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Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law†

The concept of stereotype is novel in the case law of the European Court of Human Rights. The ECtHR has started to refer to stereotypes in several recent judgments concerning, notably, race and gender equality. In contrast, anti-stereotyping has long been a central feature of both American and Canadian equal protection law. Offering a comparison of the legal reasoning of the ECtHR and the U.S. and Canadian Supreme Courts, this Article uncovers both the pitfalls and the potential of the stereotype concept to advance transformative equality.

It is hard to develop a proper legal response to stereotyping, as not all stereotypes are bad and, moreover, laws are inevitably based on generalizations. At a minimum, this Article argues, courts should name stereotypes well and carefully examine their harm. This comparative analysis shows that, at its best, legal reasoning can expose and target the invidious cycle wherein stereotyping and discrimination perpetuate each other. Both the U.S. Supreme Court and its Canadian counterpart, however, show a tendency to equate stereotypes with unfair generalizations. This Article cautions against that. Stereotypes can indeed be inaccurate or negative, but they can also be statistically correct, or prescriptive. When stereotypes are conceived of too narrowly (as only raising issues of accuracy), the concept loses its ability to strengthen a transformative equality analysis.

This Article first charts and critiques the emergent ECtHR case law on stereotypes. It then offers a fresh analysis of the strengths and weaknesses of the U.S. and Canadian Supreme Courts' treatment of stereotypes. Two deceptively simple questions will form the leitmotif

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† DOI http://dx.doi/org/10.5131/AJCL.2015.0007

throughout the comparison: (i) how do these courts conceive of stereotypes, and (ii) given that stereotyping is not necessarily always negative or problematic, how do these courts determine whether the application of a stereotype is invidious? It concludes by exploring what the ECtHR can borrow from American and Canadian equal protection analysis.

Introduction

The concept of stereotyping is novel in the case law of the European Court of Human Rights (the ECtHR or "Strasbourg Court"). The Strasbourg Court has started to refer to stereotypes in several recent judgments concerning, notably, race and gender equality.[1] In contrast, "stereotype" has long been part of the constitutional vocabulary in the United States and Canada. Anti-stereotyping is a central tenet of equal protection law in both these countries. Especially in the United States, "the anti-stereotyping principle" has a distinguished pedigree, dating back to the early 1970s.[2] It comes as no surprise then that the U.S. and Canadian Supreme Courts have developed much richer legal reasoning about stereotypes than the ECtHR. That is why this Article seeks insights from their reasoning for the Strasbourg Court.[3]

Briefly put, stereotypes are beliefs about the characteristics of groups of people. They are, in other words, "attributions of specific characteristics to a group."[4] Misconceptions about stereotypes abound.[5] Contrary to what is often assumed, stereotypes are neither necessarily statistically inaccurate generalizations[6] (think of notions like "professional basketball players are tall"), nor are they necessarily negative (witness stereotypes such as "Italians are passionate"). Psychologists have done extensive research into the ways in which stereotypes shape judgment and behavior.[7] Psychologists have also

1. Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447; Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77.

2. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010). *See infra* Part II.A.

3. The South African Constitutional Court and the Inter-American Court for Human Rights also boast a rich stereotyping jurisprudence. *See, e.g.*, *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (S. Afr.); Atala Riffo and Daughters v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 502 (Feb. 24, 2012). These jurisdictions would make for fascinating future research on the concept of stereotypes.

4. John F. Dovidio et al., *Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview*, *in* The Sage Handbook of Prejudice, Stereotyping and Discrimination 3, 5 (John F. Dovidio et al. eds., 2010).

5. For discussion, see, e.g., David J. Schneider, The Psychology of Stereotyping 562–568 (2004).

6. *See, e.g.*, Lee Jussim et al., *The Unbearable Accuracy of Stereotypes*, *in* Handbook of Prejudice, Stereotyping and Discrimination 199 (Todd D. Nelson ed., 2009).

7. Three good introductory volumes are Stereotypes and Prejudice: Essential Readings (Charles Stangor ed., 2000); Handbook of Prejudice, Stereotyping and

established that stereotypes fulfill several functions. On the one hand, as "cognitive schemas," these beliefs allow us to process information quickly.[8] Also, stereotyping allows people to differentiate between in- and out-groups, and thus to maintain a positive image of oneself and one's in-group. To a certain extent, therefore, stereotypes perform necessary functions in our lives, namely those of simplifier and of self-image booster.[9] On the other hand, stereotypes also constrain. They put people in a box by providing a normative template of what is expected or accepted behavior. Thus, for instance, women are expected to be "pretty" and men are expected to be "tough." In this way, stereotypes reinforce inequality by justifying existing hierarchies and perpetuating discrimination.[10]

In legal scholarship, specifically feminist legal scholarship, the connection between the stereotype concept and equality is contested. There is no agreement as to what extent a focus on stereotypes helps judges to conceptualize equality in a more meaningful manner. There are three positions on the topic. First, several commentators have maintained that an anti-stereotyping focus has only delivered formal equality to the American and Canadian courts, meaning equality as sameness.[11] Then there are other commentators, notably recently from the United States, who have argued that the anti-stereotyping principle is grounded in a substantive conception of equality that is not per se about sameness, but is rather aimed at rectifying the kind of subordination that arises from the enforcement of traditional roles.[12] Lastly, there is a body of scholarship, mainly from human rights scholars, which connects a focus on stereotypes to a transformative conception of equality.[13] Transformative equality jurisprudence contests and seeks to transform the root-causes of inequality and dis-

DISCRIMINATION, *supra* note 6; THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 4.

8. *See*, *e.g.*, Dovidio et al, *supra* note 4, at 7.

9. On the functions of stereotypes, see generally SCHNEIDER, *supra* note 5, at 363–71.

10. *See, e.g.*, Peter Glick & Laurie A. Rudman, *Sexism*, *in* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 4.

11. Catharine MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281, 1292–93 (1991); Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work–Family Conflict*, 110 COLUM. L. REV. 1 (2010); Margot Young, *Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15*, 50 SUP. CT. L. REV. 183, 209 (2010) (Can.).

12. *See, e.g.*, Franklin, *supra* note 2; Neil S. Siegel & Reva B. Siegel, *Struck By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010).

13. *See, e.g.*, REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010); Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*, *in* TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 111 (Ineke Boerefijn et al. eds., 2003); RIKKI HOLTMAAT & JONNEKE NABER, WOMEN'S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE (2011);

crimination. These last commentators assert that stereotypes lie at the root of social and cultural patterns that privilege some groups over others, and that equality entails transforming these deeply engrained patterns.

This Article takes the third approach. Through a comparative analysis, it seeks to uncover both the pitfalls and the potential of the stereotype concept to advance transformative equality. This Article envisages a more pedagogical role for the Strasbourg Court in the field of non-discrimination than the Court has played so far. One of the central claims of this Article is that the Strasbourg Court should name and contest the forces that underlie structural inequality. These forces often consist of stereotypes. Obviously, the ECtHR cannot eradicate harmful stereotypes from society all by itself.[14] However, the Court is part of a larger conversation about equality and the emancipation of oppressed groups. It therefore matters how the Court discusses these issues. The Court's legal reasoning, which is studied by lawmakers, judges, and legal scholars around the world, should show the problems with stereotyping.

With a few notable exceptions,[15] not many commentators have taken a transnational or comparative legal perspective on stereotyping. The bulk of the literature focuses exclusively on the United States. That is a pity. Seeing through the eyes of others is particularly valuable in this area of law, because, as former Canadian Supreme Court Justice L'Heureux-Dubé has pointed out, it can "provide a much-needed external perspective on the myths and stereotypes that may continue to permeate the values and laws of our own communities and cultures."[16] This Article adds to the existing comparative literature by taking the case law of the ECtHR as its starting point and making suggestions for judicial borrowing. The Strasbourg Court frequently seeks inspiration and guidance from other jurisdictions (both outside and within the Council of Europe).[17]

Alexandra Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11 HUM. RTS. L. REV. 707 (2011).

14. Changing stereotypes is a complicated and often long process. Psychologists do a lot of research on this topic. *See, e.g.*, THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, *supra* note 4, at 491–595.

15. COOK & CUSACK, *supra* note 13; Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. AFR. L.J. 745 (2000); Suk, *supra* note 11; Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMP. L. 75 (2012).

16. The Honourable Madame Justice Claire L'Heureux-Dubé, *Beyond the Myths: Equality, Impartiality, and Justice,* 10 J. SOC. DISTRESS & HOMELESS 87, 101 (2001).

17. *See, e.g.*, Council of Europe/ECtHR, *Research Report: References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights*, *available at* http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf. However, the Strasbourg Court's use of U.S. Supreme Court jurisprudence has so far been "frugal." *See* Antenor Hallo de Wolf & Donald H. Wallace, *The Overseas Exchange of Human Rights Jurisprudence: The U.S. Supreme*

Hopefully the Court is also open to such borrowing when it comes to the concept of stereotype.

This Article starts by critically assessing the ways in which the ECtHR has reasoned when confronted by stereotypes (Part I). Next, it analyzes the anti-stereotyping reasoning of the U.S. Supreme Court (Part II) and its Canadian counterpart (Part III). Two deceptively simple questions will form the *leitmotif* throughout the comparison: (i) how do these courts conceive of stereotypes, and (ii) given that stereotyping is not necessarily always negative or problematic, how do these courts determine whether the application of a stereotype is invidious? Parts II and III conclude by critiquing respectively the American and Canadian jurisprudence, in the belief that the Strasbourg Court can also learn a great deal from their less successful features. The last Part reflects on what insights the ECtHR can borrow from the other side of the Atlantic (Part IV).

Before proceeding some preliminary remarks are in order. First, the premise of this Article is that legal reasoning matters, not just the end verdict. Fine verdicts can be based on flawed reasoning. Such is the case with many of the ECtHR judgments that will be discussed in this Article. Second, the focus of the Article is on the stereotyping concept in equal protection law generally. Many of the examples, however, will come from gender equality cases, because this is the area where the concept has gained the most traction through the years.[18]

I. Stereotyping in Strasbourg—Analyzing the Achievements, Identifying the Issues

A. *Introduction: Historical Development of the Stereotype Concept*

Several of the Strasbourg Court's landmark discrimination cases concerned stereotyping. In *Marckx v. Belgium* (1979), for example, a case concerning the legal bond between a mother and her illegitimate child and the inheritance rights of that child, the Belgian authorities relied on the argument that unmarried mothers are often unwilling to take care of their offspring.[19] Another example is *Abdulaziz, Cabales, and Balkandali v. the U.K.* (1985), which concerned an immigration law that applied stricter rules to husbands who wanted to join their legally resident wives than to wives who wanted to join their husbands. The U.K. government attempted to justify this rule by arguing that "men were more likely to seek work than women"

Court in the European Court of Human Rights, 19 Int'l Crim. Just. Rev. 287, 303 (2009). *See also* Erik Voeten, *Borrowing and Nonborrowing Among International Courts*, 39 J. Legal Stud. 547 (2010).

18. That seems true for the legal literature and for the U.S. case law. The Canadian case law on stereotypes, however, is less gender-oriented.

19. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) ¶ 39 (1979).

and would therefore have a greater impact on the domestic labor market.[20] And in *Karlheinz Schmidt v. Germany* (1994), a case about fire brigade duty that was compulsory for men only, the German government argued that "the legislature had taken account of the specific requirements of service in the fire brigade and the physical and mental characteristics of women. The sole aim which it had pursued in this respect was the protection of women."[21]

Although the Court found a violation of the non-discrimination provision, Article 14 of the European Convention on Human Rights (ECHR),[22] in all three cases, it did not recognize stereotyping as part of the dynamic that caused the discriminatory conduct. In *Marckx*, the Court did reject the idea that unmarried women are less likely to want to take care of their child; it held that "such an attitude is not a general feature of the relationship between unmarried mothers and their children."[23] But that is it. Stereotyping has not often been seen as a problem.[24] In fact, individual judges have sometimes made a point of agreeing with the stereotypes put forward by the government.[25] The stereotype concept certainly played no role in the Court's discrimination analysis in the past. This is slowly starting to change—the Strasbourg Court seems increasingly aware that stereotyping can affect human rights. Nevertheless, the Court still has a long way to go. The following three paragraphs will examine and critique the relevant ECtHR case law.

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20. Abdulaziz, Cabales, and Balkandali v. United Kingdom, App. Nos. 9214/80, 9473/81 & 9474/81, 7 Eur. H.R. Rep. 471, ¶ 75 (1985).

21. Karlheinz Schmidt v. Germany, App. No. 13580/88, 291 Eur. Ct. H.R. (ser. A) ¶ 27 (1994).

22. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5; 213 U.N.T.S. 221 [hereinafter ECHR]. Article 14 ECHR provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

23. *Marckx*, 31 Eur. Ct. H.R. (ser. A) ¶ 39 (1979).

24. A well-known exception is the dissent in *Petrovic v. Austria* (1998), a case about parental leave in Austria that was only available to mothers. The dissenters held: "The discrimination against fathers perpetuates this traditional distribution of roles and can also have negative consequences for the mother . . . [T]raditional practices and roles in family life alone do not justify a difference in treatment of men and women." Petrovic v. Austria, App. No. 20458/92, 1998–II Eur. Ct. H.R. 579 (Bernhardt & Spielmann, JJ., dissenting).

25. *See, e.g.*, *Karlheinz Schmidt*, 291 Eur. Ct. H.R. (ser. A) (Morenilla, J., concurring: "I think that the physical difference between the two sexes is a 'weighty' consideration justifying a difference of treatment by reason of the fact that certain tasks which require extreme physical efforts are ordinarily more easily accomplished by men than women, whilst the risk to health is greater for women.").

B. How Does the Strasbourg Court Conceive of Stereotypes?

The Strasbourg Court defines discrimination as a difference in treatment that has no "objective and reasonable justification."[26] When the Court uses anti-stereotyping reasoning in Article 14 analysis, it usually does so in its review of justifications. This choice makes sense if one takes a look at the Court's archives, which include many cases wherein governments tried to justify discrimination on the basis of stereotypes.[27] Examples include *Ünal Tekeli v. Turkey* (2004), a case in which an applicant complained that, as a married woman, she was not allowed to use her maiden name on official documents.[28] The Turkish government argued that women, who "are of a more delicate nature than men," need to have their position in the family protected and that it is therefore necessary that they take on the surname of their husband.[29] Another example is *Alajos Kiss v. Hungary* (2010), a case concerning the automatic disenfranchisement of people who have a guardian appointed to them.[30] The Hungarian government claimed that adults who have been placed under guardianship lack the capacity to exercise their right to vote, and that they should therefore be deprived of this right.[31]

Thus far, the judgment that boasts the richest anti-stereotyping reasoning is *Konstantin Markin v. Russia* (2012).[32] The case concerned a military serviceman who complained that he was not able to take extended parental leave, while such leave is available to servicewomen. The Grand Chamber unequivocally announced that it would not accept stereotype-based justifications for discriminatory conduct. It held that "gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation."[33] From an anti-stereotyping perspective, it is a major victory that the Grand Cham-

26. *See, e.g.*, Chassagnou and Others v. France (GC), App. Nos. 25088/94, 28331/95 & 28443/95, 1999–III Eur. Ct. H.R. 21, ¶ 91.

27. *See, e.g.*, *Marckx*, 31 Eur. Ct. H.R. (ser. A); Abdulaziz, Cabales, and Balkandali v. United Kingdom, App. Nos. 9214/80, 9473/81 & 9474/81, 7 Eur. H.R. Rep. 471 (1985); Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) (1987); 10 Eur. H.R. Rep 394 (1988); *Karlheinz Schmidt*, 291 Eur. Ct. H.R. (ser. A); Kiyutin v. Russia, App. No. 2700/10, 2011-II Eur. Ct. H.R. 29.

28. Ünal Tekeli v. Turkey, App. No. No.29865/96, 2004-X Eur. Ct. H.R. 237.

29. *Id.* ¶ 16. *See also id.* ¶ 46.

30. Alajos Kiss v. Hungary, App. No. 38832/06, May 20, 2010 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98800. *Alajos Kiss* is technically not a discrimination case (the Court only found a violation of Article 3, Protocol 1), but it was reasoned as such.

31. *Id.* ¶ 26.

32. *Konstantin Markin*, (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77.

33. *Id.* ¶ 143.

ber put this so clearly.[34] In this case, the Strasbourg Court named what is arguably the most prevalent gender-role stereotype, namely the male breadwinner/female caretaker stereotype. The Court held that States "may not impose traditional gender roles and gender stereotypes."[35] Konstantin Markin was a male applicant, but the Court emphasized that gender-role stereotyping hurts both men and women, as these stereotypes are "disadvantageous both to women's careers and to men's family life."[36] Article 14 of the ECHR is an accessory right, meaning that it has no independent existence and is applicable only in relation to the rights set forth in the Convention. Thus, in *Markin*, the Grand Chamber found a violation of Article 14 in conjunction with Article 8 of the ECHR (the right to respect for private and family life).[37]

However, much of the Court's anti-stereotyping reasoning appears in its Article 8 jurisprudence (that is, Article 8 alone, not in conjunction with Article 14). In *Aksu v. Turkey* (2012), the Grand Chamber said explicitly that stereotyping can infringe on the right to private life:

> [A]ny negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.[38]

Aksu concerned two State-sponsored publications: a dictionary and a book entitled *The Gypsies of Turkey*, written by an associate professor. Both of these publications contained derogatory stereotypes of Roma. The dictionary contained entries such as "Gypsiness—(metaphorically) being miserly or greedy"[39] and more of the same. The other book contained passages that suggested that Roma make their living by stealing.[40] Mr. Aksu, a Roma, complained that such remarks and expressions debased the Roma community. The Court recognized that what was at stake here was "negative stereotyping,"[41] but it makes no effort to unpack what these stereotypes are exactly and why they should be considered injurious.

34. Moreover, since the Court also mentions race, color, origin, and sexual orientation, this holding will surely be invoked by applicants in a wide range of cases.

35. *Id.* ¶ 142; Ünal Tekeli v. Turkey, App. No. No.29865/96, 2004-X Eur. Ct. H.R. 237, ¶ 63; Staatkundig Gereformeerde Partij v. Netherlands (Inadm.), App. No. 58369/10, 10 July 2012, ¶ 73.

36. *Markin*, 2012-III Eur. Ct. H.R. 77, ¶ 141.

37. Article 8(1) ECHR states: "Everyone has the right to respect for his private and family life, his home and his correspondence."

38. Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447, ¶ 58.

39. *Id.* ¶ 28.

40. *Id.* ¶ 12.

41. *See* quotation from the judgment accompanying *supra* note 38.

The same picture emerges in other cases: when the Court names stereotypes, it often does so in the context of Article 8, but only very cursorily. In *V.C. v. Slovakia*, for example,[42] a case about the involuntary sterilization of a Roma woman, the Court noted the Council of Europe Commissioner for Human Rights' view that Roma women are particularly at risk of suffering involuntary sterilization "due, *inter alia*, to the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits."[43] The Court mentioned the Commissioner's view, but did not further discuss these "negative attitudes." Underlying such attitudes was a widely held stereotype that Roma are parasitic and that they therefore want to live on social benefits.[44] In the examination of the merits there was no discussion of the historical roots of these attitudes, nor was there a discussion of the ways in which the government had actively promoted such negative stereotypes about Roma. It fell to the only dissenter, Judge Mijoviæ, to point out that "there was a general State policy of sterilisation of Roma women under the communist regime (governed by the 1972 Sterilisation Regulation), the effects of which continued to be felt up to the time of the facts giving rise to the present case."[45]

C. *When Does the ECtHR Consider Stereotypes Invidious?*

A close reading of the ECtHR's scant reasoning on stereotypes reveals that the Court considers stereotypes invidious when they are either untrue or based on prejudice (or a combination of both). In order to make that assessment, the Court regularly relies on a broader European consensus or on international human rights law materials.[46] For example, in the sterilization case, *V.C. v. Slovakia,* the Court referred to a report by the Council of Europe Commissioner for Human Rights[47] to establish that the negative attitudes concerning high birth rates among the Roma were worrisome.[48]

42. Another example where this occurred to some extent is Yordanova v. Bulgaria, App. No. 25446/06, Apr. 24, 2012, ¶ 142 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449 (a case about the forced eviction of a Roma settlement).

43. V.C. v. Slovakia, App. No. 18968/07, 2011-V Eur. Ct. H.R. 381, ¶ 146.

44. Dimitrina Petrova, *The Roma: Between a Myth and the Future*, 70 SOC. RES. 111, 130 (2003).

45. *V.C.*, 2011-V Eur. Ct. H.R. 381, 419 (Mijoviæ, J., dissenting).

46. *See, e.g., id.* ¶ 64–65; Ünal Tekeli v. Turkey, App. No. No.29865/96, 2004-X Eur. Ct. H.R. 237, ¶ 59–61; Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77, ¶ 140; Vejdeland and Others v. Sweden, App. No. 1813/07, Feb. 9, 2012, ¶ 6 (Spielmann & Nussberger, JJ., concurring) (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

47. CommDH (2003)12, ¶ 37.

48. *V.C.*, 2011-V Eur. Ct. H.R. 381, ¶ 146.

The Court has been confronted with untrue stereotypes several times. When this has happened, the Court has usually said so (without necessarily using the word "stereotype"). Examples include the above-mentioned *Marckx* case, wherein the Court pointed out that unmarried mothers are not less likely to care for their child than married mothers.[49] Another example is *Kiyutin v. Russia* (2011), the case of a man who was refused a Russian residence permit solely because he was HIV-positive.[50] The Court named the stereotype that HIV-positive people tend to engage in unsafe sex, and denounced it as false:

> Excluding HIV-positive non-nationals from entry and/or residence in order to prevent HIV transmission is based on the assumption that they will engage in specific unsafe behaviour and that the national will also fail to protect himself or herself. This assumption amounts to a generalisation which is not founded in fact.[51]

Similarly, in *Markin*, the Court does not accept the stereotype that women ought to be caregivers and the inference that is drawn from this stereotype, namely that the caring role of fathers is less important than that of mothers in the period of a child's life during which parents are eligible for parental leave.[52] The Court implies that this stereotype is untrue.[53]

When the Court is confronted with stereotypes that are based on prejudice, it has used the term "negative attitudes." For example, negative attitudes in the form of "a predisposed bias on the part of a heterosexual majority against a homosexual minority" cannot justify restricting the rights of gay people.[54] The Court has employed this reasoning to great effect in cases about the participation of homosexuals in the military[55] and the criminalization of sexual conduct between men.[56] In *Kiyutin*, the Court explores how stereotypes can arise from a mixture of ignorance and prejudice—resulting in beliefs

49. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) ¶ 39 (1979). See *supra* text accompanying note 23.

50. Kiyutin v. Russia, App. No. 2700/10, 2011-II Eur. Ct. H.R. 29, ¶ 63 (2011).

51. *Id.* ¶ 68.

52. Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77, ¶ 132.

53. *Id.*

54. Lustig-Prean and Becket v. United Kingdom, App. Nos. 1417/96 & 32377/96, 29 Eur. H.R. Rep. 548, ¶ 90 (2000); Smith and Grady v. United Kingdom, App. Nos. 33985/96 & 33986/96, 1999-VI Eur. Ct. H.R. 45, ¶ 97.

55. *Id.* For an insightful discussion of these cases see Michael Kavey, *The Public Faces of Privacy: Rewriting Lustig-Prean and Beckett v. United Kingdom*, *in* DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (Eva Brems ed., 2012) 293.

56. L. and V. v. Austria, App. Nos. 39392/98 and 39829/98, 2003-I Eur. Ct. H.R. 29, ¶ 52 (2003).

that are harmful both because they are untrue and because they create stigma and discrimination:

> HIV infection has been traced back to behaviours—such as same-sex intercourse, drug injection, prostitution or promiscuity—that were already stigmatised in many societies, creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny.[57]

Importantly, however, the Court always performs a proportionality analysis—whether the Court addresses stereotypes under Article 8 or under Article 14 (in conjunction with another provision of the Convention).[58] This means that even (*prima facie*) invidious stereotyping can be justified in the eyes of the Court, provided it is proportional to the legitimate aim sought to be realized. The proportionality analysis is where the Court deploys its margin of appreciation doctrine.[59] Put briefly, the margin of appreciation is a "doctrine of judicial deference;"[60] the width of the margin of appreciation determines how strictly the Court will scrutinize a government's conduct.

The Strasbourg Court has accepted two types of justifications for stereotypes. Firstly, stereotyping can be justified by an important countervailing public interest. In *Aksu*, the Grand Chamber countenanced the State's lack of interference in the publication of the derogatory book and dictionary because it held that the rights and interests of others (in being provided with information and in academic freedom of expression) weighed more heavily.[61] Secondly, stereotyping can be justified when it serves to correct factual inequalities. For example, in several cases concerning the provision of social benefits, the Court has in essence held that gender role stereotyping can be allowed if it serves to correct a factual inequality between men and women.[62] Take *Runkee and White v. U.K.*, a case that was

57. Kiyutin v. Russia, App. No. 2700/10, 2011-II Eur. Ct. H.R. 29, ¶ 64 (2011). Regarding HIV-based prejudice, see also I.B. v. Greece, App. No. 552/10, Oct. 3, 2013, ¶ 81 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127055.

58. For a more general analysis of the Court's analysis of justifications under Article 14 ECHR, see, e.g., Aaron Baker, *Proportional, Not Strict, Scrutiny: Against a U.S. "Suspect Classifications" Model Under Article 14 ECHR in the U.K.*, 56 Am. J. Comp. L. 847, 854–57, 882–89 (2008).

59. *See generally, e.g.*, Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (2012); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxford J. Legal Stud. 705 (2006).

60. Legg, *supra* note 59, at 1.

61. Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447, ¶¶ 69–71, 82–84.

62. *See, e.g.*, Stec v. United Kingdom (GC), App. No. 65731/01, 2006-VI Eur. Ct. H.R. 131, ¶¶ 61, 66 (2006); Andrle v. Czech Republic, App. No. 6268/08, Feb. 17, 2011,

brought by applicants who complained that, as men, they were not eligible for "widow's benefits" upon the deaths of their wives.[63] The Strasbourg Court noted in this judgment that the British widow's pension "was first introduced in 1925, in recognition of the fact that older widows, as a group, faced financial hardship and inequality because of the married woman's traditional role of caring for husband and family in the home rather than earning money in the workplace."[64] The Court therefore considered that this pension "was intended to correct 'factual inequalities' between older widows, as a group, and the rest of the population"; as such, "this difference in treatment was reasonably and objectively justified."[65] Social benefits cases such as these illustrate that the ECtHR is quite tolerant of paternalistic stereotypes—much more so than the U.S. Supreme Court, as the next Part will discuss.[66]

D. *Critique of the ECtHR's Treatment of Stereotypes*

The Court's treatment of stereotypes includes two serious flaws. The first and most basic problem is that the Court often neglects to *name* stereotypes. This is a problem because the Court's ability to address invidious stereotyping depends on its willingness to identify stereotypes.[67] You cannot change a reality without naming it.[68] Both in cases wherein stereotyping *implicitly* played a part[69] and in cases where the government *explicitly* referred to stereotypes,[70] the Court has generally kept quiet. True, in several Article 14 cases the Court has withheld its consent to differences in treatment based on invidious stereotypes. But it has usually done so without naming the stereotypes in question. In *Salgueiro da Silva Mouta v. Portugal* (1999), for example, a complaint was lodged at the ECtHR about the Lisbon Court of Appeal's decision to withhold child custody from a

¶¶ 53–60 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103548.

63. Runkee and White v. United Kingdom, App. Nos. 42949/98 & 53134/99, May 10, 2007 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80478.

64. *Id.* ¶ 37.

65. *Id.* ¶ 40.

66. *See infra* Part II.D.

67. Cook & Cusack, *supra* note 13, at 39–70; Timmer, *supra* note 13, at 720–22.

68. *Cf.* Catharine MacKinnon, Women's Lives, Men's Laws 89 (2005) ("[Y]ou can't change a reality you can't name.").

69. *See, e.g.*, Rantsev v. Cyprus and Russia, App. No. 25965/04, 2010-I Eur. Ct. H.R. 65 (a sex trafficking case in which the Court does not discuss the underlying stereotype that women on an artiste visa in Cyprus are the (sexual) property of their employers). For discussion, see Timmer, *supra* note 13, at 730–34.

70. *See, e.g.*, M. and Others v. Italy and Bulgaria, App. No. 40020/03, July 31, 2012 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112576 (case concerning the kidnapping of a Roma girl and the police response; the government relied on the stereotypes that Roma women are untruthful and that Roma women are commonly abused by their family).

father who was living together with another man, because he "had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria"; the Lisbon Court had ruled that the child should live in "a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into."[71] The Court of Appeal had thus imprinted the false stereotype that homosexuals cannot be good fathers and simultaneously the prescriptive stereotype that proper fathers should not live with their male partners. The Strasbourg Court subsequently found a violation of Article 8 in conjunction with Article 14, but it did not explain what was wrong with the reasoning of the Lisbon Court. Similarly, in other stereotyping cases, the sum of the ECtHR's reasoning has consisted in the remark that the governments in question did not bring forward valid reasons.[72] The result of such sparse reasoning is that Council of Europe Member States learn nothing about the harm that stereotyping does. The Court eschews its pedagogical role.

This leads to the second problem with the Court's treatment of stereotypes, namely that the Court but seldom analyzes stereotyping as a discrimination issue. Essentially, the harm of stereotyping is that it justifies and reinforces discrimination: stereotypes anchor structural inequality. The Court's legal reasoning should capture this. In order to release the potential of the stereotype concept, the Court will have to start recognizing that stereotyping can be a form of wrongful unequal treatment.[73] It is only by framing invidious stereotyping as a discrimination issue that the Court can transcend the level of the individual claimant and address the wider harmful implications of such stereotyping.[74] To be sure, the Grand Chamber justly held in *Aksu* that negative stereotyping can impact on an individual's private life.[75] But only by analyzing such stereotyping from an antidiscrimination perspective can the Court address the wider impact it has on groups (such as Roma, people with a mental disability, or women). Stereotyping is not just a private experience—it is chiefly a

71. Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IX Eur. Ct. H.R. 309, ¶ 14.

72. *See, e.g.*, Schuler-Zgraggen v. Switzerland, App. No. 14518/89, 16 Eur. H. R. Rep. 405 (1993), ¶ 67; Zarb Adami v. Malta, App. No. 17209/02, 2006-VIII Eur. Ct. H.R. 305, ¶ 82 (2006).

73. *Cf.* Sophia Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L.J. 291, 297–303 (2004).

74. Judge Mijoviæ made a similar point in her dissenting opinion in *V.C. v. Slovakia*: "Finding violations of Articles 3 and 8 alone in my opinion reduces this case to the individual level . . . [T]he sterilisations performed on Roma women were not of an accidental nature, but relics of a long-standing attitude towards the Roma minority in Slovakia." V.C. v. Slovakia, App. No. 18968/07, 2011-V Eur. Ct. H.R. 381, 419–20 (Mijoviæ, J., dissenting).

75. Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447. *See supra* Part I.B.

social experience.[76] It is that social experience/problem that the Court can address and contest with an Article 14 analysis.

Especially worrisome is that anti-stereotyping reasoning has had no place (yet) in the Court's review of whether an impugned measure falls under the *scope* of Article 14. While it is a positive development that the Court has now recognized that gender stereotypes cannot justify differential treatment,[77] a focus on stereotypes should not remain confined to the second stage of the *Court's* Article 14 analysis. Otherwise many stereotyping cases will not be able to pass the gates of Article 14. The most salient example of a case that clearly concerns invidious stereotyping, but which the Court refused to examine under Article 14, is *Aksu v. Turkey*, the judgment about derogatory stereotypes of Roma in a government-sponsored book and dictionary.[78] The Grand Chamber's reasoning was as follows: "[T]he Court observes that the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing *prima facie* evidence that the impugned publications had a discriminatory intent or effect."[79]

This interpretation of discrimination is too narrow.[80] By equating discrimination with differential treatment, the Court missed the point here. The wrongs of stereotyping are not comparative in nature: they do not derive from a comparison with another group that has been treated better.[81] The wrong in *Aksu* was not that the Roma have been treated differently than other groups, but that the remarks in these books were stigmatizing and demeaning in and of themselves. Especially the contested dictionary was a striking (and literal!) example of Catherine MacKinnon's insight that "subordination is 'doing

76. *See, e.g.,* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002) (about the experience of African-Americans with stereotypes); SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS 150–62 (1985) (on stereotypes about Jewish people).

77. Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77. *See supra* Part I.B for discussion.

78. Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447. This despite the fact that the Chamber judgment *had* examined the case under Article 14. *See* Aksu v. Turkey, App. Nos. 4149/04 & 41029/04, July 27, 2010 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99994. Other examples include V.C. v. Slovakia, App. No. 18968/07, 2011-V Eur. Ct. H.R. 381 (*see supra* note 74); M. and Others v. Italy and Bulgaria, App. No. 40020/03, July 31, 2012 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112576; Yordanova v. Bulgaria, App. No. 25446/06, Apr. 24, 2012, ¶ 142 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110449 (a case about the forced eviction of a Roma settlement).

79. *Aksu* (GC), 2012-I Eur. Ct. H.R. 447, ¶ 45.

80. That is not the only reason why this holding is troublesome; it is also striking that the Court does not recognize mental suffering caused by misrecognition as a discriminatory effect.

81. Sophia Moreau, *Equality Rights and the Relevance of Comparator Groups*, 5 J.L.& EQ. 81, 88–92 (2006). *See also* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 779–91 (2011); Timmer, *supra* note 13, at 723–24.

somebody else's language.'"[82] It is highly problematic that the Court was unable to "see" this as an instance of discrimination. That is not to say that the Convention was violated in the *Aksu* case: the State's interest in protecting freedom of expression does provide a strong justification for its conduct. But the discussion about justifications properly belongs in the second stage of the analysis: the complaint of Mr Aksu should first have been recognized under the scope of Article 14.

In contrast with the case law of the ECtHR, the next Parts will show that the American and Canadian Supreme Courts do analyze stereotypes under their respective constitutional equal treatment provisions. Across the Atlantic, stereotyping is definitely—arguably even paradigmatically—considered a discrimination issue.

II. Stereotype as a Concept in American Equal Protection Law

A. *Introduction: Historical Development of the Stereotype Concept*

The anti-stereotyping principle has a long history in U.S. constitutional equal protection law. During the civil rights movement of the 1950s and 1960s, lawyers advocating for racial equality drew on the concept of stereotyping to show what was wrong with segregation.[83] By the end of the 1960s, people in the women's rights movement applied the concept in the domain of gender equality.[84] Justice Ruth Bader Ginsburg, then professor and head of the Women's Rights Project at the American Civil Liberties Union (ACLU), convinced the Supreme Court to include the anti-stereotyping principle in its sex-based equal protection law in the 1970s.[85] The way Ginsburg formulated it, the anti-stereotyping principle combats gender roles: she argued that the law had no business in enforcing the traditional "separate spheres" ideology, whereby men are expected to be breadwinners and women are expected to be caregivers.[86] This theme strikes a deep chord in American legal consciousness because of the widely known and now-infamous separate opinion of Justice Bradley in *Bradwell v. Illinois* (1873).[87] Lawyer Mira Bradwell was refused a license to practice law because she was a woman. In a passage that

82. Catharine MacKinnon, Only Words 25 (1993).

83. Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 Buff. L. Rev. 450 (1964). About this history, see Franklin, *supra* note 2, at 107–08.

84. Franklin, *supra* note 2, at 108–14. *See also* Barbara Kirk Cavanaugh, Note, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. C.R.-C.L. L. REV. 260 (1971).

85. For a thorough account of this history, see Franklin, *supra* note 2. *See also* Siegel & Siegel, *supra* note 12.

86. Franklin, *supra* note 2, at 119–42.

87. 83 U.S. (16 Wall.) 130 (1873).

most U.S.-trained lawyers will be familiar with, Justice Bradley justified this restriction because:

> The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[88]

In the past few decades, the Supreme Court has regularly cited this opinion to illustrate what modern constitutional equal protection law is all about: providing protection against measures based on this kind of ideology.[89] It has been argued that "[s]tereotyping is the central evil that the Court's equal protection doctrine seeks to prevent."[90] The anti-stereotyping principle is, however, by no means limited to U.S. constitutional law. Jurisprudence about specific anti-discrimination legislation—notably Title VII of the Civil Rights Act,[91] the Age Discrimination in Employment Act (ADEA),[92] and the Americans with Disabilities Act (ADA)[93]—also regularly includes anti-stereotyping reasoning.[94] Nowadays, the front line of the anti-stereotyping principle seems to lie in the domain of sexual orientation and gender identity discrimination.[95] All combined, the U.S. case law on stereotyping is vast. This Article will therefore restrict its focus to the Supreme Court's interpretation of constitutional equal protection law. It does not aim to give a comprehensive overview of the case law. Instead, the following section offers a conceptual analysis of the Supreme Court's anti-stereotyping reasoning.

88. *Id.* at 141 (Bradley, J., concurring).

89. *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 684–685 (1973); Mississippi University for Women v. Hogan, 458 U.S. 718, 735 (1982); J.E.B. v. Alabama, 511 U.S. 127, 133 (1994); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 729 (2003).

90. David H. Gans, Note, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876 (1994–1995).

91. 42 U.S.C. §§ 2000e-2000e-17 (2006 & Supp. IV 2011).

92. 29 U.S.C. §§ 621-634 (2006).

93. 42 U.S.C. § 12101 (2006).

94. This has certainly had an impact on constitutional equal protection analysis. Meredith Render has made a comparison of anti-gender-stereotyping reasoning under the Constitution and under Title VII. Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133 (2010). *See also* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest f,mor Perfect Proxies*, 85 CORNELL L. REV. 1447, 1463–64 (1999–2000).

95. *See, e.g.,* Cary Franklin, *Sex, Stereotyping, and Same-Sex Marriage*, BALKINIZATION (Jan. 12, 2013, 10:35 AM), http://balkin.blogspot.be/2013/01/sex-stereotyping-and-same-sex-marriage.html; Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287 (2011); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

B. How Does the U.S. Supreme Court Conceive of Stereotypes?

Building on the work of other commentators, notably K. Anthony Appiah, it is submitted that there are four types of stereotypes in U.S. anti-discrimination law.[96] First, there are *role-typing stereotypes*;[97] these are assumptions about the proper roles or behavior of people who belong to a certain group (e.g., the idea that women are homemakers).[98] Second are *false stereotypes*; they include stereotypes that are based on prejudice, whether consciously or unconsciously held (e.g., the claim that African-Americans lack intelligence), *as well as* stereotypes that are less clearly negative but are empirically/statistically unsound (e.g., the assumption that women will regret having an abortion). Third are *statistical stereotypes*; this is the kind of stereotype that reflects a statistical truth about the group as a whole, but which does not accurately reflect the situation of the individual. The stereotypes in this group are thus largely accurate but overbroad assumptions (e.g., the view that men have more physical strength than women). And finally the case law includes *prescriptive stereotypes*; these require a certain form of behavior or standard of appearance from certain groups of people (e.g., women should dress femininely). This section will discuss these forms of stereotype one by one, with the emphatic caveat that many stereotypes will fall under multiple headings at the same time.

Role-typing stereotypes are the most prevalent form of stereotype in the U.S. case law.[99] In fact, anti-role-typing reasoning is foundational for the whole anti-stereotyping jurisprudence. This Article has elected to label role-typing as one of the four forms of stereotype, but concerns over role-typing actually seem to animate the whole jurisprudence. Gender-role stereotyping in particular has often been condemned by the Court, following Justice Ginsburg's campaign in the 1970s. Gender-based classifications are not allowed when they are based upon "assumptions about the proper roles of men and women."[100] For example, the Court has identified as stereotypical the ideas that wives are dependent on the income of their husbands,[101]

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96. Several commentators have developed typologies of the concept of stereotyping in equal protection law. *See* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 47–48 (2000); Render, *supra* note 94, at 143–63. I find Appiah's typology especially insightful. I broadly agree with the three forms of stereotype (statistical, false, and normative) that he has identified, but this Article adds role-typing as a separate category. Also, as will become apparent in this paragraph and the next one, the present analysis of why these stereotypes are considered invidious in American anti-discrimination law differs in part from Appiah's.

97. The term "role-typing" comes from the case law itself. *See* Stanton v. Stanton 421 U.S. 7, 15 (1975).

98. *See also* COOK & CUSACK, *supra* note 13, at 28–29 (describing sex role stereotypes).

99. For a thorough overview of the case law, see Franklin, *supra* note 2.

100. Mississippi University for Women v. Hogan, 458 U.S. 718, 726 (1982).

101. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

that nursing is a female job,[102] and that caring for family members is "women's work."[103] "No longer," the Court has held, "is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[104] Sex roles have the effect of putting men and women in separate spheres and keeping them there; when they are instantiated into law, the Court recognizes, stereotypes become a "self-fulfilling prophecy"[105] or a "self-fulfilling cycle of discrimination."[106]

But not only role-typing on the ground of gender is forbidden: a similar distrust of role-typing informs the Supreme Court's jurisprudence on age discrimination and disability discrimination. One example is the well-known disability case of *Olmstead v. Zimring*, which concerned the question whether the ADA requires placing mentally disabled people in community-based programs rather than in institutions, whenever this is possible. Here, Justice Ginsburg wrote for the majority: "[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[107] The stereotype that Justice Ginsburg refers to is simultaneously false and a role-type.

Next are *false stereotypes*. Firstly, stereotypes can be false because they lack empirical support. Consider *Gonzales v. Carhart* (2007), the case that upheld the ban on late-term abortions known as "partial birth abortion."[108] Without actually using the term "stereotype," Justice Ginsburg said there is no "reliable evidence" for the idea that "[w]omen who have abortions come to regret their choices, and consequently suffer from '[s]evere depression and loss of esteem.'"[109] This idea was part of the majority's justification for upholding the statute, which restricted access to abortion.[110] Justice Ginsburg included a long list of references to psychological and medical literature that contests the idea that "having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have."[111] Another example is found in *Hazen Paper v. Biggens*, a case about age discrimination, where the Supreme Court held: "It is the very essence of

102. *Mississippi University for Women*, 458 U.S. at 729–30 (1982).
103. *See, e.g.*, Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).
104. Stanton v. Stanton 421 U.S. 7, 14–15 (1975).
105. *Mississippi University for Women*, 458 U.S. at 730 (1982); U.S. v. Virginia, 518 U.S. 515, 543 (1996).
106. *Nevada Department of Human Resources*, 538 U.S. at 736 (2003).
107. Olmstead v. Zimring, 527 U.S. 581, 660 (1999).
108. Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531 (2003).
109. Gonzales v. Carhart, 550 U.S. 124, 183 (2007) (Ginsburg, J., dissenting).
110. *Id.* at 159.
111. *Id.* at 183 n.7 (Ginsburg, J., dissenting).

age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."[112] Age discrimination, it continued, is "based in large part on stereotypes unsupported by objective fact."[113] Secondly, stereotypes can also be false in the sense that they are grounded in prejudice. The paradigmatic example in the U.S. is race-based stereotypes.[114] Stereotypes that are overtly based on prejudice are nowadays by and large excised from the law, but they have occasionally surfaced in recent decades, for example in cases about jury selection.[115]

Third are *statistical stereotypes*. These are the kinds of stereotype that are statistically true for the group as a whole, but not for a specific individual. The Supreme Court has long recognized that beliefs about groups of people can be stereotypes even if there is statistical truth to them.[116] The Court often invalidates statistical stereotypes when they are simultaneously a form of role-typing. Take, for example, the case of *Weinberger v. Wiesenfeld* (1975), a case that concerned a man who had earned significantly less than his wife. When his wife died, Wiesenfeld tried to claim survivor's benefits, which were denied him because he was a man (and therefore supposed to be the breadwinner). The Court held:

> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. . . . But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.[117]

Moreover, the case of *U.S. v. Virginia Military Institute* (1996) (*VMI*) shows that the Court is capable of seeing and dismantling statistical stereotypes even when they are based on "inherent"/physical differences.[118] *VMI* concerned the exclusion of women from a state-run military college. The State of Virginia justified this by claiming that women were by their nature unsuited to the "adversative model"

112. Hazen Paper v. Biggins, 507 U.S. 604, 610 (1993).
113. *Id.* at 610–11.
114. Lusky, *supra* note 83.
115. *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 128 and 130–31 (1994) (about gender-based peremptory challenges of jurors); Batson v. Kentucky, 476 U.S. 79 (1986) (about race-based peremptory challenges); Miller-El v. Dretke, 545 U.S. 231, 237–38 (2005).
116. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975); Craig v. Boren, 429 U.S. 190, 201 (1976); J.E.B. v. Alabama, 511 U.S. 127, 139 (1994). These cases concern gender equality, but sections of the Supreme Court have later confirmed this in other areas. *See e.g.*, Kentucky Retirement Systems v. E.E.O.C., 554 U.S. 135, 162 (2008) (Kennedy, Scalia, Ginsburg & Alito, JJ. dissenting).
117. *Weinberger*, 420 U.S. at 645 (1975).
118. U.S. v. Virginia, 518 U.S. 515 (1996).

reigning at the institute.[119] The majority of the Court, in an opinion authored by Justice Ginsburg, agreed that it might be true that—because of natural differences—most women are unsuited to VMI's method of education. But this was nonetheless not true of all women. Therefore, the Court held:

> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity . . . [Sex] classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.[120]

VMI was consequently ordered to admit women. Part II.C will discuss when the Court considers statistical stereotypes invidious—clearly, not all statistical stereotypes are impermissible.

Fourth, and last, are the *prescriptive stereotypes*. These are stereotypes that stipulate a certain form of behavior or standard of appearance from individuals in order to conform to the norms associated with their group,[121] or to conform to the norms of the dominant group (assimilation).[122] This is a topic that has been extensively analyzed.[123] There are many examples in U.S. case law of such stereotypes, though mainly in the lower courts.[124] Most of these cases concern workplace discrimination and are litigated under Title VII. The major Supreme Court case on prescriptive gender stereotyping is *Price Waterhouse v. Hopkins* (1989).[125] Despite her impressive work record, Hopkins was denied partnership in the accounting firm Price Waterhouse. Hopkins was thought to be too aggressive and not sufficiently charming. The Court held that gender played a motivating part in Price Waterhouse's decision not to promote her. Several partners at the firm counseled Hopkins to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jew-

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119. *Id.* at 541.

120. *Id.* at 533–34.

121. Appiah, *supra* note 96, at 48.

122. African-American women, for example, have been required to wear hairstyles that conform to the standards of whites. *See* Pauline Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

123. *See, e.g.,* Robert Post, *Prejudicial Appearances: The Logic of American Anti-Discrimination Law*, 88 CAL. L. REV. 1 (2000); Render, *supra* note 94; DEBORAH L. RHODE, THE BEAUTY BIAS (2010); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

124. For analysis, see, e.g., Render, *supra* note 94; Stone, *supra* note 123.

125. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). For discussion see, e.g., Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049 (1991); Stone, *supra* note 123.

elry"[126] and to take "a course in charm school."[127] The Court held that "stereotypical notions about women's proper deportment" influenced the employment decision.[128] "As for the legal relevance of sex stereotyping," the Court said, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[129]

C. *When Does the U.S. Supreme Court Consider Stereotypes Invidious?*

The U.S. anti-stereotyping principle has been called an "empty" heuristic.[130] Meredith Render claims that "the term 'stereotype' only parrots back the justice principle we impose upon it. Our concept of 'stereotype' is simply too thin to do more."[131] This Article takes a different view. In American equal protection law, stereotyping is a broad and versatile concept. There is no one-size-fits-all answer to the question when stereotyping is invidious. What the case law shows is that it depends on the kind of stereotype (role-typing, false, prescriptive, or statistical), the ground of the stereotype (gender, race, disability, age, etc.), and the context in which it is deployed (e.g., employment). But that does not make the anti-stereotyping principle an empty vessel: the Supreme Court has developed several guidelines that predict the permissibility of a stereotype. To be clear, this Article does not seek to develop a normative theory about the question when stereotyping *ought* to be considered invidious.[132] Rather, it descriptively explores what makes stereotypes invidious according to the Supreme Court.

Key to the Supreme Court's approach to stereotypes is its concern with *role-typing*. As the last section noted, this concern seems to animate all parts of the anti-stereotyping jurisprudence. What is so harmful about role-typing? Throughout recent decades, the Supreme Court has provided several angles on the wrongs of role-typing. One of these angles is autonomy: role-typing infringes on the freedom of every individual to carve their own path in life and, in doing so, prove their mettle.[133] This is why women should be allowed access to Vir-

126. *Price Waterhouse*, 490 U.S. at 235 (1989).
127. *Id.* at 256.
128. *Id.*
129. *Id.* at 251.
130. Render, *supra* note 94, at 143.
131. *Id.* at 161.
132. Other people have done so. In the American context, see notably DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008). Hellman argues that discrimination is wrong when it is demeaning: "demeaning is the core moral concept separating permissible from impermissible differentiation." *Id.* at 30.
133. Suk, *supra* note 11, at 54. *See e.g.*, U.S. v. Virginia*,* 518 U.S. 515, 532 (1996) (Scalia, J., dissenting) (women should have "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities").

ginia's Military Institute[134] and why men should be allowed access to a state-run School of Nursing.[135] The Court recognizes that role-types exercise control over people.[136] In *Frontiero v. Richardson* (1973), the Court put this powerfully: traditionally, the Court held, different roles for men and women were "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[137] Another important angle on the wrongs of role-typing is subordination: by assigning different roles to men and women, women end up in an inferior "legal, social, and economic" position.[138] The Court has repeated again and again that women may not be denied rights or opportunities because they are assumed to fulfill a different role in life than men.[139]

Ultimately, the Court recognizes that role-typing *creates discrimination* in subtle and self-sustaining ways. Take this powerful passage from *Nevada Department of Human Resources v. Hibbs* (2003), a case about a male employee who sought leave from work under the Family and Medical Leave Act:[140]

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.[141]

In Glenn Loury's words, by acting on their stereotypes, observers (in this case, employers) "set in motion a sequence of events that has the effect of reinforcing their initial judgment."[142] The *Hibbs* quotation

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134. *Id.*

135. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

136. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 185–86 (2007) (Ginsburg, J., dissenting).

137. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

138. *U.S. v. Virginia,* 518 U.S. at 534 (1996).

139. *See, e.g.*, *id.* at 543.

140. 29 U.S.C. §2612 (2006).

141. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003). For an analysis of the anti-stereotyping reasoning in this case and its significance compared to older cases, see Reva B. Siegel, *"You've Come A Long Way Baby": Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2005–2006).

142. LOURY, *supra* note 76, at 23.

shows that the Supreme Court understands this problematic circularity of stereotypes perfectly.

The Court refers to these wrongs of role-typing in cases that concern the other three sorts of stereotype: false, statistical, and prescriptive. To begin with *false stereotypes*, it is not surprising that, since starting down the anti-stereotyping path, the Supreme Court has had the least difficulty determining that these are invidious. False stereotypes are always invidious because, in Appiah's words, "they burden people for no good reason."[143] What is distinctive about false stereotyping is that it often affixes a stigma.[144] The Court has on several occasions named this connection between false stereotypes and stigmatization. For example, in a case about jury selection, *J.E.B. v. Alabama* (1994), the Court held: "Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.' . . . It denigrates the dignity of the excluded juror."[145] The Court reasoned that acting on an erroneous stereotype leads to the stigmatization of certain jurors, and that this in turn is an offense to their dignity.

As regards *statistical stereotypes*, the question of when they are invidious is exceedingly tricky. The U.S. Supreme Court has often seemed to suggest that the state cannot rely on such a stereotype vis-à-vis an individual who does not have the characteristic that is associated with her group.[146] It is tempting to assume that the Court's objection to statistical stereotypes lies in their "overbreadth," or, in other words, their lack of accuracy.[147] Indeed, the Court frequently uses the term "overbroad" when it refers to stereotypes.[148] But on further reflection, the sole fact of overbreadth does not do much analytical work.[149] Frederick Schauer has pointed out that rules that are

143. Appiah, *supra* note 96, at 48.

144. For more about the ways in which stereotypes and racial stigma reinforce each other, see R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context,* 79 N.Y.U. L. REV. 803, 830–36 (2004). *See also* LOURY, *supra* note 76, at chs. 2–3. I do not mean to imply that stigmatization *only* occurs through false stereotyping. People are also regularly stigmatized, for example, for not conforming to prescriptive role-types.

145. J.E.B. v. Alabama, 511 U.S. 127, 142 (1994) (citations omitted).

146. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 89 (2001) (O'Connor, J., dissenting) ("[C]ontrary to this stereotype, Boulais [the father] has reared Nguyen, while Nguyen apparently has lacked a relationship with his mother.").

147. This is Mary Anne Case's (descriptive) argument: "[T]he assumption at the root of the sex-respecting rule must be true either of all women or no women or all men or no men . . . [O]verbreadth alone seems to be enough to doom a sex-respecting rule." Case, *supra* note 94, at 1449–50.

148. *See, e.g.*, *J.E.B.*, 511 U.S. at 131 (1994); U.S. v. Virginia*,* 518 U.S. 515, 533, 542 (1996).

149. Although on occasion the Court does remark on the closeness of the fit, or in other words the degree to which the stereotype is statistically correct. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 201–202 (1976) ("if maleness is to serve [as] a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit'").

based on overbroad generalizations about classes of people are made all the time without being struck down by anti-discrimination law.[150] In fact, as John Hart Ely noted, stereotypes "are the inevitable stuff of legislation."[151] Take, for example, the rule that in order to get a driver's license one must be at least sixteen years old (eighteen in much of Europe). This rule is based on the assumption that children who are younger than the given age will not be safe drivers. This assumption is, in turn, based on the stereotype that children are likely to be reckless. It is an example of a statistically sound stereotype that will without any difficulty pass the test of equal protection law.

Consequently, only certain sorts of statistical stereotypes will be considered problematic. The determination of this point is much more a matter of content than of accuracy.[152] The invidiousness of statistical stereotypes largely depends on their grounds, such as disability, gender, or race. U.S. equal protection law does not offer a comprehensive or unified theory in this respect: the reasons why statistical *gender* stereotypes are held to be invidious may differ from the reasons why statistical *disability* stereotypes are so considered. Again the gender equality case law provides the clearest guidance on why the Supreme Court considers some statistical stereotypes wrong: it is because today's statistical reality is often the product of past disadvantage. In other words, many statistically sound stereotypes are actually the result of cultural contingency; their soundness is a product of past discrimination and that is why the Court is suspicious of them.[153] This is where the Court's concern with role-typing often comes in again. It is statistically correct, for example, to say that women are more likely than men to be homemakers. But this is because women have historically been expected to fulfill this role and because they have been excluded from roles in the public sphere.[154] This is also why the Court speaks of "a self-fulfilling cycle of discrimination" in the *Hibbs* case.[155]

What makes *prescriptive stereotypes* invidious is again a complex issue. Obviously, like statistical stereotypes, not all stereotypes that envisage a certain form of behavior by certain groups of people are

150. See Frederick Schauer's work for a convincing argument that "generalizing about classes is more prevalent, and more accepted, than is often appreciated." FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES 72 (2003). *See also* HELLMAN, *supra* note 132, at 114–37.

151. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 156 (1980).

152. *Cf.* HELLMAN, *supra* note 132, at 132.

153. SCHAUER, *supra* note 150, at 139–41. Further, "the cultural contingency of that empirical basis . . . makes it wrong to translate the empirical generalization into public policy." *Id.* at 141.

154. *See e.g.*, Stanton v. Stanton 421 U.S. 7, 15 (1975).

155. *See supra* text accompanying note 141.

wrong.[156] Take, for example, family law provisions that require parents to take care of their children and ensure that their basic necessities are met. These legal provisions are not a form of discrimination, even though they are based on a prescriptive stereotype, namely that parents should assume responsibility for their children. The case law is clear that prescriptive stereotypes that dictate a role division between men and women are unacceptable. However, especially in the employment context, it is unclear precisely when prescriptive role-typing is problematic.[157] Thus, lower courts have frequently failed to apply the Supreme Court's broad holding in *Hopkins*, cited above, that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"[158] to complaints of sexual orientation or gender identity discrimination, as these are not explicitly covered by Title VII.[159]

D. Critiques of the American Anti-Stereotyping Doctrine

Domestic scholars have extensively criticized the Supreme Court's usage of the anti-stereotyping principle. This Article will not be able to do justice to all these critiques. Some of the most pressing issues require mention, however, in order to caution the ECtHR against the pitfalls of the stereotype concept.

First of all, some judges[160] and many scholars[161] have complained about the opacity of the concept. Much of the confusion stems from the fact that the Supreme Court often conflates the *meaning* of the term stereotype with the *harms* associated with the concept. Thus, the Supreme Court regularly uses the term "stereotype" pejoratively, namely as meaning an *unfair* generalization.[162] The next Part will show that the Canadian Supreme Court creates a similar confusion.[163] The ECtHR ought to avoid such misunderstandings and stay closer to a neutral definition: as beliefs about groups of people, stereotypes are not necessarily unfair or negative. Stereotypes first need to be named and then their harms need to be assessed in context.[164]

156. *See also* Appiah, *supra* note 96, at 49. Appiah seems to disagree, however, about statistical stereotypes. He considers these wrong by definition because they involve an "intellectual error," namely a misunderstanding of the relevance of the facts.

157. *See generally* Render, *supra* note 94; Stone, *supra* note 123.

158. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

159. For discussion *see, e.g.*, Kramer, *supra* note 95; Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423 (2012).

160. J.E.B. v. Alabama, 511 U.S. 127, 161 (1994) (Scalia, J., dissenting).

161. *See, e.g.*, Render, *supra* note 94; Stone, *supra* note 123.

162. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 68, 90 (2001).

163. *See infra* Part III.B.

164. *See also infra* Part IV.A.

Another important critique is that the Supreme Court has been unreceptive to the ways in which stereotyping might be justified when it is done to ameliorate the position of a disadvantaged group. In *Regents of the University of California v. Bakke* (1978), the well-known case concerning affirmative action in higher education, Justice Powell (writing for the majority) observed that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[165] This is turning the argument around: on this account, affirmative action can hardly be justified, because it would create further stereotypes. The suspicious attitude of the Supreme Court towards ameliorative measures is possibly due in part to a deep-seated cultural emphasis on liberty. But it also has specific jurisprudential roots in the 1970s, when, in (in)famous cases such as *Geduldig v. Aiello* (1974) and *General Electric Company v. Gilbert* (1975),[166] the Supreme Court "declined to apply the anti-stereotyping principle in domains where it had identified 'real' differences between the sexes," such as pregnancy and abortion.[167] When a distinction was made on the grounds of "real" physical difference, the Court did not see the generalization at issue as a stereotype. To be sure, since then, in cases like *VMI*, the Supreme Court has recognized that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."[168] Still, however, the Court does not see room for the compensatory use of stereotypes when they concern physical differences. Mandatory retirement for employees who have reached a certain age, for example, is not an option,[169] and neither is mandatory maternity leave.[170] The Supreme Court continues to look askance at protective measures. Julie Suk has argued that this has significantly inhibited the Court's ability to achieve substantive equality. She writes: "The American antistereotyping approach attempts to give women the same chance as men to prove their mettle,

165. 438 U.S. 265, 298 (1978).

166. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Company v. Gilbert, 429 U.S. 125 (1975).

167. Franklin, *supra* note 2, at 90. For a critique of the ways in which the Court deals with stereotypes in cases that concern reproduction, see also, e.g., Gans, *supra* note 90; Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO STATE L.J. 1095 (2009); Barbara Stark, *Anti-stereotyping and "The End of Men"*, 92 B.U. L. REV. ANNEX 1 (2012).

168. U.S. v. Virginia, 518 U.S. 515, 533–34 (1996) (citations omitted). *See also* Mississippi University for Women v. Hogan, 458 U.S. 718, 728 (1982) ("[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened"); Case, *supra* note 94, at 1460–61.

169. Suk, *supra* note 15.

170. Suk, *supra* note 11.

but fails miserably by ignoring the gendered barriers to their ability to do so."[171] Part IV.A will continue the discussion of protective stereotyping, as this is a topic on which the American, Canadian, and Strasbourg jurisprudence widely diverge.

III. Stereotype as a Concept in Canadian Charter Equal Protection Law

A. *Introduction: Historical Development of the Stereotype Concept*

The concept of stereotyping has gained great prominence in Canadian equality jurisprudence, but it is difficult to retrace its precise origins. Very likely, the concept is partly a doctrinal transplant or a "migrant idea" from the U.S.,[172] where, as was just discussed, the concept has a long pedigree.[173] The first time the Supreme Court of Canada referred to stereotyping as a problem of discrimination was in the case of *C.N.R. v. Canada (Human Rights Commission)* (1987).[174] This case, concerning the disadvantaged position of women in the hiring policies of the Canadian National Railway Co., was litigated under the Canadian Human Rights Act.[175] Next, the concept was present in the very first Supreme Court case litigated under Section 15 of the Canadian Charter of Rights and Freedoms,[176] namely *Andrews v. Law Society of British Columbia* (1989).[177] *Andrews* raised the question whether the rule that Canadian citizenship was required for admittance to the bar of British Columbia violated Section 15, the Charter's equality provision. The majority of the

171. *Id.* at 54.

172. This term is borrowed from The Migration of Constitutional Ideas (Sujit Choudry ed., 2006).

173. The U.S. Fourteenth Amendment and its jurisprudence have generally had a profound impact on the development of the Canadian constitutional equality guarantee, though largely as an anti-model. *See, e.g.*, Mayo Moran, *Protesting Too Much: Rational Basis Review under Canada's Equality Guarantee*, *in* Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms 71 (Sheila McIntyre & Sandra Rodgers eds., 2006).

174. C.N.R. v. Canada (Human Rights Commission), [1987] 1 S.C.R. 1114 (Can.). Regrettably, there is no Canadian equivalent of the kind of history that Cary Franklin has written with regard to the U.S. anti-stereotyping principle. *See* Franklin, *supra* note 2.

175. S.C. 1976-77, c. 33 (subsequently consolidated in R.S.C. 1985, c. H-6).

176. Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K). Section 15 states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

177. Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (Can.).

Supreme Court ruled that it did. Though the Court used the term stereotype only fleetingly in *Andrews*, the essence of the idea was there.[178] Later came *Law v. Canada* (1999), a case that concerned the question whether in granting survivor's benefits, the Canadian Pension Plan could set a threshold age of thirty-five, or whether this constituted age discrimination.[179] The judgment in this case defined the frame in which the Supreme Court would interpret Section 15 during the next decade. The Court held: "The purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."[180]

In *R. v. Kapp* (2008), the Court built on *Law* and formulated "a two-part test for showing discrimination under s. 15(1)," namely "1) Does the law create a distinction based on an enumerated or analogous ground?; 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[181] The applicants in *Kapp*, who were commercial fishers, complained that an exclusive twenty-four-hour fishing license that was given to three Aboriginal bands constituted race discrimination. The Supreme Court disagreed and concluded that the measure, which was aimed at ameliorating the position of the Aboriginal bands, did not breach Section 15.

The *Kapp* test remains the current test under Section 15.[182] It shows that the concept of stereotyping is crucial to the Supreme Court's understanding of discrimination, as stereotyping is one of just two ways (the other being the perpetuation of prejudice) in which a distinction can be held to be discriminatory under the Canadian Charter.[183] Indeed, several authors have taken the view that stereotyping is *too* dominant a concept in Section 15 jurisprudence, in the sense that the emphasis on stereotyping has impeded the Court from recognizing forms of discrimination that cannot be captured by this heuristic.[184] The critics make a valid point: many Section 15 claims have been stranded because the claimant could not prove that a rule was based on a stereotype.[185] The Supreme Court acknowledged this

178. *Id.* at para. 43.
179. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (Can.).
180. *Id.* at para. 51.
181. R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 17 (Can.)
182. Recently confirmed in Quebec (Att'y Gen.) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61, para. 185 (Can).
183. *Id.* at paras. 185–206.
184. *See, e.g.*, Gwen Brodsky & Shelagh Day, *Women's PovertyIis an Equality Violation*, *in* MAKING EQUALITY RIGHTS REAL, MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER 319, 324–29 (Fay Faraday, Margaret Denike & M. Kate Stephenson eds., 2009); Sophia Moreau, *The Promise of* Law v. Canada, 57 U. TORONTO L.J. 415, 420–21 (2007).
185. *See, e.g.*, Lovelace v. Ontario, 2000 SCC 37, [2000] 1 S.C.R. 950, para. 73 (Can.); Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R.

critique in *Quebec (Att'y Gen.) v. A.* (2013)*,* which concerned the question of whether it is valid to exclude *de facto* spouses from the patrimonial and support rights granted to married and civil union spouses.[186] This judgment reveals that while the concept of stereotyping is undoubtedly crucial in Section 15 jurisprudence, it is also still being further developed.

The next sections will analyze how the Supreme Court of Canada conceptualizes stereotyping and its wrongs. The focus is on the Court's interpretation of the Charter, which is part of the Canadian Constitution. In Canada, each province also has separate anti-discrimination legislation (such as, for example, the Ontario Human Rights Code), but as space is limited this Article will not discuss the Supreme Court's interpretation of that type of legislation. These provincial laws concern discrimination in horizontal relations and that makes them less directly relevant for a comparison with the case law of the ECtHR.[187] Neither will this Article discuss criminal law jurisprudence, where the issue of stereotyping also has come up occasionally.[188] The exceptional criminal law case that will be discussed, *R. v. Ewanchuk*, is a case that also raised a Section 15 claim.[189]

B. *How Does the Canadian Supreme Court Conceive of Stereotypes?*

Given the centrality of the concept of stereotyping, especially since *R. v. Kapp*, the Canadian Supreme Court has made surprisingly little effort to explicate its understanding of stereotypes.[190] Nor has it made any real effort to explain how it comprehends the difference between prejudice and stereotypes, while a distinction between these two concepts is clearly made in the second part of the *Kapp* test.[191]

Similar to its U.S. counterpart, the Canadian Supreme Court blends its definition of stereotyping with the question of when stere-

567, para. 108 (Can.); Withler v. Canada, 2011 SCC 12, [2011] 1 S.C.R. 396, para. 77 (Can.); Gosselin v. Quebec, 2002 SCC 84, [2002] 4 S.C.R. 429, para. 70 (Can.) (LeBel, J., dissenting).

186. Quebec (Att'y Gen.) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61, para. 205 (Can) ("The Court has thus explicitly acknowledged the inadequacy of a uniquely stereotype-based approach that has been criticized by several authors.").

187. Although a horizontal case of employment discrimination can end up at the ECtHR if the domestic courts did not address the issue properly due to a shortcoming in national law. *See, e.g.*, Redfearn v. United Kingdom, App. No. 47335/06, Nov. 6, 2012, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114240.

188. *See, e.g.*, R. v. Seaboyer, [1991] 2 S.C.R. 577, paras. 129 et seq. (Can.) (L'Heureux-Dubé, J., dissenting in part); R. v. Cinous, 2002 SCC 29, [2002] 2. S.C.R. 3, para. 167 (Can.) (Arbour, J., dissenting).

189. R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.). *See infra* Part III.B.

190. Many commentators have delivered the same critique. *See, e.g.*, Denise Réaume, *Defending the Human Rights Codes from the Charter*, 9 J.L. & EQUALITY 67, paras. 35–36 (2012).

191. *See supra* text accompanying note 181 about the *Kapp* test.

otyping is invidious, reasoning that the requirement of substantive equality is violated when stereotyping occurs.[192] The Court reflexively talks about stereotyping and discrimination together. As an oversimplification, the Court seems to say: stereotyping = invidious = discrimination.

Trying to disentangle that reasoning, one finds the clearest definition of stereotypes in the *Law* case. There, the Court observed: "A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess."[193] This definition actually holds three forms of stereotype:

1) Negative stereotypes (a belief that a group possesses "undesirable traits");
2) Statistically unsound stereotypes (a belief that a group possesses traits which, in fact, it does not possess); and
3) Statistically sound stereotypes that are incorrect for the individual applicant (a statistically sound but overbroad belief about the traits of certain groups).[194]

These three kinds of stereotype are indeed found throughout the Section 15 case law. The Court does not often uncover explicitly negative stereotypes, but there are some examples. In *Vriend v. Alberta* (1998), for instance, a case that concerned a man whose employment was terminated on the basis of his homosexuality, the Court condemned "the stereotype that homosexuals are less deserving of protection and therefore less worthy of value as human beings."[195] The majority of stereotypes in the jurisprudence concern the second and third varieties, however. Most of the time, though, the Court does not determine whether a stereotype is actually statistically sound or not, but just confines itself to saying that the belief in question "does not correspond to the actual circumstances and characteristics of the claimant or claimant group."[196] Thus, the Court

192. *See, e.g.*, Withler v. Canada, 2011 SCC 12, [2011] 1 S.C.R. 396, para. 39 (Can.).

193. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, para. 64 (Can.).

194. Again, of course, a stereotype can be both negative and either statistically sound or unsound.

195. Vriend v. Alberta, [1998] 1 S.C.R. 493, para. 30 (Can.). Other examples of negative stereotypes include Lovelace v. Ontario, 2000 SCC 37, [2000] 1 S.C.R. 950, para 71 (Can.) ("by the stereotype that they are 'less aboriginal', with the result that they are generally treated as being less worthy of recognition, and viewed as being disorganized and less accountable than other aboriginal peoples"); R. v. Williams, [1998] 1 S.C.R. 1128, para 58 (Can.) ("Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.").

196. *Withler*, 2011 SCC 12, para. 36.

commonly talks of stereotypes as "attributed rather than actual characteristics."[197]

The Court's understanding of stereotypes as inaccurate characterizations runs up against the fact that laws are inevitably based on generalizations.[198] In practice, therefore, the Court has tolerated many inaccurate/overbroad stereotypes. The prime examples are the Court's numerous judgments that concern age-based restrictions in benefit schemes.[199] Take, for instance, *Gosselin v. Quebec*, a case concerning a Quebec social assistance scheme that set the benefit rate for adults under thirty at one-third the rate for those over thirty.[200] McLachlin, C.J., writing for the majority, held: "The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, . . . provided these assumptions are not based on arbitrary and demeaning stereotypes."[201] Turning to the facts of the case at hand, however, and to the argument that the selection of the age of thirty as a cut-off point failed to correspond to the actual situation of young adults requiring social assistance, she stated: "[A]ll age-based legislative distinctions have an element of this literal kind of 'arbitrariness'. That does not invalidate them."[202] In one breath, the Chief Justice says that rules may not be based on arbitrary stereotypes, yet that some measure of arbitrariness is inevitable in age-based restrictions. Denise Réaume points out that "[t]he degree of inaccuracy, it seems, must pass some unspoken threshold before it counts as a stereotype."[203]

What is lacking in the Canadian jurisprudence are *role-typing stereotypes* and *prescriptive stereotypes*. Compared to the U.S., the Supreme Court of Canada does not have a strong judicial discourse on these categories of stereotyping. One notable exception is Justice L'Heureux-Dubé's separate opinion in the case of *R. v. Ewanchuk* (1999).[204] *Ewanchuk* was not litigated under Section 15, but as a criminal law case. The complainant was sexually assaulted as a seventeen-year-old girl by the much older Ewanchuk in his van. At issue was whether the trial judge had erred in thinking that the defense of "implied consent" existed in Canadian law. Justice L'Heureux-Dubé recast the essence of the case as follows: "This case is not about con-

197. *See, e.g.*, Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, para. 37 (Can.); Miron v. Trudel, [1995] 2 S.C.R. 418, para. 132 (Can.) (McLachlin, J.) ("presumed rather than actual characteristics"); Gosselin v. Quebec, 2002 SCC 84, [2002] 4 S.C.R. 429, para. 38 (Can.) (LeBel, J., dissenting); R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 18 (Can.).

198. See *supra* text accompanying notes 149–152.

199. *See, e.g.*, Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (Can.); *Gosselin*, 2002 SCC 84; *Withler*, 2011 SCC 12.

200. *Gosselin*, 2002 SCC 84.

201. *Id.* at para. 56.

202. *Id.* at para. 57.

203. Réaume, *supra* note 190, at para. 35.

204. R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.).

sent, since none was given. It is about myths and stereotypes."[205] According to her, both the trial judge and the Court of Appeal judge relied on "mythical assumptions that when a woman says 'no' she is really saying 'yes', 'try again', or 'persuade me.'"[206] Furthermore, in response to the suggestion of one of the Court of Appeal judges that the applicant could have dealt better with the assault by using "a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee," Justice L'Heureux-Dubé also condemned the prescriptive stereotype that "women should use physical force, not resort to courts to 'deal with' sexual assaults."[207] Justice L'Heureux-Dubé's opinion skillfully uncovers simultaneously the essence of this particular case and its wider implications for women's equality.

C. When Does the Canadian Supreme Court Consider Stereotypes Invidious?

The Canadian Section 15 jurisprudence is much richer on the topic of how discriminatory distinctions can be distinguished from non-discriminatory ones than it is on how to conceptualize stereotypes. Ever since *Andrews*, the Canadian Supreme Court has expressed its commitment to substantive or "true" equality (as opposed to formal equality).[208] The Court has coupled substantive equality to a contextual approach: whether discrimination exists depends on context.[209] According to the Court, "the main consideration must be the impact of the law on the individual or the group concerned."[210] Thus "the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation."[211]

However, the Court's thinking has evolved noticeably over the years on the question of how impact is to be assessed. In *Law*, the Court famously "turned towards dignity" to distinguish permissible from impermissible distinctions:[212] differential treatment is discrimi-

205. *Id.* at para. 82 (L'Heureux-Dubé, J., dissenting). For further analysis of Judge L'Heureux-Dubé's opinion from the perspective of stereotyping, see COOK & CUSACK, *supra* note 13.

206. *Ewanchuk*, [1999] 1 S.C.R. 330, para. 87 (L'Heureux-Dubé, J., dissenting).

207. *Id.* at para. 93.

208. Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, paras. 25–34 (Can.). For discussion, see Moran, *supra* note 173.

209. *See, e.g*, Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9, [2009] 1 S.C.R. 222, para. 193 (2009); Withler v. Canada, 2011 SCC 12, [2011] 1 S.C.R. 396, para. 37 (Can.)

210. *Andrews*, [1989] 1 S.C.R. 143, para. 26.

211. *Withler*, 2011 SCC 12, para. 37.

212. *Cf.* Fay Faraday, Margaret Denike & M. Kate Stephenson, *In Pursuit of Substantive Equality*, *in* MAKING EQUALITY RIGHTS REAL, *supra* note 184, at 9, 15 (ascribing the phrase to Denise Réaume). On the Canadian Supreme Court's turn to

natory, the Court held, when it demeans a person's dignity. In order to assess whether a person's dignity is demeaned, the Court proposed four contextual factors in *Law:*

1) preexisting disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or claimant group;
2) degree of correspondence between the "ground on which the claim is based and the actual need, capacity or circumstances of the applicant";[213]
3) whether the law or program has an ameliorative purpose or effect; and
4) the nature of the interest affected.[214]

Although the dignity test received a lot of criticism from academic circles—which the Court explicitly acknowledged in *R. v. Kapp*[215]—the four *Law* factors have been used ever since.

In *Kapp*, the Court proposed to interpret these four contextual factors as going to the question of whether the claimant suffered disadvantage or stereotyping, "rather than to the *Law* question of whether the claimant's dignity has been demeaned."[216] The Court explained:

> The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2).[217]

So, according to the Supreme Court, the "correspondence factor"[218] (factor number two) deals with stereotyping.[219] The Court confirmed this in *Withler v. Canada* (2011), a case concerning widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death: "Where the claim is that a

dignity, see generally Denise G. Réaume, *Discrimination and Dignity*, 63 LA. L. REV. 1 (2003).

213. Faraday, Denike & Stephenson, *supra* note 212, at 15.

214. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, paras. 72–75 (Can.).

215. R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 22 (Can.).

216. Sophia Moreau, R. v. Kapp: *New Directions for Section 15*, 40 OTTAWA L. REV. 283, para. 16 (2008–2009).

217. *Kapp*, 2008 SCC 41, para. 23.

218. *R. v. Kapp* defines this factor as the "degree of correspondence between the differential treatment and the claimant group's reality." *Id.* at para. 19 (summarizing the *Law* case).

219. *See also* Quebec (Att'oy Gen.) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61, paras. 203, 206 (Can.).

law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances."[220] If there is no such correspondence, the Court considers the stereotype invidious.

The third factor—whether the law or program has an ameliorative purpose or effect—is also interesting in the context of the topic of this Article. A significant part of the Supreme Court's Section 15 equality jurisprudence concerns ameliorative measures. The Canadian Charter explicitly allows for affirmative action in Section 15(2).[221] The relationship between Sections 15(1) and 15(2) has been intensively debated both by the Court itself[222] and by academic commentators.[223] In *R. v. Kapp*, the Court held that Section 15(1) is aimed at *preventing* discrimination and that Section 15(2) is aimed at *enabling* governments to proactively *combat* discrimination.[224] If the government can demonstrate that a measure meets the criteria of Section 15(2), then this measure is insulated from challenges under Section 15(1).[225]

Remarkably, the Court's approach to stereotypes under Section 15(2) is very different from its approach under Section 15(1): when a stereotype is deployed for a "good" purpose, the requirement of "fit" (which is of such paramount importance under Section 15(1)) is interpreted leniently.[226] This can be deduced from several of the Court's remarks in the *Kapp* case, notably that "[n]ot all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination"[227] and "[t]he fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members."[228] Ameliorative measures can suffer from both over- and under-inclusiveness,[229] but this does not seem to be of much concern to the Court. If the authorities employ a statistical stereotype for benign purposes, the Court will be extremely lenient. Perhaps not surprisingly, this confirms that the Canadian Supreme Court's approach to benign/good stereotyping is the opposite of the U.S.

220. Withler v. Canada, 2011 SCC 12, [2011] 1 S.C.R. 396, para. 38 (Can.).
221. *See supra* note 176.
222. *Kapp*, 2008 SCC 41.
223. *See, e.g.*, Vanita Goela, *A Proposed Transjudicial Approach to s. 15(2) Charter Adjudication*, 32 DALHOUSIE L.J. 109 (2009); Luc B. Tremblay, *Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm*, 60 AM. J. COMP. L. 181 (2012).
224. *Kapp*, 2008 SCC 41, para. 37.
225. *Id.* at paras. 37–41; *see also* Moreau, *supra* note 216.
226. Some small degree of fit is still required, however: see *Kapp*, 2008 SCC 41, para. 60.
227. *Id.* at para. 55.
228. *Id.* at para. 59.
229. Goela, *supra* note 223, at 124–29.

Supreme Court's approach. It is, in fact, much more in line with the ECtHR's views on stereotypes that serve a benevolent purpose.[230]

D. Critiques of the Canadian Anti-Stereotyping Doctrine

There are several issues regarding the Canadian jurisprudence that are particularly relevant in the ECtHR context. To start, there are three problems with the Canadian legal reasoning that the ECtHR should take care not to replicate. In the first place, the definition of stereotypes from the *Law* judgment is misconceived.[231] In *Law* the Supreme Court refers to stereotypes as "misconceptions," but as discussed above, stereotypes are not necessarily misconceptions. Stereotypes can be statistically accurate or prescriptive (as the U.S. case law acknowledges) and, moreover, to a certain extent, stereotypes can fulfill useful functions in human interaction (as psychologists have established).[232] In other words, the Supreme Court unduly narrows the concept.

The second problem is that by associating stereotyping exclusively with the second of the four *Law*-factors, namely the correspondence factor, the Supreme Court in effect reduces the inquiry into stereotypes to a question of accuracy or *fit*. This does not work well, because it takes more than this to determine whether a stereotype is invidious, as the work of John Hart Ely, Frederick Schauer, and others—as well as the U.S. experience with statistical stereotypes—has shown.[233] The Strasbourg Court can, however, rather easily avoid this mistake by using all four *Law*-factors to determine whether the application of a stereotype is harmful in a given situation, not just the second factor of fit. Part IV will elaborate on this suggestion.

The third concern is related. Since *Law*, the Supreme Court's equality analysis has become very formal and abstracted from the individual claimant. This is because the correspondence factor has become the dominant one in the Court's reasoning,[234] at the expense of the other contextual factors such as preexisting disadvantage.[235] The emphasis on the second *Law*-factor, so the argument runs, directs the Supreme Court's Section 15 analysis to the "reasonableness of government policy choices" instead of to the effects of the impugned

230. *See supra* Part I.C and *infra* Part IV.A.
231. *See supra* text accompanying note 193.
232. *See supra* text accompanying notes 7–9.
233. *See supra* Part II.C.
234. For an empirical overview of how the Court has analyzed the four *Law* factors, see Bruce Ryder, Cidalia Faria & Emily Lawrence, *What's* Law *Good For? An Empirical Overview of Charter Equality Rights Decisions*, 24 SUP. CT. L. REV. 103, 121–22 (2004) (Can.).
235. The Court itself acknowledged this criticism in Quebec (Att'y Gen.) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61, para. 206 (Can).

action on disadvantaged groups.[236] In other words, the claimants disappear from the picture, and in their place, the Court puts policy analysis.[237] Thus, in *Gosselin* the majority but slightly remarked on the extreme stress and hardship that Louise Gosselin had to endure because she did not qualify for social assistance and was destitute. The majority did not mention the fact that she tried to commit suicide or that she had been forced to exchange sex for food and shelter in order to survive.[238] Rather, the majority elaborated on the government's purpose in enacting the benefits scheme that restricted assistance to adults over thirty, and remarked that the legislator is entitled to enact laws on the basis of "everyday experience and common sense."[239] Largely ignoring the perspective of the claimant, the Court took the perspective of the legislator and assessed whether it was reasonable.[240] The ECtHR can avoid this problem by carrying out a careful proportionality analysis that takes both the applicant's and the state's perspectives into account.

Finally, it appears that the Supreme Court of Canada has difficulty recognizing stereotypes, especially when they are "imposed for the claimant's 'own good.'"[241] Margot Young has suggested that the judiciary cannot be trusted to "smoke out" stereotypes. Where "systemic discrimination is the norm," she writes, "it is hard to pick out stereotyping as false."[242] The Supreme Court may especially have a hard time recognizing harmful stereotypes when these relate to situations that are far removed from the privileged world of the judges themselves.[243] Young's point is well taken.[244] Particularly when stereotypes are so deeply entrenched that they seem like "common sense," they are difficult to detect by judges. This is a challenge that, inevitably, the ECtHR must face as well. The Canadian experience should put the ECtHR on its guard against too easily accepting stereotypes that accord with the judges' own preconceptions and views of the world.

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236. McIntyre, *supra* note 242, at 96.

237. I thank David Schneiderman for drawing my attention to this problem.

238. Women's Court of Canada, *Gosselin v. Québec (Attorney General)*, 18 CAN. J. WOMEN & L. 193, 197, 212 (2006).

239. Gosselin v. Québec, 2002 SCC 84, [2002] 4 S.C.R. 429, para. 56 (Can.).

240. Sheila McIntyre, *Deference and Dominance: Equality without Substance*, *in* DIMINISHING RETURNS, *supra* note 173, at 95. This is a familiar problem of anti-discrimination law, which Alan Freeman diagnosed as far back as 1978. *See* Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Overview of the Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

241. Brodsy & Day, *supra* note 184, at 327.

242. Young, *supra* note 11, at 207. *See similarly* McIntyre, *supra* note 240, at 104–105.

243. *Id. See also* David Schneiderman, *Universality vs. Particularity: Litigating Middle Class Values under Section 15*, 33 SUP. CT. L. REV. 367 (2006) (Can.).

244. *See also* Timmer, *supra* note 13, at 720.

IV. What Strasbourg Can Borrow From the Other Side of the Atlantic

This Part will highlight the positive lessons from both the American and Canadian jurisprudence, and on this basis make recommendations for the ECtHR.

A. *Preliminary Note on How the Tensions Between the U.S. and Canadian Equal Protection Doctrines Impact Borrowing by Strasbourg*

There are deep tensions between American and Canadian equal protection law.[245] Indeed, in the Canadian legal imagination, U.S. equal protection law has repeatedly figured as an "anti-model."[246] The Canadian concept of equality is often held to be "substantive," whereas American equality is regularly characterized as "formal."[247] In this Article, one element of difference between these two equal protection doctrines has surfaced in particular, namely that the Supreme Court of Canada is much more tolerant of protective measures and positive discrimination than is the U.S. Supreme Court. This raises the question of how that affects the suggested borrowing: can the Strasbourg Court productively borrow from two such widely different equal protection doctrines?

On a methodological level it bears emphasizing that it is not the purpose of this Article to reconcile these tensions. Rather, the aim is to select the features of both the American and the Canadian approaches to stereotyping that are most likely to benefit the equality analysis of the Strasbourg Court.[248] As was explained in the Introduction, this Article takes the position that the Strasbourg Court should develop a more transformative equality analysis, meaning that it should name, contest, and seek to transform the root-causes of inequality and discrimination. It is submitted that the Strasbourg Court can borrow from both Supreme Courts without conceptual inconsistency if it takes care to appropriate only those elements of their legal reasoning that have transformative potential. What follows from the analyses of Parts II and III is that—despite their weaknesses—both the American and Canadian case law contain seeds of a

245. These tensions have been extensively discussed in the scholarly literature. *See, e.g.*, Roozbeh (Rudy) B. Baker, *Balancing Competing Priorities: Affirmative Action in the U.S. and Canada*, 18 Transnat'l L. & Contemp. Probs. 527 (2009); Moran, *supra* note 173; Stephen F. Ross, Charter *Insights for American Equality Jurisprudence*, 21 Windsor Y.B. Access Just. 227 (2002).

246. Moran, *supra* note 173, at 71.

247. *See, e.g.*, *id.*

248. In comparative legal scholarship, this is sometimes referred to as *bricolage*—borrowing from materials and concepts that are readily "at hand." Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1286 (1999). *See also* Bruno de Witte, *New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance*, 60 Am. J. Comp. L. 49 (2012).

transformative approach to stereotypes. The U.S. Supreme Court is especially strong in naming the different forms of stereotyping (with a special emphasis on role-types) and in uncovering the invidious circular connection between discrimination and stereotypes. The Canadian Supreme Court, on the other hand, has richly elaborated on the elements of a contextual analysis. The next sections will discuss how the Strasbourg Court can benefit from these insights.[249]

Returning to the question of how the differences between the U.S. and Canadian equal protection doctrines impact any potential borrowing, it should be noted that the Supreme Court of Canada is more likely than its American counterpart to approve of stereotyping that forms the basis for ameliorative measures. This means that where the two Supreme Courts diverge is in their *assessment of the invidiousness* of stereotypes. Specifically, the American Supreme Court is inclined to consider protective stereotyping invidious, whereas in the Canadian jurisprudence, it depends on the impact of such stereotyping. The question in Canada then becomes whether the impugned stereotyping actually disadvantages a vulnerable or protected group.

The difficulty with this approach lies in the fact that when stereotyping occurs to improve the position of a disadvantaged group, the invidiousness of such stereotyping is usually ambiguous. *Andrle v. Czech Republic* (2011) forms a good illustration of this ambiguity.[250] This case concerned the Czech pension scheme, which assigns different pensionable ages for men and women. In the Czech Republic, women with children are entitled to an earlier retirement than men, depending on the number of children they have raised. The scheme leaves no room for individual assessments: even when, in a concrete case, it was the father who took care of the family, he will not be entitled to an earlier pension. The Czech government argued that this rule was created under the former Communist regime, when women were expected to work full-time *and* be responsible for the household, thus carrying a heavy burden.[251] The government claimed that "the differentiated pensionable age for women depending on the number of children raised would continue to be justified until social conditions changed enough for women to cease to be disadvantaged as a consequence of the existing family model."[252] The ECtHR agreed with the government and did not invalidate the pension rule under the prohibition of discrimination, because:

249. *See infra* Parts IV.B–D.
250. Andrle v. Czech Republic, App. No. 6268/08, Feb. 17, 2011 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103548.
251. *Id.* ¶ 35.
252. *Id.* ¶ 37.

changes in perceptions of the roles of the sexes are by their nature gradual . . . [T]he State cannot be criticised for progressively modifying its pension system to reflect these gradual changes . . . and for not having pushed for complete equalisation at a faster pace . . . [T]he Court finds that the original aim of the differentiated pensionable ages based on the number of children women raised was to compensate for the factual inequality between men and women . . . [T]his approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women."[253]

Obviously, the stereotype at issue in *Andrle* is that women are responsible for child care. In this instance the application of this stereotype is ambiguous because the pension scheme comparatively benefited women—the disadvantaged group. In that sense, the effect of this instance of stereotyping can be said to be positive. On the other hand, the gender-role at issue is precisely what has cabined women so long in a disadvantaged position. The Czech government—and subsequently the Strasbourg Court—reinforced the gender role-type by leaving the pension scheme as it is.

The problem with *Andrle* (and many cases like it)[254] is the Strasbourg Court's legal reasoning. Precisely because the stereotyping is ambiguous, the verdict—no discrimination—is not per se problematic. But the Court did not properly explain what was at stake in this case: it did not name the stereotype and its harm. It did not indicate that the damage of the Czech pension scheme is that it perpetuates stereotypes that have historically ensured women's subordinated position. Nor did it explain that these kinds of benefits schemes encourage fathers and mothers to assume traditional roles when it comes to the work–family balance. Moreover, the Czech government had argued in *Andrle* that "changes in the organisation of family life were evolving only very slowly in the Czech Republic."[255] The government suggested that it played no role in either changing or reinforcing gender role-types, and that its laws were only a reaction to social circumstances, instead of a shaping force in society. The government thus basically denied that it could have a catalytic role in changing traditional stereotypes. The Strasbourg Court erred in going along with this argument.

What follows from the ambiguousness of this kind of well-meant stereotyping is that the Strasbourg Court cannot productively look to the U.S. or Canadian Supreme Courts to see how it should decide

253. *Id.* ¶¶ 58, 60.
254. *See, e.g.*, Stec v. United Kingdom (GC), App. No. 65731/01, 2006-VI Eur. Ct. H.R. 131, ¶¶ 62, 64 (2006).
255. *Andrle*, App. No. 6268/08, ¶ 38.

cases that concern protective or ameliorative measures. The Strasbourg Court will have to decide on the invidiousness of stereotypes on a case by case basis. The point is, however, that the ECtHR can and should gain insights from across the Atlantic on how better to address stereotyping in its legal reasoning.

B. *Stereotypes Take Different Shapes; Statistical and Prescriptive Stereotypes Can Also Be Invidious*

The first transatlantic message for the ECtHR is that stereotypes come in several forms. This Article has shown that the American jurisprudence contains a fuller account of these forms than does the Canadian jurisprudence. The U.S. Supreme Court has recognized role-typing, false, statistical, and prescriptive stereotypes.[256] So far, the ECtHR has only acknowledged the first two of these four, the most prominent example of a role-typing case being *Konstantin Markin v. Russia*, and a good example of a false stereotyping case being *Aksu v. Turkey*.[257] This means that the ECtHR still lacks a strong record on the wrongs of statistical and prescriptive stereotypes—despite the fact that both these types have surfaced repeatedly in the Strasbourg case law. Examples of statistical stereotypes can be found in British cases that concern the unavailability of widow's benefits for widowers on the basis of the (statistically correct) assumption that older widows face particular financial hardship.[258] This is a statistical stereotype that is a result of a role-type, namely the male breadwinner model.[259] Prescriptive stereotypes, on the other hand, have surfaced, for example, in cases concerning abortion. The prescriptive stereotype "a (prospective) mother should sacrifice herself for her child" is at the core of several Polish abortion cases, such as *P. and S. v. Poland* (2012), in which the applicant—a fourteen-year-old girl who became pregnant as a result of rape—was told by several health care professionals that she should carry the pregnancy to term even though she did not want to.[260]

256. *See supra* Part II.B.

257. Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77; Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447. *See supra* Part I.B.

258. Runkee and White v. United Kingdom, App. Nos. 42949/98 & 53134/99, May 10, 2007, ¶ 37 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80478.

259. *See* similarly Abdulaziz, Cabales, and Balkandali v. United Kingdom, App. Nos. 9214/80, 9473/81 & 9474/81, 7 Eur. H.R. Rep. 471, ¶ 75 (1985) ("the Contracting States in this area laid particular stress on what they described as a statistical fact: men were more likely to seek work than women").

260. P. and S. v. Poland, App. No. 57375/08, Oct. 30, 2012 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114098. *See also* Tysiac v. Poland, App. No. 5410/03, Mar. 20, 2007 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812; R.R. v. Poland, App. No.

It is not necessary that the Strasbourg Court explicate, every time it is confronted with a stereotype, exactly what form the stereotype takes. What the Court should name is the *content* of a stereotype, not so much its form. In order to be able to do that, however, the Court should be aware that stereotypes come in different guises and that all forms of stereotype—including statistical and prescriptive ones—can be harmful.

C. *To Distinguish Whether a Stereotype Is Invidious Requires a Contextual Analysis*

What the ECtHR should take on board from the Canadian jurisprudence is the emphasis on contextual analysis. The Canadian approach to stereotyping is unduly formalistic because the Supreme Court associates the stereotype concept too strongly with the question of fit.[261] But in the wider Canadian equal protection doctrine there are certainly elements that can give the concept of stereotype a more transformative direction. Especially the four contextual factors of the *Law* case—preexisting disadvantage, fit/correspondence, ameliorative purpose, and the nature of the interest—are useful to distinguish acceptable from invidious stereotyping. All four, not just the correspondence factor, can help to determine whether or not the *impact* of a stereotype *on an applicant* is such that the Strasbourg Court should be suspicious of the stereotype. The words "impact on an applicant" are highlighted to emphasize what is important: the ECtHR should not, as the Canadian Supreme Court is prone to do, dilute the stereotyping enquiry into one-sided policy analysis.[262]

It is especially crucial to involve the first factor, preexisting disadvantage, in the analysis.[263] If a stereotype concerns a group that has historically suffered disadvantage, there is a strong likelihood that the stereotype in question is invidious. This emphasis on preexisting disadvantage should not be difficult for the ECtHR to adopt in stereotyping cases, as it accords well with the existing Strasbourg case law on "vulnerable groups."[264] In judgments concerning people living with HIV and people with a mental disability, for example, the Court has announced that it will carefully scrutinize restrictions on fundamental rights that are applied to groups which have "suffered

27617/04, May 26, 2011 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911.

261. *See supra* Part III.D.

262. *Id*.

263. *Cf.* Quebec (Att'y Gen.) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61, ¶ 176 (Can).

264. *See* Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emergent Concept in European Human Rights Convention Law*, 11 I•CON 1056 (2013).

considerable discrimination in the past."[265] "The reason for this approach," the Court has said, "is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and need."[266]

In light of all the criticism of the *Law* judgment and the Canadian Supreme Court's use of the four factors in its subsequent case law, this Article does not intend to glorify these factors. It is merely suggested that they can provide useful guidance for the ECtHR's inquiry into stereotypes; which factors will be helpful in a given situation will depend on the facts of the case.[267] In relatively easy cases, all contextual factors will point the same way. For example, in *Alajos Kiss v. Hungary*, the ECtHR case about the automatic disenfranchisement of people under guardianship, all factors would point towards the conclusion that the application of the stereotype that people who have been appointed a guardian are incapable of voting had a harmful effect on the people affected.[268] The people affected were mostly mentally disabled adults, who had historically suffered many disadvantages (factor one); the fit between the blanket disenfranchisement and the actual capacities of people under guardianship was very tenuous (factor two); the rule served no ameliorative purpose (factor three); and the interest affected was the applicant's ability to vote, which is a fundamental right that ensures full membership in society (factor four).

In the harder cases, however—notably those concerning ameliorative programs—the four contextual factors will not all point in the same direction. As was noted above, whether a stereotype is harmful is then ambiguous.[269] Examples include the ECtHR's social benefits cases that concern differential treatment on the ground of sex, such as *Andrle v. Czech Republic*[270] and *Runkee and White v. U.K.*, where the governments could argue that their scheme was devised so as to benefit women (the third contextual factor).[271] In these harder cases,

265. Alajos Kiss v. Hungary, App. No. 38832/06, May 20, 2010 ¶ 42 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98800; Kiyutin v. Russia, App. No. 2700/10, 2011-II Eur. Ct. H.R. 29, ¶ 63 (2011).

266. *Id.*

267. The Canadian Supreme Court itself also emphasizes that the question of which factors need to be canvassed depends on the nature of the case, and that flexibility is important in this respect. *See* Withler v. Canada, 2011 SCC 12, [2011] 1 S.C.R. 396, para. 66 (Can.).

268. *Alajos Kiss*, App. No. 38832/06.

269. *See supra* Part IV.A.

270. Andrle v. Czech Republic, App. No. 6268/08, Feb. 17, 2011 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103548. *See supra* Part IV.A.

271. Runkee and White, App. Nos. 42949/98 & 53134/99, May 10, 2007 (unpublished), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-

the ECtHR will have to balance the several contextual factors. In this respect, the ECtHR can draw on the case law of the Canadian Supreme Court, which has decided that when a stereotype is deployed for a "good" purpose, the requirement of fit (the second contextual factor) can be interpreted more leniently.

D. Stereotyping Is Connected to Discrimination in a Self-Reinforcing Circle

This Article has claimed that it is problematic that the ECtHR often fails to see stereotyping as a discrimination issue.[272] However, the precise connections and distinctions between stereotyping and discrimination are notoriously difficult to fathom. Indeed, social psychologists have analyzed these connections extensively.[273] Nevertheless, the U.S. Supreme Court has managed to create a rich account of the links between stereotyping and discrimination, of which the ECtHR would do well to take notice.

The U.S. Supreme Court has made clear that stereotyping and discrimination are connected in a self-reinforcing invidious cycle. In essence, that Court describes this circle in three steps: stereotypes can form a *manifestation* of discrimination, as well as a *rationalization* and a *cause* of discrimination. The Supreme Court's reasoning in *Hibbs* (quoted in Part II.C) exposes this cycle brilliantly.[274] First, stereotypes are manifested as discrimination. In the *Hibbs* case, the Court noted that there are differential leave-taking policies for male workers and female workers (employers often "discouraged [men] from taking leave");[275] this situation of discrimination is rationalized, or justified, by the idea that "women are mothers first, and workers second," and that the family is "the woman's domain."[276] These stereotypes, in turn, create further discrimination by "forc[ing] women to continue to assume the role of primary family caregiver, and foster[ing] employers' stereotypical views about women's commitment to work and their value as employees."[277] On a case-by-case basis this cycle may be difficult to detect, the Supreme Court noted.[278] But, through its reasoning in cases like *Hibbs*, the Court has succeeded in showing the structural nature of inequality—it has unveiled the *patterns* of discrimination that result from invidious stereotyping.

80478. See *supra* text accompanying notes 63–65. For more discussion of these social benefits cases, see Timmer, *supra* note 13, at 735–36.

272. *See supra* Part I.D.

273. *See, e.g.*, DOVIDIO ET AL., *supra* note 4; NELSON, *supra* note 7; SCHNEIDER, *supra* note 5, at 266–320.

274. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003). See *supra* text accompanying note 141.

275. *Id.* at 730–31, 736.

276. *Id.* at 736.

277. *Id.*

278. *Id.*

So far, the ECtHR has only recognized one part of the circle—namely, that stereotypes can be wrongfully used by the State as a rationalization (or in other words, a justification) of discrimination. *Konstantin Markin v. Russia* is, as discussed, the clearest instance where the ECtHR makes this point.[279] The Strasbourg Court has not yet seemed to acknowledge the other connections between stereotyping and discrimination, i.e., that stereotyping can also be a manifestation as well as a cause of (further) discrimination. Thus, in the *Markin* case, the self-sustaining cycle went as follows. The two major stereotypes on which the Russian Constitutional Court relied in *Markin* are that women do not play an important role in the military and that women have a special social role associated with motherhood.[280] To begin, the stereotype that women do not play major roles in the military is statistically correct: women only constitute approximately 10% in the Russian military and are extremely underrepresented in its leadership positions.[281] In the eyes of the government, this fact then justified giving parental leave to servicewomen but not servicemen (as giving it to servicemen would have had too much of an impact on the operational effectiveness of the military). This rule then forced servicewomen to assume care for their children and forced servicemen to continue working, which then had the effect of reinforcing the initial gender stereotypes.

The idea that stereotyping *causes* discrimination is especially important. As a human rights court, the ECtHR should not only treat the symptoms but also attack the disease. The Court should seek to weed out the roots of discrimination.

E. Two Ways of Using Article 14 ECHR and Integrating the Margin of Appreciation

Because of this invidious cycle, the Strasbourg Court should consistently frame stereotyping as an Article 14 issue. This entails that the Court recognize that stereotyping falls within the scope of Article 14.[282] Subsequently, the Court will be faced with two questions: at which point in its analysis should the Court assess the invidiousness of stereotypes, and how does the margin of appreciation fit into the analysis? These questions are interrelated.

There are two alternative routes that the Strasbourg Court could take in order to integrate an anti-stereotyping approach into its legal analysis. The first option is for the ECtHR to assess the invidiousness of stereotypes under the *scope* of Article 14 (in conjunction with Arti-

279. Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77, ¶ 143. *See supra* Part I.B.

280. *Id.* ¶ 34.

281. Jennifer G. Mathers, *Russia's Women Soldiers in the Twenty-First Century*, 1 MINERVA J. WOMEN & WAR 8 (2007).

282. *See supra* Part I.D.

cle 8 or another Convention provision). As this Article has argued, the ECtHR could make this assessment on the basis of the four contextual factors from the Canadian *Law* case.[283] Up to this point, this has been the Canadian route. In the event that the ECtHR determines that a stereotype is invidious, it should then narrow the margin of appreciation in its analysis of justifications. This is where this route diverges from the Canadian model: the Canadian Supreme Court rarely proceeds to inquire whether a Section 15 violation can be justified.[284] In other words, practically the whole of the Canadian analysis occurs under the scope of the right to equality.

The ECtHR's second option would be to assess the invidiousness of stereotypes during the second stage of the analysis, as part of the consideration of *proportionality*. The four *Law* factors (preexisting disadvantage, fit/correspondence, ameliorative purpose, and the nature of the interest) lend themselves well to the analysis of proportionality in the strict sense, namely balancing.[285] On one side of the balance, the ECtHR could assess what kind of impact a stereotype has on the applicant and her group, and on the other side the Court could weigh the countervailing public interests. As long as the Court makes a careful analysis of what is on the applicant's side of the balance—in other words, a careful analysis of the impact of a stereotype—it could apply the margin of appreciation doctrine as usual (insofar as there is a "usual" when it comes to this doctrine).

Either of these routes could deliver fine anti-stereotyping reasoning. The second route, where the crux of the stereotyping assessment would fall under the proportionality analysis, is probably more palatable to the Strasbourg Court, given its habitual emphasis on proportionality. The important point is for the ECtHR to recognize that stereotyping gives rise to an Article 14 claim and then to examine stereotypes and their invidiousness carefully.

Conclusion

Not all stereotypes are bad.[286] Moreover, we cannot completely deny ourselves, or the legislator, the use of generalizations about groups of people. As a result, it is hard to develop a proper legal response to stereotyping. This comparative legal analysis has shown

283. Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 (Can.).

284. Section 1 of the Canadian Charter does provide for the possibility of reasonable limitations on the rights set forth in the Charter. The Supreme Court has been extensively criticized for not using Section 1 in equality cases, but instead doing all of the justifications analysis under Section 15. *See, e.g.*, McIntyre, *supra* note 236; Moreau, *supra* note 184, at 425–30.

285. *See generally*, Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 340–70 (2012).

286. *Cf.* Schneider, *supra* note 5, at 19; Suk, *supra* note 11.

that the ECtHR can productively borrow from both the American and the Canadian Supreme Courts in this respect. At a minimum, a proper legal response requires that courts name stereotypes well and carefully examine their harm. At its best, anti-stereotyping reasoning exposes and targets the often hidden structures of inequality and discrimination. This is where the stereotyping concept can have real added value for the Strasbourg Court. American and Canadian equal protection law teaches the Strasbourg Court that stereotyping and discrimination are joined together in a cycle that sustains itself. That is to say, stereotypes can be a manifestation of discrimination, as well as a rationalization and a cause of (further) discrimination. The goal of addressing stereotypes through law is to break that circle open. The Strasbourg Court is not there yet. So far it has only recognized one part of the circle, namely that stereotypes are (often) misused to justify discrimination.

The comparative analysis has also shown, however, that both the American and the Canadian jurisprudence have their weaknesses. Notably, both countries' Supreme Courts sometimes equate stereotypes with unfair generalizations. The ECtHR should not copy such sloppy legal reasoning. Stereotypes can indeed be inaccurate or negative, but they can also be statistically correct, or prescriptive. When stereotypes are conceived of too narrowly (as only raising issues of accuracy), the concept loses its ability to advance transformative equality.

To conclude, the three courts that are examined in this Article all struggle and sometimes fail to formulate an appropriate response to stereotyping. The recent surge of attention paid by the Grand Chamber to stereotypes in the cases of *Markin* and *Aksu* accordingly presents the ECtHR with an opportunity.[287] Building on these cases and on the jurisprudence from the United States and Canada, the Strasbourg Court can take up the stereotyping concept and show the way forward. What started as borrowing might then turn into cross-fertilization.[288] Now is the time for the Strasbourg Court to step up to the challenge of conceptualizing equality and discrimination more meaningfully.

287. Konstantin Markin v. Russia (GC), App. No. 30078/06, 2012-III Eur. Ct. H.R. 77; Aksu v. Turkey (GC), App. Nos. 4149/04 & 41029/04, 2012-I Eur. Ct. H.R. 447.

288. Provided of course that the U.S. and Canadian Supreme Courts are open to this; in the case of the U.S. Supreme Court, this is doubtful. *See, e.g.*, Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 I•CON 519 (2005).