Substantive equality revisited:
A reply to Sandra Fredman

Catharine A. MacKinnon*

The first time substantive equality was argued to a court of law was by the Women’s Legal Education and Action Fund (LEAF) before the Supreme Court of Canada in Andrews v. The Law Society of British Columbia, decided in 1989.¹ There, the Aristotelian formal equality approach revolving around sameness and difference was explicitly rejected for the first time in a legal argument.² Substantive equality—predicated on and illustrated by but not limited to the situation of women—was expressly argued as an alternate paradigm, its substantive content turning on change in the lived inequalities of the historically disadvantaged.³ Toward this end, equality claims under § 15 of the Charter of Rights and Freedoms were to be subjected to “the purposive approach,” meaning assessed “bearing in mind that the purpose of the section is to promote the equality of those who have been disadvantaged”⁴—in other words, concretely, change-oriented, and asymmetrically.⁵ “Factual inquiry into the concerns of substantive inequality”⁶ was to be guided by the relation of the claim to an enumerated ground, the institutionalization of the ground or practice throughout society “so as to affect, in a systematic and cumulative way, dignity, respect, access to resources, physical security, credibility, membership in community, or power,” and whether the

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² See, e.g., id. ¶¶ 64, 68. This equality theory originated in Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 106–141 (1979), was further developed in Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 32 (1987), and was presented in a speech to the National Meeting of Equality-Seeking Groups in Ottawa, Canada, Jan. 13–16, at 18 (1989) (“the alternate view that could change things is best pursued . . . through a substantive analysis of each particular inequality”) (copy on file with author). For an analysis of my legal work in Canada, see Sheila McIntyre, Timely Interventions: MacKinnon’s Contribution to Canadian Equality Jurisprudence, 46 Tulsa L. Rev. 81 (2010).

³ Andrews factum, supra note 1, ¶ 23, 24, 28, and passim.

⁴ Id. ¶ 33.

⁵ An asymmetrical equality approach, so termed, is argued to my knowledge for the first time to a court of law: id. ¶ 36.

⁶ Andrews factum, supra note 1, ¶ 50.
group making the claim has “a social history of disempowerment, exploitation, and subordination to and by dominant interests.” 7 In its decision in Andrews, 8 the first Supreme Court decision rendered under § 15 of the newly entrenched Charter of Rights and Freedoms, the Supreme Court of Canada adopted the distinctive features of LEAF’s substantive equality approach.

Scholarly notice taken of the distinct departure that substantive equality provides constitutional and international law is welcome and overdue. 9 Bringing together a list of factors traditional in equality thinking as adjudicated and theorized with current themes and developments in existing scholarship, as Fredman descriptively does in “Substantive Equality Revisited,” is useful as well. Her treatment is more substantive at points than the typical abstractions, but not always and not by much. Curiously, the entry point of substantive equality into the legal canon is reduced to its facts, and its reinstatement after a considerable interregnum period of wandering in the Canadian wilderness is cited only for another point. 10 The “single principle” argued to “resist capture” in the “substantive conception” of inequality that eludes her 11 can be discerned in developing substantive equality jurisprudence, if one looks in the right places. Actually, it may not be recognizable as a principle in the philosophical sense, because it is not an abstraction but the social content specific to each “pre-existing disadvantage” 12 based on concrete grounds. Social hierarchy is its identifying principle. 13

Fredman’s first of four proffered “dimensions” of substantive inequality, disadvantage, while promising and core to the Canadian constitutional approach as well as the Charter’s language, does not necessarily come with identifying instructions. Social hierarchy—above and below, more and less, higher and lower, dominant and subordinate, superior and inferior—does. Disadvantage is intrinsically a comparative hierarchy. Her second dimension—countering prejudice, stigma, stereotyping, humiliation, and violence based on protected characteristics—is not a separate dimension, but rather a list of some of the forms social disadvantage takes. Third, she would enhance voice and participation as against exclusion. This could easily be reduced to “equal opportunity” (wrongly claimed by Fredman to be a substantive theory 14) or go

7 Id.
8 Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (Can.). In the present response, the Supreme Court of Canada’s equality jurisprudence is focused for reasons of space and because of its depth and leadership on the subject.
10 Sandra Fredman, Substantive Equality Revisited, 14(3) INT’L J. CONST. L. 712, n. 81 (2016) and id. at 726 (referring to Kapp’s repudiation of dignity as necessary to equality claims).
11 Id. at 713.
13 Hierarchy has been identified as the core principle of social inequality in all my equality work since the mid-seventies. For some recent detailed focus, see MacKinnon. supra note 9, at 12.
14 Fredman, supra note 10, at 723.
awry if not guided by a pre-existing grounded hierarchy test. By itself it does not lead to the identification of whose voice needs to be enhanced or who is being excluded. Asserting that the dimensions interact does not fully solve this problem. Historical hierarchy fills both lacunae. Moreover, while these two are positive equality values, failing to further them does not necessarily make a law discriminatory. Accommodating difference, part of her fourth dimension, without a substantive guide, could readily become the excuse for unequal treatment, aka “special treatment,” and the badge of stigma and worse than it often has been. It also reifies existing hierarchies. Similarly, no law will likely be found discriminatory for failing to achieve structural change, leaving the legal status of this dimension unclear in operation, the practical use of these standards analytically foggy.

Most of Fredman’s purportedly substantive factors can equally well be, and often have been, abstractions—meaning they can as readily be filled by advantaged as by disadvantaged content, hence are as formal as they are substantive. If a factor can be flipped, if its dimensions can as readily be filled by dominant as by subordinate groups, it is neutral as between equality and inequality, so it is not substantively equal. One can be equally stereotyped as a white man or as a black woman, for example. The stereotyping per se can be equal. The substance of the stereotypes is what is not equal, promoting hierarchies of male dominance and white supremacy in social reality. Stereotyping as a concept, which simply means overgeneralization from group characteristics, accurate or inaccurate, will not tell you this if you do not already know it.

Similarly, without a grip on how hierarchy of status and privilege works under compulsory heterosexuality, namely in homophobia, it is possible to argue, and was, that being excluded from the definition of “spouse” because both in a couple are of the same sex is not a dignitary violation.15 And without an understanding of hierarchy as the mainspring of substantive inequality, the conclusion can be drawn that “dignity” is that substance, digging the Court into decades of abstraction and detour, as the Kapp Court16 eventually recognized had occurred. Fredman sees the thankfully now well-recognized problems of making indignity the sine qua non of discrimination,17 but not that Canada going down this road in M. v. H. was a symptom of its failure to grasp the substance of substantive equality—hierarchy—as already the center of its approach. That is, excluding gays and lesbians from the definition of “spouse” in the mandatory scheme for the dissolution of long-term relationships in Ontario did not readily fit into the Court’s conception of “disadvantage” because it had overlooked hierarchy, there of social status and worth, as the substance of substantive inequality. The substantive inequality of gay men and lesbians, recognized as an undeniable fact of social hierarchy, would have readily encompassed dignity and worth as one expression of it, but would not have needed it as a core equality concept, because that place would already have been filled.

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17 Fredman, supra note 10, at 725. For one discussion, see MacKinnon, supra note 9, at 11–12.
What Fredman terms “several substantive conceptions of equality” are not necessarily that at all. In the main, they are doctrinal versions of the sameness/difference analysis struggling, frequently ineffectively, to produce outcomes that a substantive equality theory would readily require. Their fraught place in the existing equality canon is due to knowing where they want to go but not how getting there is antithetical to what the mainstream doctrine contemplates or, in the hands of some, allows. The tension between formal and substantive equality is missed here. Indirect discrimination or disparate impact theory is a particularly valiant attempt to remedy the consequences of hierarchy that are otherwise reinforced by conventional equality theory. But substantive equality is not just another version of disparate impact. If hierarchy is not recognized as the concept core to inequality, disparate impact/discrimination-in-effect doctrine is vulnerable to repeated failure, because unless one already knows that a disparity is the impact or effect of a preexisting substantive hierarchy, addressing it can be, and repeatedly is, evaded.

Reasonable accommodation is a “difference” theory: an attempt to accommodate the undesirable implications of imposing sameness. This is fraught, given that differences can also justify reinscribing disadvantages by law. It can also be symbolically stigmatic even when a desired material outcome is achieved. Apparently substantive equality’s rejection of both sides of the Aristotelian formula—both “sameness” and “difference,” each of which takes its measure by reference to a dominant standard being obscured as such—has not been understood. Along the same lines, affirmative action, by (as it is expressed) taking race or sex into account, continually founders on the rock of “special treatment” and is endlessly open to the charge of being a form of discrimination itself within the formal paradigm. This endangers the existence of such programs (a relative of positive discrimination in some systems), as well as stigmatizes its beneficiaries by failing to criticize as biased the hierarchical standard by which its recipients are disadvantaged, against which affirmative action, demeaned as “preferential treatment,” attempts equalization. Systemic discrimination, for its part, is definitely integral to substantive equality but is not typically recognized as a legal claim or doctrine. “Unfair” discrimination, a constitutional term in South Africa, is clearly a reaction to the traps of formal equality, its sideling of substance. If equality was understood substantively, i.e., anti-hierarchically, fairness would not be needed as a modifier.

Poverty is the reality most substantively analyzed by Fredman. It could provide a helpful illustration of how a hierarchical dynamic concept of inequality works, particularly because its less-and-more material dialectic is undeniable. Her critique of market-based proposals in the discrimination setting, observing that “the status

18 This is explained in MacKinnon, Difference and Dominance, supra note 2.

19 Justice Scalia of the US Supreme Court is particularly fond of this formulation. See, e.g., Romer v. Evans, 517 U.S. 620, 638–639 (1996).

quo, without legal intervention, requires the out-group to bear the full cost.”\(^{21}\) is an admirable deployment of an anti-hierarchical analysis. However, using socio-economic disparity as a critique of disadvantage shows a bafflingly narrow concept of disadvantage. What is the “socio-” part of socio-economic disadvantage, if not “a pattern of stigma and prejudice, structural barriers and exclusion”?\(^{22}\) Then there is the legal reality that economic disadvantage as a classification has to date been precluded in US equality law,\(^{23}\) is not yet an enumerated or analogous ground in Canada,\(^{24}\) as well as so far not targeted as such for remedy by equality law in the UK or South Africa. Having the one ground that is extrinsic to equality law’s coverage in these major instances be the one in which inequality’s hierarchical mainspring is treated as functioning, if not named, certainly raises the question of what happened to all the other social hierarchies through which inequality, with all its disadvantages, operates: white above Black, men over women, straight over gay, human over other animals, to start with. It is the actual substantive content of these hierarchies, which produce current disadvantage and (other than the last one) track Canada’s grounds that needs to be theorized in substance to theorize substantive equality. One useful question in this connection is the relation of race, age, and sex to poverty.\(^{25}\) If discrimination against those recognized grounds was ended, how much economic disadvantage would be left? That would be a substantive equality inquiry.

In light of this analysis, the reason Peter Westen, referenced by Fredman,\(^{26}\) can think that equality and rights are redundant is because he misses the way Aristotelian equality has become a systemic norm, absorbed into the rule of law itself. As LEAF lucidly explained in its Andrews factum,

The “similarly situated” notion is already embodied in the rule of law. The rule of law is satisfied if officials enforce rules impartially against all those to whom they apply . . . To say that likes should be treated alike in the formal sense of equality is to say only that laws should be laws. . . . [T]his formal approach does not assist in deriving the underlying meaning of equality in the context of a claim to substantive equality.\(^{27}\)

\(^{21}\) Fredman, supra note 10, at 734.

\(^{22}\) Id. at 735. Further, surprisingly, this is precisely what Fredman’s discussion of the work of Lister and Porter demonstrates. See Fredman, supra note 10, at 737.


\(^{24}\) “Canadian courts . . . have exhibited an increasing resistance to the possibility that claims of discrimination on the basis of grounds related to economic disadvantage might found valid discrimination claims under s. 15 of the Canadian Charter of Rights and Freedoms.” Jessica Eisen, On Shaky Grounds: Poverty and Analogous Grounds under the Charter, 2 Can. J. Poverty L. 1, 1 (2013). Arguing that it should be so found, see Martha Jackman, “Constitutional Contact with the Disparities of the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law,” 2 Rev. Const. Stud. 76 (1994). Justice Deschamps, now retired, has alone stated that while employment status “at least at this time” is not regarded as an analogous “to redress economic inequality . . . would be more faithful to the design of the Charter . . .” but “would constitute a sea change” in its interpretation. Ontario v. Fraser [2011] 2 S.C.R. 3, ¶¶ 315, 317.

\(^{25}\) Fredman, supra note 10, at 735, connects socio-economic disadvantage to “other dimensions” of hers, but not to other grounds.

\(^{26}\) Id., at 712, n. 1.

\(^{27}\) Andrews factum, supra note 1, ¶ 65.
Fredman notes that Westen saw that equality could be a right in itself, at least in a racial context, but he did not develop its substance. Equality becomes an “empty idea” when it is all formal and no context or content.

Members of the Supreme Court of Canada have recently observed the role of hierarchy in passing, initially through quoting Dean Nathalie des Rosiers stating: “In a democratic society, hierarchies between forms of relationships based on a status wholly unrelated to their needs are not appropriate . . . .” in a case involving access of common law spouses to state family breakdown mechanisms. In 2013, revisiting a close question in Quebec, the Supreme Court of Canada saw that laws can devalue individuals, including unintentionally, by conveying a negative social image, favoring certain individuals at the expense of others because of enumerated or analogous characteristics. “Such laws would perpetrate prejudice against certain individuals by establishing a hierarchy of worth based on prohibited grounds of discrimination, such as sex or sexual orientation.” This analysis, it is observed, requires contextual inquiry and account of disadvantages suffered by groups. While excluding common law spouses (gay and straight alike) from the state-mandated marital property regime was considered as possibly imposing a “hierarchy of conjugality,” it was found not to impose a “hierarchy of worth.”

The point being, hierarchy identifies the substance of substantive equality. It is Professor Fredman’s sought “single principle” that coheres the dynamic substance of her otherwise abstract concepts and static lists. The Withler admonition comes to mind: “care [is] needed to avoid converting inquiry into substantive equality into formalistic and arbitrary” analysis. Although the Supreme Court of Canada often produces results that are consistent with a hierarchical analysis—its express equality rulings on hate propaganda in Keegstra, on pornography (which Fredman elides) in Butler and Little Sisters, as well as not mentioning equality but being very substantive on domestic violence in Lavallée are striking instances—the gaping hole at the

\[\text{Fredman, supra note 10, at 716 (Westen discussing “racial injury”).}\]
\[\text{The US Supreme Court’s identification in so many words of its own blind spot on this score is analyzed in Mackinnon, Sex Equality, supra note 9, at 1241–1244.}\]
\[\text{Quebec (Attorney General) v. A. [2013] 1 S.C.R. 61, ¶ 197 (finding de facto spouses’ exclusion from family property system on dissolution does not violate Section 15).}\]
\[\text{Id.}\]
\[\text{Id. ¶ 251.}\]
\[\text{Id. ¶ 255.}\]
\[\text{Id. ¶ 266. The “reasons for judgment” quoted here were accepted by four justices; Madam Chief Justice McLachlin’s § 1 opinion provided the fifth vote for the result, upholding the exclusion. Madam Justice Abella’s dissent, finding the exclusion discriminatory under § 15, was endorsed by a majority of the Court in a disadvantage analysis attentive to hierarchy, see, e.g., id. ¶ 323, although that language is not used.}\]
\[\text{Withler v. Canada (Attorney General) [2011] 1 S.C.R. 396, 401, 413 (referring to abstraction in search for “proper” comparator group) (emphasis added).}\]
center shared by the Fredman analysis and the explicit Supreme Court of Canada jurisprudence to date is the substantive content of the inequalities that is revealed when hierarchy is focused. For sex, that substance is arguably sexual and physical violation together with deprivation of reproductive control.38 These issues, argued by LEAF in many cases as equality questions under § 15, were frequently (not always) won in the result—in the reproductive setting, see for example Borowski, Daigle, and Sullivan & Lemay39—although the Court has not yet applied an equality analysis to them in so many words. Sometimes they were lost,40 arguably a result of the failure of the Court to see the sex inequality issue as such, despite having squarely recognized it at other times.41 In recent years, the Court’s jurisprudence on sexual assault arguably amounts to much that a substantive equality analysis would require.42 Yet the failure to identify the substance of substantive equality has led the Court down some blind alleys and restricted its express development of an equality doctrine that continues to have immense unrealized promise.

Substantive equality’s potential is beginning to be realized in areas of law entirely ignored in Fredman’s treatment of “the evolving meaning of the right to equality in international and domestic human rights law.”43 Despite listing “violence” as a substantive factor, Fredman avoids equality analyses of sexual abuse. The US Supreme Court has recognized sexual harassment as a sex inequality claim. (This, in opinions by leading conservatives,44 also complicates her claim that in the US “conservative judges regard substantive equality as highly problematic.”45 Apparently the substance of equality is not wholly owned by liberals.) Under the European Convention on Human Rights, a new sex equality jurisprudence is developing in application to rape46 and, most stunningly, to domestic violence.47 In international criminal law, substantive sex equality concepts are being fielded in prosecutions for gender crime, including in the ad hoc tribunals for genocidal rape48 and in the International Criminal Court.

38 LEAF’s facta argue these issues in substance. The centrality of sexual abuse to sex inequality is argued in CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).
43 Fredman, supra note 10, at 714.
45 Fredman, supra note 10, at 713.
48 The legal recognition of rape in a genocide originated in Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) and was first applied by an international authority in Prosecutor v. Akayesu, Case No. ICTR 96 4 T ¶¶ 731–734 (1998).
in its statute\(^{49}\) and in its first case for recruitment and use of child soldiers,\(^{50}\) bringing together human rights and international criminal law. In prostitution and sex trafficking, one of the fastest-moving and most promising areas of law toward equality around the globe, Sweden’s criminalization of sex purchasers and pimps and decriminalization of prostituted people is, in effect and in legislative introduction, a substantive sex equality law.\(^{51}\) Perhaps the most striking illustration of the contrast between formal and substantive equality analysis in the constitutional canon can be found in South Africa’s decision in Jordan v. State considering the law’s criminalization of prostituted people and not sex buyers.\(^{52}\) The Palermo Protocol to the Transnational Organized Crime Convention, defining sex trafficking to include sexual exploitation through “abuse of power or position of vulnerability,”\(^{53}\) as well as through force, fraud, and coercion, is a de facto substantive equality law. The UN Secretary General’s Report of 2006 recognized sexual violence explicitly as a form of gender-based inequality,\(^{54}\) as did the dual resolutions on the same day in 2013, one from the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),\(^{55}\) the other by the UN Security Council,\(^{56}\) converging human rights with humanitarian law, both recognizing gender-based violence as a substantive form of sex inequality and a threat to international security and peace.

It is principally in the law of sexual abuse that the substantive sex equality action is. There, the hierarchy of sex has been exposed in substantive operation, and the substantive equality approach is escaping legal silos and leaping jurisdictional boundaries to address it.

\(^{49}\) See Rome Statute of the International Criminal Court, art. 7, ¶ 1(g), July 17, 1998, 2187 U.N.T.S. 3 (defining “crime against humanity” to include “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”); id. art. 7, ¶ 1(h) (recognizing persecution based on gender as a “crime against humanity”); id. art. 8, ¶ 2(b)(xxii) (defining “war crimes” perpetrated during international armed conflicts to include “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”); id. art. 8, ¶ 2(e)(vi) (extending definition to encompass non-international armed conflicts); id. art. 6(b) (defining “genocide” to include “[c]ausing serious bodily or mental harm to members of [a] group,” which has been interpreted to apply to sexual atrocities in genocides).

\(^{50}\) Almost all the first cases prosecuted at the ICC include gender crimes in some form. A particularly useful example can be found in the prosecutor’s opening argument in Lubanga, gendering the claim for violation of the prohibition on child soldiers. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Prosecutor’s Opening Statement, at 8–9 (Jan. 26, 2009), available at https://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCOTPSTLMO2009090126ENG2.pdf.


\(^{52}\) Jordan v. State, 2002 (6) SA 642 (CC) ¶ 69 (S. Afr.).


