or homelessness is not a personal characteristic akin to race, religion, national origin, or other personal traits—a necessary component of enumerated and analogous grounds of discrimination.[66]

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60. *Tanudjaja*, *supra* note 38 at paras 129-134; *Banks*, *supra* note 38 at para 104.
61. *Tanudjaja*, *supra* note 38 at para 125.
62. *Ibid* at para 136.
63. *Banks*, supra note 38 at para 104; Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5:1 Oñati Socio-Leg Series 225 at 236.
64. Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50:3 Osgoode Hall LJ 637 at 654-655, DOI: <10.60082/2817-5069.1019>; *Banks*, *supra* note 38 at paras 100-106; *Boulter v Nova Scotia Power Incorporation,* 2009 NSCA 17 at paras 42-43 [*Boulter*]; *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2009 FC 873 at paras 73-90; *NM v Canada Employment Insurance Commission*, 2021 SST 499 (CanLII) at paras 59-60; *Tanudjaja*, *supra* note 38 at paras 122-137; *Begum v Canada (Citizenship and Immigration)*, 2017 FC 409 at para 125; *R v Ferkul*, 2019 ONCJ 893 at para 30.
65. *Boulter*, *supra* note 64 at paras 42-43; *Tanudjaja*, *supra* note 38 at para 129.
66. *Tanudjaja*, *supra* note 38 at para 130.

Third, there are concerns about the distributive implications of recognizing new analogous grounds of discrimination, especially those related to individuals' socio-economic plight.[67] Courts note that the judiciary lacks the institutional competence to reallocate public resources or engage in complex public policy decision-making, both of which may be necessary to remedy certain forms of socio-economic discrimination.[68] Furthermore, judges worry that such conduct is inconsistent with the separation of powers.[69]

2. *Direct discrimination and rejected analogous grounds*

This restrictive approach to analogous grounds of discrimination generates significant consequences. By rejecting certain analogous grounds of discrimination, courts indirectly affirm that certain historically marginalized groups cannot suffer unconstitutional discrimination based on their personal traits.[70] The result is that the State can impose disadvantages against such groups that perpetuate prejudices and stereotypes, and that exemplify the wrongfulness of direct discrimination.[71] To illustrate this point, suppose the State enacts a law that reads "poor persons and unhoused persons cannot frequent public parks."[72] The current s. 15 *Charter* framework would permit such discrimination because poverty and homelessness are not recognized grounds of discrimination for the reasons discussed above.[73]

This example highlights certain consequences of rejecting proposed analogous grounds of discrimination. Begin with vagueness and lack of objectively verifiable criteria to circumscribe the discriminated class and identify its members. The current s. 15 *Charter* framework overlooks how the State can leverage vagueness and breadth to maximize discrimination against marginalized groups.[74] More specifically, the State can discriminate

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67. *Ibid* at para 147; Judy Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution" (2007) 23:2 SAJHR 235 at 236-237, DOI: <10.1080/19962126.2007.11864922>.

68. Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14:1 CJWL 185 at 195-196, DOI: <povertyandhumanrights.org/docs/11_DAY_BRODSKY.pdf> [perma.cc/G98J-3EVC]; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 93; Sandra Fredman, "Redistribution and Recognition: Reconciling Inequalities" (2007) 23:2 SAJHR 214 at 217. DOI: <10.1080/19962126.2007.11864923>; *Andrews*, *supra* note 1 at 190-191; *Boulter*, *supra* note 64 at para 43.

69. Cass Sunstein, "Public Values, Private Interests, and the Equal Protection Clause" (1982) 1982 Sup Ct Rev 127 at 142, DOI: <10.1086/scr.1982.3109555>; *Tanudjaja*, *supra* note 38 at para 140.

70. Skolnik, "Homelessness," *supra* note 13 at 70; Jessica Clarke, "Protected Class Gatekeeping" (2017) 92 NYUL Rev 101 at 129, online: <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1936&context=faculty-publications.

71. Skolnik, "Homelessness," *supra* note 13 at 70.

72. This example was initially provided in Skolnik. See *ibid.*

73. *Ibid*.

74. John Calvin Jeffries Jr, "Legality, Vagueness, and the Construction of Penal Statutes" (1985) 71:2 Va L Rev 189 at 197, 213-214, DOI: <10.2307/1073017>; Tammy W Sun, "Equality by Other

against a group more effectively by defining it vaguely, broadly, or imprecisely.

Vagueness is a particularly effective means to maximize discrimination for a simple reason: it increases enforcement discretion.[75] Vague laws and policies require front-line actors—police officers, bus drivers, healthcare providers—to routinely interpret their scope.[76] The low-visibility of discretionary enforcement actions—and the fact that most of these actions escape judicial review—means that courts will rarely assess whether a statute was enforced lawfully.[77] These concerns highlight why a purported analogous ground's vagueness can worsen discrimination.

Courts have also rejected proposed analogous grounds because, in their view, it is not possible to circumscribe the parameters of the analogous ground or objectively determine who falls within its scope.[78] For this reason, judges have accepted being a recipient of social assistance as an analogous ground of discrimination but rejected poverty and homelessness as constitutionally protected classes.[79]

But existing parameters can define certain analogous grounds and identify the individuals that fall within them. Canada established its first ever Official Poverty Line in 2019—an objective criterion that can be used to circumscribe the scope of poverty as an analogous ground and determine which individuals experience that condition.[80] Similarly, scholars have argued that homelessness can be defined as a legal condition where individuals lack private property rights—a definition that offers

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Means: The Substantive Foundations of the Vagueness Doctrine" (2011) 46:1 Harv CR-CLL Rev 149 at 154, DOI: <journals.law.harvard.edu/crcl/wp-content/uploads/sites/80/2009/06/149-194.pdf> [perma.cc/28YF-P7LN].

75. Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97:3 Colum L Rev 551 at 560, online: <scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1126&context=faculty_scholarship> [perma.cc/EEC5-LDKR].

76. Jeffries Jr, *supra* note 74 at 218, citing *Kolender v Lawson*, 461 US 352 (1983).

77. James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process versus Crime Control" in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) at 196.

78. *Tanudjaja*, *supra* note 38 at para 130-131.

79. *Ibid*; *Falkiner v Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ONCA); Martha Jackman & Bruce Porter, "Socio-Economic Rights under the *Canadian Charter*" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) at 224 (providing an overview of the decision in *Falkiner*).

80. National Advisory Council on Poverty, *Building Understanding: The First Report of the National Advisory Council on Poverty* (Ottawa: Employment and Social Development Canada, 2020) at 15; *Poverty Reduction Act*, SC 2019, c 29, s 315, s 7 (establishing the Official Poverty Line).

workable parameters and objective criteria to identify its members.[81] To be clear, these are not the only possible legal definitions of poverty or homelessness. Yet these definitions illustrate how these analogous grounds can be circumscribed by workable definitions that allow the group's members to be ascertained.

The second justification for rejecting some analogous grounds of discrimination—the requirement that personal traits are immutable or constructively immutable—also allows the State to impose disadvantages that perpetuate prejudices and stereotypes against marginalized groups that have not been recognized as a constitutionally protected class. Recall how courts conclude that poverty and homelessness are neither immutable nor constructively immutable traits because individuals can escape these socio-economic conditions.[82] But traits such as poverty and homelessness can be relatively stable and difficult for individuals to change.[83] The problem is that individuals can experience direct and indirect discrimination precisely because their personal traits are sticky and persistent.[84] If these traits could be changed with relative ease, individuals could avoid discrimination based on these traits more easily. Later sections demonstrate why the concept of quasi-immutable traits can capture the wrongfulness of discrimination based on personal characteristics that are stable and difficult to change.[85]

There are also important counterarguments to the third justification for rejecting certain analogous grounds of discrimination: that courts who recognize these grounds must necessarily reallocate public resources and exceed their institutional competence.[86] For one, certain foundational judicial decisions require the State to directly or indirectly reallocate public resources to ensure that *Charter* rights are respected. Courts have ordered the State to build French language schools to fulfil minority

81. Christopher Essert, "Property and Homelessness" (2016) 44:4 Philosophy & Pub Affairs 266 at 266, DOI: <10.1111/papa.12080>; Andy Yu, "Equity and Homelessness" (2020) 33:1 Can JL & Jur 245 at 246, DOI: <10.1017/cjlj.2019.37>; Terry Skolnik, "Homeless Encampments: A Philosophical Justification" (2023) 36 JL & Soc Pol'y 97 at 99, DOI: <10.60082/0829-3929.1453>; Jane Baron, "Homelessness as a Property Problem" (2004) 36:2 Urban Lawyer 273 at 273.

82. *Boulter*, *supra* note 64 at paras 42-43; *Tanudjaja*, *supra* note 38 at para 129.

83. Sara Greene, "A Theory of Poverty: Legal Immobility" (2019) 96:4 Wash UL Rev 753 at 759-760, online: <scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6484&context=faculty_scholarship> [perma.cc/KA9U-6NSZ]; Skolnik, "Homelessness," *supra* note 13 at 88; Sealy-Harrington, "Assessing Analogous Grounds," *supra* note 15 at 48.

84. Skolnik, "Homelessness," *supra* note 13 at 88.

85. *Ibid* at 90.

86. William Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction" (2001) 69:5 Fordham L Rev 1821 at 1878-1879, online: <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3710&context=flr&sei> [perma.cc/P45L-Q6EV] (providing an overview of these concerns); Bradley Hogin, "Equal Protection, Democratic Theory, and the Case of the Poor" (1989) 21:1 Rutgers LJ 1 at 40.

language education rights and have retained supervisory jurisdiction over that order's implementation.[87] The Supreme Court of Canada's *Jordan* framework—which imposed presumptive ceilings that apply to a defendant's right to be tried within a reasonable time —required the State to reallocate resources to prevent an influx of stays of proceedings.[88] Even the judiciary's recognition that officers generally require a warrant to search a dwelling house requires the State to spend more time and resources on police investigations.[89] The search warrant requirement obliges officers to do more thorough investigations, interview witnesses or conduct surveillance, and spend time in court to obtain a warrant—all of which cost more money than warrantless searches.[90] Furthermore, the judiciary can strike down laws that are discriminatory on their face without generating any redistributive implications.[91] A declaration of constitutional invalidity would not require judges to engage in complex redistributive schemes. Nor would such a declaration violate the separation of powers or exceed the judiciary's institutional competence. Rather, judges would do what they typically do in contexts where a statute violates a constitutional right: strike it down.[92] Lastly, judges can also allocate *Charter* damages—meaning damages that compensate for constitutional right infringements—to remedy unconstitutional discrimination without having to engage in significant public resource reallocation or overstep their constitutional role.[93]

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87. See e.g. *DoucetBoudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 87-88.

88. See e.g. *R v Jordan*, 2016 SCC 27 at para 5. The Court held that cases tried in a provincial court result in a presumptively unreasonable delay when the actual or anticipated end of the trial exceeds eighteen months. The presumptive ceiling is thirty months for cases in a superior court, or, for cases tried in a provincial with a preliminary inquiry. For an overview, see Terry Skolnik, "Precedent, Principles, and Presumptions" (2021) 54:3 UBC L Rev 935 at 964-966. See also Olivia Stefanovich, "Justice Minister Says He's Ready to Legislate if Pandemic Delays Lead to Charges Being Tossed," *CBC News* (15 July 2020), online: <www.cbc.ca/news/politics/stefanovich-jordan-decision-covid19-cases-delay-1.5638893> [perma.cc/TW8R-8XWK].

89. See e.g. *Hunter et al v Southam Inc*, 1984 CanLII 33 (SCC) at 161-162 [Hunter]; *R v Feeney*, 1997 CanLII 342 (SCC) at paras 43-44.

90. See e.g. William J Stuntz, "Race, Class, and Drugs" (1998) 98:7 Colum L Rev 1795 at 1820-1821, DOI: <10.2307/1123466> (noting that traffic stops are relatively cheap for the police compared to obtaining search warrants).

91. For an example of such laws that were struck down as unconstitutional in the United States, see *Parr v Municipal Court*, 479 P (2d) 353 at 353-360 (CA Sup Ct 1971); Miranda Oshige McGowan, "From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition" (2004) 88:5 Minn L Rev 1312 at 1340-1341, online: <scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1730&context=mlr> [perma.cc/5YF3-3DU4].

92. Kent Roach, "Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience" (2005) 40:3 Tex Intl LJ 537 at 546, DOI: <10.2139/ssrn.621245>; *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at paras 13-22.

93. *Vancouver (City) v Ward*, 2010 SCC 27 (discussing *Charter* damages as a remedy for constitutional rights violations).

To be clear, this does not mean that considerations such as justiciability and institutional competence are irrelevant to s. 15 *Charter* claims. Rather, in contexts that do engage redistributive concerns more directly, a claim's justifiability and the judiciary's institutional competence factor more heavily into the appropriateness of the remedy.[94]

These considerations highlight one way in which the current s. 15 *Charter* framework is interpreted narrowly because it fails to protect certain marginalized groups against some forms of direct discrimination. The next section highlights how the right to equality fails to protect individuals against discrimination based on quasi-immutable traits.

III. *Restrictive equality rights and quasi-immutability*

The second reason why the right to equality is interpreted narrowly is because it fails to recognize discrimination based on quasi-immutable traits.[95] The term quasi-immutable trait implies a personal characteristic that is relatively stable and difficult to change.[96] Examples of quasi-immutable traits include poverty, homelessness, having a criminal record, and being overweight.[97] The previous section showed that the current right to equality framework permits direct discrimination against groups that have not been recognized as a constitutionally protected class. That section highlighted how groups can experience obvious forms of direction discrimination based on personal traits that lack constitutional protection. But what explains this? This section argues that the s. 15 *Charter* right to equality fails to protect groups against direct and indirect discrimination based on quasi-immutable traits; a form of discrimination against which individuals should be constitutionally protected. And as discussed more below, once we recognize that individuals can suffer direct discrimination based on quasi-immutable traits, we understand that they can experience indirect discrimination based on these same traits.

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94. C Edwin Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection" (1983) 131:4 U Pa L Rev 933 at 986-987, DOI: <10.2307/3311988>.

95. Skolnik, "Homelessness," *supra* note 13 at 86-88.

96. *Ibid* at 87-88.

97. These examples are taken directly from Skolnik. The original quotation is: "Those personal characteristics include traits such as poverty, homelessness, being overweight, or possessing a criminal record." See *ibid*. For examples of how courts have either rejected or not recognized these analogous grounds, see e.g. *Tadros v Peel Regional Police Service*, 2007 CanLII 41902 (ONSC) at para 40 (rejecting criminal record as an analogous ground); *R v Boudreau*, 2002 NSSC 236 at paras 12-26 (rejecting criminal record as an analogous ground); *Banks*, *supra* note 38 at paras 89-106 (rejecting poverty as an analogous ground); *Tanudjaja*, *supra* note 38 at paras 122-137 (rejecting homelessness as an analogous ground). See also Emily Luther, "Justice for All Shapes and Sizes: Combatting Weight Discrimination in Canada" (2010) 48:1 Alta L Rev 167 at 167-168, DOI: <10.29173/alr167> (highlighting how courts have not yet recognized weight as an analogous ground of discrimination under s 15 of the *Charter).*

Although quasi-immutable traits can be changed, they are different from constructively immutable traits in important respects.[98] First, individuals may wish to change a quasi-immutable trait because it is the reason why they experience discrimination.[99] In contrast, individuals generally wish to maintain a constructively immutable trait—such as religion or marital status—because it is deeply associated with personhood or individual identity.[100]

Second, the stereotypical assumptions associated with discrimination based on quasi-immutable personal traits is also unique. The trait's stickiness and persistence account for why the individual both suffers discrimination *and is blamed for their condition.*[101] Discrimination based on quasi-immutable traits typically involves generalizations regarding a person's laziness, poor choices, or weakness of will.[102] These assumptions go something like this: impecunious persons could escape poverty if they worked harder and picked themselves up by their bootstraps.[103] Others may posit that individuals would not be overweight if they could get their act together—if they ate less or exercised more.[104] These generalizations blame the individual both for the trait that results in discrimination and for not changing it.

Third, discrimination based on quasi-immutable traits attempts to shift the locus of moral wrongdoing away from the discriminator and towards the discriminated. The rejection of quasi-immutable traits conceptualizes the victim's personal responsibility as a form of contributory negligence or

98. Skolnik, "Homelessness," *supra* note 13 at 87-88.
99. *Ibid*.
100. *Ibid*; Samuel Marcosson, "Constructive Immutability" (2001) 3:2 U Pa J Const L 646 at 682-683, online: <scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1428&context=jcl> [perma.cc/AM2J-257Z].
101. Margot Young, "Context, Choice, and Rights: *PHS Community Services Society v Canada (Attorney General)*" (2011) 44:1 UBC L Rev 221 at 242-243, 250-251, 253, online: <commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1352&context=fac_pubs> [perma.cc/ZD3Q-UCNT].
102. See e.g. Danieli Evans Peterman, "Socioeconomic Status Discrimination" (2018) 104:7 Va L Rev 1283 at 1311, online: <www.virginialawreview.org/wp-content/uploads/2020/12/Evans_Online%20Revised.pdf> [perma.cc/4VVN-KJGB]; Joel F Handler & Yeheskel Hasenfeld, *Blame Welfare, Ignore Poverty and Inequality* (Cambridge: Cambridge University Press, 2007) at 70; Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 209-210, 220-221.
103. Michele Estrin Gilman, "The Poverty Defense" (2013) 47:2 U Rich L Rev 495 at 540, online: <scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1257&context=all_fac> [perma.cc/RNB5-65VX] (describing this stereotypical claim made by others).
104. J Paul R Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17:3 Adv Q 338 at 347 (describing this stereotypical claim made by others), cited in Luther, *supra* note 97 at 183; Sealy-Harrington, "Assessing Analogous Grounds," *supra* note 15 at 51.

assumption of risk that bars a successful anti-discrimination claim.[105] This conceptualization imports evaluative judgments regarding culpability for one's plight.[106]

The quasi-immutable traits described above—such as poverty, homelessness, and having a criminal record—share many of the same hallmarks of other analogous grounds of discrimination. These quasi-immutable personal traits tend to be highly stigmatized and involve a history of marginalization, stereotyping, and prejudice.[107] These same traits can limit a person's access to housing or employment opportunities, or subject them to other forms of social, economic, or political exclusion.[108] Furthermore, as discussed above, these quasi-immutable personal characteristics can be defined with adequate precision and have objective parameters to identify their members.[109]

IV. *Restrictive equality rights in criminal justice contexts*

1. *Discrimination in the criminal justice system*

The third reason why the s. 15 *Charter* right is interpreted restrictively is because it is largely absent from areas of the law where discrimination is ubiquitous, such as criminal law and procedure.[110] Discrimination is

105. David Hamilton, "The Paper War on Poverty" (1971) 5:3 J Econ Issues 72 at 73, DOI: <10.1080/00213624.1971.11502987>.

106. See e.g. Tiffany Graham, "The Shifting Doctrinal Face of Immutability" (2011) 19:2 Va J Soc Pol'y & L 169 at 181-182 (discussing the connection between equal protection doctrine, choice, and blameworthiness).

107. See e.g. Devah Pager, "The Mark of a Criminal Record" (2003) 108:5 Am J Sociology 937 at 960-962, DOI: <10.1086/374403> (criminal records); Stephanie Papadopoulos & Leah Brennan, "Correlates of Weight Stigma in Adults with Overweight and Obesity: A Systematic Literature Review" (2015) 23:9 Obesity 1743 at 1744, DOI: <10.1002/oby.21187> (weight); Wendy Williams, "Struggling with Poverty: Implications for Theory and Policy of Increasing Research on Social Class-Based Stigma" (2009) 9:1 Analyses Soc Issues & Pub Pol'y 37 at 39-42, DOI: <10.1111/j.1530-2415.2009.01184.x> (poverty and socio-economic status).

108. See *Fraser*, *supra* note 2 at para 76; Pager, "The Mark of a Criminal Record," supra note 178 (describing the impact of a criminal record on employment opportunities); Rebecca Puhl & Kelly Brownell, "Bias, Discrimination, and Obesity" (2001) 9:12 Obesity Research 788 at 789-80, DOI: <10.1038/oby.2001.108> (summarizing studies that explore employment discrimination related to obesity); Sarah Golabek-Goldman, "Ban the Address: Combating Employment Discrimination Against the Homeless" (2017) 126:6 Yale LJ 1788 at 1791-1792, 1796-1809, online: <yalelawjournal.org/pdf/h.1788.Golabek-Goldman.1868_9wo15f6u.pdf> [perma.cc/53DS-FUAD].

109. *Supra*, notes 80 and 81, Section II(2).

110. Other scholars have raised this point decades ago. See e.g. Rosemary Cairns Way, "An Opportunity for Equality *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61:4 Crim LQ 465 at 466-467 [Cairns Way, "Opportunity for Equality"]; Rosemary Cairns Way, "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible" (2005) 4 JL & Equal 203 at 203-204; Rosemary Cairns Way, "Attending to Equality: Criminal Law, the *Charter* and Competitive Truths" (2012) 57 SCLR (2d) 39 at 49, DOI: <10.60082/2563-8505.1231>, citing Christine Boyle, "The Role of Equality in the Criminal Law" (1994) Sask L Rev 203 at 207.

easy to find in the criminal justice system.[111] Compared to white persons, Black persons are more likely to be pulled-over by the police,[112] frisk-searched,[113] arrested and charged with certain crimes,[114] detained pending trial,[115] subject to use of force,[116] and incarcerated.[117] Black persons and Indigenous persons are also more likely to be carded by the police, meaning that officers order individuals to identify themselves even though they did not engage in actual or suspected wrongdoing.[118] They are also disproportionately incarcerated.[119]

Despite these realities, and despite calls for a more express incorporation of the right to equality within the criminal law, the constitutional right to equality has played little to no role in Canadian criminal law and procedure jurisprudence.[120] This omission can be surprising given the Court's increasing recognition of systemic racism and racial profiling in the criminal justice system.[121] Admittedly, there are some exceptional

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111. Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2023) 13:4 Race & Justice 530 at 531-3, DOI: <10.1177/215336872110064>; Skolnik, "Racial Profiling," *supra* note 5 at 436-438.

112. Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (Halifax: Nova Scotia Human Rights Commission, 2019) at 33; Lorne Foster, Les Jacobs & Bobby Siu, *Race data and traffic stops in Ottawa, 2013–2015: A Report on Ottawa and the Police Districts* (Ottawa: Ottawa Police Service, 2016) at 3-5.

113. Steven Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 Can J Corr 322 at 325, DOI: <10.3138/cjccj.2014.E32>.

114. Ontario Human Rights Commission, *A Disparate Impact: A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: OHRC, 2020) at 4-7.

115. Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42:1 Brit J Crim 186 at 187, DOI: <10.1093/bjc/42.1.186> (highlighting disparities in remand in custody rates); Anna Mehler Paperny, "Exclusive: New Data Shows Race Disparities in Canada's Bail System," *Reuters News* (19 October 2017), online: <www.reuters.com/article/us-canada-jails-race-exclusive-idUSKBN1CO2RD> [perma.cc/5KBB-AFK4] (highlighting disparities in remand in custody rates). Note that both of these sources are cited in Owusu-Bempah et al, *supra* note 111. See also Julian Roberts & Anthony Doob, "Race, Ethnicity, and Criminal Justice in Canada" (1997) 21 Crime & Justice 469 at 498, 502-503 (also highlighting disparities in remand in custody rates).

116. Toronto Police Service, *Race & Identity Based Data Collection Strategy: Understanding Use of Force & Strip Searches in 2020* (Toronto: Toronto Police Service, 2022) at 48-50, 53-55, 61-62; Terry Skolnik, "Use of Force and Criminalization" (2022) 85:3 Alb L Rev 663 at 673.

117. Owusu-Bempah et al, *supra* note 111 at 533.

118. Victor Armony, Mariam Hassaoui & Massimiliano Mulone, "Les interpellations policières à la lumière des identités racisées des personnes interpellées Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial" (Montreal: CRIDAQ, 2019) at 8-11.

119. Jamil Malakieh, *Adult and Youth Correctional Statistics in Canada, 2017/2018* (Ottawa: Statistics Canada, 2019) at 5; Owusu-Bempah et al, *supra* note 111 at 533.

120. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 290. See also Cairns Way, "Opportunity for Equality," *supra* note 110 at 466-467.

121. Amar Khoday, "Ending the Erasure? Writing Race into The Story of Psychological Detentions—

criminal law decisions where s. 15 of the *Charter* was invoked successfully. Recently, the Supreme Court of Canada held that it is unconstitutionally discriminatory to require defendants to register in a sex-offender registry when they were declared not criminally responsible for a sexual offence.[122] The Court decided that the provision discriminated against individuals with mental disabilities.[123] But this type of case is far removed from the types of routine discrimination that pervades the criminal justice system and that s. 15 of the *Charter* does little to remedy.[124] What explains this?

Scholars have offered various explanations. First, lawyers can overlook the right to equality in criminal justice contexts. David Tanovich notes that white defense lawyers may not consider the importance of raising s. 15 *Charter* claims in criminal cases that involve discrimination or racial profiling.[125] Second, in contexts where the defendant is white and courts apply the ancillary powers doctrine—which the judiciary uses to create new common law police powers—judges may not consider the prospect that the new police power will be applied discriminatorily against racialized persons.[126] Third, some argue that s. 15 *Charter* claims require substantial (and expensive) evidence to demonstrate a law's discriminatory impact, which can act as a barrier to equality claims in criminal justice contexts.[127] Although courts can take judicial notice of systemic racism, disparate impact claims tend to be supported by expert evidence, access to information requests, and an empirical analysis of statistical data.[128] Fourth, the right to equality is relatively absent in criminal law jurisprudence due to path dependence in adjudication.[129] The phenomenon of path dependence

Examining *R. v. Le*" (2021) 100 SCLR (2d) 165 at 166, DOI: <10.60082/2563-8505.1416>; *R v Chouhan*, 2021 SCC 26 at paras 57-80; *R v Le*, 2019 SCC 34 at paras 89-97 [*Le*]; *R v Ahmad*, 2020 SCC 11 at para 25; *R v Ipeelee*, 2012 SCC 13 at para 67.

122. *Ontario*, *supra* note 52.

123. *Ibid* at paras 50, 57-70.

124. Terry Skolnik, "Criminal Justice Reform: A Transformative Agenda" (2022) 59:3 Alta L Rev 631 at 633-636, online: <albertalawreview.com/index.php/ALR/article/view/2689/2637> [perma.cc/6GHF-GB4V].

125. David Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR (2d) 655 at 674-683, DOI: <10.60082/2563-8505.1128 >.

126. *Ibid* at 675; Skolnik, "Racial Profiling," *supra* note 5 at 454.

127. David Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 at 179-180, DOI: <10.60082/2817-5069.1446>.

128. Nicholas Stephanopoulos, "Disparate Impact, Unified Law" (2019) 128:6 Yale LJ 1566 at 1615, online: <www.yalelawjournal.org/pdf/Stephanopoulos_3rua1o85.pdf> [perma.cc/9K8A-NLMT]; *R v Morris*, 2021 ONCA 680 at para 123 (discussing how courts can take judicial notice of systemic racism).

129. Oona Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86:2 Iowa L Rev 601 at 604-605 (describing path dependence in

is deeply rooted in the common law and refers to how past decisions and adjudicative approaches become "locked in and resistant to change."[130] Various factors reinforce path dependence in adjudication: adherence to precedent, stare decisis, analogical reasoning, a commitment to judicial minimalism, the correctness standard for pure errors of law, and more.[131] Judges adjudicate present legal disputes in a certain way because that is what they have done in the past.[132] Even in cases where defendants do advance s. 15 *Charter* claims in criminal justice contexts, courts tend to either address equality rights briefly, or summarily dismiss discrimination arguments.[133] Unconstitutional discrimination claims have also failed in contexts where courts engaged more fully with s. 15 *Charter* arguments in criminal law cases.[134]

These considerations partly explain why the right to equality continues to play a minimal role within criminal law and procedure jurisprudence. For reasons like these, lawyers turn to other *Charter* rights to advance the right to equality in criminal law contexts, and courts rely on rights other than s. 15 of the *Charter* to decide cases that involve unconstitutional discrimination—an approach that is critiqued in the next subsection.

2. *Restrictive equality rights and the wrongfulness of discrimination*

The absence of s. 15 of the *Charter* in criminal justice jurisprudence results in significant consequences. Unlike s. 15 of the *Charter,* other constitutional rights fail to capture the distinct moral wrongfulness of discrimination.[135] To paraphrase Tarunabh Khaitan, discrimination is wrong because individuals suffer due to their morally irrelevant personal traits.[136] Unconstitutional discrimination characteristically involves a

adjudication).

130. *Ibid* at 605.

131. *Ibid* at 622; Alec Stone Sweet, "Path Dependence, Precedent, and Judicial Power" in Martin Shapiro & Alec Stone Sweet, eds, On Law, Politics, and Judicialization (Oxford: Oxford University Press, 2002) at 122-124.

132. See e.g. Skolnik, "Racial Profiling," *supra* note 5 at 455; Eugene Volokh, "The Mechanisms of the Slippery Slope" (2003) 116:4 Harv L Rev 1026 at 1035-1036, online: <www2.law.ucla.edu/Volokh/slippery.pdf> [perma.cc/B7UC-ESM6]; Hathaway, *supra* note 129 at 627-628.

133. Julie Jai & Joseph Cheng, "The Invisibility of Race in Section 15: Why Section 15 of the *Charter* Has Not Done More to Promote Racial Equality" (2006) 5:1 JL & Equality 125 at 127-129, citing *R v Williams*, [1998] 1 SCR 1128 at paras 40, 47-48; *R v Spence*, 2005 SCC 71 (the Court did not mention s. 15 of the *Charter*); *R v S (RD)*, 1997 CanLII 324 at para 46 (the Court briefly mentioned s. 15 of the *Charter* but did not apply it). For more recent examples, see e.g. *R v Kokopenace*, 2015 SCC 28 at para 37 (briefly rejecting s. 15 *Charter* argument); *Le*, *supra* note 121 (not mentioning s 15 of the *Charter*).

134. See e.g. Sharma, *supra* note 6 at paras 27-82.

135. Larry Alexander, "What Makes Wrongful Discrimination Wrong Biases, Preferences, Stereotypes, and Proxies" (1992) 141:1 U Pa L Rev 149 at 218-219, online: <scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3635&context=penn_law_review> [perma.cc/KY44-R5V2].

136. This definition is taken directly from Tarunabh Khaitan, *A Theory of Discrimination Law*

form of rank-ordering, whereby the State treats certain individuals and groups as subordinate, inferior, less worthy, or undeserving based on their personal traits.[137]

Discrimination can exist in various forms, such as stereotyping, making decisions based on prejudice, marginalizing others, depriving others of basic resources, and robbing individuals of their dignity and self-respect.[138] These forms of discrimination violate substantive equality and fail to treat individuals with equal concern, consideration, and respect.[139]

Discrimination's wrongfulness is different from the wrongfulness of other constitutional rights infringements, such as arbitrary detentions or unlawful searches.[140] Arbitrary detentions principally undermine liberty interests.[141] These detentions limit a person's freedom to move, act, or make basic choices without interference by the State.[142] Similarly, unconstitutional searches principally invade an individual's privacy interests.[143] These unconstitutional searches may infringe a person's right

(Oxford: Oxford U Press, 2015) at 194, "The primary wrongfulness of discriminatory conduct lies in the fact that it makes a person suffer because of her morally irrelevant or even valuable membership of a group."

137. Catherine MacKinnon, "Substantive Equality: A Perspective" (2011) 96:1 Minn L Rev 1 at 11-12, online: <www.feministes-radicales.org/wp-content/uploads/2012/06/Catharine-MacKinnon-Substantive-Equality-A-Perspective-Copie.pdf> [perma.cc/YE6F-4GHH]; Denise Reaume, "Discrimination and Dignity" (2003) 63:3 La L Rev 645 at 678-679, online: <digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5984&context=lalrev> [perma.cc/UW96-M475]; Sophia Moreau, "What is Discrimination?" (2010) 38:2 Philosophy & Pub Affairs 143 at 154, DOI: <10.1111/j.1088-4963.2010.01181.x>; Sophia Moreau, "Discrimination and Subordination" in David Sobel, Peter Vallentyne & Steven Wall, eds, *Oxford Studies in Political Philosophy,* vol 5 (Oxford: Oxford University Press, 2019) at 117-119; Deborah Hellman, *When is Discrimination Wrong?* (Cambridge: Harvard University Press, 2008) at 34-36.

138. Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 UTLJ 291 at 297-314, DOI: <10.2139/ssrn.535622>.

139. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 218-220; *Andrews*, *supra* note 1 at 165.

140. Richard J Arneson, "What Is Wrongful Discrimination?" (2006) 43:4 San Diego L Rev 775 at 779, online: <philosophyfaculty.ucsd.edu/faculty/rarneson/documents/writings/what-is-wrongful-discrimination.pdf> [perma.cc/R8GD-BKLS] (noting that the wrongfulness of discrimination is rooted in differential treatment based on animus or prejudice).

141. James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48:2 McGill LJ 225 at 268-269, online: <lawjournal.mcgill.ca/wp-content/uploads/pdf/2684732-Stribopoulos.pdf> [perma.cc/ETE6-HGH8]; *R v Grant*, 2009 SCC 32 at paras 19-21; *R v Therens*, 1985 CanLII 29 (SCC) at paras 50-51.

142. James Stribopoulos, "A Failed Experiment—Investigative Detention: Ten Years Later" (2003) 41:2 Alta L Rev 335 at 338, 353, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3313&context=scholarly_works> [perma.cc/AX7V-PKG4].

143. *Hunter*, *supra* note 89 at 159-160, 167-168; William J Stuntz, "Privacy's Problem and the Law of Criminal Procedure" (1995) 93:5 Mich L Rev 1016 at 1016, DOI: <10.2307/1289989>; Tim Quigley, "The Impact of the Charter on the Law of Search and Seizure" (2008), 40 SCLR (2d) 117 at 123, DOI: <10.60082/2563-8505.1112>. Note that unconstitutional searches may undermine other interests, such as dignity or bodily integrity. See *Hunter*, *supra* note 89 at 168; *R v Golden*, 2001 SCC 83 at paras 76, 87.

to be left alone, intrude upon their seclusion, undermine their decisional autonomy, or humiliate them—all of which exemplify different ways in which privacy interests are infringed.[144]

The wrongfulness of unconstitutional discrimination—and the violation of substantive equality interests—is thus distinct from the wrongfulness of other constitutional rights violations. An unlawful search that was motivated by racial animus involves rank-ordering that demeans individuals based on morally irrelevant personal characteristics—a wrong that is fundamentally distinct from restricting liberty or invading privacy.[145] Arbitrary detentions based on racial profiling subject individuals to additional dignitary and psychological harms—such as humiliation, prejudice, and a feeling of being targeted rather than protected—that other arbitrary detentions do not.[146]

Discrimination's unique wrongfulness highlights several disadvantages of using rights other than the s. 15 *Charter* right to equality (hereafter, non-equality rights) to counteract unconstitutional discrimination. Notably, courts that rely on non-equality rights to counteract discrimination overlook or minimize its wrongfulness.[147]

Expressive theories of law elucidate how unconstitutional discrimination constitutes a distinct moral wrong that is different from other types of unlawful State action.[148] These theories recognize that legislation and State action communicate messages to the public.[149] Elizabeth Anderson and Richard Pildes note that discriminatory laws

144. Samuel Warren & Louis Brandeis, "The Right to Privacy" (1890) 4:5 Harvard L Rev 193 at 205, DOI: <10.2307/1321160> (describing the right to be left alone); William Prosser, "Privacy" (1960) 48:3 Cal L Rev 383 at 389, DOI: <10.15779/Z383J3C> (describing these types of invasions of privacy).

145. I Bennett Capers, "Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle" (2011) 46:1 Harv CR-CLL Rev 1 at 3, 44, online: <journals.law.harvard.edu/crcl/wp-content/uploads/sites/80/2009/06/1-50.pdf> [perma.cc/CZ5S-H65R].

146. Susan Bandes et al, "The Mismeasure of *Terry* Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities" (2019) 37:4 Behav Sci & Law 176 at 181, 183-184, DOI: <10.1002/bsl.2401>; Jack Glaser*, Suspect Race: Causes and Consequences of Racial Profiling* (Oxford: Oxford University Press, 2015) at 125-126; Terry Skolnik & Fernando Belton, "*Luamba* et la fin des interceptions routières aléatoires" (2023) 101 Rev Barreau Can 671 at 686..

147. Khaitan, *A Theory of Discrimination Law*, *supra* note 136 at 194 (describing the primary wrongfulness of discrimination).

148. Elizabeth Anderson & Richard Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148:5 U Pa L Rev 1503, DOI: <10.2307/3312748> (describing expressive theories of law); Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous nor a Panacea" (2012) 32:1 Oxford J Leg Stud 1 at 5-9, DOI: <10.1093/ojls/gqr024> (discussing expressive theories of law related to discrimination).

149. Anderson & Pildes, *supra* note 148 at 1520.

express sentiments such as contempt, hostility, and disrespect towards certain individuals and groups.[150]

Constitutional decision-making also fulfils an important expressive function.[151] Through constitutional adjudication and reasoned decisions, courts communicate that the State violated a particular constitutional right, identify the interests that the State harmed, and acknowledge the specific wrongfulness of unlawful State action.[152] While discriminatory laws express contempt, judicial decisions that strike down such laws on s. 15 *Charter* grounds express that the State engaged in a particular type of wrongdoing: treating individuals as inferior, subordinate, or lesser-than.[153]

Expressive theories of law demonstrate why s. 15 *Charter* violations communicate that the State committed a particular type of wrong that is different than other constitutional rights violations. By using non-equality rights to counteract discrimination, courts neither validate the unique wrong of discriminatory treatment nor call the State to account for the specific harms of discrimination.

The expressive value of constitutional adjudication matters for other reasons. Reasoned constitutional decisions cabin the role and purpose of various rights and the principal interests that they protect.[154] In doing so, constitutional decision-making—and the reasoned decisions that flow from it—maintain the *Charter*'s internal structure and coherence.[155] Furthermore, constitutional adjudication validates how claimants suffered a particular harm and affirm that the State engaged in a particular wrong—an approach that unifies the moral connection between the wrongfulness of State action and the particular harm that claimants suffer from such conduct.[156]

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150. *Ibid* at 1521.

151. Cass Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2024-2025, 2028, DOI: <10.2307/3312647>.

152. Lorraine Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution" (2001) 80:1-2 Can Bar Rev 699 at 737; Reva B Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown" (2004) 117:5 Harv L Rev 1470 at 1480-1481, 1484-1485, DOI: <10.2307/4093259> (describing how the Court identified equality interests and the nature of the State's wrongdoing in *Brown*).

153. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 291-292.

154. Peter Hogg, "Interpreting the Charter of Rights: Generosity and Justification" (1990) 28:4 Osgoode Hall LJ 817 at 820-821, DOI: <10.60082/2817-5069.1759>.

155. Benjamin Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the Canadian Charter of Rights and Freedoms" (2015) 65:3 UTLJ 239 at 259, DOI: <10.3138/UTLJ.2660>, citing *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 337-338.

156. Reaume, *supra* note 137 at 672-673, 678-679 (highlighting the connection between the wrong of demeaning human dignity and the harms of stereotyping and prejudices).

3. *Restrictive equality rights in criminal law and procedure*

The use of non-equality rights to counteract discrimination raises an important concern. Notably, courts do not acknowledge the unique wrongfulness of unconstitutional discrimination—and fail to express that the State treated individuals with less concern and respect—when they use non-equality rights to counteract discrimination. Two examples illustrate this point: s. 7 *Charter* claims that minimize the harms and wrongs of indirect discrimination and s. 9 *Charter* claims that fail to address racial profiling adequately.

Consider first how claimants have turned to s. 7 of the *Canadian Charter* to remedy indirect discrimination.[157] The BC Court of Appeal decision in *Vancouver (City) v Adams—which involved a constitutional challenge to a municipal ordinance that was backed by quasi-criminal penalties*—highlights the shortfalls of this approach. S. 7 of the *Charter* protects the right to life, liberty, and security of the person—rights that cannot be deprived except in accordance with the principles of fundamental justice.[158] In *Adams,* a group of unhoused persons challenged the constitutionality of municipal ordinances that prohibited persons from erecting temporary shelters on public property.[159] At the time of the constitutional challenge, there were too few shelter spaces to accommodate the city's unhoused population.[160] The prohibition placed the claimants in an untenable position. If they did not erect temporary shelters, they risked suffering physical and psychological harm due to the elements.[161] If they erected shelters and disobeyed the law, they risked fines, arrest, and other forms of coercion.[162]

The Court decided that the ordinances were unconstitutional. By prohibiting temporary shelters at all times, unhoused persons were required to risk their physical and mental well-being to obey the law, which limited

157. Marie-Eve Sylvestre, "The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2011) 42:3 Ottawa L Rev 389 at 401-402; *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at paras 128-130 [Waterloo].

158. *Canadian Charter,* s 7; Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at 578-579, DOI: <10.7202/1032679ar>.

159. *Victoria (City) v Adams*, 2009 BCCA 563 at paras 21-24 [*Adams* BCCA]; Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43:2 Queen's LJ 297 at 316 [Skolnik, "Regulated Differently"].

160. *Adams BCCA*, *supra* note 159 at para 28; Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43 Fordham Urb LJ 741 at 756-757, online: <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2662&context=ulj> [perma.cc/MS6G-UKR6] [Skolnik, "Impossibility to Obey the Law"].

161. *Adams BCCA*, *supra* note 159 at paras 39, 102.

162. *Victoria (City) v Adams*, 2008 BCSC 1363 at para 32 [*Adams* BCSC] (mentioning that the bylaw and *Provincial Offences Act* imposed penalties).

their s. 7 *Charter* right to life, liberty, and security of the person.[163] The Court decided that the ordinances were unconstitutionally overbroad and thus infringed unhoused persons' rights for no reason.[164] Notably, the State could maintain the use of public parks—and achieve its regulatory objective—if it required unhoused persons to remove their temporary shelters during the day.[165] The Court decided that certain portions of the ordinances were constitutionally inoperative insofar as they contravened s. 7 of the *Charter.*[166]

But the ordinances' impact on the claimants' equality rights—and the indirect discrimination they suffered from these ordinances—was barely addressed in the decision.[167] As the trial decision noted, the claimants did not pursue a s. 15 *Charter* claim.[168] Yet a more expansive equality framework could have recognized that the ordinances subjected unhoused persons to the unique harm of unconstitutional discrimination—suffering based on their personal traits—and that the State committed a particular wrong—treating unhoused persons as less worthy of concern and respect in various ways. Admittedly, a successful s. 15 *Charter* claim may not have changed the outcome of the case. But it would have set an important precedent. In the future, claimants could bring *Charter* challenges based on laws or policies that discriminate against unhoused persons as a constitutionally protected class.

The ordinances failed to treat unhoused persons with equal concern and respect for various reasons. The ordinances required unhoused persons—and only unhoused persons—to risk their life and security of the person to obey the law.[169] The State expressed less concern for unhoused persons' shared interests in physical and psychological well-being.[170] Furthermore, the State disregarded the fact that only a third of unhoused persons had access to shelter and could obey the urban camping ban simultaneously

163. *Adams* BCCA, *supra* note 159 at paras 82-89, 102-110; Sarah E Hamill, "Private Property Rights and Public Responsibility: Leaving Room for the Homeless" (2011) 30 Windsor Rev Legal Soc Issues 91 at 92 (providing an overview of the decision).
164. *Adams* BCCA, *supra* note 159 at paras 112-126; Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Showdown" (2013) 22:1 Const F Const 31 at 37-38, DOI: <10.21991/C9D962>.
165. *Adams* BCCA, *supra* note 159 at paras 112-116.
166. *Ibid* at para 166.
167. Note that the Court did summarize the intervenor Poverty and Human Rights Centre's arguments related to equality and unconstitutional discrimination. But the Court did not engage with equality rights or unconstitutional discrimination in the decision.
168. *Adams* BCSC, *supra* note 162 at para 28.
169. Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 Windsor YB Access Just 226 at 241, DOI: <10.22329/wyaj.v35i0.5690>.
170. *Ibid*.

and avoid coercion.[171] The ordinances were more than unconstitutionally overbroad. They also treated unhoused persons—a group that has experienced historical and contemporary disadvantage—as second-class citizens and in a manner that exacerbated their marginalized status.[172]

Consider next how the absence of the right to equality in criminal law fails to acknowledge the harms and wrongs of racial profiling. The police power to conduct random traffic stops is an example. In the 1990 *Ladouceur* decision, the majority of the Supreme Court of Canada upheld the constitutionality of random traffic stops.[173] The Court decided that officers can pull-over motorists at random to verify the validity of their driver's license, evaluate their sobriety, or assess the vehicle's mechanical fitness.[174] Although random traffic stops result in arbitrary detentions that violate s. 9 of the *Charter*, the majority decided that the violation is justified in a free and democratic society.[175] In their view, random traffic stops are a proportional means to protect public safety on roadways and to deter illegal driving-related activities.[176] Yet the majority's analysis barely considered how such stops could result in racial profiling that undermines the right to equality. For over three decades, officers have been constitutionally authorized to exercise this power,[177] and racialized persons have been disproportionately subject to such stops.[178]

Scholars note how discriminatory traffic stops perpetuate prejudice and stereotypes, exacerbate historical marginalization and disadvantage, and result in subordination and domination. For instance, Bennett Capers notes that these stops are stigmatizing and humiliating, and "ascribe negative meanings to racial difference."[179] Highlighting the connection between such stops and historical marginalization, David Harris observes

171. *Adams* BCCA, *supra* note 159 at para 28. The court noted that there were 1,000 unhoused persons in Victoria yet only 141 shelter beds that expanded to 326 beds during extreme weather conditions.
172. Jennifer Watson, "When No Place Is Home: Why the Homeless Deserve Suspect Classification" (2003) 88 Iowa L Rev 502 at 518-523.
173. *R v Ladouceur*, [1990] 1 SCR 1257, 1990 CanLII 108 (SCC) [*Ladouceur* cited to SCR]; Steven Penney, "Driving While Innocent: Curbing the Excesses the 'Traffic Stop' Power" (2019) 24 Can Crim L Rev 339 at 344-345.
174. *Ladouceur*, *supra* note 173 at 1287.
175. *Ibid* at 1288-1289; Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29:2 Osgoode Hall LJ 329 at 359-360, DOI: <10.60082/2817-5069.1749>.
176. *Ladouceur*, *supra* note 173 at 1278-1288.
177. Note that the Superior Court of Quebec recently struck down a law that authorized random traffic stops for various reasons, one of which was that the law resulted in unconstitutional discrimination. See *Luamba c Procureur général du Québec*, 2022 QCCS 3866 at paras 777-832 [*Luamba*].
178. Wortley, *supra* note 112 at 33; Foster, Jacobs & Siu, *supra* note 112 at 3-5; Lorne Foster & Les Jacobs, *Traffic Stop Race Data Collection Project II Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa* (Ottawa: publisher unknown, 2019) at 4.
179. Capers, *supra* note 145 at 23-24.

that such stops are degrading, "use blackness as a surrogate indicator or proxy for criminal propensity," and "aggravate years of accumulated feelings of injustice."[180] Similarly, Ekow Yankah remarks that traffic stops reinforce negative stereotypes regarding race and criminality, and reinforce racial subordination and domination.[181]

These concerns highlight how random traffic stops do not merely restrict freedom arbitrarily—they undermine equality and treat individuals as inferior based on morally irrelevant personal traits. The claim that random traffic stops only limit freedom overlooks the wrongfulness of racial profiling and the harms that individuals experience from it—harms and wrongs that s. 15 of the *Charter* can acknowledge in ways that s. 9 of the *Charter* cannot.

V. *Expansive equality and its implications*

1. *Towards a more expansive right to equality and applicable framework*

The previous sections elucidated how the right to equality's legal framework is interpreted narrowly in three principal ways. The s. 15 *Charter* framework fails to counteract direct discrimination against certain marginalized groups. It overlooks how discrimination can be based on quasi-immutable personal traits. Section 15 of the *Charter* is also largely absent from criminal law and procedure where discrimination is ubiquitous. Yet a more expansive s. 15 *Charter* framework—and a more robust right to equality—could have significant implications. There are several ways in which s. 15 can be interpreted more purposively and the right to equality framework can be modified to redress discrimination more effectively. These proposals address the three ways in which s. 15 of the *Charter* is interpreted restrictively as discussed in previous sections.

First, courts should recognize that discrimination can be based on quasi-immutable traits that are relatively stable and difficult to change.[182] This approach favors the judicial acceptance of new analogous grounds of discrimination that courts have either rejected or have yet to recognize, such

180. David Harris, "The Stories, the Statistics, and the Law: Why Driving While Black Matters" (1999) 84:2 Minn L Rev 265 at 268, 289, 291, online: <scholarship.law.umn.edu/cgi/viewcontent.cgi?article=2132&context=mlr> [perma.cc/KRG9-59VB].

181. Ekow Yankah, "Pretext and Justification: Republicanism, Policing, and Race" (2019) 40 Cardozo L Rev 1543 at 1560, 1572, online: <cardozolawreview.com/pretext-and-justification-republicanism-policing-and-race/> [perma.cc/A3WC-7H4A].

182. See e.g. Skolnik, "Homelessness," *supra* note 13 at 88-90; Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994) 2:1 Rev Const Stud 76 at 95 (highlighting how poverty is stable and difficult to change for many individuals).

as poverty, homelessness, or having a criminal record. This more flexible analogous grounds framework is consistent with Justice L'Heureux-Dubé's concurring opinions in the *Corbière* and *Dunmore* decisions.[183] In those cases, L'Heureux-Dubé J acknowledged that discrimination can be based on personal characteristics that are "difficult to change."[184] This approach would more clearly prohibit direct and indirect discrimination based on quasi-immutable traits and address the first way in which equality rights are interpreted narrowly.

The recognition that individuals can suffer direct discrimination based on quasi-immutable traits results in an important consequence: it acknowledges that individuals can also face indirect discrimination based on quasi-immutable traits. Laws that regulate unhoused persons disparately provide an example. Recall how a law that expressly prohibits unhoused persons from frequenting parks results in direct discrimination.[185] Yet unhoused persons suffer indirect discrimination when neutrally worded laws prohibit everyone from erecting temporary shelters on public property despite a lack of available shelter spaces.[186] Previous sections showed how such laws require unhoused persons alone to sacrifice their basic interests in physical and psychological well-being to obey the law.[187] Both laws exemplify the wrongfulness of discrimination: treating unhoused persons as subordinate and conceptualizing their shared interests as less worthy of concern. A more expansive right to equality could capture both forms of discrimination in ways that s. 15 of the *Charter*'s current framework does not.

This more flexible approach to the right to equality offers a compelling justification to revisit potential analogous grounds of discrimination based on quasi-immutable traits – grounds that courts have rejected previously but merit reconsideration under a more expansive right to equality framework. Admittedly, many of the examples above analyze discrimination in criminal or quasi-criminal contexts. Yet once one accepts that certain

183. Corbiere, *supra* note 26 at para 60, l'Heureux-Dub); Dunmore v Ontario (Attorney General), 2001 SCC 94 at para 166 [Dunmore]; Sealy-Harrington, "Assessing Analogous Grounds," supra note 15 at 38, 43.
184. Corbiere, *supra* note 26 at para 60, l'Heureux-Dubé; Dunmore, supra note 186 at para 166.
185. Skolnik, "Homelessness," *supra* note 13 at 69.
186. Terry Skolnik, "Impossibility to Obey the Law," *supra* note 160 at 750-755. See e.g. *Pottinger v City of Miami*, 810 F Supp 1551 (SD FL 1992); *Jones v City of Los Angeles*, 444 F (3d) 1118 (9th Cir 2006); *Adams* BCCA, *supra* note 159; *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Shantz*]; Jeremy Waldron, "Homelessness and Community" (2000) 50:4 UTLJ 371 at 397, "[The law's] impact is so qualitatively different from the impact of the regulation on the person who has a home to return to that it amounts almost to the application of a quite different set of laws."
187. Skolnik, "Regulated Differently," *supra* note 159 at 323; Adams BCCA, supra note 159 at paras 28, 102.

marginalized groups can—and do—suffer discrimination based on quasi-immutable traits in criminal justice contexts, it becomes clear that they can face discrimination outside of these contexts, too. A judicial expansion of the right to equality's role within criminal law and procedure—and defense lawyers and interveners' greater willingness to invoke this right in criminal law cases—can generate important spill-over effects into other legal domains.

For this same reason, courts could also catalyze a shift in socio-economic rights jurisprudence by recognizing discrimination based on quasi-immutable traits.[188] By affirming that individuals can suffer indirect discrimination based on quasi-immutable traits such as poverty or homelessness, the judiciary may revisit the appropriate remedies to counteract this discrimination.[189] Although judicial concerns regarding institutional competence and redistribution will not disappear, courts may reexamine whether the State must allocate certain resources—or take reasonable steps to do so—to counteract discrimination.[190]

This account highlights the connection between the three ways in which the right to equality is interpreted restrictively: its inability to remedy some forms of direct discrimination, its failure to counter discrimination based on quasi-immutable traits, and its absence within criminal law and procedure. This account also illustrates why certain marginalized groups should be recognized as a constitutionally protected class under this more expansive right to equality framework. The concept of quasi-immutable traits, in turn, illustrates why marginalized individuals and groups can be treated as second-class citizens based on personal characteristics that are neither immutable nor constructively immutable. Section 15 of the *Charter*'s current restrictive interpretation of personal traits shows why the right to equality must protect individuals against discrimination based on quasi-immutable traits. And analyzing the right to equality's considerable absence in certain legal domains establishes that marginalized groups who

188. Ania Kwadrans, "Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?" (2016) 25 JL & Soc Pol'y 78 at 83, DOI: <10.60082/0829-3929.1225> (noting the connection between discrimination and socio-economic rights).

189. Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40:3-4 Osgoode Hall LJ 297 at 330-331, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1438&context=ohlj> [perma.cc/75FM-AMKG] (noting how courts have not engaged with socioeconomic rights claims meaningfully because they reject socio-economic status as an analogous ground).

190. Sandra Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty" (2011) 22:3 Stellenbosch L Rev 566 at 581-584 (noting that such concerns persist even if courts recognize poverty as an analogous ground).

suffer unconstitutional discrimination in criminal law and procedure can face discrimination outside of these contexts.

2. *Expansive equality in criminal law and procedure*

Second, courts should expand the right to equality's role in criminal law and procedure.[191] This expanded approach would recognize the unique harms and wrongs of discrimination in the criminal justice system, call the State to account for these wrongs, and require the State to justify them. But a more expansive right to equality could also re-orient certain aspects of criminal law and procedure in the following ways.

To begin, a more expansive right to equality could justify striking down police powers that have previously been upheld as constitutional.[192] Recall how the Supreme Court of Canada upheld the random traffic stop power in the 1990 decision *R v Ladouceur*.[193] Since then, human rights commissions, scholars, and judicial decisions have highlighted how this power is exercised disproportionately against racialized persons—a case of indirect discrimination.[194] A s. 15 *Charter* claim could justify striking down this police power because of its disparate impact, the dignitary harms that it inflicts, and that it engenders a loss of confidence in the criminal justice system, especially amongst racialized persons who are over-policed.[195] These considerations can also demonstrate why the burdens of this police power outweigh its benefits.

Section 15 of the *Charter*'s increased role in criminal law also provides a compelling justification for courts to reassess the constitutionality of judicially created police powers that lack adequate transparency and oversight mechanisms.[196] For instance, the Supreme Court of Canada created common law police powers to detain individuals for investigative purposes and to stop-and-frisk them.[197] Yet the Court did not require officers to document these detentions or searches, gather race and ethnicity-based data regarding their use, or provide individuals with receipts of such

191. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 290-293.
192. *Ibid*.
193. *Ladouceur*, *supra* note 173.
194. *Supra* note 112 and accompanying text.
195. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 292-293; Terry Skolnik, "Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades" (2023) Osgoode Hall LJ 505 at 538-539 [Skolnik, "Policing in the Shadow of Legality"]. On overruling *Ladouceur* more generally, see also David Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905 at 928-929, DOI: <10.29173/alr1313>. See more recently *Luamba*, *supra* note 177 at paras 777-832 (striking down a provision of the *Quebec Highway Safety Code* that authorized random traffic stops because it violated s 15 of the *Charter*); Skolnik & Belton, "*Luamba* et la fin des interceptions routières aléatoires," *supra* note 146 at 706.
196. Skolnik, "Racial Profiling," *supra* note 5 at 459-462.
197. *R v Mann*, 2004 SCC 52 at para 45.

encounters.[198] Some empirical studies indicate that Black adolescents are disproportionately searched—and subject to a greater number of searches—compared to their white counterparts.[199] By expanding s. 15 of the *Charter*'s role within the criminal law, courts may revisit these powers to ensure that they impose proper transparency and oversight measures that better prevent discrimination.[200]

The right to equality can also be used to challenge discriminatory police practices that have not been prohibited expressly by the Supreme Court of Canada. Carding is an example.[201] The term "carding" implies that officers require a person to identify themselves when the officers do not suspect or believe that the person committed an offence.[202] The police then store that information in a database, notably for intelligence purposes.[203] Research studies demonstrate that racialized and Indigenous persons are disproportionately carded by the police.[204] Yet even in contexts when the Supreme Court of Canada recognized that the police engaged in carding—and noted its disparate impact on racialized persons—the Court did not expressly strike down that practice as unconstitutional or dictate when officers have the lawful power to identify persons.[205] Today, a patchwork of provincial statutes, regulations, and internal police directives continue to govern carding and its applicable legal framework varies between jurisdictions.[206]

Claimants could constitutionally challenge the practice of carding on the grounds that it discriminatorily impacts Indigenous and racialized persons, and thus, violates the s. 15 *Charter* right to equality. The Supreme

198. Skolnik, "Racial Profiling," *supra* note 5 at 451.
199. Steven Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 Can J Corr 322 at 332, DOI: <10.3138/cjccj.2014.E32>.
200. Skolnik, "Rééquilibrer le rôle," *supra* note 6 at 287-288.
201. Anita Lam & Timothy Bryan, "Documenting Contact and Thinking with Skin: A Dermatological Approach to the Study of Police Street Checks" (2021) 36:3 Can JL & Soc'y 359 at 360-361, DOI: <10.1017/cls.2020.39> (providing an overview of carding and street checks); Skolnik, "Policing in the Shadow of Legality," *supra* note 201.
202. The Honourable Michael Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen's Printer, 2018) at 4; Heston Tobias & Ameil Joseph, "Sustaining Systemic Racism through Psychological Gaslighting: Denials of Racial Profiling and Justifications of Carding by Police Utilizing Local News Media" (2020) 10:4 Race & Justice 424 at 426, DOI: <10.1177/2153368718760969>.
203. Tulloch, *supra* note 208 at xi.
204. See e.g. Armony, Hassaoui & Mulone, *supra* note 118 at 8-11; Wortley, *supra* note 96 at 104; Ruth Montgomery et al, *Vancouver Police Board Street Check Review* (Vancouver: PYXIS Consulting Group, 2019) at 108-109.
205. *Le*, *supra* note 121 at paras 10, 94-97; Skolnik, "Policing in the Shadow of Legality," *supra* note 201 at 540-541.
206. See e.g. Montgomery et al, *supra* note 210 at 23-24; Dean Bennett, "Alberta Bans Police Carding Immediately; Street Checks Will Have New Rules," Global News (20 November 2022), online: <globalnews.ca/news/7472347/alberta-policing-reform-announcement/> [perma.cc/PB9X-E4M7].

Court of Canada may potentially invalidate this practice, provide clearer guidance on when the police can lawfully order individuals to identify themselves, and determine the transparency and oversight mechanisms that are necessary to satisfy constitutional safeguards.

These are just some examples of how a more expansive right to equality can influence criminal law and procedure. But there are many others. A broader right to equality holds the potential to better redress discrimination in the jury selection process. For instance, it could expand the scope of challenges for cause that screen out potential jurors who harbour racial animus or bias.[207] The right to equality may provide additional justifications to strike down mandatory minimum sentences that contribute to the over-incarceration of Indigenous and racialized persons. More generally, the right to equality may constitutionally invalidate discriminatory algorithmic decision-making in the criminal justice system, including predictive policing and risk assessments in bail and in sentencing.[208]

Conclusion

This article argued that the constitutional right to equality is interpreted restrictively in various respects. It showed why the current s. 15 *Charter* right to equality framework cannot counteract obvious forms of direct discrimination. It highlighted how courts overlook how discrimination can be based on quasi-immutable traits that are relatively stable and difficult to change. It demonstrated how successful s. 15 *Charter* claims are largely absent from criminal law and procedure jurisprudence. It also explained why the right to equality is necessary to recognize the unique harms and wrongs associated with discrimination, and to call the State to account for these wrongs. In doing so, this article set out why discrimination based on quasi-immutable traits constitutes a unique form of wrongdoing; one that incorporates stereotypes and prejudices regarding individuals' culpability for their own plight.

Section 15 of the *Charter*'s potential expanded role within the criminal law also elucidated why courts should recognize new analogous grounds based on quasi-immutable traits, such as poverty, homelessness,

207. Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after Parks" (2013) 92:2 Can Bar Rev 267 at 297-299; Kent Roach, "The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case" (2018) 65:3-4 Crim LQ 271 at 273-274. Although both scholars highlight the need to expand challenges for cause, a successful s. 15 *Charter* challenge may provide the basis to do so.

208. Nye Thomas et al, *The Rise and Fall of AI and Algorithms in American Criminal Justice* (Toronto: Law Commission of Ontario, 2020) at 20-22; Aziz Huq, "Racial Equity in Algorithmic Criminal Justice" (2019) 68:6 Duke LJ 1043 at 1053-1054.

or having a criminal record. A more expansive equality framework could better protect unhoused persons who suffer discrimination based on urban camping laws or injunctions to clear homeless encampments.[209] This same framework could lead courts to strike down laws that permit defendants to be cross-examined on their criminal records at trial—a prejudicial practice that increases the likelihood of conviction, dissuades defendants from testifying in their own defense, and contributes to wrongful convictions.[210] A broader right to equality could lead courts to strike down excessive financial penalties that disproportionately impact impecunious persons and entrench them in poverty—equality claims that could be combined with the s. 12 *Charter* right to be free from cruel and unusual punishments.[211] And a more inclusive s. 15 *Charter* framework could invalidate discriminatory police practices such as random traffic stops that disproportionately impact racialized persons.[212]

The fact that individuals can face direct discrimination in criminal justice contexts based on quasi-immutable traits means that they can face indirect discrimination based on these same traits. Yet acknowledging that poverty and homelessness can constitute analogous grounds of discrimination within the criminal law suggests that these same traits can constitute analogous grounds of discrimination in other areas of the law, too.

This article's core arguments also offer a new way to think about the right to equality's evolution within Canadian law and the ways in which it is interpreted narrowly. On its face, it seems that s. 15 of the *Charter* plays a minimal role within the criminal law because it has been interpreted restrictively in other areas of the law. But the reverse may be true. The right to equality may be interpreted narrowly *because* it has played virtually no role within the criminal law and has had little opportunity to counteract indirect discrimination in a manner that could spill-over into other legal areas—a line of inquiry that should be explored in future research. Ultimately, this article showed how a broader right to equality

209. See e.g. *Adams* BCCA, *supra* note 159; *Shantz*, *supra* note 189; *Waterloo*, *supra* note 157; *British Columbia v Adamson*, 2016 BCSC 584.

210. Terry Skolnik, "Two Criminal Justice Systems" (2023) 56:1 UBC L Rev 285 at 316-322; John Blume, "The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted" (2008) 5:3 J Empirical Leg Stud 477 at 479, 481, 491, DOI: <10.1111/j.1740-1461.2008.00131.x>.

211. See e.g. Terry Skolnik, "Beyond Boudreault: Challenging Choice, Culpability, and Punishment" (2019) 50 Crim R (7th) 283 at 289-291; Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 New Crim L Rev 73 at 81-84, DOI: <10.1525/nclr.2019.22.1.73>.

212. See Skolnik & Belton, "*Luamba* et la fin des interceptions routières aléatoires," *supra* note 146 at 706 (striking down s. 636 of Quebec's *Highway Safety Code* on s. 15 *Charter* grounds).

can catalyze a new era of anti-discrimination law both inside and outside the criminal justice system.