

# OF PIGEONHOLES AND PRINCIPLES: A RECONSIDERATION OF DISCRIMINATION LAW<sup>©</sup>

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The common law has never developed a cause of action for discrimination. Instead, the legislatures have stepped in. This article explores not whether there should be a cause of action for discrimination at common law, but whether our thinking about discrimination from a legal point of view would benefit from drawing upon common law methodology. We can contrast two methodologies for the design and development over time of legal norms: the top-down model of the comprehensive code designed to bring to life a grand theory about the norms regulating human interaction, and the bottom-up model of case-by-case analysis aiming toward the development of a set of principles explaining and justifying individual decisions. Each has its place, but the latter is perhaps better suited to creating and changing norms in the discrimination law area. However, the abdication of responsibility by the common law has led to the legislatures intervening in their typical top-down style. Lacking a grand theory, the resulting statutory rules have something of the quality of arbitrary pigeonholes into which complainants must fit their fact situation or fail. Three issues are examined, revealing the detrimental impact of the pigeonhole-like quality that current codes have taken on over the course of their development. The first two concern the difficulties encountered in determining which attributes come within the protection of the law through being designated as prohibited grounds of discrimination; the last is a re-examination of whether discrimination is confined to differential treatment motivated by prejudice or encompasses causing adverse effects upon vulnerable groups and individuals. The article makes some first steps towards showing how discrimination law could develop differently if we were to adopt something more like the common law method of norm creation and change.

Puisque la discrimination ne donne pas naissance à une cause d'action en common law, il a fallu que les Assemblées législatives s'interposent. Dans cet article, s'interroge si notre façon de voir la discrimination, d'un point de vue juridique, pourrait bénéficier d'une méthodologie illuminée par la common law. On peut faire le contraste entre deux méthodologies utilisées pour la conception et le développement des normes juridiques: soit le modèle "du haut en bas" (top down) du code détaillé, conçu pour mûrir une théorie globale de normes qui prescrivent le comportement humain, et le modèle "ascendant" (bottom up) qui analyse les cas avec le but d'énoncer des principes pouvant expliquer et justifier des décisions particulières. Chaque modèle a sa place, mais le deuxième modèle se prête peut-être mieux à la création et à la modification des normes dans le domaine de la discrimination. Toutefois, l'abdication de la responsabilité par la common law a suscité le fonctionnement du modèle du haut en bas par les Assemblées législatives. Faute d'une théorie globale, les règles législatives ont l'effet de créer des catégories arbitraires dans lesquelles les demandeurs et demandereses doivent classer leur situation individuelle ou prendre le risque d'échouer. On comprend l'impact préjudiciable de ces catégories qui caractérisent les codes par le biais de trois questions posées par l'auteure. Les deux premières questions se rapportent à la difficulté à déterminer quels attributs font l'objet de la protection de la loi en raison de leur désignation de motif de discrimination illicite. Finalement, l'auteure se demande si la discrimination est limitée au traitement différentiel motivé par le préjudice ou si la discrimination doit avoir des conséquences préjudiciables sur les groupes et les individus vulnérables. Cet article fait les premiers pas dans une rhétorique qui suggère que les lois en matière de discrimination pourraient se développer de façon très différente si l'on utilisait une méthodologie puisée de la common law.

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The common law has never developed a cause of action for discrimination. Instead, legislatures have stepped in, initially to prohibit discrimination through a quasi-criminal form of regulation, later to create a civil remedy.<sup>1</sup> When the issue of a common law remedy was raised in *Bhadauria*,<sup>2</sup> the Supreme Court of Canada held that human rights legislation occupied the field, thus obviating common-law development in the area. To create a common-law right would simply be to duplicate the mechanism put in place by the legislature. Most of the debate about the wisdom of the decision in *Bhadauria* has turned on the importance of the benefits at the margin of having an additional remedial avenue. While this debate is important and is likely to heat up again in light of the substantial backlogs plaguing human rights dispute resolution, in this article I explore not whether there should be a cause of action for discrimination at common law, but whether our thinking about discrimination from a legal point of view would benefit from drawing upon common-law methodology.

I begin by distinguishing two contrasting methodologies for the design and development of legal norms over time. First, I discuss the top-down model of the comprehensive code designed to bring to life a grand theory about the norms regulating human interaction. Second, I identify the bottom-up model of case-by-case analysis aimed at the development, informed by concrete experience, of a set of principles explaining and justifying the individual decisions. I argue that each model has its place, but that the latter is perhaps better suited to creating and changing norms in the area of discrimination law. However, the abdication of responsibility by the common-law courts—the chief practitioners of the art of bottom-up law-making—led to the intervention of the legislatures in their typical top-down style. Unfortunately, the legislature’s efforts to devise comprehensive human rights codes have not been undertaken with the benefit of the kind of grand theory that is needed to sustain them. Lacking such a foundation, the resulting statutory rules have something of the quality of arbitrary pigeonholes into which complainants must fit their fact

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<sup>1</sup> The legislative history is traced in W.S. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Scarborough: Carswell, 1994) 1.

<sup>2</sup> *Bhadauria v. Board of Governors of Seneca College*, [1981] 2 S.C.R. 181.

situations or fail.

In this article, I demonstrate the pigeonhole-like quality that current codes have taken on over the course of their development, and examine three issues that reveal the detrimental impact of this law-making strategy. The first two of these issues concern the difficulties encountered in determining which attributes come within the law's protection through designation as prohibited grounds of discrimination. The third issue is a re-examination of a central aspect of the scope of discrimination—whether it is confined to differential treatment motivated by prejudice or encompasses causing adverse effects upon vulnerable groups and individuals. Throughout this article, I attempt to show how discrimination law could develop differently if we were to adopt something more like the common-law method of norm creation and change. Only first steps are possible here—the common-law method is incrementalist, with fully developed theories of liability developing only gradually as a result of many minds thinking through many cases.

For the purposes of this exercise, I do not engage the debate about whether adjudication in this area should remain under the auspices of administrative tribunals, or whether it should be returned to the jurisdiction of the common-law courts. There are arguments on both sides. I am more concerned with how we think about discrimination as a legal problem, whatever institution is charged with the formulation and adjudication of its rules. As will be clear from what I have already said, this argument about which is the best approach to norm making is directed at the central substantive rules defining the rights and responsibilities that directly regulate human relationships in this area, not the rules that govern other more administrative functions of human rights commissions.

## I. TWO MODELS OF LAW-MAKING

The two approaches to norm creation and interpretation contrasted in this article are at two ends of a continuum, but often shade into one another. Articulating the two extremes as models helps explicate the attitude towards law-making that underlies each. Neither model is all good, nor all bad; rather, different legal problems may lend themselves better to the use of one rather than the other. Both approaches involve the creation of general standards of conduct, the hallmark of law-making.<sup>3</sup> Such standards can be drafted in terms of greater or lesser abstraction and generality. Competing senses of the interplay between abstraction and specificity divide the two models. The first model operates in a top-down fashion, and is associated with the legislative approach to norm

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<sup>3</sup> H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 124. Hart contrasts this notion of general standards with “particular directions given to each individual separately.”

creation. The second exemplifies a bottom-up methodology, and is based on the common-law process. My analysis initially pries apart the abstract methodology and the character of the institution employing it; I return below to questions arising out of the adoption of a particular model by a particular institution. The top-down model is Benthamite in character, while the bottom-up model owes more to the Blackstonian tradition.<sup>4</sup> My objective is to isolate the methodology of norm creation associated with each of these traditions in order to examine the usefulness of each in the discrimination law context. As I deploy them, both models are highly idealized. Each produces its own distinctive style of judging that flows from its conception of norm creation.

In its ideal form, the top-down model conceptualizes the law-making enterprise as the task of stating a comprehensive system of detailed, precise rules grounded in a sound moral theory and designed to cover every situation to be regulated. The authoritative determination, in advance, of the lawfulness of all behaviour is its ambition. The first step is to decide which moral theory or value structure is to be adopted. Are we to subject all matters to a utility calculus or reject trading off one person's well-being against that of others? Shall we treat autonomy as more important or is virtue? Do we take morality to be monistic or pluralistic? In light of the answers to these and many more questions we can proceed to derive and enact more specific rules to deal with such things as the collection of government revenue, automobile accidents, human cloning, monopolistic behaviour, et cetera. As Hart pointed out, in order to work, such a model requires both determinacy of aims or values, and determinacy of fact: "If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility..."<sup>5</sup> Combined with the availability of a comprehensive and determinate theory of the principles governing human relations, determinacy of fact would allow us to work out our normative responses to all the possible fact situations and decide in advance how each ought to be regulated. In such a world, the law-making enterprise would be a one-off event in that all the laws could be stated in one authoritative document—no gaps would exist and no change would ever be needed. On this model, the law-making process may start with grand principles of morality, but the lawmaker's task is ultimately to

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<sup>4</sup> For a full-length treatment of the tug-of-war between these two traditions of legal thought, see G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986). In identifying the models with these larger schools of thought, I do not mean to tackle the full debate between these two schools. For present purposes, I remain aloof from the deeper theoretical debate about the extent to which these two schools exemplify competing accounts of the law, or the authoritative status of legal rules. Similarly, I do not consider whether the norms that come out of each of these processes properly deserve to be called "rules." For a recent analysis of how rules, standards, principles, and factors play different roles in legal reasoning, see R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996) 1.

<sup>5</sup> Hart, *supra* note 3 at 128.

formulate a precise system of rules regulating behaviour and describing the consequences of nonconformity with the law. The complementary task of the adjudicator is simply to apply the rules as they are written.

At the other end of the spectrum is what might best be described as the bottom-up model of norm creation. This model holds that although we may agree on and be deeply committed to certain abstract values or principles, we cannot anticipate all the fact situations in which they may be implicated, nor can we fully map out a comprehensive view of the concrete consequences implicated by those values.<sup>6</sup> We want our legal system to be informed by principles of justice, liberty, and equality, but these are multi-faceted concepts whose full meaning is contested. In such situations, it is wise not to attempt a comprehensive theory issuing a precise network of rules at the outset, but rather to let the implications of the abstract principles be revealed incrementally through confronting fact situations on a case-by-case basis.

The process ideally begins with the application of the abstract principle to paradigm cases in which there is both widespread consensus and firm conviction as to the right outcome. Reasons will be offered as to why particular cases fall under the law's protection. Normally, decision making in these paradigm cases will yield relatively precise rules that cover the standard features of cases thought to be paradigmatic. Consideration of a range of paradigm cases as they have emerged will provide us with an opportunity to reformulate the abstract principle or value, allowing us to become more precise over time about its contours. This reformulation may well include within its purview cases that would not have been anticipated, or if anticipated, would not have been considered within the scope of the principle at the start of the process. This exercise may also recast some cases that were originally thought to fall within the value as more properly excluded by it. In other words, reformulation will make the original abstract principle more determinate in ways that may expand or contract initial judgments about its application. Our thinking radiates from there to take in situations that are closely analogous, each possible analogy serving to test the scope of the principle as previously articulated. Decisions about whether or not to include an analogous situation under the principle make the scope of the principle still more determinate. Again, after some experience of working through analogous situations, revised rules that make sense of the types of cases dealt with so far will be able to be formulated. The process continues indefinitely—taking stock of where the extension by analogy has taken us so as to reformulate the principle anew, and then starting again to consider further analogies as actual disputes present themselves for resolution. Within this model, the process of norm creation is an ongoing matter in which

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<sup>6</sup> Sunstein, *supra* note 4 c. 2. Sunstein characterizes these as situations of incompletely theorized agreement.

any case might be an opportunity for extension by analogy or other reshaping of the principle. Mere rule application is therefore not easily distinguished from changing or adapting the rule to meet changing needs or understandings of the problems at hand.<sup>7</sup>

Whether this approach permits a more expansive interpretation of the legal rule at stake depends, of course, on how broadly or narrowly the general principle that is offered as the explanation of past cases is framed. If one were able to craft a general principle that fit all the existing precedents, the outcome in a given case would be exactly the same as that arrived at by a judge who treats the rulings in past cases as fixed pigeonholes into which any new case must fit in order to succeed. However, by moving to a higher level of abstraction to frame the relevant principle, a judge may craft a standard that may not only exclude some of the outcomes in past cases, but also extend beyond existing case law, thereby creating room for the recognition of new types of fact situations as falling within the reach of the law. This approach understands that the law needs to adapt to new social conditions and changing social mores to accommodate growth over time. As there is typically more than one general principle available to rationalize an area of law, the locus of controversy within such an approach is whether a particular judgment goes farther than is legitimate. The more abstract the principle offered, the more room it creates for growth or change in the law, but the more controversial the act of norm creation involved. At the extreme, a judge who offers the general principle “people ought to be good” to explain an area of case law would be giving other judges virtually unlimited discretion to expand the law as far as any plausible conception of “good” would take them. This example demonstrates the latent legitimacy dilemma with the bottom-up method. Adaptation to change keeps the law supple, yet the more creative a new formulation of an old principle is, the more likely it is to provoke questions about the nature of the decision maker doing the reformulating.

Ultimately, the bottom-up approach pushes legal analysis in the direction of formulating a theory of liability in each area of law. This theory is constructed out of our considered judgments about particular cases. Only such a theory can contain and support the search for general principles to explain

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<sup>7</sup> Lord Atkin’s approach in the landmark negligence case *Donoghue v. Stephenson*, [1932] A.C. 562 [hereinafter *Donoghue*] illustrates this dynamic approach to norm creation. Lord Atkin saw the instances in which plaintiffs had been successful in the past as examples of “some general conception of relations giving rise to a duty of care” and thought that there must be “some common element” underlying the past cases. See *ibid.* at 580. He understood it to be the judge’s role to articulate that common element in order to generate a general principle uniting the case law and guiding future decisions. For an exposition of the Blackstonian roots of this conception of the connection between concrete cases and more general principles, see Postema, *supra* note 4 at 30-38.

existing case law.<sup>8</sup> Although judges rarely attempt to articulate such a theory in any kind of detail, their judgments are usually informed by intuitions that fit into some theoretical framework. While the process should be thought of as inherently open-ended, so that we should never be too confident that we have found the theory that settles everything once and for all, the effort to formulate a rationale that goes beyond existing particular instances is a crucial step in the development of the law. By contrast, the top-down model starts with a general theory and uses it to derive more precise rules for concrete cases from it; these rules, in turn, guide and constrain adjudication. According to this approach, theorizing is mostly the job of the legislature. If the legislature properly fulfills its function of working out a comprehensive moral theory and drafting the specific rules necessary to deal with all possible fact situations, there should be little need for adjudicators to engage with the large moral principles underlying the rules.

As is already apparent, the bottom-up model combines the law-making and adjudicative functions of a legal system. The separation of these two functions is more natural to the top-down model. In a democratic age, it is to be expected that a democratically representative body would be charged with the task of norm creation. The job of adjudication would ideally be a modest one, confined to settling factual disputes and deciding whether a given set of facts fall within the rules laid down. Any more ambitious activity on the part of adjudicators would be characterized as a usurpation of the democratic process.

The idealistic aspect of the top-down model lies in postulating the lawmaker's ability to articulate a comprehensive moral theory and anticipate all possible fact situations in order to draft precise rules to govern them. A more realistic approach would acknowledge that full determinacy in these matters is not possible. We can neither fully anticipate all the fact situations likely to arise for consideration, nor the value judgments to be made about them. A lawmaker may still strive under these conditions to articulate a comprehensive system of values in a determinate way and draft a body of precise rules instantiating them, but the scheme will be based on current knowledge and values. Gaps will appear in the framework as new situations arise, or as we change our minds about the appropriate norms to govern. Some gaps may be filled through interpretation of the rules laid down, but the greater the degree of precision employed in drafting the rules, the less leeway there will be for interpretation. The scheme will therefore need to be revised from time to time. The revision

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<sup>8</sup> Sunstein, *supra* note 4 c. 2. Although Sunstein argues that rules amounting to incompletely theorized judgments are common in law, and even crucial to the ability of the system to contain the various political pressures it is subjected to, it seems to me that the urge to try to move to a more completely theorized level is also pervasive. This is not to say that every judge faced with a controversial matter makes the attempt, nor that every attempt is successful. But it is no accident that important moments in a legal system's development are typically characterized by such an attempt.

process would repeat the process undertaken the first time by articulating the values that should govern and laying down precise rules derived from them. How onerous this task would be for the lawmaker depends on our sense of the severity of the indeterminacies that plague us. When our values and objectives are clear and the range of fact situations that implicate them are unlikely to change much over time, the prospects of producing a scheme that lays down clear, precise, and enduring rules is good. To the extent, though, that we seek to regulate murkier issues, frequent revision will be needed. In the context of a separation of legislative and adjudicative functions, legitimacy concerns will confine the creative urges of adjudicators. Democratic principles again press in the direction of giving the amendment task, beyond minor interpretive adjustments, to a democratically representative body.

This acknowledgment of indeterminacy brings out a pitfall of the top-down model. Its ideal functioning depends on the lawmaker having worked out a general theory that grounds the rules, even though typically only the rules themselves will be enacted. If the ambition of drafting a web of specific rules is pursued in circumstances in which the lawmaker has been unable to work from a comprehensive moral theory or unable to anticipate the range of fact situations likely to arise and calling for regulation, the drafted rules will be without adequate moral foundation and seriously incomplete. Yet their precision will hinder adjudicators from filling the gaps that will inevitably come to light over time. The rules enacted will be mere pigeonholes—lists of “does” and “don’ts”, “cans” and “can’ts”, “ins” and “outs” without grounding in a durable theory of human interaction. If the rules can be amended or changed with ease, the need for constant revision may not matter. However, if change is cumbersome and therefore happens only infrequently, the existing pigeonholes will seem increasingly arbitrary to those unfairly squeezed in or left out. If the standing weakness of the bottom-up method is its susceptibility to a challenge of its legitimacy when the overeager principle seeker becomes too ambitious, the comparable weakness of the top-down model is its inflexibility when faced with unanticipated situations.

Both models in their ideal form include both a general moral theory governing human interaction and more precise rules regulating concrete action. The top-down model starts with the theory and derives the concrete rules from it. The bottom-up model starts with paradigm fact situations and works up from the reasons for decision in such cases to intermediate general principles and ultimately to a provisional general theory. Some connection to the general theory is the lifeblood of the concrete rules. If the connection is cut, rule application becomes mere pigeonholing. Each approach must find its own response to the central dilemma of law-making: combining flexibility with political accountability.

In our legal tradition, each model is associated with a particular

institution, but there is no intrinsic connection between approach and agent. Legislatures or courts can employ either model. In the early stages of the development of doctrine, the common-law courts must pursue something like the bottom-up model. The institutional limitations on adjudicative bodies are well-known and much analyzed. They do not have the necessary resources, nor do the data of individual cases give them sufficient material to work with, to develop from scratch a comprehensive theory to regulate a particular field. But once an area of doctrine has become richly developed and much analyzed, larger theories do develop, and decision making in particular cases becomes more like the application of a general set of principles to individual fact situations. On the other hand, there is a corrupt version of the bottom-up model that reproduces the inflexibility to which the top-down model is prone. As I have articulated it, the bottom-up model requires adjudicators to take on the responsibility of trying to move progressively toward a more determinate justification for legal doctrine while continuing to test emerging theories against society's reactions to their consequences in new concrete cases. In the hands of adjudicators who do not fully take up this challenge, the bottom-up method has no "up"; decision making remains mired in the facts of particular cases, and courts stick closely to the decided case law, a self-imposed exercise in pigeonholing. There have been periods during which this arid approach characterized the common law, and, of course, it continues to tempt some of the judges some of the time.

Similarly, there is no guarantee that all statutes will be the product of a comprehensive moral theory, accurately converted into a precise system of rules. Instead, the legislative law-making process may mimic the bottom-up method and be based on little more than a vague sense of the values at stake and a firm conviction about how they apply in a handful of concrete situations. If a lawmaker enacts rules narrowly dealing only with the easy cases anticipated, the conventional understanding of the division of labour between legislators and adjudicators will produce another board of pigeonholes. Inflexibility will plague such a statute and those subjected to its regulation. Avoiding this result requires either fast tracking necessary legislative reforms as the need for them becomes apparent, or drafting the norms in such a way as to confer discretion on adjudicators to do the work of developing the indeterminate norms with which the legislature started. The former strategy will often not be feasible; the latter prompts the same legitimacy issues that law-making by adjudicators always arouses.

Any complex legal system is likely to employ both abstract law-making methods. Which method is employed in any given area ought to depend on our conception of the nature of the phenomenon to be regulated. If the issue at hand involves clear, relatively determinate objectives and the situation in which it arises is stable, greater precision is possible. However, in a great many

areas of law such precision is neither possible nor desirable. To pursue the top-down model in circumstances to which it is ill-suited is likely to result, as Hart warned, in “settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified.”<sup>9</sup> In the presence of significant indeterminacies of either value or facts, issues are perhaps better left to be worked out over time through the bottom-up method.

This contrast between the two philosophies of norm creation and adjudication can be used to examine the development of human rights legislation and the form current codes typically take.<sup>10</sup> I argue that the history of law-making in the area of discrimination law has been characterized more by pigeonholing than working from or toward a general theory about what discrimination is and why it is wrong. Is discrimination capable of being defined in a cut and dry manner, after our having anticipated all possible scenarios and decided which should be regulated and how? Or does discrimination refer to a problem of human interaction that is fluid and constantly manifesting itself in new forms such that we have no clear sense of all the circumstances in which it might arise in future or what to do about them? If the latter, our method of designing norms to regulate it should be equally fluid and open to change. To judge from the pattern of development of anti-discrimination law, one would have to conclude that a complete general theory of discrimination has never informed legislative efforts and is still unavailable. Yet much of the law is drafted with precision that would be appropriate only if dictated by such a theory, one in which we could have confidence. This gives little discretion to the adjudicator to adapt the law to accommodate a new but deserving situation, even though cases inevitably arise which do not fit existing legal categories. The complainants in these cases will have to be told that there is no remedy for what happened to them until the legislature amends the law.<sup>11</sup> The precision of the rules also creates little incentive for adjudicators to search for a theory capable of explaining the rationale for the rules and guiding their intelligent development over time. Indeed, the more precise the rules, the more likely that adjudicative attempts to fill in gaps and develop norms will be met with the criticism that adjudicators have no authority to amend the rules laid down by Parliament. The lower status in the legal hierarchy of administrative tribunals, who are charged with first instance adjudication in the discrimination

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<sup>9</sup> Hart, *supra* note 3 at 130.

<sup>10</sup> I will mainly refer to the Ontario legislation, but the same could be true about most, if not all, Canadian codes.

<sup>11</sup> In rare instances, a complainant will be able to invoke the *Charter* to fill a gap in the statute, as happened in *Vriend v. The Queen in Right of Alberta*, [1998] 1 S.C.R. 493. The analysis of the wisdom of *Charter* intervention in such cases should produce the kind of search for principle that ought to inform equality litigation. However, from the point of view of the average complainant in a discrimination action, *Charter* litigation is the most expensive and least accessible form of adjudicative norm development.

context, only exacerbates this tendency. The problem with discrimination law over the last fifty years has been that of bringing into alignment the nature of the phenomenon and the norm creation and an adjudication process that suits it.

## II. PIGEONHOLING DISCRIMINATION

The story of the Canadian courts' refusal to use their authority to create a cause of action for any form of discrimination is well-known. Invited to hold that public policy could be invoked to render unlawful a tavern owner's refusal to serve a black man, the Supreme Court, in *Christie v. York*<sup>12</sup>, refused to ride that unruly horse. Although *Christie* was decided under Quebec law, courts in common law provinces accepted its authority for upholding freedom of contract even at the expense of denying the harm of discrimination.<sup>13</sup> The Courts' refusal to intervene left it up to the legislatures to fill the gap.<sup>14</sup> Although I think these judgments unfortunately represent a pigeonholing mindset within the relevant areas of the common law, spelling out how it might have been different at common law is not part of my present purpose.<sup>15</sup> Instead, I want to examine how the legislatures responded to the task of creating norms to deal with the problem of discrimination.<sup>16</sup>

Legislative rule making in this area can be characterized as a version of a bottom-up approach without the "up." Rather than starting with a comprehensive theory of equality, the legislature has identified successive paradigmatic cases of behaviour that should be prohibited, and has decided each

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<sup>12</sup> [1940] S.C.R. 136 [hereinafter *Christie*]. For a complete discussion, see J.W. Walker, *Race Rights and the Law in the Supreme Court of Canada* (Toronto: Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997).

<sup>13</sup> Tarnopolsky & Pentney, *supra* note 1 at 1-24.

<sup>14</sup> According to Walker, *supra* note 12 at 143-44, the legislature was not initially eager to step in, preferring to pass the buck back to the courts.

<sup>15</sup> This task has been taken up recently by A. Reichman, "Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination" (2001) 14 Can. J. L. & Jur. 79; and some years ago by H.L. Molot, "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation" (1968) 46 Can. Bar Rev. 612.

<sup>16</sup> Again, in extolling the virtues of the bottom-up methodology usually considered at home in the common law courts, I do not mean to paper over the flaws of the courts as historical institutions. I do mean to separate the methodology within the common law from the ultra-conservative, laissez-faire political values that have sometimes informed its use. I take this to be no different from the way that the top-down method can be used by one legislature to institute a progressive legal scheme and by another in pursuit of a conservative agenda.

particular case by drafting precise rules targeting that behaviour.<sup>17</sup> Three aspects of the paradigmatic cases that have been provided for stand out. The first is the type of good or opportunity that is denied, or in other words, the contexts within which discrimination is prohibited. The second is the grounds upon which an individual is denied a good or opportunity, or the bases of unlawful discrimination. The last covers the circumstances that make a denial unlawful, or what I would call the fault standard for discrimination.

Legislation with respect to the first two aspects of unlawful discrimination has developed into a detailed system of rules about who cannot do what to whom in what context. For some time, the third aspect—the heart of discrimination law—was much less precisely articulated in the legislation. However, I shall argue below that even here there are signs that the legislature was operating with a paradigm case in mind, which the legislation reflects in its precise exemption of some forms of behaviour from the general prohibition against discrimination. In any event, although we now have a fairly detailed web of rules that is far more complex and intricate than the original legislation, it is not clear that we are much closer to a theory that animates the scheme.

After illustrating the case-by-case methodology that the legislature seems to have followed by tracing the legislative history of the provisions governing the contexts in which discrimination is prohibited and the prohibited grounds of discrimination, I will briefly examine two issues that have arisen in the interpretation of the prohibited grounds in order to demonstrate the stifling effects of this pigeonholing. In the process, I will argue that only the search for a more principled formulation of the prohibited grounds will push us in the direction of a better understanding of the prohibition and enable the legal system to deal creatively and effectively with changes in circumstances and our understanding of those circumstances. I will then turn to the question of what I refer to as the fault standard in discrimination law to show that, in a more subtle way, its elaboration too is plagued by the same problems and requires the same kind of solution.

My conclusion is that given the indeterminacies surrounding the phenomenon of discrimination, the legal rules governing it must build in the possibility of growth and incremental change. So far, law-making has tended to pronounce on particular types of concrete cases without incorporating into the law sufficient reference to the underlying values that inform the particular judgments. Adjudicators are therefore left to apply relatively static rules. The legislature would have been better advised to enact core principles, not purporting to constitute a complete theory but pitched at an intermediate level of abstraction, explicitly leaving it up to adjudicators to do the work of case-by-

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<sup>17</sup> This builds on an argument made by N. Gupta, *Reconsidering Bhadauria: A Re-examination of the Roles of the Ontario Human Rights Commission and the Courts in the Fight Against Discrimination* (LL.M. Thesis, University of Toronto Faculty of Law 1993) [unpublished] c. 4.

case development and refinement of the principles through interpretation in the context of concrete fact situations.<sup>18</sup> Using as a model the typical process of reasoning that informs tort law doctrine, I will describe how some core elements of the cause of action for discrimination could be reconceptualized.

A. *Contexts and Grounds: The Apotheosis of the Pigeonhole*

The Ontario legislature began to prohibit discrimination in the 1940s by targeting a single, narrowly defined problem: the phenomenon of shopkeepers and other service providers announcing their unwillingness to deal with non-white members of the public by displaying “Whites Only” signs. This behaviour was prohibited by the *Racial Discrimination Act*.<sup>19</sup> Within a decade, it was decided that discrimination in employment was objectionable, and so the *Fair Employment Practices Act*<sup>20</sup> was enacted. Around the same time, the legislature decided that it was unfair to pay women less for the same work performed by a male employee, and prohibited such activity in *The Female Employees Fair Remuneration Act, 1951*.<sup>21</sup> Shortly thereafter, the legislature decided that it was not enough to prohibit the posting or publishing of notices of a discriminatory sort to ensure equal access to goods and services, so it prohibited the denial of “accommodation, services or facilities available in any place to which the public is customarily admitted”<sup>22</sup> on discriminatory grounds. A few years later, the problem of people being denied rental accommodation on the private market came to the legislature’s attention; the *Fair Accommodation Practices Act* was amended to prohibit discriminatory denial of “occupancy in any building containing more than six units.”<sup>23</sup> The legislation was later further expanded to prohibit discrimination in the provision of all goods, services, and

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<sup>18</sup> According to M. Morin, my suggested approach has much in common with that of Portalis, the celebrated drafter of the first French Civil Code, perhaps confirming that the common-law method, which inspires my efforts, and the codification approach need not be considered sharply contrasting methods of norm creation. M. Morin, “Portalis c. Bentham? Les objectifs assignés à la codification du droit civil et du droit pénal en France, en Angleterre et au Canada” in Commission du Droit du Canada, *La législation en question* (Ottawa: Commission du Droit du Canada, 2000) at 139-217. An English version, revised by the author, is available: “Portalis v. Bentham?: The Objectives Pursued by the Codification of the Civil and Criminal Law in France, England and Canada,” online: Law Commission of Canada <<http://www.lcc.gc.ca/en/themes/gr/rl/ldi1999.pdf>> (date accessed: 23 July 2002).

<sup>19</sup> S.O. 1944, c. 51.

<sup>20</sup> S.O. 1951, c. 24.

<sup>21</sup> S.O. 1951, c. 26.

<sup>22</sup> *Fair Accommodation Practices Act, 1954*, S.O. 1954, c. 28.

<sup>23</sup> *Fair Accommodation Practices Amendment Act, 1960-61*, S.O. 1960-61, c. 28.

facilities.<sup>24</sup> This was a response to organizations such as children's sports leagues slipping out of liability for excluding girls by arguing that this was not a service or facility customarily available to the public but rather customarily available only to boys.

Each new statute added a separate pigeonhole—a new, relatively precise prohibition—to the overall scheme. The first consolidation of all these anti-discrimination provisions was the *Ontario Code of 1962*.<sup>25</sup> It collected in a single statute the various contexts in which discrimination had been prohibited in the past. Periodic reconsolidations have followed the same pattern. Thus, the modern codes typically include provisions creating a cause of action for discrimination in employment, housing, and provision of goods and services. Since 1962, Ontario has added a general prohibition on discrimination in contracting to round out the modern contexts within which discrimination is prohibited.

A similar pattern can be traced with respect to the prohibited grounds of discrimination. The list of grounds has grown over the years, but that growth looks less like the result of the legislature's attempts to work out a general theory about who deserves the law's protection, than the ad hoc application of band-aids as the Ontario Human Rights Commission has publicized the plight of groups of people left out of the *Code's* protection. Anti-discrimination legislation in Ontario started by identifying the paradigm cases of race and religion. Given the monumental struggles to liberate blacks from slavery and the catastrophic rise of anti-Semitism throughout the western world in the 1930s, the case for protecting these groups from discrimination in various contexts was an easy one. New grounds were added only gradually as cases arose and the victims of these forms of discrimination had to be turned away by the system. In the midst of an immigration boom, the first employment discrimination law sensibly went beyond the protected categories of race and creed present in the *Racial Discrimination Act, 1944* to encompass "colour, nationality, ancestry or place of origin"<sup>26</sup> as well. However, it neglected to include sex, marital status, family status, or age, not to mention sexual orientation, disability, or poverty. These other grounds were added in dribs and drabs: age discrimination was

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<sup>24</sup> See *Re Ontario Human Rights Commission et al. and Ontario Rural Softball Association* (1979), 102 D.L.R. (3d) 303 (C.A.); *Re Cummings and Ontario Minor Hockey Association* (1979), 26 O.R. (2d) 7 (C.A.). The legislation was amended in 1981. See *Fair Accommodation Practices Act* S.O. 1981, c. 53, s. 1. In recommending expansion, the Ontario Human Rights Commission remarked that the limitation to places to which the public is customarily admitted "had particular relevance in the 1950's and 1960's to the elimination of discrimination in hotels and restaurants," the very contexts in which the common law judges failed to act, thus provoking the legislative initiative. See Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: Ontario Human Rights Commission, 1977) at 48 [hereinafter *Life Together*].

<sup>25</sup> S.O. 1961-62, c. 93 [hereinafter *Code*].

<sup>26</sup> *Fair Employment Practices Act, 1951*, *supra* note 20.

dealt with in a separate statute in 1966,<sup>27</sup> sex and marital status were not included until 1972,<sup>28</sup> family status and handicap in 1981,<sup>29</sup> and sexual orientation only in 1986.<sup>30</sup> This process of piecemeal reform led the Ontario Human Rights Commission in its 1977 report, *Life Together*, to complain that “the legislation is now riddled with anomalies and hamstrung by limitations which render it increasingly unable to address the burgeoning human rights needs of this province.”<sup>31</sup>

It is hard to avoid the conclusion that, in respect of both these aspects of the problem of discrimination, the legislature has adopted the bottom-up method of case-by-case rule-making by waiting for fact situations not yet covered by the rules to present themselves and then deciding how they should be handled. Given our legal system’s lack of experience with equality as a norm, perhaps a case-by-case method was the best way to start. It is not to be expected that the legislature would be able to articulate at the outset a comprehensive theory in such uncharted territory. But it is not clear that the legislature has taken the next step—moving towards an articulation of the deeper principles that explain the concrete cases. At least, it has not done so in the statute itself. Yet the enactment of precisely enumerated contexts within which discrimination is prohibited and prohibited grounds of differentiation has given adjudicators little leeway to develop such principles on the basis of which coverage to new categories could be extended. Instead, every time a new deserving case crops up, it requires an act of the legislature to deal with it, with all the delays attendant upon gearing up such a complex machine to handle what are often fine matters of detail, not to mention the risk of political opportunism or obstructionism at the expense of vulnerable minority groups. The result is a statute that resembles a board of pigeonholes, requiring legislative intervention to add new holes as needed.

## B. *The Interpretive Effects of Pigeonholing Prohibited Grounds*

### 1. Square Pegs into Round Holes

A more fluid form of norm creation is necessary to give adjudicators the tools to gradually extend the coverage of the *Code* as new variations on the discrimination theme arise. The process of enumerating discrete prohibited grounds of discrimination has been going on for more than fifty years, and

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<sup>27</sup> *The Age Discrimination Act, 1966*, S.O. 1966, c. 3, s. 2.

<sup>28</sup> *An Act to Amend the Human Rights Code, 1972*, c. 119.

<sup>29</sup> *Human Rights Code, 1981*, S.O. 1981, c. 53.

<sup>30</sup> *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64.

<sup>31</sup> *Life Together*, *supra* note 24 at 8.

deserving groups are still left out. Despite these continuing gaps, there has been no attempt to reformulate the criteria for inclusion in the *Code*'s protection in terms of a general principle, even though we now have enough experience to do so.

Let me illustrate the inadequacies of the existing pigeonholes and the superiority of a principled approach through the example of the struggle to obtain coverage for the obese.<sup>32</sup> Obesity is not itself a prohibited ground of discrimination under the *Code*, nor does it comfortably fit under any of the other grounds. Efforts have been made to argue that it is a form of discrimination on the basis of disability or "handicap," as it is labeled in the *Code*, but the definition of handicap in the *Code* is rendered in incredibly precise terms.<sup>33</sup> In particular, it ties disability to the effects of "bodily injury, birth defect, or illness," whereas the causes of obesity are often unknown, making it impossible to establish the link to illness. Occasionally complainants may succeed in fitting their claim into the category of sexual harassment, when it has been clear that the respondent's behaviour was informed by derogatory attitudes about gender, but this covers only a subset of obesity cases.

Yet it is clear that the obese suffer many of the same forms of disadvantage in the workforce, in acquiring accommodation, and in access to goods and services as those in protected categories: they are stigmatized, denied opportunities, and paid less than others—all without sound basis.<sup>34</sup> The assault on human dignity suffered by the obese is as severe as in other cases of discrimination and the tangible disadvantage is as harmful. Thus, if this group

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<sup>32</sup> See Gupta, *supra* note 17. The leading Canadian cases are *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425 and *Davison v. St. Paul Lutheran Home of Melville, Sask.* (1993), 19 C.H.R.R. D/437. A similar story could be told using the attempts to portray pregnancy discrimination and sexual harassment as sex discrimination, or sexual orientation discrimination as family-status discrimination. The former cases met with some success. See *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219 and *Janzen v. Platy Enterprises* (1989), 59 D.L.R. (4th) 352 (S.C.C.). However, the latter case failed. See *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

<sup>33</sup> The full definition is as follows: s. 10 (1): "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental retardation or impairment,
- (c) a learning disability, or a disfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under *Workers Compensation Act*.

<sup>34</sup> J.P.R. Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17 *Advocates' Q.* 338.

is to be recognized as discriminated against, another amendment to the legislation is necessary. Even if this amendment is forthcoming, it will merely add another pigeonhole to the board. By itself, another addition moves us no closer to a theory about why these various groups deserve protection, and the fact that the existing enumerated grounds function as discrete pigeonholes means that adjudicators have little incentive or institutional legitimacy to develop a general theory. Instead, they get wrapped up in trying to fit square pegs into round holes—determining whether there is sufficient evidence of a physiological cause of this complainant's obesity to justify fitting it under the rubric of illness even though it is plain that prejudice against the obese usually stems from the belief that it is *not* an illness, but rather due to lack of self-discipline.

With each debate about the legislative addition of a new pigeonhole, we have, in fact, been developing an implicit sense of what sorts of attributes should not be used as a basis for decisions having a detrimental impact on the individual. It is long overdue to attempt to render this in an abstract principle, leaving its further concrete extension to be managed by adjudicators. Legislation could make it unlawful to discriminate on the basis of an attribute that either has been, or comes to be, the basis of unfair derogatory stereotypes, or one that individuals cannot fairly be required to change in order to enjoy full participation in society, whether because the attribute is immutable or simply within the range of human commitments deserving of respect.<sup>35</sup> This approach would make it possible for coverage to be naturally extended to the obese (and other new cases).<sup>36</sup> In the context of equality rights under the *Canadian Charter of Rights and Freedoms*,<sup>37</sup> a provision involving a more open-ended formulation of the prohibited grounds of discrimination, the Supreme Court of Canada has recently begun to develop an abstract set of principles along these lines.<sup>38</sup> No

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<sup>35</sup> It is important, I think, not to put too much emphasis on the idea that it is the *immutability* of attributes that should render improper their use to condition benefits. I see immutability as simply the extreme case of situations in which it is unfair to expect someone to change an important aspect of personality in order to gain access to important social opportunities and benefits, or suffer the consequences of exclusion.

<sup>36</sup> For an analysis that argues for the usefulness of enumerated grounds of discrimination provided that they are understood to be capable of expansion, see D. Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 C.J.W.L. 37. I see my suggestion of reformulating into an abstract principle what we learn about discrimination by considering why certain grounds are likely to be problematic not as denying that enumerated grounds have a use, but as better facilitating the process of growth.

<sup>37</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>38</sup> See especially the dissenting judgment of Justice L'Heureux-Dubé in *Egan v. Canada*, [1995] 2 S.C.R. 513 at 548-52, which seems to have started a more reflective process of considering what the enumerated grounds have in common and how they are tied to the fundamental purposes of section 15. This process has been continued in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *Law*]; and more explicitly in *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 in the judgments of both Justices McLachlin and Bastarache, as well as Justice L'Heureux-Dubé.

deep consensus has yet been achieved; there is still much work to be done in excavating our social knowledge about the enumerated grounds of prohibited discrimination in order to develop a theory readily able to guide extension to new contexts, but the process has begun. Meanwhile, human rights code jurisprudence is stuck in a style of adjudication that insists on matching litigants to prefabricated categories, rather than engaging in a process of continually redesigning the categories to meet human needs. Furthermore, were it possible for private-sector discrimination complainants to participate in this search for principle, there is every reason to expect that the resulting theory would be richer and more nuanced than that which will arise out of constitutional deliberation on its own. The tableau of cases arising in the private sector is itself richer and more varied than the range of disputes likely to arise out of interactions between government and citizens, and it is against such variety in context and circumstance that a principle is best tested and refined.

This way of conceptualizing the forbidden bases of discrimination is intrinsically tied, as it should be, to the developing understanding of the human interests that discrimination legislation should be seeking to protect.<sup>39</sup> In keeping with the main threads of section 15(1) jurisprudence, I take those interests to include at least these two: the protection of human dignity and fair opportunity to enjoy access to important goods. Both are bound up with the human good of autonomy. The elaboration of the dignity interest at stake will go hand in hand with the developing understanding of the ways in which categorization on the basis of various attributes is stigmatizing, demeaning, or disrespectful. The idea that there are some things about oneself one should not have to change in order to get ahead will inform and be informed by our developing sense of what the fair opportunity for full participation in society means. Saying that what human rights law needs is the development of a full theory of what human dignity means and what full participation requires does not, of course, guarantee that the theory as elaborated by a court or the courts at any point in time will be correct.<sup>40</sup> While it is true that abstract concepts give courts a great deal of discretion, both for better and for worse, when advance

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<sup>39</sup> *Charter* jurisprudence inchoately recognizes this in the debate that has been ongoing in the Supreme Court with respect to whether the test for a section 15(1) violation involves three steps or two steps, and in the slippage between the second and third aspects of the *Law* test. See *Law, ibid.*; *Corbière, ibid.*

<sup>40</sup> Thus, while I do not disagree with the criticisms made by Pothier, *supra* note 36 at 49-56, of the Supreme Court's reasoning in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 and *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, I think it is a mistake to attribute the inadequacies of the judgments to the fact that the focus of section 15 decision making has now become the protection of human dignity. Rather, in these cases one might argue that the Court has focused too narrowly on the connection between *demeaning* a group or individual and violation of dignity. It is to be hoped that the concept of human dignity will come to be seen as more capacious than that. For a preliminary effort to push in the direction of enlarging the concept, see D.G. Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001) 2 *Theoretical Inquiries in Law* 349.

precision is impossible we have no choice but to take our chances with the process of incremental development of legal norms. Each bad judgment must simply become an opportunity for critique and further reflection.

## 2. Intersectionality Revisited

The effort to state the basis upon which discrimination is impermissible in a more principled fashion would also help alleviate another problem created by a pigeonholing mentality. Nitya Duclos has effectively illustrated how the pigeonholes that currently define the prohibited grounds of discrimination can work injustice upon those who find themselves disadvantaged because of a combination of enumerated attributes.<sup>41</sup> The itemization of grounds encourages adjudicators to analyze fact situations through the lens of one alleged ground of discrimination at a time.<sup>42</sup> In analyzing what is wrong with this approach, we can illustrate once more the value of going beyond the enumerated grounds of discrimination as inert categories stating conditions for the imposition of liability, to articulate principles explaining why discrimination on these bases is unacceptable. The treatment of the statutorily enumerated grounds as both “isolated” and “homogenous”<sup>43</sup> gives rise to two main problems.

The first problem involves situations in which adjudicators fail to notice how the combination of factors actually compounds the injury to the complainant. The case of *Alexander v. British Columbia*<sup>44</sup> illustrates the problem very well. The respondent liquor store manager refused to serve Alexander because he thought she was drunk. In fact, she had a motor impairment that affected her gait and speech, and she was partially blind. Alexander was also a First Nations woman. The tribunal found for the complainant, but characterized the discrimination as being solely on the basis of disability. Here, the worry is that the adjudicator’s tendency to focus on a

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<sup>41</sup> N. Duclos, “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 C.J.W.L. 25 [hereinafter “Disappearing Women”]. See also Pothier, *supra* note 36 at 22ff.

<sup>42</sup> The same tendency seems to affect cases in which there is some dispute about whether to find that discrimination on the basis of a prohibited ground occurred or to attribute the respondent’s behaviour to an attribute not protected by the law. As illustrated by *Mossop*, *supra* note 32, this can result in the complainant being placed exclusively in the no-liability pigeonhole, through a finding that the alleged discrimination was based on a non-prohibited ground. For a discussion of this tendency, see N. Iyer (formerly Duclos), “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1994) 19 Q.L.J. 194 [hereinafter “Categorical Denials”].

<sup>43</sup> Iyer, *ibid.* at 192-93.

<sup>44</sup> (1989), 10 C.H.R.R. D/5871.

single (perhaps the strongest) ground for the complaint means that the full flavour of the injury is overlooked. Perhaps the adjudicator read these facts correctly—perhaps the respondent would have treated anyone with this disability in the same way, regardless of her race. But it would scarcely stretch credulity to imagine that the respondent was influenced by the fact that the complainant was Aboriginal, perhaps assuming too quickly that she must be drunk because she was Aboriginal. In focusing exclusively on the disability basis of the complaint, the tribunal missed an opportunity to examine how much more insulting it is likely to be to a First Nations person than to others to be treated this way. In other words, using the enumerated grounds as pigeonholes—as mutually exclusive logical categories into only one of which a single individual can fit—obscures a central issue in the case: what harm was done to the complainant by the respondent’s behaviour?

The second kind of intersectionality case that has been badly handled is one in which the two (or more) grounds of discrimination are both necessary and jointly sufficient conditions of the bad treatment. In other words, had either ground not been present, the other would not have elicited the discriminatory conduct or effect. This situation is illustrated by the American case, *De Graffenreid v. General Motors*,<sup>45</sup> in which a black woman was not allowed to make a Title VII complaint that the respondent discriminated against those who were both black and women. The argument against recovery in these sorts of cases seems to be that if the respondent can show that he has hired black men and that he has hired white women, there has been neither race discrimination nor sex discrimination. The hiring of black men shows that the employer does not discriminate on the basis of race and the hiring of white women shows that it does not discriminate on the basis of sex. In such cases, the focus on each ground to the exclusion of the other makes the discrimination disappear. The enumeration of discrete prohibited grounds seems to foster this approach, as though the correct procedure were to run one’s finger down the list of prohibited grounds and noting that “black women” is not one of the categories, deny a claim, just as one would deny a claim to recovery for discrimination on the basis of obesity because it is an attribute that is not on the list. At a deeper level, this result implies that discrimination on the basis of a particular factor is uniform, so that all members of a given group must be similarly affected or discrimination is not made out;<sup>46</sup> it conveys the impression that there is a homogeneity to each category as well as a separation between them.

The physicality of the pigeonhole image captures well the implicit

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<sup>45</sup> 413 F.Supp. 142 (E.D. Mo. 1976).

<sup>46</sup> “Disappearing Women”, *supra* note 41 at 34, 43; “Categorical Denials”, *supra* note 42.

approach in both these kinds of situations.<sup>47</sup> If the complainant has already been put into one pigeonhole, the same peg cannot also occupy another, different hole. A complainant who straddles two such pigeonholes does not properly fit into either of them. So how would the pursuit of a more bottom-up method make a difference? To begin with, ideally we would be working not with a code that lists prohibited grounds, but rather one that gives a more general description of the sorts of attributes that should not be belittled or used to restrict opportunity. This would make it natural to examine hard cases not by merely looking for a perfectly fitting pigeonhole, but by examining whether the case in hand exemplifies the form of harm that the statute seeks to protect against. But even if we must work from an enumerated list, that list could be treated as the equivalent of the initial range of easy cases decided through a case-by-case method; that is, raw material out of which to construct a more general principle. This approach would require asking deeper questions about why each of these attributes might be on the list and using that inquiry in the interpretive exercise of responding to a fact situation involving the intersection of two or more factors.

Even a sophomoric effort in this direction would tell us that the list includes examples of attributes toward which some people have derogatory attitudes leading them to stigmatize others as inferior. This we understand to constitute a serious harm to human dignity, so it is prohibited to deny someone access to a good or opportunity because one thinks that he or she is unworthy of common respect. This much is already well established in section 15(1) jurisprudence.<sup>48</sup> With this understanding of the point of discrimination law,<sup>49</sup> there is no need to separate the two aspects of a person's complaint, and personality, in a case like *Alexander*. The law defines acting with certain reasons as discriminatory because it is an assault on dignity. If someone performs a given act for more than one of the outlawed reasons, he or she has, insofar as the dignitary interest at stake is concerned, committed two wrongs. Each wrongful reason constitutes an independent insult; together they magnify the harm suffered.

In other words, focusing on only one of two interacting grounds of discrimination extends the pigeonholing approach beyond the drafting style of the statute to our understanding of the harm of discrimination, preventing adjudicators from seeing the whole wrong and its impact on the whole person. There is more than a passing resemblance here to the difficulty judges have had

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<sup>47</sup> Iyer in "Categorical Denials", *supra* note 42, uses the image of "pockets" to convey a similar sense of the physical impossibility of occupying two categories at the same time.

<sup>48</sup> See the survey of previous case law by Justice Iacobucci in *Law*, *supra* note 38.

<sup>49</sup> I emphasize that this is only part of the purpose of discrimination law. I would not want to be taken to be arguing that discrimination law is limited to the control of bigoted behaviour.

in the past with the idea of concurrent liability in tort and contract. There have been times when tort and contract were treated as mutually exclusive pigeonholes, forcing plaintiffs to choose between categories to describe the wrong committed against them. But, of course, we now understand that a single act can constitute more than one wrong.<sup>50</sup> Indeed, this now seems self-evident in a way that makes us wonder how judges could have ever not seen it. The idea that slotting fact situations into specific pigeonholes is the way to decide cases obscures the truth. Once we see the inadequacy of this approach, all that is left is to work through the remedial implications of overlapping grounds of liability to make sure that the plaintiff/complainant is not doubly compensated.

If we recognize that the roots of each of the enumerated grounds in discrimination law lie in the interest in human dignity, instead of insisting on putting each case in a single pigeonhole and then confining the discussion to how the complainant was affected in that respect, the various aspects of the respondent's attitude toward the complainant come together to contribute to an analysis of the total indignity inflicted on the complainant.<sup>51</sup> As Duclos points out, there is a tendency to award higher damages in cases involving complainants who fall into more than one disadvantaged group, indicating that this point is sometimes at least implicitly understood.<sup>52</sup> Yet it would better ensure that complainants received full compensation, and at the same time it would contribute more to our developing understanding of the phenomenon to have a discussion of these matters on the record, not simply operating behind the scenes.<sup>53</sup> Such a discussion would develop our thinking about the human interests that ought to be protected by discrimination law—a fundamental

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<sup>50</sup> Of course, there remains a lively debate about the limits of concurrency—the circumstances in which the imposition of liability in tort would unacceptably undermine an exclusionary rule in contract. See *e.g.* *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 [hereinafter *Bow Valley Husky*]. In such cases a decision does have to be made about which ground of liability takes precedence. I can see no such potential conflict between a finding of liability for discriminating on racial grounds and a finding of liability for discriminating on disability grounds.

<sup>51</sup> However, if we focus exclusively on the frustration of the complainant's tangible ends (obtaining a particular service) as the relevant harm, such cases represent harm that is overdetermined by wrongful conduct. If we take the remedial point of a complaint to be to put the person back in the position she would have enjoyed if not for the wrongful action, the complainant is entitled to compensation only once for the harm of not being allowed to make a purchase. The respondent's dual motives do not increase this aspect of the harm suffered. The two (or more) types of harm caused by discrimination are often not clearly distinguished. Another way to articulate the critique offered here is to say that the pigeonholing mentality has inhibited adjudicators from embarking on a more principled investigation of the harms to be redressed by discrimination law. As ever, some conception of the human interests protected by a cause of action is the conceptual companion of an account of the harms for which redress is available.

<sup>52</sup> "Disappearing Women," *supra* note 41 at 41.

<sup>53</sup> *Ibid.* Similarly, as Duclos also points out, it would help provide a more nuanced understanding of sexual harassment to acknowledge the ways in which racial and other forms of stereotyping inform such behaviour, contributing to the harm experienced by the victim.

element in our conception of the cause of action.

A similar analysis can be offered of the difference it makes to the second type of fact situation involving intersectionality to take a principled approach. I have always found the logic in these cases most puzzling. An allegation that black women, for example, have been discriminated against can be broken down into the claim that it was because of the complainant's race *and* because of her sex that she was denied some opportunity. In causal terms, each of the attributes of race (being black) and sex (being female) is necessary for the harm to arise, but neither is sufficient. But in no other civil claim is it necessary to establish that there is a single, sufficient cause or explanation of the harm suffered in order to succeed. Normally, all that matters is that the alleged wrongdoing is a "but-for" cause or necessary condition; the existence of multiple necessary conditions that come together to create the harm is no bar to recovery, especially when both causes are alleged to be unlawful behaviour and are combined in the behaviour of a single agent. By this standard, provided that a black female complainant can show that had she been white or male, she would have been hired (or her chances would have been improved), she ought to be considered to have established a case for both race and sex discrimination.

To explain the flaw in the reasoning in *De Graffenreid*, we need to pay attention first to the distinction between discrimination that involves acting on prejudice and adverse-effect discrimination. The first type of discrimination involves performing an act that disadvantages another for particular, disrespectful reasons. The latter form of discrimination involves denying access to goods, services, or opportunities, whatever the reasons, if that denial cannot be justified.<sup>54</sup> A principled approach would require asking not whether "black women" are on the list, but whether the employer's behaviour reveals the imposition or reinforcement of inequality—an instance of disrespectful treatment or denial of fair participation rights. It is possible for an employer to hold attitudes that are based on stereotypes about, or are disrespectful toward, only the women of a particular racial group. Indeed, many racist attitudes and stereotypes are bifurcated along gender lines. For example, black *men* are associated in the bigot's mind with violence or criminality, while black *women* are equated with promiscuity. If there is reason to believe that some prejudiced, sex-specific attitude underlies this employer's behaviour, why should it matter that he does not treat men in this group badly? He may have learned to reconsider previously held derogatory attitudes toward the men, but not yet been confronted about his attitudes toward the women. It may simply be that the derogatory views he holds about the men do not come into play in a way that creates unfair hiring criteria or working conditions. Whatever the explanation for why the men in the group are not badly treated, it is beside the point if

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<sup>54</sup> This formulation skates around the many difficult questions about what constitutes justification for actions having an adverse effect, but it will serve for present purposes.

derogatory attitudes toward the women insult their dignity. What this reveals is that the apparent assumption underlying the pigeonholing approach that each protected category is homogenous has a corollary: prejudice towards members of each group is equally homogenous. Once that assumption is exploded, there should be no further obstacle to grounding a complaint on the intersection of two forms of prejudice.

Similarly, it is possible that an employer's policies, while not grounded in prejudice, could have side effects that disproportionately affect not all members of a racialized minority or all women, but primarily racial minority women. Imagine a case in which an educational requirement is imposed which, because of different social conditions affecting black women is harder for them than for white women or black men to meet. If this barrier cannot be justified according to the usual tests, why should it be allowed to stand once its effect on vulnerable members of society in restricting opportunity is established? Again, the assumption that the enumerated grounds are homogenous carries the implication that any given act will affect all members of a particular category in exactly the same way. More careful analysis of intersectionality cases demonstrates the falsity of this premise. If we let these cases be an opportunity for understanding the subtleties of discrimination and its harmful effects, rather than an exercise in fitting human beings into prefab categories, they will often go from being hard cases to being easy ones—from no discrimination to multiply grounded discrimination.

C. *What Counts as Discrimination?: Developing a Fault Standard for Discrimination*

The very fact that the *Code* has developed through the elaboration of ever longer lists of prohibited grounds, and the gluing together of independent contexts within which discrimination is prohibited itself indicates that there is no general theory of the wrong of discrimination informing the legislation. However, the best evidence of this lack of theory is that the central concept of “discrimination” goes unexplicated in the statute.<sup>55</sup> In contrast with the precise list-drawing elsewhere, this might look on the surface like the incorporation of a very abstract concept, leaving much interpretive room for adjudicators to use it to adapt to changing conceptions of equality based on the growing experience of the prevalence and effects of inequality. But a closer look makes this less clear. While Canadian legislatures have shied away from directly defining discrimination, in the early stages they defined the exemptions to the prohibition against discrimination in a narrow pigeonhole-like fashion, which in turn threatened to confine the scope for growth of the concept of discrimination

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<sup>55</sup> As noted by Tarnopolsky & Pentney, *supra* note 1 at 4-1, this absence of a definition is true of all but the Manitoba and Quebec statutes.

itself. This has provoked what I see as an unnecessary crisis of legitimacy in respect of a central aspect of the cause of action for discrimination as adjudicators have had to struggle against the wording of the statute to do what is clearly required to keep the law relevant to modern conditions.

The debate around the first case before the Canadian courts raising the issue of whether the law prohibited adverse-effects discrimination or only intentional discrimination illustrates this difficulty.<sup>56</sup> The legislation contained a very general prohibition of discrimination,<sup>57</sup> yet no general qualification on that prohibition. Indeed, the legislation included a quite specific qualification, providing that some discrimination may be justified, but confining the circumstances to age, sex, or marital status discrimination when found to be a *bona fide* occupational requirement (BFOR).<sup>58</sup> Since the allegation in the case at hand was religious discrimination, this exception to the main prohibition was not available. The inclusion of a specific exception was fastened upon by the lower courts<sup>59</sup> as justification for concluding that this was the only exception the legislature intended. This left standing, and unqualified, the prohibition against discrimination on the basis of creed (*inter alia*). If discrimination were interpreted to include causing an adverse impact on a member of a protected group, whether intentionally or not, this would leave respondents liable for any behaviour, however reasonable, that happened to have a discriminatory effect. Under these circumstances, the lower courts thought it only fair to read the legislation narrowly to prohibit only intentional discrimination. The Supreme Court of Canada avoided this result by reading a proviso into the legislation that a respondent could exonerate himself by showing that he had made reasonable efforts to accommodate the complainant's situation.<sup>60</sup> In other words, the Court created a new, wider exemption to counterbalance the extended concept of discrimination.

Although the Supreme Court's decision better reflects the needs of society, the lower courts' interpretation was, I think, more faithful to the statute as written. If discrimination is limited to differential treatment motivated by a protected characteristic, the explicit exception for age, sex, and marital status differentiations that can be judged *bona fide* makes perfect sense, since there are

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<sup>56</sup> *O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

<sup>57</sup> At the time, the relevant provision (section 4(1)(g)) of the Ontario Code said simply "No person shall...discriminate against any employee with regard to any term or condition of employment because of...creed...of such...employee".

<sup>58</sup> Section 4(6) of the *Ontario Human Rights Code* provided: "The provisions of this section relating to any discrimination...based on age, sex or marital status do not apply where age, sex or marital status is a *bona fide* occupational qualification and requirement for the position of employment."

<sup>59</sup> *Ontario Human Rights Commission v. Simpson-Sears Ltd.* (1982), 36 O.R. (2d) 59 (Ont. S.C.); (1982), 38 O.R. (2d) 423 (Ont. C.A.).

<sup>60</sup> *O'Malley*, *supra* note 56.

obvious examples of situations in which even explicit differentiation on these grounds would be justified. (The sex of restroom attendants is perhaps the most used example of legitimate differentiation.) There is no need to invent any further exceptions since it is hard to imagine intentional discrimination against those identified by any of the other prohibited grounds as justifiable. The broader interpretation opened up a gap in the legislation which the courts then had to fill. It invites us to ask why, if the legislature intended a broad interpretation of discrimination, did it not provide the obviously necessary provision to take into account legitimate competing interests? It is more plausible, I think, to suppose that the legislation was drafted with the easy case of discrimination in mind—treating someone worse simply for the reason that she is female, or non-white, or a member of a religious minority. Although that is not made explicit in the discrimination provision itself, it is betrayed by the narrowness of the one exception included. That is not to say that the legislature intended that adverse effect discrimination not be prohibited; it is more likely that no one thought about it. The legislature did not anticipate the situation of a neutral rule or policy that has discriminatory effects; therefore, the value judgment that its resolution requires was not confronted.

Even if one thinks the Supreme Court reached the right decision, one has to admit that it was in the teeth of the legislation, rather than with its help. And not because we have reason to believe that the legislature had decided against this expansive meaning of discrimination—we cannot plausibly claim to have a developed theory of equality in hand and a fully fleshed out sense of the range of fact situations likely to engage our attention into the distant future that might ground a claim that the legislature meant to confine the scope of discrimination.<sup>61</sup> Rather, the legislation seems to have been drafted with a single paradigm case (bigotry) in mind. When a court, operating under the bottom-up method, contents itself with announcing an outcome for a given fact situation

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<sup>61</sup> Indeed, the confirmation that the Supreme Court's result was in keeping with the legislature's sense of where the law should be lies in the fact that as *O'Malley* was winding its way through the system, the Ontario legislature was amending the *Code* to explicitly include liability for "constructive discrimination." It is telling, however, that even as it enlarged the scope of liability, the legislature chose once again to do it through the construction of a new pigeonhole. Instead of revising the basic provisions of the *Code* making discrimination unlawful so as to directly expand the notion of discrimination to encompass the adverse-effect concept, the legislature enacted a separate provision making it an infringement of rights "where a requirement... is imposed *that is not discrimination on a prohibited ground* but that would result in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination..." *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 10 (now section 11), as amended, *Equality Rights Statute Law Amendment Act*, S.O. 1986, c. 64. This formulation seems to concede that adverse-effect "discrimination" is not really discrimination, but will be made unlawful anyway. It creates a new basis for liability, but not by creating a new concept of discrimination. When the Supreme Court later, in *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561, read such blanket exceptions to the duty not to discriminate as applying to employer policies as a whole rather than their application to individuals, thereby negating the possibility of a duty to accommodate created in *O'Malley*, the legislature was forced to revise the statute yet again.

rather than contributing to the ongoing construction of a theory, it is generally understood that later courts are in no way precluded from considering new fact situations, or making a more ambitious attempt to rationalize the existing case law. However, when the legislature lays down precise rules, this generally precludes regulation of uncovered situations. Democratic conceptions of legitimacy prescribe that it should be the legislature that makes decisions about how and when the law is to be extended. Therefore, to legislate with more precision than the subject matter makes sensible inhibits the law's organic development. Instead of being changed and adapted incrementally, the law lurches from plateau to plateau. Or, if adjudicators try to keep the law abreast of social conditions, their efforts are likely to provoke unnecessary crises of legitimacy.

The absence of a definition of discrimination in human rights codes has been remarked upon by commentators, often with at least a tinge of disapproval.<sup>62</sup> But we should, I think, be neither surprised nor particularly regretful at the absence of a definition. Definitions are all very well if we know precisely what we want and can capture it adequately in a verbal formula. A definition here would require a comprehensive theory of equality, a highly contested and very complex matter, and something that presently eludes us. Under these circumstances, an early attempt to define the concept with precision would only have more tightly confined us to society's understanding of the paradigm cases at the time of enactment, and that would limit the law's ability to develop as it confronts new fact situations until the legislature could get around to amending the legislation. Pressed to define discrimination, the drafters of the *Code* when the adverse effects issue arose would likely have done so even more explicitly in terms of the paradigm of differential treatment based on prejudice. With efforts to segregate the races visible everywhere at the time, it is not surprising that this should be considered the paradigmatic evil to be addressed. At that point in time it was no more to be expected that a legislature could anticipate the need to encompass effects as well as intentions than to imagine an eighteenth-century common-law judge working with images of typical trespass cases foreseeing the development of trespass on the case and the opening up of negligence law it made possible.

It should be recognized that the rights and responsibilities that constitute discrimination law are not capable of precise determination, and laws in this area must be drafted accordingly. This approach makes sense if we see discrimination law as an extension of the realm of non-voluntary obligations centred in tort law. Tort law is the home of the ongoing articulation of the

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<sup>62</sup> Tamopolsky & Pentney, *supra*, note 1 at 4-1-4-4; B. Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 36; and J. Keene, *Human Rights in Ontario* (Toronto: Carswell, 1992) at 6.

general duties we owe to one another to take care for the well-being of others.<sup>63</sup> Historically, tort law has concentrated on the protection of physical security and the security of property, but has also begun to reach into the realm of pure economic interests<sup>64</sup> and, more slowly, emotional harm<sup>65</sup> often grounded in a violation of dignity. The scope of involuntary obligation has grown considerably over the last century. Over the history of its development, an ongoing battle has been waged to determine which obligations will be treated as truly involuntary, and which will be subject to override through contract or treated as created only by agreement.<sup>66</sup> Through human rights statutes, the law of involuntary obligation has been extended to offer some protection to a range of dignity interests and the economic and social interest in employment, accommodation, and access to services. In doing so, it has to negotiate many of the tensions characteristic of tort law. It has long been recognized, if there was ever any doubt, that tort law is incapable of definition.<sup>67</sup> Instead, doctrine tends to be constructed around a sense of the human interests at stake on each side in

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<sup>63</sup> Of course, other characterizations of tort law are also present in the literature. Some focus on tort law's role in facilitating industrial development. See M.J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977). Others focus more generally on how tort doctrine responds to changing social, economic, political, and cultural changes. See R.L. Abel, "A Critique of Torts" (1990) 37 U.C.L.A. L. Rev. 785. In focusing on what one might call tort law's moral function, I do not mean to deny that these other perspectives have something to teach us. But whatever else tort law may be, it is also a system of involuntary obligations, increasingly formulated in terms of the general duties we owe each other.

<sup>64</sup> The courts in some jurisdictions are reaching further than others. After initiating change with the landmark decisions in *Amis v. Merton London Borough Council*, [1978] A.C. 728 and *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520, the U.K. House of Lords has cut back considerably on the scope of recovery for pure economic loss. See e.g. *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908. However, the Canadian, Australian, and New Zealand courts continue cautiously to extend obligations in this area. In the Canadian context, see *Canadian National Railway v. Norsk Pacific Steamship* (1992), 91 D.L.R. (4th) 289 (S.C.C.); *Winnipeg Condominium Corp. No. 36 v. Bird Construction* (1995), 121 D.L.R. (4th) 193 (S.C.C.); and *Bow Valley Husky*, *supra* note 50.

<sup>65</sup> This development has taken place under the rubric of the tort of intentional infliction of nervous shock, often referred to in more recent decisions as the intentional infliction of emotional distress. See e.g. *Rahemtulla v. Vanfed Credit Union*, [1984] 3 W.W.R. 310 (B.C. S.C.); *Canada v. Boothman* (1993), 49 C.C.E.L. 109 (Fed. T.D.); *Clark v. The Queen* (1994), 94 C.L.L.C. 14,028 (F.C.T.D.).

<sup>66</sup> For an illuminating examination of the early stages of this progression, see R. L. Rabin, "The Historical Development of the Fault Principle: A Reinterpretation" (1981) 15 Ga. L. Rev. 925. Although not described in precisely these terms, Rabin's account is the story of how discrete no-liability pigeonholes were gradually eliminated or marginalized by the growth of a general concept of negligence.

<sup>67</sup> For a classic attempt, fully appreciative of the impossibility of the task, see P. H. Winfield, *The Province of the Law of Tort* (Cambridge: Cambridge University Press, 1931). Some see in this indeterminacy mostly doctrinal incoherence perhaps designed to mask an ulterior agenda. See e.g. A.C. Hutchinson & R. Maisey, "Blurred Visions: The Politics of Civil Obligations" in K. Cooper-Stephenson and E. Gibson, eds., *Tort Theory* (North York: Captus Press, 1993). Where indeterminacy is unavoidable, however, it is just as important that we be alive to the potential it gives rise to for pushing the law in directions more conducive to human flourishing.

enjoying some form of protection, and in being required to provide it, and the need to balance these in some way that gives fair consideration to each. This is the general result of successive efforts to convert the outcomes in particular cases into more general principles purporting to explain those outcomes. It is precisely because the interests on neither side are capable of precise articulation that the process remains an open-ended one, with each extension of the harm from which people should be protected being met with a re-examination of the legitimate competing interests in the freedom to pursue legitimate ends.

If discrimination law is best seen as a statutory part of the law of non-voluntary obligation traditionally identified with tort law, and partakes of the same sorts of indeterminacies and the same conceptual structure, it follows that law-making and norm development in this area should mimic that in the area of tort. This process in tort law necessarily pursues the bottom-up method because tort has been left to the courts to administer. The legislature could have facilitated a similar approach in the discrimination area by drafting the statute in open-ended terms, leaving it up to adjudicators to work out the meaning of discrimination and the circumstances that excuse or justify it. This would allow for the development over time, through the reasons articulated in each case, of a fuller theory of equality and its role in regulating human interactions. The Ontario legislature has, instead, continued to amend the *Code* in piecemeal fashion to catch up with or jump ahead of anticipated or feared doctrinal moves by the courts so that the provisions governing “constructive” discrimination and the BFOR defence have become increasingly byzantine.

Interestingly, the Supreme Court of Canada has recently taken matters into its own hands, formulating a general approach to determining liability for discrimination that pays very little attention to the precise wording of the various codes, but is nevertheless meant to guide adjudication across the country. In *British Columbia (P.S.E.R.C.) v. BCGSEU*,<sup>68</sup> the Court swept away the distinction between direct and indirect discrimination and declared that whenever an act or policy has the effect of differentially treating an individual or individuals identified by reference to one of the prohibited grounds of discrimination, liability will be imposed unless the respondent can show that the standard was: 1) adopted for a purpose rationally connected to the enterprise; 2) adopted in good faith as necessary to the fulfillment of a legitimate purpose; and 3) reasonably necessary to that purpose, proof of which requires a showing that accommodation of the adversely affected individuals is impossible without imposing undue hardship on the respondent. Thus, it seems that the Supreme Court has realized, even if legislatures have not, that a general set of principles under which a wide variety of fact situations can be analyzed is the appropriate structure of discrimination law. Now what is needed is for adjudicators

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<sup>68</sup>[1999] 3 S.C.R. 3.

throughout the system to take on the responsibility of adding flesh and bones to the skeleton by testing it against concrete fact situations and developing a richer account of the basis of liability in light of such analyses.

### III. CONCLUSION

With more than fifty years of experience in dealing with discrimination, we have, I think, outgrown the method of law-making that consists of using the legislative machinery to enact successive new pigeonholes each time a new kind of fact situation arises that deserves protection. It is time for a change. The human phenomenon of discrimination—of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage—is not capable of being codified in precise terms of the sort that have characterized past legislative efforts. In retrospect, this law-making strategy has been as ill-conceived as if legislatures had pre-empted initial judicial reluctance to develop the action for trespass on the case by legislating negligence law in a similar manner. Just imagine what the law of negligence would have looked like: first a statute imposing liability on the drivers of horse-drawn coaches (later updated for automobiles), then another for manufacturers of household products, then another for landlords, followed by one for construction companies, after which one for accountants—each specifying what counts as negligence as understood at the time, and therefore having to be constantly updated to include new forms of negligence in the context. Given the boundless ingenuity of the human species in finding new ways to harm one another, this approach to negligence would have been madness.

Entrusted with working out general principles that keep the law relevant to the social conditions with which it must deal, the adjudicators charged with the task in the common law courts have shown themselves more or less up to the challenge.<sup>69</sup> In the process and over the long run, a practice of thinking creatively about those principles has thrived, and our understanding of the normative foundations governing potentially harmful interactions between people has grown. This, in turn, arguably alleviates concerns about the courts as decision makers by making debates about underlying values more transparent. It is time we recognize that discrimination law is an extension of the enterprise of figuring out how much care we each ought to take for the well-being of others. The specificities of human interaction that might give rise to a complaint of discrimination are as unlimited as in the context of negligence or tort more generally and hence equally indefinable. Given the openness of the enterprise at hand, norm creation within it requires flexibility. As Lord

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<sup>69</sup> I do not mean to deny that there has at various times been intense controversy over particular adaptations or refusals thereof. But such controversy is considered to be part of the process from which the courts, like other legal participants learn.

Macmillan said, “The categories of negligence are never closed.”<sup>70</sup> We need a way of formulating laws in the discrimination context that will allow us to say that the categories of discrimination are likewise never closed.

Fostering a culture of principled debate about discrimination law may contribute to the process of more securely embedding these principles in legal consciousness. If their interpretation, growth, and extension are understood as part of the same process of argument and debate that surrounds other important legal principles, instead of discrimination liability rules being perceived as more or less arbitrary pigeonholes that may exclude or trap, this may militate against the tendency of constituencies inclined to resist the imposition of human rights norms to dismiss human rights statutes as an exercise in pandering to “special interest groups.” Without an articulated foundation in principle, discrimination law can only ever oscillate between competing political camps—each trying to secure the enactment of its preferred pigeonholes. The role of egalitarian values in defining citizens’ rights and obligations vis-à-vis each other is too important not to try to do better.

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<sup>70</sup> *Donoghue, supra* note 7 at 619.