(Re)Producing Nation: Race, Gender, Sexuality, The Sovereign and the Living Constitution

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Abstract

This paper touches on some of the key themes of the author's dissertation project. It discusses identity construction in constitutional discrimination claims and the possibility of creating an anti-subordination framework from fragments of the existing Canadian and American equality jurisprudence.

Résumé

Cet article touche sur quelques thèmes clés du projet de dissertation de l'auteure. Il discute de la construction de l'identité dans les allégations de discrimination constitutionnelle et la possibilité de créer un cadre anti-subordination des fragments des jurisprudences canadiennes et américaines existantes sur l'égalité.

Introduction

My dissertation investigates the ways that both the Canadian and American Constitutions use a mechanics of discipline in order to construct, (re)produce and maintain the cohesion of the social body. Those who would pollute the purity of the national narrative are contained through the regulation of ability, sexuality and race; those who would stop the reproduction of its members are disciplined through state control of abortion, sexuality and birth control. Constitutional equality claims establish the meaning of discrimination and thereby the borders of intelligibility, thus playing a pivotal role in creating the normative bodies that make up the nation. This paper will touch on some of the key themes of my dissertation project and describe the possibility of constructing an anti-subordination framework from elements of the existing equality jurisprudence of both jurisdictions.

The statement "I have been discriminated against because I am [insert identity category here]" implies that the discrimination is located inside my body. Rephrased: "Because I am [insert identity category here], I have been discriminated against" implies a certain causal relationship between what my body is and the discrimination that occurred. If it is on the basis of my identity that discrimination occurs, it is on the basis of something within me that the discrimination occurs. This, however, is never the case. It is not what a person is but rather what the person has been made to be that is the essence of discrimination. Part of my dissertation project is to flesh out an alternative analytical framework from those that are currently in use at the Supreme Courts of Canada and the United States (US) in constitutional equality claims. This framework takes the discrimination out of the claimant's body and relocates it within the

actions that constitute discrimination, thereby shifting the focus from the noun back on to the verb. This requires reframing discrimination as a process that objectifies people. It also requires an interrogation of how this objectification in turn plays out in the courts by making claimants only intelligible according to the very criteria that objectified them in the first place.

Ian Haney López argues that the United States Supreme Court is engaging in "a principled refusal to recognize race in public life" (López 2006, 48). This colourblind jurisprudence reproduces racial inequality not through the application of "a theory of racial inferiority" but through an analysis of race "as an abstract meaningless category" (López 2006, 48). In her dissent in *Egan v. Canada*, Canadian Supreme Court Justice (as she was then) Claire L'Heureux-Dubé forewarned that an analysis that focuses on creating abstract categories can ultimately end up bereft of a substantive component that considers the most important questions: what are the effects of the policy and are they discriminatory (*Egan* 1995, paragraphs 52-54)? At the outset, L'Heureux-Dubé J.'s concern may appear to endorse a certain type of liberal neutrality that could foster the erasures and exclusions that I discuss. On the surface it might seem as though she is presenting a *Canadian Charter of Rights and Freedoms*[1] version of the type of jurisprudence that López is criticizing at the US Supreme Court. However, when considering some of the notable regressions at the Supreme Court of Canada[2] it becomes apparent that focusing too much on identity can create the same preservation of inequality that is the result of failing to consider the power relations that emerge from historically constructed meanings attached to identity.

Angela Harris describes how this phenomenon plays out in her account of the similarities between Jorge Luis Borges' fictional character Funes the Memorious[3] and the statutory construction of "We, the People." Funes the Memorious inhabits a consciousness that denies generalities to the point where community and commonality become impossible. The metanarrative "We, the People" creates a social reality that denies particularities to the degree that difference is erased. A complete denial of generalities has the same result as a complete denial of particularities. The erasure of collective or relational experiences ignores the possibilities for collective or group identity formation and identity formation through processes of self-identification in relation to others. The denial of particularities erases systemic forms of group subordination, systemic exclusion and the existence of unequal power relations between and among people. Denying the existence of differences and the denial of identity-based collectivities creates erasures within the larger singular collective of "We, the People" (Harris 1991).

López describes race as being a "magic word: say it and race suddenly springs into being..." (López 2006, 49). This is what Michel Foucault is getting at through his methodology outlined in the *Archeology of Knowledge* (Foucault 1972) and it provides a useful framework for deconstructing the ways in which the *Canadian Charter* cases foster the same preservation of inequality as Funes the Memorious's denial of generalities. It also provides a way of deconstructing the colourblindness that is a result of the narrative of "We, the People" present in many of the US cases that López is referring to. The narrative of "We, the People," however, is by no means limited to the US context nor is Funes the Memorious limited to the Canadian context. Although not explicitly written in the Canadian Constitution, the metaphor: "We, the people," can be extended to the Canadian context. The Canadian Supreme Court is also engaged in constructing a singular social body through the repetition of the phrase: "those members of Canadian society equally deserving of concern, respect and consideration" (*Andrews* 1989, 171; *Egan* 1995, paras 52-54; *Law* 1999, para. 42; *Kapp* 2008, para. 15). This occurs throughout the equality jurisprudence surveyed in my dissertation project. The difference between the jurisdictions is how membership in the singular polity is structured by the Court.

Traces of "We, the People" and Funes the Memorious can be seen in all of the cases that are under consideration here and they can all be deconstructed according

to Foucault's methodology. The construction of the democratic polity as a singular group to the exclusion and/or social marginalization of those identified as other is a very important feature of all of these cases. The consideration of identity becomes the determinant of the degrees of citizenship to which the claimant(s) are entitled as a result of their respective claims. Within the context of the equality jurisprudence of both Canada and the US, the over-determination of particularities that Harris uses Funes the Memorious to illustrate becomes the yardstick for membership in the underdetermined collectivity of "We, the People."

According to Foucault, discourse does not only reveal and describe: it creates the objects of which it speaks (Foucault 1972, 49). The objects of discourse for my purposes are the types of discrimination, the democratic social body, and the bodies of the people being discriminated against. What Foucault is concerned with can be revealed through an analysis of the discursive strategies used by the courts and the outcomes generated in Supreme Court decisions. Foucault is clear about his intention to avoid a discussion of subtext or revealing the unspoken. However, in describing what is in the process of becoming through discourse it is also possible to describe what is not possible or intelligible as a result of a set of rules that can only see what they themselves create. These are the effects of both the application of the analytical frameworks and the respective identity constructions created by the Supreme Courts in each jurisdiction.

The discursive strategies used by the courts reveal the conditions of intelligibility within the legal archive of constitutional law. The US Supreme Court's colourblind jurisprudence creates what López describes as an "ethereal understanding of race" that "disconnects race from social practices of group conflict and subordination" (López 2006, 48). This can also be said of any number of the other identity categories that come into being in discrimination claims. It can also be said of intersectional identities and it can be seen in the Canadian context. López's position, however, is that there is an alternative interpretation that is rooted in an anti-subordination framework constructed by the US Supreme Court. *Hernández v. Texas*, *Brown v. Board of Education*, and *Perez v. Sharp* taken together may reveal a different set of discursive strategies. I would also include Justice Kennedy's opinion in *Lawrence v. Texas* as a set of discursive moves that might also contribute to this framework. This framework makes it possible to understand the objects of discourse created in the courts differently. In this paper I discuss aspects of these four cases and include elements of the Canadian jurisprudence taken from *Andrews v. Law Society of BC* and *Egan v. Canada*.

Registers of the Ban and Degrees of Citizenship: Creating "We, the People"

The legislation under review in constitutional discrimination claims is generally engaged in the subjection of people to various registers of the ban by relieving them of degrees of citizenship. The figure of Roman law, *homo sacer*, the one who cannot be offered in ritual sacrifice but can be killed and it will not be called a homicide, factors into this picture insofar as *homo sacer* embodies the bare life and is the result of the epistemic violence inherent in the legal form (Agamben 1998). The bare life is marked by basic survival and basic subsistence, a life subject to the extreme register of the ban having no claim to legal rights. There are, however, degrees of the ban and thereby a variety of ways that traces of *homo sacer* make an appearance in constitutional equality claims.

Giorgio Agamben begins his investigation of *homo sacer* with a discussion of the entry of the bare life into the sphere where one can engage in living the *bios politikos* (Agamben 1998). For both Plato and Aristotle, *zoe*, the bare life, expresses the fact of living driven by biological necessity, and *bios* reflects a qualified, public or political life (Agamben 1998, 1). Within this framework the law has the power to define who is to become bare life and to regulate those who are a part of the political or qualified life. But, the bare life and the political life only come into being through rights discourse and the discursive strategies used by the courts to create those

who lead these lives. The bodies of those who are part of "We, the People" of the American national narrative and those members of Canadian society "equally deserving of concern, respect and consideration" that make up the "We, the People" of Canadian context do not pre-exist their entry into the statist national narrative. Rather, they are constructed through rights discourse. Here, the law separates the political animals from the bare life. Those reduced to the bare life are both included in and excluded from the larger collective of "We, the People" existing both inside and outside the law in a relationship of simultaneity - insider alterity (Agamben 1998, 110).

Agamben further discusses how the exception becomes the norm through a prolonged suspension of the normative structure the exception is meant to reinforce. Here, Carl Schmitt's discussion of the state's power to create internal public enemies becomes particularly important. Schmitt's theory describes the state's attempt to achieve internal unity through the creation of an antagonistic other (Agamben 2005; Schmitt 1966). The purpose of the state is not only the capacity to use force against external enemies but to prevent civil war by ensuring that internal divisions never reach the capacity to engage in the political friend/enemy relation (Agamben 1998, 46-48; Schmitt 1966). Schmitt's theory, however, is dependent on the bodies of that declared enemy pre-existing the declaration as a natural group (Schmitt 1966). Because discourses create the objects of which they speak, following Foucault, I would argue that it is in the moment of the declaration that the enemy and the enemy's characteristics spring into being.

In order for legal norms to be valid, they must establish the normal situation as they lose their applicability in any abnormal situation (Agamben 1998, 46-47). However, just as Foucault theorizes that every moment of opposition to the norm silently reinforces it (Foucault 1990), the abnormal situation paradoxically serves as a reinforcement of the legal norm. Agamben discusses the US *Patriot Acts* as examples of not only the reification of Schmitt's category of the political in all its capacity (the construction of both internal and external enemies), but as mechanisms through which the sovereign invokes a permanent state of exception (Agamben 2005). The rule fails to prevent actions that under normal circumstances would be unacceptable (Agamben 2005). As such, *homo sacer* is replicated in the form of the sovereign. The sovereign may be equal before the law, subject to laws such as treason and the criminal law, but is also outside the law insofar as the sovereign is the one who has suspended the functional juridical apparatus.

The US Appellate Court decision, *Perez v. Sharp* and the British Columbia Court of Appeal's decision in *Andrews v. Law Society of British Columbia* are both illustrative. Although neither case represents the application of a state of exception, traces of *homo sacer* appear in both California Chief Justice Roger Traynor's 1948 opinion and former British Columbia Court of Appeals Judge Beverley McLachlin's 1986 decision. Traynor C.J. invokes national emergencies, the survival of the race and the figures of those who would be excluded from the sovereign "We, the People." McLachlin J.A. (as she was then) invokes "irrelevant personal characteristics" that become a justification for the internment of "enemy aliens in wartime" (*Andrews* 1986 as cited in *Andrews* 1989). *Homo Sacer* also makes an appearance at the Supreme Court of Canada in the 1989 *Andrews* decision when the "discrete and insular minorities" of the US jurisprudence spring into being and the Court reiterates McLachlin J.A.'s concerns about "enemy aliens" (*US v. Carolene Products Co*.1938 as cited in *Andrews* 1989).

Perez v. Sharp is a case recognizing that bans on interracial marriage violate the equality provisions of the *14th Amendment*. Traynor C.J.'s opinion explicitly recognizes the constructedness of racial categories, thereby rendering distinctions made on the basis of race, and in particular distinctions that rely on percentages of racial make-up, invalid and absurd. On the other hand, just as Traynor C.J. deconstructs race, he also invokes the word race as a surrogate for the sovereign in the form of "We, the people." He cites *Skinner v. Oklahoma*[4] stating: "Marriage and

procreation are fundamental to the very existence and survival of the race" (Perez 1948). "The race" simply stated can be interpreted as the human race or, alternatively, as that group of people that exists within the regulatory boundaries of the United States and in particular in California in 1948. Traynor C.J. then cites *Hirabayashi v. United States*, the Japanese internment case, in order to illustrate that in matters of national emergency race can be used as a means to contain an internal enemy although miscegenation does not constitute such an emergency. On the one hand, striking down the anti-miscegenation provisions of the statute allows a white woman, Andrea Perez, and a Black man, Sylvester Davis, to marry. On the other, race can be invoked by the Executive and Congress to intern Perez and Davis on that very basis if a national emergency were to be declared that implicated their simultaneously constructed and irrelevant, yet immutable-in-times-of-emergency, characteristics.

Andrews v. Law Society of BC is the case that fleshed out the meaning of the *Canadian Charter* equality provisions in terms of substantive equality - equality of results rather than equality of treatment. But looking beneath the success story of substantive equality is revealing. Mark David Andrews argued that the Canadian citizenship requirements for admission to practice law violated section 15 (1). Andrews was a white, Oxford educated, male lawyer who remained a British subject but was also a permanent resident of Canada. The Supreme Court of Canada established that s. 15 is designed to protect those "groups who suffer social, political and legal disadvantage in our society" (*Andrews* 1989). And, following the language of the US Supreme Court they decided that Andrews was a "discrete and insular minority" (*US v. Carolene* Products 1938, footnote 4). *Andrews* is revealing when juxtaposed against the US racial prerequisite cases. In these cases racialized people who were subject to social, legal and political disadvantages, such as segregation and racially biased jury selection, were considered exempt from the *14th Amendment* because they were white by law (López 1996). In the Supreme Court of Canada's decision in *Andrews* a white, Oxford educated, male lawyer was considered a "discrete and insular minority" suffering "social, political and legal disadvantage" (*Andrews* 1989). Furthermore, the *Andrews* Court then reiterated the opinion of McLachlin J.A. (as she was then): "discrimination not to be tolerated in peacetime" could include "the internment of enemy aliens..." (as cited in *Andrews*, 1989). This type of discrimination is what led to the interment of Japanese Canadians during the Second World War and it is the same justification for the production of *homo sacer* that appears in Traynor, C.J.'s 1948 opinion in *Perez*. Those Canadians equally deserving of concern, respect and consideration also spring into being for the first time under the *Canadian Charter* in *Andrews*.

In these cases, the norm is reinforced by the exceptional situation and the power of the law is reinforced through its capacity to invoke the ban. A heteronormative couple who can reproduce the race and a white man of privilege become the norm but the acceptable forms of discrimination during times of national emergency invoke the ban. In both the US and Canadian national stories of democracy "We, the People" are the sovereign. If "We, the People" are the sovereign and the sovereign is *homo sacer* in its capacity to invoke the state of exception, then everybody, including those excluded from the "We, the People," is always already simultaneously inside and outside the law. Is everyone *homo sacer*? Is the ban the normal and ubiquitous condition of life governed by the constitutional order of the democratic statist nation?[5] (Agamben 1998, 52-64; 2005). If it is and if everyone is *homo sacer*, what does this mean?

Within the statist nation there are different registers of the ban and thereby degrees of citizenship. These degrees of citizenship are not only designated through variations in official status such as refugee status, landed immigrant or permanent resident status, but they are also contingent on the characteristics that identify those who legally qualify as full citizens. In discrimination claims those who are recognized as citizens

and those who can avail of social citizenship rights can only exercise these rights to a limited degree depending on the legislation under review and on what is visible as a legal right within the rights discourse of each jurisdiction. In general, people inhabiting both jurisdictions can only exercise their rights to the extent that they can avoid the multiple forms of structural violence that may not be *de jure* condoned by the law as it exists on paper, but are *de facto* condoned through the absence of meaningful remedies and access to justice. If this is true, what does constitutional equality rights discourse have to offer?

Producing an Anti-Subordination Framework

Judith Butler argues that it is only through recognition by others that people become "socially viable beings" (Butler 2004, 2). Recognition becomes the site of power through which people are "differentially produced" (2004, 2 & 58). There exist "schemes of recognition" that can "undo" the person by both conferring and/or withholding recognition (Butler 2004). But, what does it mean to be undone through discourse? The bodies constructed through rights discourse are both subjects subjected and objects objectified. Through deconstruction discourse is privileged as that which constructs multiple realities. The rights discourses that are produced in the US and Canadian equality jurisprudence reify physical characteristics and grant degrees of citizenship status through the bodies that they create. These creations also depend on exclusions and silences. Here is where subjectivity and agency are possible yet constrained. Here is where an anti-subordination framework can be found within the fragments of the jurisprudence that already exists.

Meanings in those places where discourse is codified are constantly being reinterpreted and are thereby creating new content. The stability and consistency of *Stare Decisis*, the legal concept of precedent, becomes a fiction. Although no one can be emancipated from discourse, through radical invention the schemes of recognition that render one a socially or not socially viable being can be altered to expand the range of possibilities for better or worse. To withhold recognition is still a mode of recognition. Erasure still has presence and in the undoing something is being done. It is therefore not possible to become that for which there is no place in a given regime of truth. One will always be intelligible even if one is intelligible as an absence, an aberration or an anomaly. And one will always carry the traces of the presences and absences that preceded them.

The discursive strategies used by the courts not only police the borders of who is included in the polity but they (re)produce and reify single-axis categories of analysis through the bodies of claimants. In each case identity is under consideration in the contest over degrees of citizenship and the register of the ban. The courts construct and apply analytical frameworks to discrimination claims made under the constitutional equality provisions. These rubrics are the rules about how to interpret the rules. In the Canadian context one of the steps in the equality analysis requires the claimant to establish grounds of discrimination from the pre-existing list outlined in section 15 of the *Charter* or to establish analogous grounds. This list is as follows: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Sexual Orientation has been read into the *Charter* after *Egan v. Canada* and cases have also pleaded multiple grounds (Duclos 1993; Pothier 2001). But, as discussed earlier, an overemphasis on grounds can result in an over-determination of the claimant's body and thus detract from a consideration of the most important questions.

Dianne Pothier argues that grounds of discrimination are necessary to "focus attention on the real sources of discrimination" (Gilbert 2003, 13; Pothier 2001, 44). Nitya Duclos argues against a grounds approach because a focus on grounds ignores the structural and systemic causes of discrimination at the same time as it constructs the claimant as the problem (Duclos 1993, 47-48; Pothier 2001, 69-70). I follow Duclos and L'Heureux-Dubé J. insofar as their analyses focus on the community practices and relationships that are the sites

where recognition happens, where power is exercised and discrimination occurs (Duclos 1993; Gilbert 2003; L'Heureux-Dubé 1999). Although Pothier argues for a relational approach, my concern is that since she published her article in 2001, the grounds approach at the Supreme Court of Canada has produced some very problematic outcomes.[6] That said, when considering the equality jurisprudence from the US, it does not seem to matter whether there are grounds or not. The same processes of classification occur at the US Supreme Court without a grounds approach. Looking at *Kimberly Nixon v. Vancouver Rape Relief Society*, a case that did not make it to the Supreme Court of Canada but relies on grounds to the detriment of the claim, is illustrative.

Vancouver Rape Relief Society denied Kimberly Nixon the opportunity to train as a volunteer rape crisis counselor because she had not been a woman since birth. In 1995 Kimberly Nixon filed a complaint on the ground of sex discrimination. In the *Nixon* decisions, Kimberly Nixon's "biological and brain sex" became the focal points of the case (*Nixon* 2002, 2003; *Vancouver Rape Relief Society* 2004, 2005). To a large extent the over-determination of her body eclipsed a consideration of the discriminatory conduct and its effects. Kimberly Nixon was at one and the same time the subject of a claim and the object of legal discourse, inside and outside the law, standing as a representative of a series of classifications and categories that were reified and at times denied through her body. The grounds approach shifted the focus from the verb to the noun, transforming the claim into a contest over sex/gender taxonomy. This is precisely what L'Heureux-Dubé J. warned against in her dissent in *Egan*. It is not the grounds and how Kimberly Nixon's body fits into them that are what Pothier refers to as "the real sources" of the discrimination. It is, rather, the community practices, the policies they generated and the effects they had on Kimberly Nixon that are sources of the discrimination. These are by and large what were eclipsed through an over-emphasis on grounds in these decisions.

The importance of the *Nixon* decisions in the consideration of an anti-subordination framework is nothing new: identity categories are constructed and their use within the context of discrimination claims can be discriminatory in itself. The *Nixon v. Vancouver Rape Relief Society* decisions, when juxtaposed against *Perez v. Sharp*, discussed earlier, illustrate that although Traynor C. J. still manages to exclude people from the polity by invoking national emergencies, his use of a deconstructive methodology to strike down the racist sections of the statute is much more conducive to understanding the power dynamics of group subordination than the repressive attempt to categorize the claimants.

Emphasizing the social construction of categories alone, however, is not enough to garner an anti-subordination analysis (López 2006, 48-52). An analysis of the court's choice of evidence reveals that historiography is important. The choice between competing histories in *Lawrence v. Texas* is illustrative. Fortunately for John Lawrence and Tyron Garner, the recognition that taxonomies have histories won. As a result the remaining state sodomy laws that applied to conduct between consenting adults were invalidated.

United States Supreme Court Justice Antonin Scalia's dissent in *Lawrence* uses the history and traditions approach to outline a history and tradition of homophobia that would uphold sodomy laws in the US. In Scalia J.'s dissent the history and traditions argument was used to invoke an oppressive historiography as evidence to target same sex couples and justify ongoing subordination. This opinion would codify the denial of basic social citizenship rights to people included in the criminalized category homosexual. Fortunately, US Supreme Court Justice Anthony Kennedy, writing the majority opinion in *Lawrence*, cites a different history as part of his rationale to find sodomy laws discriminatory:

> The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century...Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual

activity more generally...far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century.

(*Lawrence* 2003)

The final two cases that I will consider here are *Hernandez v. Texas* and *Brown v. Board of Education*. These cases were both decided in 1954 within two weeks of one another. In *Hernandez* former US Supreme Court Chief Justice Earl Warren creates a framework that considers the effect(s) of legislation combined with community practices that can be demonstrated to perpetuate the subordination of, and thereby bring into existence, particular groups of people (*Hernandez* 1954). The issue in this case "was not classification, but hierarchy (López and Olivas 2008, 303)." *Hernandez* was not considered a race case because for legal purposes in 1954 in Texas, Mexican Americans were white and every party to this case relied on their whiteness to bolster their respective arguments. For example, the League of United Latin American Citizens (LULAC) agued that the segregation of Mexican Americans was inappropriate because they were white. The lower courts also used the legal classification of Mexican Americans as white to establish that the *14th Amendment* was not applicable (López 2006, 44). Warren C. J., however, offered a two-step analytical framework asking: 1) does the group exist as a "distinct class" and 2) was the "differential treatment" unreasonable (*Hernandez* 1954; López and Olivas 2008, 290)? Rather than trying to determine whether or not Mexican Americans constituted a racial group, Warren C.J. focused on evidence pointing to a history of group subordination in the community. In doing so, Warren C.J. produced an inquiry into how the group came into being under "social practices of group subordination (López and Olivas 2008, 290)."

López argues that *Hernandez* and *Brown* should be read together in order to establish race conscious remedies (López and Olivas 2008). Brown is widely held to be the landmark desegregation case in the US. But critics such as López and Olivas argue that without considering the decision in *Hernandez*, *Brown* read alone is more often than not misread. In *Brown I* the Court explicitly states: "[t]he most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States'" (*Brown I* 1954). Here is where interpretation can lead to an analysis that applies only to racial classifications and that if no such classifications exist in the legislation, discrimination cannot be found. In the converse situation every classification, including those in the interest of affirmative action, are rendered suspect (López and Olivas 2008). Although the meaningful integration of the public school system did not accelerate until after the *Civil Rights Act of 1964* was implemented, in *Brown II* the Warren Court articulated a remedy that required the expenditure of public resources (*Brown II* 1955).

Challenges to the current conditions of intelligibility across jurisdictions would require a framework that is capable of recognizing and naming discrimination what it is: subordination. An anti-subordination framework would combine the remedies found in *Brown II* with the community practices analysis found in *Hernandez*. It would include the deconstruction in *Sharp* and the historiography found in Kennedy J.'s opinion in *Lawrence v. Texas* . And finally, it would consider discrimination from the relational standpoint found in L'Heureux-Dubé J.'s dissent in *Egan* with the substantive equality found in *Andrews*.

Conclusion

Foucault argues: "history transforms documents into monuments" (Foucault 1972, 6). In the context of equality cases these monuments bring Constitutions to life. Traces of these stories, this cast of reified categories and historical characters, these truths, tests, presences in silence, denials and emergencies can be heard elsewhere in the respective equality jurisprudence of each jurisdiction. The use of specific phrases and citations combined with similar reasoning enables traces of all of these cases to bleed across time and geographic location. Using Foucault's methodology it is possible to identify them.

"We, the People" are the sovereign in the fantasy of democracy and the courts are the spaces where the state (re)produces the nation. The interpretation of the equality guarantees enshrined in the respective Constitutions under consideration here are at the nexus of power, discipline and sovereignty. If an anti-subordination framework could be put to work it cannot begin and end with only the consideration of the effects of the legislation or the extra-juridical practices of any given community. It must begin in the adjudication process itself.

Endnotes

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. See *Gosselin v. Quebec (Attorney General)* [2002] S.C.R. 429 (the overemphasis on age led to the conclusion that forcing people to live on under $200/month was an affirmation of the dignity of people under 30. They failed to consider gender when women were trading their sexuality for food and following through with unplanned and unwanted pregnacies); *Auton (Guardian a litem of) v. British Columbia A G* [2004] 3 S.C.R. 657 (One of the reasons the Court denied autistic children access to therapies was because they chose the wrong comparator group and thereby failed to establish the appropriate ground).
3. Funes the Memorious is a story where Borges fictionalizes himself and his meeting with Ireneo Funes. Funes is a person who cannot think in abstraction or make generalizations. He spends his days learning Latin, recounting descriptions of the houses that surround him and inventing artificial languages and counting systems that give every numeral up to 24,000 arbitrary names.
4. This was a Supreme Court case that held compulsory sterilization for criminals to be unconstitutional.
5. I am using Foucault's terminology rather than nation state.
6. See note 2.

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