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The *Charter* of Whites: Systemic Racism and Critical Race Equality in Canada

Joshua Sealy-Harrington*

Systemic discrimination...is discrimination that results from the simple operation of established procedures ... none of which is necessarily designed to promote discrimination.

Brian Dickson, Chief Justice of Canada[1]

I've been struggling with the definition of systemic racism ... We put in policies and procedures to make sure we don't have systemic racism.

Brenda Lucki, Commissioner of the Royal Canadian Mounted Police[2]

I'd invite you: what is the definition of systemic racism? There is no definition. It's tossed around.

Erin O'Toole, leader of the Conservative Party of Canada[3]

We still can't get our leaders to talk about what systemic racism means. We still can't get them, after they take a knee, to stand up and actually do something. That means y'all don't want to do nothing anyway.

Celina Caesar-Chavannes, former Liberal Member of Parliament[4]

I. INTRODUCTION

Systemic racism and colourblindness are intimately linked (though, because of the ableist connotation of colourblindness, I will call the latter race evasive-ness, unless I am directly quoting another scholar).[5] The

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1 *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139 [*Canadian National Railway*].

2 Amanda Connolly, "RCMP Head Says She's 'Struggling' with Definition of Systemic Racism for Force," *Global News* (10 June 2020), online: <globalnews.ca/news/7049595/ brenda-lucki-rcmp-systemic-racism/>.

3 Andrew Russell, "Erin O'Toole Won't Say Whether He Believes There Is Systemic Racism in Canada," *Global News* (30 August 2020), online: <globalnews.ca/news/7304475/erin-otoole-systemic-racism-canada/>.

4 "Can You Hear Me Now? With Celina Caesar-Chavannes" (9 February 2021) at 47:33, online: *The Bad + Bitchy Podcast* <tun.in/tk6v2u>.

5 I use "colourblindness" in my introductory remarks because it is a well-known term in the context of a particular conversation about constitutional equality law – namely, whether courts should be neutral to, or accommodating of, racial difference in their assessment of discrimination claims (see notes 8 and 9 below). However, given the ableist connotations in criticisms of colourblindness phrased as such – that is, criticisms that associate "blindness" with negative traits, for example, ignorance – I otherwise refer to the term as "race evasiveness" (unless I am directly quoting from another scholar, in which case I maintain their use of "colourblindness"). For criticism of using the term "colourblindness" and, relatedly, preferring the phrase "colourevasiveness," see Subini Ancy Annamma, Darrell D Jackson & Deb Morrison, "Conceptualizing Color- Evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-Blind Racial Ideology in Education and Society" (2017) 20:2 Race, Ethnicity & Education 147. And for a broader

former – systemic racism – refers to how intergenerational legacies and ongoing practices of oppression and dispossession translate into contemporary societal inequality.[6] The latter – race evasiveness – refers to the belief that those legacies and practices should not be accounted for in our contemporary legal, political, and economic thought.[7] Put plainly, systemic racism is an effect and race evasiveness is a cause. To be clear, reasonable people can disagree over how race should be accounted for in policy. But it is inconceivable to think that, without some such accounting, legacies and practices of racial subordination will simply expire. The staggering racial inequalities that persist in Canada – indeed, globally – are no accident. And their end – if ever – will be no accident, either.

Recently, a peer reviewer mildly questioned my discussion of race evasiveness – a concept more often discussed in America – when critiquing Canadian equality law. I was sympathetic to that peer reviewer's perspective: America does, indeed, have a particularly active jurisprudential[8] and scholarly[9] discourse on race evasiveness in constitutional equality law. Yet, when I think of race evasiveness and constitutional law, I have Canada especially in mind. Indeed, the less active conversation on race evasiveness in Canadian law is not proof of less evasion but more – an evasion of the evasion itself. To be sure, Canada has more progressive equality-law standards than America. In general terms, American equality law is formal (that is, concerned with similar treatment), whereas Canadian equality law is substantive (that is, concerned with sub- ordinating treatment).[10] But, as the Supreme Court of Canada has consistently recognized – from its very first equality decision (Andrews) to its most recent (Fraser) – equality is about

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discussion of how disability metaphors invoking blindness can carry ambivalent connotations in so far as blindness can also be associated with positive traits – for example, impartiality, see Naomi Schor, "Blindness as Metaphor" (1999) 11:2 differences: A Journal of Feminist Cultural Studies 84; Doron Dorfman, "The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor" (2016) 5:2 Cambridge J Intl & Comp L 275 at 277; Joshua Sealy-Harrington, "Embodying Equality: Stigma, Safety, and Clément Gascon's Disability Justice Legacy" (2021) 103 SCLR (2d) 197 at 235–37.

6 My definition of "systemic racism" warrants brief elaboration. The Supreme Court of Canada first defined systemic discrimination as "discrimination that results from the simple operation of established procedures ... none of which is necessarily designed to promote discrimination." See *CN v Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 at1138–39 (SCC). However, implicit in this definition is why discrimination would follow "from the simple operation of established procedures." And that why is the result of legacies of racial subordination that I make explicit in my definition of systemic racism. See generally Khiara M Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 147–53; Jamelle Bouie, "What 'Structural Racism' Really Means," *New York Times* (9 November 2021), online: <www.nytimes. com/2021/11/09/opinion/structural-racism.html>.

7 Annamma, Jackson & Morrison, *supra* note 5 at 154.

8 See e.g. *Plessy v Ferguson*, 163 US 537 at 559 (1896) (Harlan J dissenting) [*Plessy*]; *Minnick v California Department of Corrections*, 452 US 105 at 128 (1981) (Stewart J dissenting); *City of Richmond v JA Croson Co*, 488 US 469 at 521 (1989) (Scalia J concurring); *Metro Broadcasting v FCC*, 110 S Ct 2997 at 3028 (1991) (O'Connor J dissenting), citing *Arizona Governing Comm v Norris*, 463 US 1073 at 1083 (1983).

9 See e.g. Cheryl I Harris, "The Story of *Plessy v Ferguson*: The Death and Resurrection of Racial Formalism" in Michael Dorf, ed, *Constitutional Law Stories* (New York: Foundation Press, 2004) 181 at 187; Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, MA: Harvard University Press, 2002) at 32–66; Kimberlé Williams Crenshaw, "Color Blindness, History and the Law" in Wahneema Lubiano, ed, *The House That Race Built* (New York: Vintage Books, 1998) at 280; Jody David Armour, *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* (New York: New York University Press, 1997) at 115–53; Charles R Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39:2 Stan L Rev 317.

10 See e.g. Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2015) 19:2 Rev Const Stud 191 at 194–95.

impact.[11] And on impact, Canadian equality law before the Supreme Court of Canada has been largely elusive in terms of promoting, or even broaching, racial equality. It is in this sense that I argue we have a "*Charter* of whites."

I will be blunt: were "race" not listed as a protected ground under the *Charter*, it is not apparent to me that there would have been much difference in the Supreme Court's first four decades of equality jurisprudence – at least, not for Indigenous and Black people, who are the focus of my analysis here.[12] The protected grounds enumerated in the *Charter* are "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Yet the Supreme Court has barely considered racial discrimination claims. Race is, thus, first listed yet last enforced – a constitutional token to a promise of racial equality left not only with little success but with little attempt.

This chapter's thesis is straightforward: that systemic racial-justice advocacy under section 15 of the *Charter* is doctrinally viable and, thus, should be contemplated in the toolkit of social-change strategies in Canada.[13] There is plenty of social science literature on the character and pervasiveness of racial inequality in Canada – and this chapter does not comprehensively summarize that. Instead, this chapter – with reference to critical race scholarship and the court's first and latest equality decision under the *Charter* – explains how a consistent thread across all three authorities is an expansive vision of "critical race equality" that makes systemic and positive advocacy viable under Canadian constitutional law.

This chapter contains two parts. The first part discusses the theory of critical race equality, in particular, six principles I identify as animating a critical race perspective on equality rights. Those principles can be understood as criteria for evaluating the extent to which a theory of equality aligns with critical race theory and, in turn, bears certain capacities for promoting substantive racial justice. The second part discusses the practice of critical race equality by tracing a genealogy of critical race principles over the first thirty-five years of constitutional equality at the Supreme Court of Canada. I conclude by calling for a coalition

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[11] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*]; *Fraser v Canada*, 2020 SCC 28 [*Fraser*]. By "most recent," I mean most recent as of the time of this article's initial drafting. Since then, the Court has released two equality decisions: *Ontario (Attorney General) v G*, 2020 SCC 28 [*G*]; *R v CP*, 2021 SCC 19 [*CP*]. However, neither *G* nor *CP* purports to overturn *Fraser*. See *G*, *ibid*, paras 40–44, 47, 51, 69; *CP*, *ibid*, paras 56–57, 111, 141, 153, 167. Accordingly, this article is largely undisturbed by those reasons.

[12] I acknowledge that the nature of indigeneity as a racial category is contested. See e.g. Sebastien Grammond, "Disentangling Race and Indigenous Status: The Role of Ethnicity" (2008) 33:2 Queen's LJ 487. However, racial logics are nonetheless present in the context of Indigenous subordination. For example, Kim TallBear observed in a recent guest lecture in my Race, Racism and the Law course at the University of Ottawa that how notions of "Red" people extend racial logics to Indigenous communities. See generally Bethany R Berger, "Red: Racism and the American Indian" (2009) 56:3 University of California Los Angeles L Rev 591. Moreover, race, ethnicity, and indigeneity are all concepts that, depending on context, can do useful analytical work in disentangling our processes of identity, identification, and subordination. Regarding race and ethnicity, see Ian F Haney Lopez, "Retaining Race: LatCrit Theory and Mexican American Identity in *Hernandez v Texas*" (1997) 2 Harv Latino L Rev 279 [Haney Lopez, "Retaining Race"]. Lastly, irrespective of the ways in which racial ideas and Indigenous subordination intersect, the critical race scholarship that I draw on promotes a progressive interpretation of systemic discrimination under section 15. For this reason, I apply that critical race lens to systemic discrimination against Black and Indigenous people in this article. However, I acknowledge that litigation relating to Indigenous people can be supplemented through alternative constitutional analyses, including those relating to treaty rights and sections 25 and 35 of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See e.g. Sonia Lawrence & Debra Parkes, "*R v Turtle*: Substantive Equality Touches Down in Treaty 5 Territory" (2020) 66:7 Criminal Reports 439.

[13] Many other provisions of the *Charter*, of course, can promote systemic racial justice. But this article considers section 15 alone – in part because of the extent to which the Court has been particularly silent on matters of substantive racial equality under that provision.

of scholars, lawyers, and organizers to incorporate systemic and positive litigation in their social change toolkits with a view to translating our *Charter* of whites into a *Charter* for all.

II. THE THEORY OF CRITICAL RACE EQUALITY

This chapter argues that critical race theory principles are reflected in – and, indeed, have always been reflected in – Canada's constitutional text and juris- prudence. Making this argument, though, first requires identifying what those critical race theory principles are.

In his ground-breaking article "A Critique of Our Constitution Is Color-Blind," critical race theorist Neil Gotanda conducts a detailed examination of race evasiveness in American constitutional law.[14] His critique, of course, is framed in relation to the US Constitution. But the principles he notes as absent from American constitutional doctrine are present in Canadian constitutional doctrine. Those principles – that is, critical race equality principles – outline a vision of equality that is (1) ambitious, (2) contextual, (3) ideological, (4) comparative, (5) systemic, and (6) positive.

On principle one – ambition – Gotanda critiques the Supreme Court of the United States for adopting "a vision of race as unconnected to the historical reality of Black oppression," thereby limiting "the range of remedies available for redress."[15] This warrants elaboration. Simply put, how one conceptualizes race informs how they conceptualize racism and, in turn, how they conceptualize antiracism (that is, the pursuit of racial equality). Accordingly, where racial equality is at issue, a series of cascading political questions – which either expand or contract the ambition such equality entails – are engaged. With this in mind, Gotanda critiques ahistorical conceptions of race that limit racism to "individual prejudice" and, thus, construct "an ideological limitation on the remedies for racism."[16] Correspondingly, Gotanda advocates for an understanding of race situated within a historical frame, thereby responding to race's "institutional and structural dimensions beyond formal racial classification."[17] For example, Gotanda references economic aid as a remedy for structural racial subordination, which is only legible within a historical frame of racial capitalism.[18] And, more broadly, Gotanda points out how the "complex phenomenon called race" is intertwined with "particular manifestations of racial subordination – substandard housing, education, employment, and income for large portions of the Black community."[19] These are ambitious issues of social policy, there is no doubt. But they are issues, nonetheless, inseverable from enduring legacies of racial oppression. To neglect these issues, then, would be to neglect racial equality itself.

On principle two – context – Gotanda critiques American courts for their "simplistic" analysis.[20] He explains how a "deeper analysis" of "racial practice" demonstrates that structures of racial subordination are "highly contextualized, with powerful, deeply embedded social and political meanings."[21] Without first acknowledging these meanings, manifest forms of racial inequality have been overlooked by

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14 Neil Gotanda, "A Critique of Our Constitution Is Color-Blind" (1991) 44:1 Stan L Rev 1.
15 *Ibid* at 37.
16 *Ibid* at 43, 44, n 175.
17 *Ibid* at 44.
18 *Ibid*. By "racial capitalism," I mean the ways in which capitalism inherently deploys logics of difference to rationalize disparities. See Robin DG Kelley, "What Did Cedric Robinson Mean by Racial Capitalism?" *Boston Review* (12 January 2017), online: <bostonreview. net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism>.
19 Gotanda, *supra* note 14 at 45, 63.
20 *Ibid* at 5.
21 *Ibid* at 6.

America's highest court[22] and even progressive scholars.[23] And all of this is complicated by how race itself – as a social rather than biological fact – cannot be assessed with precision.[24] Indeed, to hold out race as "objective and apolitical" is to disguise and discount the ways in which racial taxonomies institutionalize racial subordination.[25] In sum, when analyzing racial equality, the contextual nature of both equality and race necessitates a flexible analytical framework.[26]

On principle three – ideology – the opening line to Gotanda's article is illustrative: he "examines the ideological content of the metaphor 'Our Constitution is color-blind.'"[27] Specifically, Gotanda argues "that the United States Supreme Court's use of color-blind constitutionalism – a collection of legal themes functioning as a racial ideology – fosters white racial domination" by legitimizing, and thus maintaining, "the social, economic, and political advantages that whites hold over other Americans."[28] Given this, Gotanda stresses how "the real social conditions underlying a ... constitutional dispute" must be accounted for, including with reference to "social science analyses."[29] Some may call this activist judicial ideology (for a discussion on judicial activism, see Macfarlane, Chapter 2 in this volume).[30] But, as Gotanda observes, there is already a "subliminal ideology" concealed "between the lines of the Court's articulated rationales and policies."[31] In other words, critical race equality is not uniquely ideological but rather distinctly so: the "color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded" – a politics that "simply do[es] not reflect historical or present reality."[32] As such, where "activism" is understood to mean judicial reasoning that is overridden by ideology,[33] and given long-standing and demonstrated patterns of systemic racial inequality, it is those who evade race – not those who acknowledge it – who are more fairly characterized as activist.

On principle four – comparison – Gotanda is pointed: "one cannot declare two things to be equal or unequal without first comparing them."[34] While trite, this observation poses a fundamental challenge to America's race evasive constitutional posture. Indeed, Gotanda explains how failing to recognize race in policy effectively forecloses racial equality: "that nonrecognition is self-contradictory. Nonrecognition fosters the systematic denial of racial subordination ... thereby allowing such subordination to continue."[35] At its height, race evasiveness can "suppress the existence of race from a narrative in which race was the center of the incident" – not simply a failure to promote equality, but a commitment to maintaining inequality.[36]

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22 *Ibid* at 38, citing *Plessy*, *supra* note 8.

23 Gotanda, *supra* note 14 at 9–10, citing Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv L Rev 1.

24 Gotanda, *supra* note 14 at 28. See generally Haney Lopez, "Retaining Race," *supra* note 12.

25 Gotanda, *supra* note 14 at 34.

26 On the necessary imprecision of constitutional equality analysis, see generally Joshua Sealy-Harrington, "The Alchemy of Equality Rights" (2021) 30:2 Const Forum Const 53. On the necessary imprecision of race, see generally Ian F Haney Lopez, "The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice" (1994) 29:1 Harv CRCLL Rev 1.

27 Gotanda, *supra* note 14 at 2.

28 *Ibid* at 2–3, 7, 18, 29, 51.

29 *Ibid* at 7, 51.

30 Emmett Macfarlane, "Revisiting Judicial Activism" in Puddister & Macfarlane, *supra* note * at 41.

31 Gotanda, *supra* note 14 at 46, 47, n 184.

32 *Supra* note 30.

33 Gotanda, *supra* note 14 at 21, n 87, citing Peter Westen, "The Meaning of Equality in Law, Science, Math, and Morals: A Reply" (1983) 82 Mich L Rev 604 at 608.

34 *Ibid* at 16.

35 *Ibid* at 20.

36 *Ibid* at 3.

On principle five – systems – Gotanda remarks "at the outset" that his article "assumes the existence of American racial subordination."[37] Why? Because of "the systemic nature of subordination in American society."[38] In this respect, Gotanda draws on other leading critical race scholars – including Kimberlé Crenshaw[39] and Patricia Williams[40] – who have persuasively described their incredulity at the staggering racial inequality that conservative jurists attempt to explain without reference to an overarching system that perpetuates that inequality.[41] In Crenshaw's words, only such an incomplete analysis could sanction the oxymorons reflected in how "one can now have all-Black desegregated schools, all-white equal opportunity employers and non-discriminatory housing with no Blacks present."[42] Further, Gotanda recognizes certain corollaries of conceptualizing inequality through a systemic lens, namely, (1) that intent cannot be required for inequality;[43] (2) that racial discrimination need not exhaust every member of a subordinated group to be recognized as such;[44] and (3) that causal chains between state policy and systemic inequality can be diffuse, particularly intergenerationally[45] – all of which reflect the powerful metaphor of race as a "miner's canary," aptly described by critical race scholars Lani Guinier and Gerald Torres:

> We maintain that one can identify race affirmatively in order to mobilize both, a critique of the connection between race and power and to identify a base of support for changing the status quo. Focusing attention on the distress of the miner's canary does not mean that one must locate the pathology within the canary itself; one can still locate the problem in the atmosphere of the mine. Using race as the miner's canary allows us to depathologize conceptions of race, poverty, and powerlessness.[46]

Lastly, on principle six – positivity – Gotanda challenges the "public-private distinction" and its "extraordinarily slippery character."[47] Specifically, he explains how race-evasive interpretation "is part of a broader vision in which legal relations are seen as located either in a public sphere of government action or in a private sphere of individual freedom."[48] And this public-private dichotomization is the logical basis for resisting equality's positive character, that is, public intervention is opposed because it improperly

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37 *Ibid* at 63.

38 *Ibid* at 45, n 178, citing Kimberlé Williams Crenshaw, "Forward: Toward a Race-Conscious Pedagogy in Legal Education" (1989) 11 National Black LJ 1 at 3.

39 Crenshaw, *ibid* at 3, n 4 citing Patricia Williams, "The Obliging Shell: An Informal Essay on Formal Equal Opportunity" (1989) 87 Mich L Rev 2128 at 2129–30.

40 In Canada, Sonia Lawrence likewise starts from the perspective of undeniable racial subordination: "I start this paper with the proposition that we live in a society that is deeply shaped by racism and the colonial project." See Sonia Lawrence, "'The Admittedly Unattainable Ideal': Adverse Impact and Race under Section 15" in Law Society of Upper Canada, *Special Lectures 2017: Canada at 150 – The Charter and the Constitution* (Toronto: Irwin Law, 2017) at 547 [Lawrence, "Adverse Impact"].

41 Gotanda, *supra* note 14 at 45, n 178.

42 *Ibid* at 15, n 69.

43 See e.g. *ibid* at 40, citing *Bakke v Regent of University of California*, 438 US 265 at 400 (1977) (Marshall J dissenting) (where he notes that "racial categories describe *relations* of oppression and unequal power" such that "[i]t is unnecessary ... to have individual Negroes demonstrate that they have been victims") [emphasis added].

44 See e.g. Gotanda, *supra* note 14 at 45 (where he describes "particular manifestations of racial subordination" such as "substandard housing, education, employment, and income for large portions of the Black community" not as "isolated phenomena" but, rather, as "aspects of the broader, more complex phenomenon called race").

45 Guinier & Torres, *supra* note 9 at 57.

46 Gotanda, *supra* note 14 at 5, 15 [emphasis deleted].

47 *Ibid* at 7.

48 *Ibid* at 13.

infiltrates private spaces: "[D]esignation of an activity as public or private is a normative process. The familiarity of the public-private distinction obscures the contingent and political character of the initial designation, and subsequent challenges to the subordinating effects of such a 'neutral' distinction are then criticized as 'political.'"[49] Relatedly, Gotanda critiques American courts for adopting a "theory of racial social change" predicated on "'never' considering race."[50] By corollary, then, he advances a theory of race consciousness – that is, of not only recognizing but disrupting "ensconced interests – usually white."[51]

II. THE PRACTICE OF CRITICAL RACE EQUALITY

With six principles emanating from the theory of critical race equality summarized above – that is, ambition, context, ideology, comparison, systems, and positivity – I now turn to the practice of critical race equality in Canada.

I explore critical race practice in four subparts: (1) outlining our *Charter* of whites, which rarely considers (let alone remedies) racial inequality; (2) looking to the past (Andrews), where these six critical principles supportive of critical race equality were first judicially affirmed; (3) looking to the present (Fraser), where those principles were recently reaffirmed; and (4) looking to the future, where those principles should be strategically incorporated into social-change toolkits. Twenty-five years following the enactment of the *Charter*, David Tanovich critiqued the lack of "race talk" in criminal punishment.[52] And now, in this text written on the fortieth anniversary of the *Charter*, I am transposing that critique to equality rights under section 15.

A. The *Charter* of Whites

The Supreme Court's racial-equality jurisprudence under section 15 is limited.[53] For example, the court has never explicitly discussed anti-Black racism under section 15 of the *Charter*.[54] In Fraser, Justice Abella writes that "in the pursuit of equality, inequality can be reduced one case at a time."[55] With respect to anti- Black racism, one wonders whether one case will ever come.

The court has occasionally – but still infrequently – considered discrimination implicating Indigenous people under section 15. But the scope of those interventions has been minimal. For example, in Kapp, a majority of the court held that the government's decision to grant an ameliorative twenty-four-hour exclusive fishing licence to three Indigenous bands was not discriminatory, despite claims of discrimination by "mainly non-aboriginal" commercial fishers who were not granted the same exclusive

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49 *Ibid*.

50 *Ibid* at 13. On the absence of race consciousness undergirding Canada's policy failure in counteracting racial inequality, see generally Keith Banting & Debra Thompson, "The Puzzling Persistence of Racial Inequality in Canada" (2021) 1 Can J Political Science 870.

51 David Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR (2d) 657.

52 See Lawrence & Parkes, *supra* note 12 at 430; Lawrence, "Adverse Impact," *supra* note 40 at 548.

53 On my review, there are no Supreme Court of Canada judgments explicitly addressing anti-Black racism under section 15 of the *Charter*. Many thanks to Power Law students Jennifer Rogers, Léa Desjardins, and Chris Casimiro for their research assistance on this particular issue. That said, the Court has addressed "anti-Black racism" under other *Charter* provisions – for example, concerning jury impartiality under section 11(d). See e.g. *R v Spence*, 2005 SCC 71, paras 31–32. Concerning "disproportionate" policing of "racial minorities" under section 9, see e.g. *R v Le*, 2019 SCC 34 at para 90; *CP*, *supra* note 11, paras 88–89.

54 *Fraser*, *supra* note 11 at para 136.

55 *R v Kapp*, 2008 SCC 41 at para 3 [*Kapp*].

licence.[56] (In other words, Kapp was not principally a claim of anti-Indigenous racism but rather one largely of "reverse racism" against mostly non-Indigenous claimants.)[57] In *R v Kokopenace*, the majority in a single paragraph[58] dispensed with the equality implications of Canada's systemically racist jury system.[59] According to the majority, the Indigenous accused in that case failed to "articulate a disadvantage" when his jury had 0 percent on-reserve representation, despite as much as 32 percent of the adult population in his district living on reserve (a questionable jury "of his peers").[60] And in Ewert, the court unanimously held that the state's risk-assessment tools for inmates are not discriminatory because, while they risked inaccuracy when applied to Indigenous inmates, no such inaccuracy was proven at first instance.[61] This is what we are left with: almost thirty-five years of Supreme Court equality jurisprudence under the *Charter*; zero section 15 judgments explicitly centring Black people;[62] sparse progressive section 15 analysis concerning Indigenous people,[63] especially about actually repairing – or even just gesturing at repairs of – Canada's despicable colonial legacy.[64]

And, to be clear, there is ubiquitous systemic inequality confronting both communities. Black people in Canada have lower incomes, less education, higher unemployment, and suffer the highest rate of hate crimes.[65] They are also more likely to be arrested, charged, overcharged, struck, shot, or killed by police.[66] Indeed, from 2013 to 2017, a Black person in Toronto was nearly twenty times more likely than a white person to be fatally shot by police.[67] Black people are also dramatically overincarcerated.[68] Likewise, Indigenous people suffer ongoing cultural genocide; lack food security, clean water, and safe and accessible housing; have a crisis of overrepresentation in the child welfare and criminal punishment

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56 In addition, Sonia Lawrence argues that *Kapp*, *supra* note 55, was not even properly considered under section 15 in any event. See Sonia Lawrence, "*R v Kapp*" (2018) 30:2 CJWL 274.

57 *R v Kokopenace*, 2015 SCC 28 at para 128 [*Kokopenace*].

58 See e.g. Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill LJ 147; Ebyan Abdigir et al, "How a Broken Jury List Makes Ontario Justice Whiter, Richer and Less Like Your Community," *Toronto Star* (16 February 2018), online: <www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community. Html>.

59 *Kokopenace*, *supra* note 57, paras 17, 28.

60 *Ewert v Canada*, 2018 SCC 30, paras 79, 91.

61 See note 53 above.

62 Other examples of jurisprudence considering section 15 of the *Charter* in the context of Indigenous people include *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203; *Lovelace v Ontario*, [2000] 1 SCR 950; *Ermineskin Indian Band v Canada*, 2009 SCC 9; *Alberta v Cunningham*, 2011 SCC 37; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30; *R v Barton*, 2019 SCC 33.

63 On what that repair could actually entail, see generally "Land Back: A Yellowhead Institute Red Paper" (October 2019), online: *Yellowhead Institute* <redpaper.yellowheadinstitute. org/wp-content/uploads/2019/10/red-paper-report-fnal.pdf>; "Cash Back: A Yellowhead Institute Red Paper" (May 2021), online: *Yellowhead Institute* <cashback.yellow headinstitute.org/wp-content/uploads/2021/05/Cash-Back-A-Yellowhead-Institute-Red-Paper.pdf>.

64 See e.g. Graham Slaughter, "Five Charts That Show What Systemic Racism Looks Like in Canada," *CTV News* (4 June 2020), online: <www.ctvnews.ca/canada/fve-charts-that-show-what-systemic-racism-looks-like-in-canada-1.4970352>.

65 See e.g. Ontario Human Rights Commission, *A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (August 2020) at 2.

66 See e.g. *ibid* at 8.

67 See e.g. Anthony Morgan, "Black Canadians and the Justice System," *Policy Options* (8 May 2018), online: <policyoptions.irpp.org/magazines/may-2018/black-canadians-justice-system/>.

68 See e.g. Ontario Human Rights Commission, *To Dream Together: Indigenous People and Human Rights Dialogue Report* (September 2018) at 37–43.

systems; and face various barriers in accessing equitable public health,[69] all of which was recently combined with the horrifying discovery of thousands of children's bodies in unmarked graves at Canada's residential schools, where the Canadian government and Catholic Church violently assimilated Indigenous children through rape, confinement, medical experimentation, and death.[70] There is, accordingly, an unquestionable need for greater systemic protection and support for Black and Indigenous lives in Canada. But what about a right to it?[71]

B. The Past: Andrews (1989)

The Supreme Court's first equality decision was *Andrews v Law Society of British Columbia*.[72] Despite dissenting in part, Justice McIntyre's opinion is the majority statement on section 15 of the *Charter* (because Justice Lamer signed onto Justice McIntyre's opinion,[73] Justices Wilson and L'Heureux-Dubé, along with Chief Justice Dickson, agreed with Justice McIntryre's section 15 analysis,[74] and Justice La Forest was "in substantial agreement" with that analysis as well).[75]

At first glance, the facts of Andrews do not scream "critical race theory." Indeed, the case involved a "British subject" who "had taken law degrees at Oxford" and "had fulfilled all the requirements for admission to the practice of law in British Columbia, except that of Canadian citizenship"[76]– no archetype of racial oppression.[77] But the legal principles outlined in the case nevertheless reflect core critical race equality insights.

First, the court's description of equality was ambitious. The goal: "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[78] To achieve this lofty goal, the court indicated that equality must be given its "full effect" through "a generous rather than a legalistic" interpretation.[79] The precise generosity the court envisaged, of course, could not be detailed in one decision. But that generosity, at a minimum, included "a large remedial component" and an understanding that the Constitution demanded not only equality in the "formulation" of the law but also its "application."[80]

Second, the court's description of equality was contextual. This is implicit in how the court discussed equality itself: "a protean word" that "lacks precise definition" and that is "an elusive concept."[81] But it

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69 See e.g. Cindy Blackstock & Pamela Palmater, "Canada's Government Needs to Face Up to Its Role in Indigenous Children's Deaths," *The Guardian* (8 July 2021), online: <www.theguardian.com/commentisfree/2021/jul/08/canada-indigenous-children-deaths-residential-schools>.

70 As Patricia Williams explains, the "rights/needs" dichotomy is one of many through which jurisprudence "purport[s] to make life simpler in the face of life's complication." See Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at 8.

71 *Andrews*, *supra* note 11.

72 *Ibid* at 158.

73 *Ibid* at 151.

74 *Ibid* at 193.

75 *Ibid* at 159.

76 That said, citizenship is, of course, a historical and contemporary marker of racial hierarchy. See generally Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Chicago: Haymarket Books, 2021).

77 *Andrews*, *supra* note 11 at 171.

78 *Ibid* at 169, 171.

79 *Ibid* at 171.

80 *Ibid* at 164 ("a protean word"), citing John H Schaar, "Equality of Opportunity and Beyond" in J Roland Pennock & John W Chapman, ed, *Nomos IX: Equality* (New York: Atherton Press, 1967) at 228.

81 *Andrews*, *supra* note 11 at 168. Indeed, as I have argued, a "clear legal test for equality is impossible." See Sealy-Harrington, *supra* note 26 at 53.

was also reflected in how the court discussed equality analysis: "the test cannot be accepted as a fixed rule or formula."[82]

Third, the court's description of equality was ideological. In other words, it did not shy away from the ways in which "equality" is value-laden. Rather, the court acknowledged and grappled with equality's "moral and ethical" dimensions.[83] In particular, the court recognized how equality is a "political symbol"[84] demanding interdisciplinary insight – a concept that is "at once a psychology, an ethic, a theory of social relations, and a vision of the good society."[85]

Fourth, the court described equality as comparative. Critically, however, the relevant comparison is not simply formal legislative distinctions. Rather, substantive equality analysis requires "comparison with the condition of others in the social and political setting in which the question arises."[86] Consequently, the comparisons under section 15 are not "mechanical," nor do they amount to a "categorization game" under applicable legislation.[87]

Fifth, the court described equality's systemic character. Despite acknowledging equality's contextual – and, thus, imprecise – nature, the court found "little difficulty ... in isolating an acceptable definition" with respect to equality's systemic attributes.[88] Indeed, it did not hesitate to include "adverse effect discrimination"[89] or "systemic discrimination"[90] within the scope of section 15's constitutional protection (and, seemingly, equated the two).[91] Most importantly, in defining systemic discrimination, the court adopted Justice Abella's definition from her historic report on employment equity: "If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."[92] With this definition in mind, the court emphasized disparate effects: "it is in essence the impact of the discriminatory act or provision upon the person affected which

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82 *Andrews*, *supra* note 11 at 171, citing *Reference re an Act to Amend the Education Act* (1986), 53 OR (2d) 554 [*Re Education*].

83 *Andrews*, *supra* note 11 at 164, citing Schaar, *supra* note 80.

84 *Ibid* at 171, citing *Re Education*, *supra* note 82.

85 *Ibid* at 164. To be clear, substantive equality is not explicitly named in *Andrews*, *supra* note 11 (indeed, it was not invoked by the Court until its 1998 decision in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624. See Lawrence, "Adverse Impact," *supra* note 40 at 194, n 16. But its meaning – that is, prohibiting "subordinating treatment" of "already suffering" groups (*ibid* at 193–94) – is reflected in the Court's reasons in *Andrews*.

86 *Andrews*, *supra* note 11 at 168, citing *Mahe v Alta (Government)*, [1987] 54 Alta LR (2d) 244 [*Mahe*].

87 *Andrews*, *supra* note 11 at 173.

88 *Ibid*.

89 *Ibid* at 174.

90 I say the Court equated "adverse effect" and "systemic" discrimination because it provides similar definitions for them. Specifically, it defines adverse effect discrimination as "where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force." *Andrews*, *supra* note 11 at 173, citing *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 551 [*Simpson-Sears*]. Similarly, it defines systemic discrimination as "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics." *Andrews*, *ibid* at 174, citing *Canadian National Railway*, *supra* note 1 at 1138–39, as well as Canada, Royal Commission on Equality in Employment, *Report of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984) at 2. Lastly, the Court passively references both definitions as reflecting a consistent idea about discrimination: "There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above." *Andrews*, *ibid* at 174.

91 *Andrews*, *supra* note 11 at 174.

92 *Ibid* at 173.

is decisive";[93] "it is the result ... which is significant";[94] and "the main consideration must be the impact of the law on the individual or the group concerned."[95] These can be read as judicial restatements of the miner's canary metaphor in critical race theory. Indeed, the court's choice of anchoring equality analysis in "enumerated and analogous grounds" can itself be understood as an analytical framework predicated on – to extend the metaphor – a flock of canaries, who "signal" suspect decision making by the state.
Various theoretical corollaries of equality's systemic character are, as they were by Gotanda, affirmed by the court in Andrews. Specifically, the court rejected – as requirements of discrimination – intent (that is, the government's motivation being the creation of inequality),[96] exhaustion (that is, the government's action impacting every group member of the subordinated class),[97] and causation (that is, the government's action being the sole or even primary source for the resulting inequality).[98]

Moreover, an additional consequence of equality's systemic character is that the government cannot insulate its activity from the charge of discrimination simply by rearticulating its conduct in neutral-sounding terms – for example, by justifying inequality as mere "qualifications required for entitlements to benefits."[99] Indeed, all such analysis of "limiting factors" on the scope of constitutional equality must be considered under section 1 of the *Charter*.[100] In the court's words, "any consideration of factors which could justify the discrimination," such as "the reasonableness of the enactment"[101] or its "proportionality,"[102] are left to section 1. And, as the court explained, sections 15 and 1 are "important to keep analytically distinct" because they carry distinct burdens of proof: claimants demonstrate inequality, governments justify it.[103]

Finally, a sixth equality principle affirmed in Andrews is its positive character (meaning, the ways in which it places not only limits on government action but also obligations). Like equality's systemic character, its positive nature is a crucial aspect of its scope and significance that is too often overlooked. At times, the court identified equality's positive character explicitly: for example, section 15 is "a compendious expression of a positive right to equality in both the substance and the administration of the law."[104] But elsewhere, this positive character is implicit. Simply put, when "the essence of true equality" is "the accommodation of differences"[105] and when "there is no greater inequality than the equal treatment of unequals,"[106] positive obligations are an unavoidable consequence of governing a pluralistic society. Indeed, the court specifically framed many of the "differences" it had in mind along racial lines (albeit in the whitewashed language of "many forms of discrimination" resulting from "contact ... with the

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93 *Ibid*, citing *Simpson-Sears*, *supra* note 90 at 547.
94 *Andrews*, *supra* note 11 at 165.
95 *Ibid* at 173.
96 *Ibid* at 167.
97 *Ibid* at 170, citing *Bliss v Attorney General of Canada*, [1979] 1 SCR 190 [*Bliss*].
98 *Andrews*, *supra* note 11 at 170, citing *Bliss*, *supra* note 97 at 192.
99 *Andrews*, *supra* note 11 at 177–78.
100 *Ibid* at 182.
101 *Ibid* at 178, contrasting Canadian law with law under the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), described in *Belgian Linguistic Case (No 2)*, [1968] 1 EHRR 284.
102 *Andrews*, *supra* note 11 at 178.
103 *Ibid* at 171, citing *Re Education*, *supra* note 82 [emphasis added].
104 *Andrews*, *supra* note 11 at 169.
105 *Ibid* at 164, citing *Dennis v United States*, 339 US 162 at 184 (1950).
106 *Andrews*, *supra* note 11 at 172.

indigenous population" and "immigration bringing those of neither French nor British background" to Canada).[107]

In brief, the Canadian government regulates a racially stratified society. And that racial stratification demands racial recognition and redress. The government cannot simply pass laws of general application and satisfy a substantive definition of equality. To the contrary, differences warrant "accommodation,"[108] and inequality warrants "differentiation."[109] This invariably positive obligation – to accommodate, to differentiate – has been doctrinally uncontroversial from the beginning of Canada's constitutional equality discourse. And absent such positive intervention, unconstitutional inequality necessarily follows.[110]

To be clear, equality's positive character does not amount to "a general guarantee of equality" in all circumstances.[111] But this caveat should not be overstated. As discussed, equality does involve "comparison with the condition of others in the social and political setting in which the question arises."[112] Therefore, section 15 was never intended to eradicate all social hierarchies, nor was it meant to disregard those hierarchies altogether. Rather, it was meant to account for social hierarchies in its evaluation and redress of substantive inequality. True, section 15 is "concerned with the application of the law."[113] But that application is indivisible from the society in which it occurs. In the court's words: "[I]t is the result ... which is significant."[114] And that result is the product of interaction between Canadian law and society. Positive obligations are not radical overreach but, instead, a constitutional duty inextricable from Canada's substantive equality commitments as they were first defined by its apex court.

C. The Present: Fraser (2020)

Just over three decades later, the Supreme Court in Fraser reaffirmed the critical race principles it first affirmed in Andrews – this time in a single majority judgment written by Justice Abella, representing six of the nine justices who participated in the ultimate decision.

The facts in Fraser, like those in Andrews, are not emblematic of critical race theory. Specifically, Fraser concerned the gendered adverse impact of the pension scheme for the Royal Canadian Mounted Police,[115] an institution recognized both past and present as a primary vehicle for white supremacist social control and violence in Canada.[116] Yet the principles animating the majority's reasoning in Fraser nevertheless track the critical race principles outlined in Gotanda's article and affirmed in Andrews.

On ambition, the court reiterates that section 15 reflects "a profound commitment to promote equality,"[117] a commitment that is "ambitious but not utopian."[118]

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107 *Ibid* at 169.

108 *Ibid* at 165, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 347.

109 *Andrews*, *supra* note 11 at 167–68, discussing the Court's decision in *Bliss*, *supra* note 97.

110 *Andrews*, *supra* note 11 at 163–64.

111 *Ibid* at 164.

112 *Ibid*.

113 *Ibid* at 173, citing *Simpson-Sears*, *supra* note 90.

114 *Fraser*, *supra* note 11 at para 3. For elaboration on the *Charter* and the Royal Canadian Mounted Police [RCMP], see Kent Roach, "The Charter and the RCMP" in Puddister & Macfarlane, *supra* note * at 214.

115 See e.g. Brandi Morin, "As the RCMP Deny Systemic Racism, Here's the Real History," *Toronto Star* (11 June 2020), online: <www.thestar.com/opinion/contributors/ 2020/06/11/rcmp-deputy-commissioners-words-on-racism-fy-in-face-of-150-years-of-history-and-pain-for-indigenous-peoples.html>; Robyn Maynard, "Police Abolition/ Black Revolt" (2020) 41 Can J Cultural Studies 70; M Gouldhawke, "A Condensed History of Canada's Colonial Cops," *New Inquiry* (10 March 2020), online: <thenewinquiry.com/a-condensed-history-of-canadas-colonial-cops/>.

116 *Fraser*, *supra* note 11 at para 27.

117 *Ibid* at para 136.

118 *Ibid* at para 82

On context, the court reaffirms "the impossibility of rigid categorizations"[119] in equality analysis and, in particular, rejects "rigid rules"[120] or a "rigid template"[121] in its equality framework – all of which leaves courts with the flexibility needed to appreciate "the full context of the claimant group's situation."[122]

On ideology, the court echoes Andrews in terms of the normative dimension to substantive equality analysis.[123] Indeed, between Andrews and Fraser, the court's interdisciplinarity has only grown to include "barriers," "exclusion," and "environments," implicating considerations that are "legal,"[124] "economic,"[125] "social,"[126] "political,"[127] "physical,"[128] "cultural,"[129] "psychological,"[130] "historical,"[131] and "sociological."[132]

On equality's comparative character, the court confirms the "role of comparison" in section 15 analysis.[133] To be sure, the court rejects "formalistic comparison."[134] But this simply repeats the court's rejection of mechanical categorization games in Andrews.[135]

On equality's systemic character, the court confirms that equality concerns the law's "actual impact."[136] Indeed, the court's confidence in Fraser as to section 15's systemic scope is arguably even greater than in Andrews. In Andrews, the court had "little difficulty" recognizing section 15's systemic capacity.[137] And, even more forcefully, the court had "no doubt" in Fraser about recognizing "that adverse impact discrimination 'violate[s] the norm of substantive equality.'"[138]

The core idea of systemic discrimination transcending Andrews and Fraser distills to how disproportionate harm "signal[s]" discrimination[139] (again, an analogy with critical race theory's miner's canary). The court in Fraser consequently brought renewed focus to the impact of law – that is, "the importance of looking 'at the results of a system.'"[140] In turn, the court in Fraser reaffirmed the same

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119 *Ibid* at para 76.
120 *Ibid*.
121 *Ibid* at paras 42, 57, citing *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 43 [*Withler*].
122 *Fraser*, *supra* note 11 at para 113, citing Elizabeth Shilton, "Gender Risk and Employment Pension Plans in Canada" (2013) 17 Can Labour & Employment LJ 140; Bernd Marin, "Gender Equality, Neutrality, Specificity and Sensitivity – and the Ambivalence of Benevolent Welfare Paternalism" in Bernd Marin & Eszter Zólyomi, eds, *Women's Work and Pensions: What Is Good, What Is Best? – Designing Gender-Sensitive Arrangements* (Farnham, UK: Ashgate, 2010) at 210.
123 *Fraser*, *supra* note 11 at para 1.
124 *Ibid*, paras 1, 34, 76, 88, citing *Quebec (Attorney General) v A*, 2013 SCC 5 at para 342 [*A*]; Royal Commission on Equality in Employment, *supra* note 90 at 2.
125 *Fraser*, *supra* note 11 at paras 1, 34, 57, 76, 88, citing *A*, *supra* note 124 at para 342.
126 *Fraser*, *supra* note 11 at paras 1, 76.
127 *Ibid* at paras 34, 57, 76.
128 *Ibid* at para 57.
129 *Ibid* at para 76.
130 *Ibid* at para 48, citing *Withler*, *supra* note 121 at para 64.
131 *Fraser*, *supra* note 11 at 48.
132 *Ibid*, citing *Withler*, *supra* note 121 at para 62.
133 *Fraser*, *supra* note 11 at para 93.
134 *Andrews*, *supra* note 11 at 168, citing *Mahe*, *supra* note 86 at 244.
135 *Fraser*, *supra* note 11 at para 42, citing *Withler*, *supra* note 121 at para 43.
136 *Andrews*, *supra* note 11 at 173–74.
137 *Fraser*, *supra* note 11 at para 47, citing *Withler*, *supra* note 121 at para 2.
138 *Andrews*, *supra* note 11 at 174, citing *Canadian National Railway*, *supra* note 1 at 1138–39; Royal Commission on Equality in Employment, *supra* note 90 at 2. See also *Fraser*, *supra* note 11 at para 39, citing *Canadian National Railway*, *ibid* at 1138–39; Royal Commission on Equality in Employment, *ibid* at 2.
139 *Fraser*, *supra* note 11 at para 39.
140 *Ibid* at para 69.

corollaries of equality's systemic character as those outlined in Andrews: namely, that discrimination does not require intent,[141] exhaustion,[142] or causation.[143]

Lastly, the court in Fraser reaffirms equality's positive character. To be fair, the majority rejects that its finding generates a "freestanding positive obligation" to "secure specific societal results such as the total and definitive eradication" of social hierarchy.[144] But there is ample space between an idyllic post-oppression society and inadequate attention to persisting racial hierarchy. And the majority's reasons fall comfortably within that space. The majority recognizes that the "absence of accommodation" can be discriminatory[145] – a corollary of which, of course, is that substantive equality, at times, demands accommodation's presence, a positive obligation. Indeed, the majority provides that "[l]aws which distribute benefits or burdens without accounting for [physical, economic, and social] differences ... are the prime targets" of systemic discrimination claims.[146] Further, by dismissing the dissenting concerns about legislative chilling effects relating to incremental efforts at reform,[147] the majority, likewise, outlines a vision of substantive equality that is capacious enough to not only forbid government conduct but, at times, obligate it. On this final point, Justice Abella pivotally observes that discrimination is "frequently a product of continuing to do things 'the way they have always been done.'"[148] Tis describes, unquestionably, a positive obligation on states to disrupt long-standing discriminatory inertias.

D. The Future: Strategic Implementation of Critical Race Equality

In her Fraser majority reasons, Justice Abella wrote one passage that is of particular importance to systemic racial advocacy. She holds that "[a]ddressing adverse impact discrimination can be among the 'most powerful legal measures available to disadvantaged groups in society to assert their claims to justice' ... Not only is such discrimination 'much more prevalent than the cruder brand of openly direct discrimination,' it often poses a greater threat to the equality aspirations of disadvantaged groups."[149] Tis passage should be interpreted as a signal of a viable judicial appetite for incorporating litigation in our systemic racial justice strategies. Our failure to see, and remedy, systemic discrimination is no mere oversight; rather, it is, in the court's perspective, a failure to use the most powerful legal response to the most prevalent contemporary form of dis- crimination. As leading critical race scholar Patricia Williams explains:

> So-called formal equal opportunity has done a lot but misses the heart of the problem: it put the vampire back in its coffin, but it was no silver stake. The rules may be colorblind, but people are not. The question remains, therefore, whether the law can truly exist apart from the color-conscious society in which it exists, as a skeleton devoid of fresh; or whether law is the embodiment of society, the refection of a particular citizenry's arranged complexity of relations.[150]

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141 *Ibid* at para 72.
142 *Ibid* at paras 70–71, 132–33.
143 *Ibid* at para 132.
144 *Ibid* at para 54 [emphasis in original].
145 *Ibid* at para 34 [emphasis added].
146 *Ibid* at paras 132–33.
147 *Ibid* at para 31.
148 *Ibid* at para 35 [citations omitted].
149 Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at 120.
150 Lawrence & Parkes, *supra* note 12 at 444.

Our *Charter* of whites has been such a skeleton devoid of fresh. For many years, we have had a substantive equality framework capable of demanding structural change in Canadian society. We must now put that framework to use at strategic sites of grave systemic disparity while being mindful of its limitations, including how the Crown – as a common defendant – will have asymmetric tactical advantages (for example, the ability to aggressively settle disputes verging towards systemically progressive precedents).[151]

Equality challenges pertaining to the structural conditions of Black and Indigenous people may strike some as outlandish, but they should not. Fundamentally, the condition of Black and Indigenous people is inextricable from legacies of oppression and dispossession. And as critical race scholar Ian Haney- López observes, calling such persisting legacies "racist" is no overstatement but rather "aims to evoke a sense of moral repugnance and social duty by vivifying the fundamental injustice of entrenched racial inequalities."[152]

There is, simply put, nothing outlandish in calling the status quo systemically racist when it clearly is by the court's own definition. Rather, what is outlandish is that, despite a constitutional commitment to substantive racial equality, many disparities for Black and Indigenous people are not only persisting but getting worse. Indigenous women are Canada's fastest-growing prison population.[153] And last year was the deadliest in the preceding four years for police shootings, with 48 percent of racially identified victims being Indigenous and 19 percent being Black.[154] To acknowledge these "persistent systemic disadvantages"[155] in a constitutional analysis of equality is not "activist"; just the opposite, it is ignoring these stark disparities that would reflect "the most unneutral" of reasoning.

The law's capacity to remedy such inequities is, as Williams notes, fundamentally an ideological issue: "Whether something is inside or outside the market- place of rights has always been a way of valuing it."[156] Indeed: "In the law, rights are islands of empowerment. To be un-righted is to be disempowered, and the line between rights and no-rights is most often the line between dominators and oppressed. Rights contain images of power, and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights."[157] But the law's ideological character should not stop us from advancing systemic discrimination claims at strategic sites of inequality. The court acknowledged – in both Andrews[158] and Fraser[159] – how equality is innately political. And so, while the court's equality legacy has been bookended by British lawyers (Andrews) and women RCMP officers (Fraser), its extension elsewhere – for example, to criminal punishment (Sharma and Turtle) – requires, at the very least, lawyers who are willing to make a case to the court.[160]

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151 Ian Haney-Lopez, "Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama" (2010) 98:3 Cal L Rev at 1071–72.

152 Geraldine Malone, "Why Indigenous Women Are Canada's Fastest Growing Prison Population," *Vice* (2 February 2016), online: <www.vice.com/en/article/5gj8vb/why-indigenous-women-are-canadas-fastest-growing-prison-population>.

153 Kelly Geraldine Malone, Meredith Omstead & Liam Casey, "Police Shootings in 2020: The Effect on Officers and Those They Are Sworn to Protect," *CBC News* (21 December 2020), online: <www.cbc.ca/news/canada/manitoba/police-shootings-2020-yer-review-1.5849788>.

154 *Fraser*, *supra* note 11 at para 42.

155 Charles L Black Jr, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421 at 427.

156 Sealy-Harrington, *supra* note 26 at 227.

157 *Ibid* at 233–34.

158 *Andrews*, *supra* note 11 at 164, citing Schaar, *supra* note 80 at 228.

159 *Fraser*, *supra* note 11 at para 113, citing Shilton, *supra* note 122 at 140; Marin, *supra* note 122 at 210.

160 *R v Sharma*, 2020 ONCA 478 at para 67; *R v Turtle*, 2020 ONCJ 429 at para 105.

That said, where and how should such cases be advanced? Two key passages from Fraser provide some guidance. First, Justice Abella held that "[i]f there are clear and consistent statistical disparities in how a law affects a claimant's group, I see no reason for requiring the claimant to bear the additional burden of explaining why the law has such an effect."[161] Criminal punishment and inequitable access to public housing, health care, and education all have such "clear and consistent statistical disparities" with respect to race. We are, therefore, living in the midst of pervasive and unaddressed racial discrimination – racial inequality that has, for too long, circumvented critical judicial examination.[162] I believe that this is, in large part, a consequence of our failure to interrogate the law's "relentlessly individualizing" instincts[163]– that is, "how the rhetoric of increased privatization, in response to racial issues, functions as the rationalizing agent of public unaccountability, and, ultimately, irresponsibility."[164]

Second, Justice Abella was unequivocal with her findings in Fraser: the association between gender and fewer or less stable working hours was "clear."[165] She had "no doubt" that the RCMP's denial of full pension benefits to job-sharing employees perpetuated sexist prejudice, despite the fact that, as Justices Brown and Rowe observed, job sharing was "designed to be ameliorative" and was voluntarily chosen by the participants.[166] Such firm findings should, absent a racist double standard, translate into successful racial justice advocacy, where the statistics are even greater, where amelioration is not credibly contemplated, where choice is even more superficial, and where subordination is only more severe – even fatal. While "[p]ension design choices have ... 'far reaching normative, political and tangible economic implications for women,'" the same is true with respect to the design of our criminal punishment system and public housing, health, and education for Indigenous and Black people in Canada.[167] To extend section 15 to these systems is not "utopian" but rather integral to the "ambitious" project of remedying substantive inequality.[168] This project, of course, cannot – and should not – rest solely with courts, but the courts, nonetheless, can play a positive role.

I conclude with Williams's call for progressive equality rights, nearly as old as the *Charter* – and set in America – yet just as urgent today for advocacy in Canada: "For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the denial of need."[169] Critical race theory scholarship, Andrews, and Fraser all coalesce around a crucial idea: that litigation is – unavoidably – one such political mechanism for confronting that denial of need.

I do not think that we should rely solely, or even primarily, on the courts. On one hand, founding critical race scholar Derrick Bell argues that "abstract legal rights, such as equality, could do little more than bring

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161 *Fraser*, *supra* note 11 at para 63.

162 *Ibid* at para 92, citing Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 219.

163 Lawrence & Parkes, *supra* note 12 at 444.

164 Sealy-Harrington, *supra* note 26 at 47. Margot Young put this aptly in her oral remarks on a recent *Fraser* panel hosted at the University of British Columbia's Peter A Allard School of Law: "[T]his neoliberal idea of the self-biographizing individual who deserves to suffer." See "*Fraser v Canada*: 20/20 Vision on Equality?" (Paper presented at Centre for Femi- nist Legal Studies, Peter A Allard School of Law, 30 October 2020) at 1:03:57, online: <ubc.zoom.us/rec/play/aV2hcz8czxDVG0G8szx6vjF_MwaHZlXCZ4UypKncxVunXgo6K7GJJTTM_56ow_CKyGBz3WUwhKIRCOsy.NPggAPapXrC9ceXl?continueMode=true>.

165 *Fraser*, *supra* note 11 at para 106.

166 *Ibid* at paras 108, 146, 197.

167 *Ibid* at para 113.

168 *Ibid* at para 136.

169 Sealy-Harrington, *supra* note 26 at 152.

about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form."[170] On the other hand, leading movement-law scholars argue that legal strategies may be "an aspect of rather than a totality of a struggle" for social change.[171] They note, astutely in my view, that "the work of rights, like the work of any law, is not simply about what it does on paper, but what it does in practice, and how people deploy it with ongoing contests over the shape of the world."[172] As the opening quotes to this chapter illustrate, Canada's ongoing contest over systemic racism is rife with political apathy. The *Charter* is, thus, a nontrivial interlocutory mechanism. Specifically, it enables racial justice advocates to influence the dialogue between various actors – courts, legislatures, and the broader public – upholding white supremacy. With this in mind, I urge coalitions of scholars, lawyers, and organizers to recognize the viability of our *Charter*, too long a *Charter* of whites, as one of many tools for challenging unconstitutional state neglect and advancing systemic racial justice.

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170 Derrick Bell, "Racial Realism" (1992) 24:2 Conn L Rev 373.
171 Amna A Akbar, Sameer M Ashar & Jocelyn Simonson, "Movement Law" (2021) 73 Stan L Rev 855.
172 *Ibid*.