Discrimination and Dignity

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INTRODUCTION

Canadian equality jurisprudence in the Charter era has been marked from the beginning by its rejection of a formal equality approach in favor of the pursuit of substantive equality. However, it has turned out to be easier to avoid a pure formal equality approach than to articulate the substance of substantive equality. If the guarantee of equality is to go beyond the Diceyan objective of ensuring that all those covered by the terms of a rule receive the benefit of inclusion, there must be criteria determining when statutory distinctions between persons are legitimate and when they are not. The development of these criteria presents not only significant conceptual difficulties but, perhaps more importantly, moral and political ones. Equality should not be an empty ideal, but if we expect the courts to supervise the various distributive tasks that occupy the modern state, how should they distribute benefits and burdens?

The right to equality is not like other constitutional rights. With the right to vote, to free expression, to a fair trial, or to freedom from unreasonable search, we can readily identify a human interest or

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2. Section 15(1) of the Charter provides that "[e]very 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." All rights in the Charter are subject to s. 1, which provides: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
cluster of interests that lies at the heart of the right which guides judicial interpretation of its contours. This is not to say that there is no controversy about the understanding and scope of these interests, but at least the participants in the debate are working from the same map. By contrast, it is not clear that we have any handle on what human interest underlies the right to equality. Without one, Dicey's pull is likely to be strong, and equality protections will do little more than correct glaring deviations from the terms of statutory rules themselves. Developing a conception of such an interest should help in formulating appropriate obligations to impose on government to secure that interest.

In this article, I examine the recent efforts of the Supreme Court of Canada to develop a substantive conception of equality through the invocation of the value of human dignity. The process of naming dignity as the touchstone of equality analysis has been laborious. The process of giving that concept some meaningful content stands as perhaps the most significant challenge facing the Court in the coming years. This turn toward dignity in Canadian equality jurisprudence has come in for a great deal of criticism. Dignity is said to be vague to the point of vacuous and, therefore, too easily useable to dress up decisions based on nothing more than conservative gut reaction or excessive deference to Parliament. Recent cases might be thought to bear out this criticism. There is no doubt that dignity can be used as an empty place-holder for other less presentable reasons for finding or refusing to find a violation of equality. But since I shall argue that some substantive interest or value must underpin s. 15 if it is to have any critical bite at all, the job of articulating that interest cannot be avoided. Although a great deal of work needs to be done in fleshing out a concept of dignity capable of filling this role, the Court is on the right track in latching onto dignity as the substantive concept informing equality rights. Rather than join the critics, I propose to work with what has already been said about what dignity means to see what constructive work it might do.


6. In analyzing the case law, I will take a somewhat broad brush approach—in particular, I will not do justice to the debate about the proper division of labor between s. 15 and s. 1 of the Charter. For purposes of this argument, I accept the trend in the case law toward doing at least some of the work of determining the limits of the right to equality within s. 15 rather than leaving it all to be done under
A. Putting the 'Substance' in Substantive Equality

The disappointing results of adjudication under the equal rights clause of the Canadian Bill of Rights led to a concerted push after 1982 and the enactment of the Charter of Rights and Freedoms to convince the Supreme Court to abandon a formal equality approach in favor of "substantive equality." But what exactly is the substance in substantive equality? To get a handle on this we must go back to the basics. Equality rights are a means of challenging the existing distribution of some benefit or burden. The point of a claim is to make an argument that some other principle of entitlement, wider in at least some respect than that used by the legislature, is the appropriate criterion for distribution of the benefit at issue. Every distribution requires the setting of criteria that govern that distribution. Defining criteria in a rule automatically gives rise to a form of equality—anyone who has not received the benefit but the rubric of determining what are the limits on rights demonstrably justifiable in a free and democratic society, the criteria provided by s. 1.

7. The Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, was an ordinary statute adopted by the federal government in 1960. Although the courts occasionally treated it as having quasi-constitutional status, the fact that it was not entrenched, combined with the conservatism of the bench, meant that it was often interpreted in a way that was extremely deferential toward Parliament. This was especially so with the equality provision, which guaranteed "equality before the law without discrimination on the basis of" various designated characteristics. The high water mark of this judicial conservatism was reached in the sex equality case A.G. Canada v. Lavell, [1974] S.C.R. 1349, in which the Supreme Court of Canada held that a provision of the Indian Act which deprived only Indian women of their status under the Act upon marriage to a non-Indian did not violate the Bill of Rights because the law applied equally to all those, Indian women, at whom it was directed. Five years later, the Court decided in Bliss v. A.G. Canada, [1979] 1 S.C.R. 183 that a provision of the Unemployment Insurance Act making regular sick leave benefits unavailable for work absences caused by pregnancy and confining pregnant women to more restrictive benefits did not deny equality before the law because it treated all "pregnant persons" alike. For a brief history of this case law, see Walter S. Tarnopolsky, The Equality Rights (Ss. 15, 27 and 28), in The Canadian Charter of Rights and Freedoms: Commentary 395 (Walter S. Tarnopolsky & Gérard A. Beaudoin eds., 1982); Beverley Baines, Women, Human Rights and the Constitution, in Women and the Constitution 31–63 (A. Doerr & M. Carrier eds. 1981).


9. For the sake of brevity, henceforth I will use "benefit" to refer to both benefits and burdens, since relief from a burden can be conceived of as a benefit.

10. Isaiah Berlin, Equality as an Ideal, in Justice and Social Policy 134–35 (Frederick A. Olafson ed., 1961) describes such a claim as pointing out the "unfairness" of the existing distribution, an argument grounded in the value of equality, as opposed to criticizing it for violating some other value, such as the promotion of virtue or happiness, not necessarily tending toward greater equality.
fulfills the criteria has not been treated equally. In this sense, equality is a side-effect or by-product of the proper application of any rule, whatever that rule is. The disappointment in the Canadian Bill of Rights jurisprudence arose out of the Supreme Court's tendency fairly automatically to accept as justified the criteria provided by the legislation under challenge—equality was conceived of as a matter of treating likes alike and the legislation itself was allowed to determine what counted as alike for its purposes. This idea is what has been labeled 'formal equality'—it is received wisdom in Canada now that this is not good enough as an approach to s. 15.

If the legislature's criteria for distribution are unsatisfactory, what should replace them? What would a vision of substantive equality require? Substantive equality pays attention to the actual conditions of life of members of disadvantaged groups—rules creating, or exacerbating, or perhaps simply not correcting background inequalities should be changed, even if they distribute some benefit equally within their own four corners. Such an approach requires a theory as to which background conditions of inequality require attention in our society, which in turn requires an account of the respects in which people should be equal. In other words, we need to know what underlying universal entitlements there are—what goods or benefits each person is entitled to share in. Once these are known, equality inheres in applying the principles that govern those entitlements. If every person is entitled to the satisfaction of her needs, then someone whose needs are not satisfied has not been treated equally; if every person is entitled to the means of subsistence, then someone who is lacking those means is not being treated equally, etc. More concrete rules providing access to pension benefits or medical attention, for instance, can be assessed according to whether they are conducive to the satisfaction of needs or the provision of the means of subsistence, etc. Thus, substantive equality appeals to some set of underlying principles specifying a range of benefits that are properly distributed universally. Its conception of

11. Id. at 132.
13. For example, Kathleen A. Lahey succinctly states the approach as follows: "the evaluation of sex equality challenges would require judges to ask whether the rule or practice that is being challenged contributes to the actual inequality of women, and whether changing the rule or practice will actually produce an improvement in the specific material conditions of the specific woman or women before them." Kathleen A. Lahey, Feminist Theories of (In)Equality, in Equality and Judicial Neutrality 83 (Sheilah L. Martin & Kathleen Mahoney eds., 1987).
14. Note that the list of benefits covered by such universal principles must be limited for the theory to be coherent. Since some forms of equal distribution will deny equality along some other dimension, there is no way to distribute every benefit and burden equally. For example, the equal satisfaction of need may conflict
equality is just as formal as that which flows from accepting the legislature’s criteria at face value; it simply relies on different criteria for allocation of specific benefits—criteria ultimately justified by reference to underlying universal entitlements.

Indeed, any approach to the adjudication of equality rights that does not simply insist on the application of the challenged legislation according to its own terms must ultimately rely on an argument that an alternative criterion of distribution is better than the one provided by the legislature. This is true even of approaches that focus exclusively on assessing the adequacy of the legislative distinction as a means of achieving legislative objectives. In the first instance, this approach hinges on determining the legislative objective, a matter that can itself be a matter of controversy and which is merely an oblique way of prescribing criteria for the distribution of the benefit in issue. An objective of alleviating poverty will carry different implications for the distribution of social assistance than an objective of encouraging self-sufficiency. Furthermore, if there is to be any room to challenge the legitimacy of the legislative objective (without which we are back to Dicey), these will hinge on some argument that there is some universal principle of entitlement, some respect in which people are entitled to be treated equally, which is not satisfied by the actual objective.

In other words, the truly substantive question in the context of how to distribute various goods is that of determining the proper criteria for each benefit likely to come up for distribution in a modern society, taking into account the need to redress existing inequalities. The task is a daunting one, considered comprehensively, quickly leading us into debates about whether it is the proper province of the judiciary. While dramatic redistribution in various ways is undoubtedly called for in our society, it remains intensely

with equality of resources. A theory of substantive equality must specify the benefits over which it ranges, mindful of the fact that the wider its swath, the more likely conflict will arise between competing aspirations toward equality.

15. For an example of this kind of approach, see David M. Beatty, The Canadian Conception of Equality, 46 U. Toronto L.J. 349 (1996). Although Beatty appears to adopt the rather radical view that all goods should be divided equally making every legislative distinction a violation of s. 15, in the final analysis, by incorporating the s. 1 analysis of whether the legislative means are calibrated to its ends, he effectively ends up with an account of equality that holds that “gratuitous” distinctions should not be made between people in distributing benefits. Such approaches can vary from weak to strong depending on how tight the connection they insist on between legislative means and end. At the weaker end of the spectrum, advocates require only that there be some rational connection, that the means used bear some relationship to the objectives sought, and the objectives be permissible. Versions with more teeth require that the means be necessary, or virtually so, to the achievement of an important objective.
controversial what is the best comprehensive theory of distributive justice. Grappling with this question is the central concern of government. To make sense of Charter equality provisions, we must articulate a role for the courts in assessing distributive criteria that allows for critically assessing existing criteria, but does not simply shift full responsibility for such distributive questions from the legislature to the courts.

Thus, a substantive equality approach to the adjudication of constitutional equality claims must be a principled approach to determining when the legislature has mistaken the principle of entitlement appropriate to some benefit, an approach that provides a reason for widening the criteria of entitlement at least somewhat. I am not sure this yields a different conception of equality, that is, a 'substantive' one, but it does suggest that we look for a substantive foundation for equality analysis—a set of values or human interests that can tell us when and why entitlement criteria are too narrow, given the benefit in issue. We do not have ready to hand a comprehensive theory of the interests that ground universal entitlements. We should expect, then, that courts will proceed cautiously in assessing the adequacy of existing criteria for distribution of benefits. As they deal with cases, one by one, they should be feeling their way toward the articulation of universal entitlements which can be regarded as foundational and against which legislation can be assessed.

The survey of Canadian equality jurisprudence sketched in the next section shows the Supreme Court gradually coming to the realization that if legislative criteria cannot be accepted at face value, there must be some substantive value capable of telling us which criteria are illegitimate, why, and what they should be replaced with. The jurisprudence has finally settled on the interest in dignity as the underlying value. The identification of human dignity as a value operates as the basis for the articulation of a universal entitlement to respect for that dignity. The distribution of concrete benefits can therefore be judged according to whether they are consistent with the respect each is equally owed. This allows the courts to begin to develop a more comprehensive theory of equality suitable to enforcement through constitutional rights protections. In some measure, virtually everyone will agree that the dignity of each person should be respected. Through grappling with the specific issues raised by the cases, we can hope that the concept of dignity will grow organically in accordance with our best critically reflective judgments about what is most important to people, as individuals, as

members of communities, and as participants in society. In participating in this process, courts will be contributing to the ongoing debate about the role of equality in our political culture.

**Fumbling Toward Dignity: The First Decade of Equality Jurisprudence**

As early as *Andrews v. Law Society of British Columbia,* the Supreme Court's first attempt to provide a test for the violation of s. 15(1), some implicit grasp of the need for a substantive foundation for equality rights is only dimly apparent. *Andrews* struck down a provision restricting access to the British Columbia Bar to Canadian citizens. Andrews was a British subject who had immigrated to Canada and was faced with a three year hiatus in his legal career while he waited for his residency period to pass before he was eligible to become a Canadian citizen. In quickly pointing out that not every legislative distinction is discriminatory, requiring justification under s. 1 to be upheld, the Court gestured toward the need for criteria to distinguish discriminatory distinctions from non-discriminatory ones. In one move apparently designed to respond to this need, the Court declared that courts should have regard to the impact of legislation on those affected in determining whether there is discrimination. This assertion was hailed as a major victory by those desperate to ensure that s. 15 jurisprudence not collapse into the aridity of formal equality. However, since every piece of legislation has some impact which leaves some better off than others (just as all legislation distinguishes between classes of persons), an injunction to have regard to impact merely pushes the inquiry back one level - what kind of impact discriminates, or inflicts a 'real' disadvantage, and what kind does not?

The Court's initial answer to this question focused on whether the distinction used is based on a "special characteristic" of the claimant. This close attention to the basis of the legislative distinction, labeled the "grounds approach," suggests that tying a burden to certain personal characteristics itself constitutes the sort of impact about which s. 15 is concerned. An approach of this sort is straightforward as long as the personal characteristics whose use is illegitimate are clear. S. 15 lists several such characteristics, but in *Andrews* itself the Court decided that this list is not exhaustive—other

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18. *Id.* at 168.
discriminatory grounds could be added on the basis of their analogous character. Treating the list as open-ended requires some means of determining what makes an unlisted characteristic analogous. To provide a deeper foundation for this approach, we need a theory about why some grounds are enumerated in the Charter as potentially problematic bases for legislative distinctions or effects, which can, in turn, provide a basis for declaring other, unmentioned grounds to be analogous. The need for a substantive foundation was not initially widely realized. Instead, many seemed to assume that necessary and sufficient conditions for the recognition of analogous grounds could be produced through a purely conceptual analysis of the common features of the grounds listed in s. 15. That has turned out to be a false hope, as the search for conceptual solutions to normative questions usually is.

For a brief moment in the wake of Andrews, without a great deal of thought having been given to what makes a new ground analogous, it looked as though the Court was going to define equality rights exclusively in terms of an expandable list of ‘special characteristics’ which were to be treated simply as prohibited bases for legislative distinction. The rule coming out of Andrews, and evidently relied on soon after in McKinney v. The University of Guelph, has typically been summarized as holding that a claimant may establish discrimination by showing disadvantage based on a ground enumerated in s. 15 or analogous thereto, whether by explicit design or in effect. It soon became clear, though, that the Court not only did not want to render every legislative distinction unconstitutional (subject to s. 1 rescue), it did not even want to rule out every distinction explicitly relying on an enumerated ground. Thus some

20. Thus, for example, Peter Hogg’s analysis of the analogous ground jurisprudence fastens onto the element of immutability as the conceptual common link between all the enumerated grounds in s. 15. Peter W. Hogg, Constitutional Law of Canada 52–29—52–35 (4th ed. 1997).

21. [1990] 3 S.C.R. 229. McKinney dealt with whether a statutory permission to private sector employers to impose mandatory retirement at age 65 constituted a violation of s. 15. A majority held that since the legislation made a clear distinction on the basis of age, an enumerated characteristic, and mandatory retirement could be experienced as a disadvantage, the s. 15 test was met. However, the Court upheld the legislation under s. 1.

22. See, for example, Hogg, supra note 3, at 52–16.1—52–19.

23. See, for example, R. v. Hess, [1990] 2 S.C.R. 906, and Weatherall v. Canada, [1993] 2 S.C.R. 872, in both of which it was held that a distinction on the basis of sex was not discriminatory—the former involving a Criminal Code provision specifying that only men can be guilty of the offence of statutory rape, and the latter deciding that a prohibition on male prison guards performing frisk searches of female prisoners while female prison guards were not restricted from performing such searches on male prisoners is not discriminatory. Note, though, that in Weatherall, the Court hedged its bets, finding merely that is it “doubtful”
further argument is needed to determine when use of a characteristic is justified even though it is on the list of protected characteristics. In other words, the Court quickly settled into the view that only those distinctions that are based on an enumerated or analogous ground and are discriminatory are prohibited by s. 15. This takes us back to the search for particular kinds of effects, as yet still unidentified and explained, that violate equality as distinguished from those that do not, however negative their consequences.

It is frequently argued that this development in the jurisprudence has reduced the scope of equality rights. But if purely conceptual conditions for recognizing analogous grounds are unavailable, a requirement that a distinction be discriminatory is the natural consequence of the need for a substantive foundation to explain when new analogous grounds should be recognized. Whatever value

that the rules about cross-gender frisking were discriminatory (at 877), and holding that they would be justified under s. 1 in any event. In Hess, while the dissent followed the 'grounds approach' strictly, finding that the statutory rape provision was a violation of s. 15 simply because it distinguished in a disadvantaging way on the basis of an enumerated ground, the majority held that there was no infringement of s. 15 despite the use of sex in defining the criteria for criminal liability for this offence (the dissent nevertheless held that the violation of s. 15 was justified under s. 1, beginning what has come to be a constant pattern of confusion about which considerations belong under the s. 15 analysis and which under s. 1). Another case illustrating that a finding of discrimination is more complicated than determining that a distinction was based on an enumerated characteristic is R. v. Swain, [1991] 1 S.C.R. 933. Here the Court found no violation of equality in a rule allowing the Crown to decline to prosecute an insane accused in favour of pursuing a trial simply on the issue of insanity with the result that a finding of insanity would leave the accused open to detention indefinitely in a psychiatric facility rather than subject to a fixed sentence as would result from an ordinary conviction. The rule clearly distinguished on the basis of an enumerated characteristic—mental disability—but the Court found that indefinite detention under these circumstances did not constitute a disadvantage. Furthermore, reading s. 15(1) as a prohibition of the use of certain characteristics would have required s. 15(2) to be read as an equally categorical exception to that rule. S. 15(2) provides “[S]ubsection (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.”


25. For an alternative explanation of the trajectory of the early case law, see Daniel Proulx, Le concept de dignité et son usage en context de discrimination: deux Chartes, deux modèles, 63 R. du B. 485, 502–13 (2003). Proulx treats the emergence of a substantive condition that a legislative distinction must violate dignity in order to be in violation of s. 15 as designed to stave off challenges to social welfare programs for being underinclusive and as required to explain the denial of discrimination in Hess and Weatherall. Hess, [1990] 2 S.C.R. 906;
explains why a new ground should be added may also provide a reason for thinking that some uses of listed grounds do not actually conflict with that value. We cannot test this until we have identified and fleshed out that value, a task ultimately to be carried out using the interest in human dignity. For now, suffice it to say that the introduction of the requirement of discrimination may be less a new threshold requirement of s. 15 than a matter of making explicit a condition already present.

The two points in the analysis of s. 15 at which controversy tends to collect—which personal characteristics are illegitimate bases for legislative distinctions, and what kinds of deprivations or disadvantaging impacts constitute discrimination—mark the points at which a substantive foundation for equality analysis is needed. We might refer to them as the "type of distinction" lens and the "type of impact" lens for analyzing what constitutes discrimination. These two lenses will often seem two sides of the same coin—two perspectives from which to go about deciding what is the difference between a discriminatory and a non-discriminatory rule. The use of a certain type of distinction constitutes a certain kind of harm; the presence of a certain kind of harm leads us to classify certain distinctions as impermissible. As the case law has developed, the key factors in the cases determining whether s. 15 has been violated can be related to one or both of these aspects of the analysis of an equality issue. A dignity-based analysis has emerged as their ground.

In Andrews, a small start is made in providing the necessary substantive foundation for equality analysis. The argument operates through the lens of considering whether citizenship is a personal characteristic whose use is discriminatory. This analysis is dominated by the question of whether the exclusion based on citizenship is based on stereotype or prejudice. However, the notion of stereotype is left undeveloped and does not seem to inform the analysis of why a restriction to citizens' of access to the legal profession violates the right to equal protection and benefit of the law. Indeed, the main s. 15 analysis, penned by McIntyre J., has a

Weatherall, [1993] 2 S.C.R. 872. This sort of explanation seems to me consistent with mine, but operates on a different plane.


27. McIntyre J. in Andrews quotes, approvingly Hugessen J.A. in Smith, Kline & French Labs v. AG Canada (Attorney General), [1987] 2 F.C. 359, 367-69 as follows: "[t]he inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantage, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others."
rather antiseptic and imprecise air. There is no close examination of the stereotype detected in the legislation, nor any analysis of what makes it so wrong. The judgments of Wilson and La Forest J.J. add a few more clues. Wilson J. focuses on characteristics that identify groups who “suffer social, political and legal disadvantage in our society” as picking out means of classification that violate s. 15. Disadvantage or vulnerability can be indicated by a group's status as a “discrete and insular minority.” This analysis seems to rely on an instinctive grasp of the sorts of group disadvantage that mark our society, and also assumes that these instincts are widely shared. However, we need to spell out what is meant by social, political and legal disadvantage to make this test meaningful. As long as we are talking about blatant restrictions meant to keep people of color or women out of certain spheres, the disadvantage may seem too clear to need much analysis. But once we move into deciding whether conditioning certain benefits on marital status, or sexual orientation, or age threatens to “bring about or reinforce .

29. The explanation may lay in the fact that McIntyre J., despite his conclusion that the legislation violated s. 15, would have upheld the legislation under s. 1 as a reasonable limit demonstrably justified in a free and democratic society. Had he developed an account of how the use of citizenship as a criterion is based on stereotype and prejudice, he might have found it harder to find it nevertheless justified. Indeed, the s. 1 argument wholeheartedly accepts the government's argument that an insistence on citizenship is a reasonable way to ensure commitment to the country and adequate acquaintance with the Canadian system of government, as well as a reasonable condition on access to the privileges of a life in the law. The implication in the s. 15 analysis that the legislation was grounded in prejudice and stereotype seems completely negated by the justification offered under s. 1 – at least if one accepts that justification. That is, the harm done by the provisions, conceived of as having something to do with the wrong of prejudice, is not only outweighed by the beneficial purpose, but entirely washed away. In fact, McIntyre J.’s s. 15 analysis makes more sense if we locate the violation of inequality simply in the concrete disadvantage of being denied access to a profession based on a characteristic closely analogous to specifically prohibited ones like nationality, that is, just in the making of a distinction on prohibited grounds. This leaves all the important questions about equality begged – what kind of disadvantage counts and what kind of basis for distinction is impermissible – but it salvages some intelligibility for McIntyre J.’s division of labor between s. 15 and s. 1. This is the first hint that there must be something wrong with the way the division of labor between s. 15 and s. 1 has been developed. If one did think the legislation exhibited prejudice, one would be hard pressed to uphold it, and if one found it completely reasonable under s. 1, how could it be discriminatory to begin with?
31. This point adopts the language of the Supreme Court of the United States in United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4, 58 S. Ct. 778, 783–84 n.4 (1938).
disadvantage" in the relevant sense, different judges’ intuition tends to lead them in different directions.

La Forest J. articulates a number of additional factors that help determine whether a distinction violates “fundamental values.” He points out that citizenship is often at least temporarily beyond the control of the individual. Although one can choose whether or not to become a citizen, the residency requirement prevents that choice from having immediate effect. Second, La Forest J. notes the close historical connection between citizenship and race, or national or ethnic origin, as bases on which myriad professions and livelihoods have in the past been denied to generations of immigrants in a clear effort to reserve the best jobs for the native-born. His depiction of the “intolerance” demonstrated in earlier efforts to marginalize immigrants gives some life and substance to the reference to stereotype and prejudice in McIntyre J.’s judgment. Finally, he points out that citizenship is irrelevant to the qualifications for admission to the bar. These factors lead him to conclude that such a basis for distinction would undermine a resident’s faith in social and political institutions and confidence that “[one] can freely and without obstruction by the state pursue [one’s] and [one’s] families’ hopes and expectations of vocational and personal development.”

These last remarks point to “personal development,” or self-fulfillment, as a human good that equality rights are designed to protect. This gives us a start in thinking about what counts as a disadvantage arising out of legislation that should attract constitutional attention. But, the state cannot be charged with the task of ensuring that all its members achieve self-fulfillment. So it is the irrelevance of the criterion used in the statute, together with its relative immutability and its use as a tool of exclusion in times past that makes this an unacceptable obstacle to self-fulfillment.

The upshot of the early equality cases can be described as follows: there is something about the use of some kinds of personal characteristics that can make their use in legislative line drawing objectionable, but it is not necessarily the case that every use of even a characteristic explicitly flagged in s. 15 is discriminatory. This tells us to look for an account of what it is about the use of certain personal characteristics that constitutes discrimination, or of what

33. Id. at 195.
34. Id. at 197, quoting Kask v. Shimizu, [1986] 4 W.W.R. 154, at 161, per McDonald J.
35. La Forest J. sums up his analysis with the comment that those subjected to such a law would rightly feel that “Canadian society is not free or democratic as far as they are concerned . . . .” Andrews, [1989] 1 S.C.R. at 197, quoting from Kask v. Shimizu, [1986] 4 W.W.R. 154, 161, per McDonald J.
kinds of consequences of using such characteristics are discriminatory ones. As provided by Andrews, the starting point for such an account is an analysis of the consequences of prejudice and stereotype. In the early cases, disagreement tended to express itself more through the analysis of whether a distinction could be justified under s. 1 rather than whether it was discriminatory, with agreement on s. 1 justification occasionally papering over the emergence of diverging opinions on what counts as discrimination. However, this period of relative consensus about the interpretation of s. 15 did not last long. Deep disagreement about the missing magic ingredient necessary to convert a characteristic into an analogous ground or to make the use of an existing ground actually discriminatory was needed to push the Court to further develop the possible competing accounts of the substantive value underlying equality rights.

Such disagreement surged to the surface in two cases decided on the tenth anniversary of the coming into force of s. 15 in 1995: Miron v. Trudel and Egan v. A-G. Canada. Miron involved a challenge to a provision of the Ontario Insurance Act setting out a standard term in automobile insurance contracts which entitled the spouse of a policy holder to collect under the policy for income loss due to a car accident caused by the driver of an uninsured vehicle. The legislative history of the provision made it clear that “spouse” meant married spouse, excluding common law relationships. Miron challenged this as a denial of equality. Egan concerned a challenge to provisions of the Canada Pension Act confining certain benefits to opposite sex couples (whether married or common law). Egan would otherwise have qualified for the benefit designed to top up the family income of elderly couples of whom one had retired and the other was in low income employment, but was excluded on the basis that he and his partner were the same sex. He challenged the provision as discriminatory on the basis of sexual orientation. Neither marital status nor sexual orientation is a ground actually listed in s. 15.

36. See, for example, R. v. Hess, [1990] 2 S.C.R. 906. By contrast, in McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229, the adoption by all members of the Court of a fairly simplistic conclusion that the simple fact of the use of an enumerated ground to impose a burden constituted discrimination pushed all the substantive disagreement between the majority and the dissent into the s. 1 analysis. The ultimate conclusion that illicit distinctions must not only use an enumerated or analogous ground, but must also be discriminatory, has brought these arguments into the discussion of what counts as a violation of s. 15 to begin with.

37. With Thibaudeau v. Canada, [1995] 2 S.C.R. 627, decided at the same time, these cases constitute a trilogy in which the pervasive disagreements on the Court about equality became apparent.


In both cases, the Court split three ways—4, 4, and 1. A bare majority found each of the provisions to be a violation of s. 15, with L'Heureux-Dubé J. offering separate reasons for that conclusion. Within the majority on the s. 15 issue, then, there were two different approaches taken in analyzing discrimination. A minority of four in each case decided that the legislation was not discriminatory, adding a third approach. The judgments thereby reveal both the type of distinction lens and the type of impact lens. The minority judgment of Gonthier J. in Miron appeals to relevance to determine whether marital status is an analogous ground and therefore potentially discriminatory. In Egan, given the Attorney General's concession that sexual orientation is an analogous ground, the s. 15 minority uses irrelevance directly to indicate discriminatory impact for purposes of s. 15. The disagreement between the McLachlin approach and the L'Heureux-Dubé approach in favor of a finding of a s. 15 violation might be described as a dispute over which of these two questions—what kinds of distinctions are discriminatory, and what kinds of effects constitute discrimination—should be the focus of analysis. In the end, both approaches appeal clearly to dignity for the first time as some sort of touchstone for answering these questions.

In contrast, judgments finding no discrimination make no reference to dignity; rather, they argue that legislation violates s. 15 only when the distinction used is irrelevant to the legislative objective. Working backwards from the characteristics flagged in s. 15 as potentially discriminatory, Gonthier J. characterizes them as ones commonly used to make distinctions that have little or no rational connection with the subject matter and as generally reflecting

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40. In Miron the same majority denied the s. 1 argument and the provision was held to be unconstitutional; in Egan, one member of the majority on the s. 15 issue, Sopinka J., defected on the s. 1 question, so the denial of pension benefits to same sex couples was found to be discriminatory but upheld. Since my discussion of these cases is confined to the s. 15 analysis, I will use “majority judgment(s)” to refer to the five judges who accepted the argument that there was a s. 15 violation, and “minority judgement(s)” to refer to the four judges who denied the s. 15 violation.

41. The other four members of the majority were McLachlin J., Cory J., Iacobucci J., and Sopinka J. McLachlin J. wrote the judgment for this group in Miron, while Cory J. wrote the s. 15 judgment for the same group in Egan.

42. The other three justices were Major, La Forest, and Lamer, JJ.

43. Although in McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229, there is considerable discussion of dignity and whether it is infringed by mandatory retirement, this discussion tended to come up in the context of the s. 1 argument rather than in the s. 15 analysis, because all members of the Court were content to hold that there was a violation of s. 15 simply by virtue of the legislature's explicit use of age to impose a disadvantage. In retrospect, one can see some of the later s. 15 disagreements foreshadowed in the s. 1 dispute in McKinney.
This approach claims that we can identify distinctions as discriminatory by whether the characteristic used is relevant to the statutory purpose. However, Gonthier J.'s use of the test of relevance begs the question rather than answering it. It is trite to observe that an examination of relevance is meaningless without a determination of the "functional values underlying the legislation," or more simply, the legislative objective. After all, the concept of relevance refers to the assessment of a mean-ends relationship. We cannot assess whether the means are good ones without knowing what the end is. Relevance is therefore not an independent criterion for diagnosing discrimination or anything else. The relevance of a criterion for distribution will simply follow from the characterization of the end. This puts all the weight on the formulation of the legislative objective; when the statement of the objective itself is informed by discriminatory attitudes, the distinction used by the legislature is bound to pass a relevance test but still be objectionable.

This is exactly what happens in Gonthier J.'s opinion in Miron and La Forest J.'s in Egan. That marriages, or at least heterosexual unions, are foundational to "civilization" is endorsed by both judges, and the legislation in both cases is taken to be a recognition of this "fundamental value." A legislative distinction designed to foster, indeed to construct, a form of relationship deemed essential to civilization is, by definition, relevant to that end. Although Gonthier J. explicitly recognizes that the legislature's objective may itself be discriminatory, he cannot get past his own conviction that the state is entitled to foster the traditional marriage relationship long enough to consider whether that conviction might itself be grounded in prejudice against alternative family forms. He cannot see that the undoubted value of the traditional family cannot by itself justify

45. Id. at ¶ 15.
46. Greschner, supra note 75, at 307.
48. By contrast, the majority characterized the legislation in both cases as designed to provide for the needs of economically interdependent family units, and judged by this standard, holding a marriage license or being of the opposite, is simply irrelevant to the question of need. For the majority, this is part of the s. 1 analysis, not part of the determination of whether the use of the distinction is discriminatory.
49. That the legislative purpose must not itself be discriminatory has been reiterated in Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358, at ¶ 64. The cases in which the acceptability of the objective is the central issue have an all-or-nothing quality. If the judges 'see' the discriminatory nature of the entire scheme, the rest of the legal analysis follows easily; if they do not, the reasoning upholding the legislation is circular.
treat other family forms as less worthy. Thus, the discussion of relevance begs the central question: is it a denial of equality to bestow a legal ‘seal of approval’ on one particular form of family? Four members of the court evidently think not, but it is not exactly clear why. An appeal to relevance alone cannot provide an answer.

This question of the proper statement of the objective of the legislature is simply the issue, from a different angle, of the appropriate criteria of access to the insurance and pension benefits at issue. Some sense of the correct principle of entitlement to that benefit will flow from the characterization of the objective of distribution. The outcome of this debate will usually determine whether the distinction used in the legislation is relevant to the objectives envisioned. This should remind us that the s. 15 test must include reference to a substantive value capable of informing the characterization of the legislative objective in a principled manner. In other words, we need a test for when a legislative objective itself denies equality.

McLachlin J.’s judgment for four members of the majority in Miron approaches the question through the type of distinction lens. Her description of the purpose of s. 15 as “prevent[ing] the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance” links the prohibited grounds of differentiation to dignity. This suggests that the grounds listed in s. 15 were chosen because they have some connection to stereotypes falsely attributing negative attributes to members of groups identified by these characteristics, and this, in turn, violates dignity. To deny benefits on such a basis is to discriminate. To expand the list, we should look for other personal characteristics that are used to stereotype. Four factors already recognized in the case law as bases
for the recognition of an analogous ground are then linked to the idea of the violation of dignity: (1) the historically disadvantaged status of a group, (2) its minority status, (3) the personal nature of the characteristic relied on by the legislature, and (4) its immutable nature. These factors are not necessary and sufficient conditions for the recognition of an analogous ground, but merely indicate the larger "unifying principle" of preventing the violation of human dignity.

However, the link between dignity and these four factors is described only very vaguely. The "theme" of violation of dignity, she says, is "reflected in" these four qualities useful in identifying new grounds. Nor does her analysis of the case at hand help draw out the link. She concludes that marital status is an analogous ground because it exhibits three of the four factors identified as markers of analogous grounds. First, the choice whether to marry or not is an important personal freedom, making married or unmarried status an important aspect of the person. Second, she notes that conjugal relationships outside of marriage have traditionally been disapproved of and therefore excluded from a host of benefits attached to marriage, giving common law couples the status of an historically disadvantaged group. Interestingly, she ties this disapproval to religious attitudes, thus suggesting that the underlying motivation is based on prejudice, but this theme is not very well developed. Finally, she notes that the option of marrying may not be open to a particular couple or may be beyond the control of any one party within a couple, muting the mutability of the status of marriage.

Having found these features applicable to the situation of being in a conjugal relationship outside of marriage, she concludes rather summarily that "[t]he essential elements necessary to engage the overarching purpose of s. 15(1)—violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making—are present and discrimination is made out."

Thus, McLachlin J. first suggests that it is the use of stereotype that violates dignity, but then focuses on the four factors that have developed as a means of identifying analogous grounds and declares

characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual? An affirmative answer to this question indicates that the characteristic may be used in a manner which is violative of human dignity and freedom." Miron, [1995] 2 S.C.R. 418, ¶ 147, per McLachlin J. (emphasis added).

54. Id. at ¶ 149.
55. Id. at ¶ 148.
56. Id. at ¶ 156.
marital status to be an analogous ground based on the applicability to it of some of those factors. There is no direct analysis of how these four factors are related to the problem of stereotyping, nor how, if at all, the exclusion of common law couples in this case was grounded in stereotype. Instead, the conclusion that the legislation is discriminatory is mediated by the application of the four factors that determine whether a new ground is sufficiently analogous; they are used as a proxy for stereotyping without the connection being articulated. In fact, her analysis seems to turn less on a finding that the legislature inaccurately attributed unfavorable characteristics to common law couples and more on the suggestion that the traditional disapproval of common law relationships is grounded in a religious belief that all other forms of conjugal relationship are immoral. Of course, one could say that the attribution of immorality to such relationships is "inaccurate," but this just seems an oblique way of describing prejudice. Perhaps because the actual case does not turn on stereotype, as such, she does little to spell out the connection she sees between stereotype and violation of dignity. The suggestion of a connection between the sorts of characteristics whose use is potentially discriminatory, the use of stereotypes, and the violation of dignity gestures toward an analysis of the grounds of discrimination in terms of a specific kind of harm done through their use, but the analysis is incomplete.

57. In Corbière v. Canada, [1999] 2 S.C.R. 203, McLachlin J., writing with Bastarache J. for the majority, seems to identify the characteristics that indicate stereotypes with features of the person that are actually or constructively immutable. It is not clear what is thought to justify this apparent retreat from an open-ended, multi-faceted account of the indicators of stereotype in favour of reliance on a single factor. I am grateful to Hester Lessard for pointing out the potential significance of this development.

58. The only mention of inaccurate, preconceived notions about common law couples mentioned in McLachlin J.'s judgment comes not in her s. 15 discussion, but in her analysis of whether the exclusion can be saved under s. 1. At this stage, she notes, having decided that the objective of the legislation is to provide for financially needy families, the exclusion of common law couples seems to be based on the assumption that such couples are not stable, financially dependent units. This she finds to be inaccurate.

59. Instead, the same form of words, declaring it wrong to impose "limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstance" is simply repeated at several crucial junctures in the argument. Miron, [1995] 2 S.C.R. 418, ¶ 131. A very similar form of words is used at para. 134, 140, 146, 147, 149, and 156.

60. In Eaton v. Brant County Board of Educ., [1997] 1 S.C.R. 241, ¶¶ 66–67, and Friend v. Alberta, [1998] 1 S.C.R. 493, ¶¶ 70–72, the Court has since stated that the use of stereotype is not the only means of discriminating. Below, in articulating a concept of dignity capable of guiding equality jurisprudence I take a stab at mapping out the various types of discrimination as different ways of
L’Heureux-Dubé J. approaches the question of which distinctions constitute discrimination by trying to identify the harm of discrimination, explicitly arguing that a focus on what characterizes the enumerated grounds and therefore identifies appropriately analogous ones obscures the central issue. In Egan she goes so far as to treat investigating the ground of discrimination within the s. 15 analysis as merely an instrument—a means of detecting discrimination as an effect rather than an independent element in the analysis. Thus, she repeatedly states that discrimination is to be identified by its effects. The question is: what kinds of effects are discriminatory ones? We have already established that this cannot be answered by reference to the effect of the denial of the specific statutory benefit without making all legislative distinctions discriminatory. Although there is some slippage on this point in L’Heureux-Dubé J.’s analysis, in the final analysis she does identify some further harm marking a distinction as discriminatory in noting that the economic consequences of the legislative distinction are merely symptomatic of the crucial effect—the offence to dignity.

From the outset, she points to s. 15’s role in giving effect to the place of “inherent human dignity” at the heart of individual rights.

Equality . . . means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

She goes on to cash this out in terms of an entitlement to equal concern and respect, using this language repeatedly throughout her judgments on s. 15.

violating dignity in order to try to make sense of the case law so far.


62. She notes in Egan, at paragraph 51, that since not every distinction based on an enumerated or analogous ground constitutes discrimination, “[a]n additional dimension of analysis is needed.”


64. Id. at ¶ 37; see also id. at ¶ 56: “A distinction is discriminatory . . . where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.”

65. Id. at ¶ 36.

66. Id.

67. Id. at ¶ 39; see also her judgment in Miron v. Trudel, [1995] 2 S.C.R. 418, ¶ 107.
L’Heureux-Dubé J. suggests her own two-part framework for the analysis of s. 15 cases—both the nature of the group affected by the legislation and the particular interests affected should be examined. The various factors flagged elsewhere in the case law—minority status, history of bias against a group, vulnerability, constructive immutability—are relevant to deciding whether a group was at risk of having its dignity violated.\(^6\) The nature of the concrete disadvantage imposed by the legislation is examined to see whether it is significant enough to constitute a violation of dignity. Thus, she ultimately brings together the two points in the Andrews analysis at which substantive grounding is needed and ties both to the concept of dignity. The examination of the nature of the group is an effort to articulate why characteristics that mark group identity are problematic bases for legislative distinctions. The exploration of the interest affected is the means of deciding what sorts of disadvantages or burdens count as discriminatory. Ultimately, however, the important interest is respect for one’s dignity, rather than interest in the specific benefit at issue, and the characteristics that are picked out as problematic are the ones whose use violates dignity.

In both Egan and Miron, the gist of L’Heureux-Dubé J.’s argument is that the restriction of the benefits at issue to opposite sex couples and married couples treats other family forms as less valuable. In Miron she argues that the explicit choice of marriage is one way people form intimate relationships of great personal significance to them, emotionally, socially, and economically; but, such relationships can be formed in other ways. Commitment can be expressed otherwise than through the observance of formalities, even through the gradual cumulative effect of a series of smaller decisions binding two lives. These other forms of commitment deserve equal respect from the legal system. In Egan, she concludes that excluding same-sex couples from the pension benefit sends the message “essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex.”\(^6\) In ultimately tying the interest affected to the importance of having one’s significant

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68. In Miron, [1995] 2 S.C.R. 418, ¶94, L’Heureux-Dubé J. introduces what may be an additional factor indicating that the basis for a legislative distinction is one that has the effect of discrimination—“whether the impugned distinction is based upon a fundamental attribute of ‘personness’ or ‘humanness.’” This factor is designed to counter the argument that since whether to marry or not is a matter of choice, it cannot be an immutable aspect of a person’s situation and distinctions based on marital status cannot be discriminatory. Marital status may be able to be chosen (yet is not always so), according to L’Heureux-Dubé J., but the choice is fundamental to one’s personality and so deserving of protection against being made the basis for legislated disadvantages.

intimate relationships recognized as legitimate, L’Heureux-Dubé J. comes closer than the rest of the Court to identifying the crux of the matter. If the benefit being distributed by the legislation is that recognition, rather than the money payable under the policy, it is hard to see how the exclusion of common law and same sex couples could be read other than as a denial of the equal worth of such relationships.

Although declining to go along with L’Heureux-Dubé J.’s simplified two-part analysis, Cory J.’s analysis in Egan nevertheless shares much of her essential reasoning. Cory J. appeals to dignity at two points. First, dignity is invoked to decide that denial of recognition of same sex relationships can be a denial of the equal benefit of the law even if this particular couple would not have benefitted economically from being included in the pension plan provision. Such denial “may have a serious detrimental impact upon the sense of self-worth and dignity of members of a group because it stigmatizes them.” It attributes inferiority to the excluded group and treats them as less deserving of benefits. Dignity comes up the second time to ground the argument for treating sexual orientation as an analogous ground. At this stage, Cory J.’s analysis draws on some of the factors that had been relied on in past cases, but not as mechanically as McLachlin J.’s analysis does in Miron. Cory J. is very clear that the factors pointing to an analogous ground are not important in their own right, but are only meant to aid in determining whether the right sort of interest is at stake—the interest in dignity. Thus, like L’Heureux-Dubé J., he canvasses both the type of impact and type of distinction lenses and grounds both in dignity.

70. Id. at ¶ 160–161.

71. Id. at ¶ 161.

72. Id. at ¶ 171: “The fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant.” It is interesting that Cory J. places so much weight on the issue of whether the legislation could be said to be based on an analogous ground, since according to La Forest J., the Attorney-General of Canada conceded that sexual orientation is an analogous ground.

73. Much has been made of the apparent methodological disagreement between L’Heureux-Dubé J. and her colleagues, even those with whom she often agrees in result. The disagreement appeared to deepen still further in Vriend v. Alberta, [1998] 1 S.C.R. 513, in which L’Heureux-Dubé J. declared, I do not agree with the centrality of enumerated or analogous grounds in Cory J.’s approach to s. 15(1). Although the presence of enumerated or analogous grounds may be indicia of discrimination, or may even raise a presumption of discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined. Of greatest significance to a finding of discrimination is the effect of the legislative distinction on that individual or group.

Vriend, at ¶ 185. Although I prefer L’Heureux-Dubé J.’s analytical framework because it more carefully ties all the reasoning to the search for violations of
He outlines the various ways in which gays and lesbians have been stigmatized, harassed and victimized in the past, including the way their intimate relationships have been stigmatized, in order to decide that they constitute a historically disadvantaged group. He then argues that the challenged provision is grounded in the stereotype that "homosexuals... cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples." Given these conclusions, it is no surprise that he holds that the exclusion of same sex couples from the pension benefit participates in the stigmatization of same sex relationships that has long characterized our society in violation of human dignity.

**THE CRYSTALLIZATION OF DIGNITY AS THE SUBSTANTIVE FOUNDATION OF EQUALITY RIGHTS**

With the decision in *Law v. Canada (Minister of Employment and Immigration)* in 1999, the Supreme Court united around the identification of the missing ingredient in a successful s. 15 challenge—a showing that legislation violates the human dignity of those negatively affected by its operation. In reviewing the case law up to this point, Iacobucci J. highlights and ratifies the previous efforts to connect equality and dignity by McLachlin J., Cory J., and L'Heureux-Dubé J. as follows:

... 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, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will...
violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.\textsuperscript{77}

On the meaning of dignity, Iacobucci J. has this to say:

What is human dignity? There can be different conceptions of what human dignity means . . . . \cite{77}he equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?\textsuperscript{78}

On the basis of his survey of the past case law, Iacobucci J. reformulates the s. 15 test as follows:\textsuperscript{79}

\textsuperscript{78} \textit{Id.} at ¶ 53.
\textsuperscript{79} In the course of this analysis, Iacobucci J. also tries to move away from a rigid, two or three step test for s. 15. "It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula." \textit{Id.} at ¶ 82, 88. He acknowledges that there will be some circumstances in which the analysis that establishes a violation of dignity will take place in the first step of the traditional analysis, usually described as that of determining whether the law imposes differential treatment on the claimant by comparison to others, and sometimes in the determination of whether the differential treatment constitutes discrimination in a substantive sense, which is itself a matter of deciding whether
... a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics,

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds, and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?80

Most of the work of an equality rights analysis will be performed at the third stage of this test. Iacobucci J. collects from the past case law four categories of "contextual factors" helpful in distinguishing discriminatory from non-discriminatory legislation through demonstrating whether a legislative distinction or impact has the effect of demeaning dignity. The first of these is "pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group."81 The fact that the claimant belongs to a

the basis for the difference is an enumerated or analogous ground and whether it "has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration." Id. at ¶ 88. Thus, it is the overarching purpose of s. 15(1) of protecting dignity that should guide the analysis and not any specific set of analytical steps. This seems to bring him closer to L'Heureux-Dubé J.'s approach which recommends abandoning a rigid focus on searching for enumerated or analogous grounds in favour of asking more loosely whether the legislative distinction violates dignity. Nevertheless, when Iacobucci J. restates the three "broad inquiries" that a court should make to determine a s. 15(1) claim, he reverts to describing the first two—whether there is a formal distinction or a differential impact, and whether it is based on an enumerated or analogous ground—in rather mechanical terms, apparently leaving the consideration of whether dignity is violated to the third inquiry.

80. Id. at ¶ 88.
81. Id. at ¶ 63.
historically disadvantaged group may indicate a longstanding failure by the legal system or social mores to extend equal concern and respect which the challenged law may perpetuate or further promote.  

Pre-existing disadvantage is also said to be linked to stereotyping—the use of inaccurate assumptions about the merits, capabilities and worth of an individual or group which stigmatize members of a group.

The second contextual factor capable of indicating a violation of dignity asks whether the legislative distinction properly reflects the actual needs, merits and circumstances of the members of the group affected by it. This factor is used to admonish Parliament not to overlook actual circumstances by laying down 'one size fits all' rules that unfairly exclude vulnerable groups. The third factor identified by Iacobucci J. is that of whether the legislation seeks to ameliorate the situation of a more disadvantaged group. In such circumstances, the distinction used is unlikely to be found to violate dignity. Finally, Iacobucci J. adopts L'Heureux-Dubé J.'s idea, articulated in *Egan*, that a crucial factor in finding harm to dignity is an analysis of the nature of the interest affected by the legislation. This makes it clear that it is not the actual, concrete effect of the legislation that matters—not the dollars and cents or the specific opportunity, benefit, or service denied—but rather whether imposing such a cost on the individual or group implicates dignity. The social and constitutional significance of the cost to the individual must be taken into account to make this decision—does it affect membership in a basic way, deny participation, or constitute a complete failure to recognize members of a particular group?

These factors are all presented as indicators of when a legislative distinction violates human dignity, yet the analysis of how each is

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82. *Id.*
83. *Id.* at ¶ 64.
84. *Id.* at ¶ 69.
85. Although used to reaffirm the need to take difference into account in the design of rules, this factor is at risk of collapsing into or at least re-incorporating the discredited 'relevance' argument offered by La Forest J. and Gonthier J. in *Egan* and *Miron*. See Beverley Baines, *Law v. Canada: Formatting Equality*, supra note 75, at 71.
86. *Law*, [1999] 1 S.C.R. 497, ¶ 72. In *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, this was apparently watered down so that the fact that legislation is designed to benefit a disadvantaged group is treated as a counterindicator of dignity violation even if those excluded from the benefit are just as bad off.
88. *Id.* at ¶ 74.
89. Proulx, *Les droits a l'égalité revus et corrigés*, supra note 24, 240–55, usefully notices that these contextual factors divide into two categories: «facteurs aggravants», or ones indicative of violation of dignity, and «facteurs disulpants», ones that are counter-indicative of violation of dignity.
related to dignity remains underdeveloped. Similarly, the four factors are said not to be either necessary or sufficient conditions for the violation of dignity, yet in subsequent cases the factors have tended to be somewhat mechanically applied. Without the relationship between the factors and dignity being fully explained, it is the factors themselves that the Court has tended to rely upon to determine the outcome of cases.

The decision in Law hinged on whether the use of age in determining entitlement to the survivor benefits is based on accurate generalizations. Crucial to this determination is the decision that the point of survivor benefits is to respond to the long-term income needs of surviving spouses. This leads the Court to give its stamp of approval to Parliament's assumption that surviving spouses over the age of 45 or over 35 if raising children or if disabled will have a harder time making up for the loss of their spouse's income than younger and less encumbered people, and that this handicap is unlikely to diminish over time. By contrast, although a younger or less encumbered person may well experience short-term economic dislocation after a spouse's death, this is likely to diminish with time. "The challenged legislation simply reflects the fact that people in the appellant's position are more able to overcome long-term need because of the nature of a human being's life cycle." Therefore, no stigma attaches to those temporarily denied the survivor benefit; there is no implication that they are less worthy of concern.

Law was a fairly easy case on its facts, making it possible for the Court to unite around the abstract idea that dignity is the substantive touchstone for equality analysis. Since Law, dignity has been used more often than not by a majority of the judges to deny equality claims, giving rise to the fear amongst equality advocates that its

91. Because the class of persons into which the claimant falls is not a historically disadvantaged group, Iacobucci J. is not concerned to impose an extremely high standard of accuracy in his factual assumptions on the government. However, he acknowledges that other situations may require a stricter standard.
92. There might be a plausible public policy argument that the short-term economic loss of losing a spouse should be better dealt with by government assistance programs, but this would have to be formulated not as an argument that it is discriminatory to refuse a long-term pension to those under 35, but rather that it is discriminatory to provide for long-term need in these circumstances and not short term need. On this argument age becomes a proxy for short-term need and the real question is whether it is demeaning or derogatory to fail to respond to those in short-term economic need as a result of the death of a spouse.
very introduction signals a conservative turn in the jurisprudence. It bears pointing out, however, that if some substantive concept is needed to ground equality rights, that concept must be at the forefront of the analysis in any case in which a claim is to be rejected; it will be the reason why claims fail when they do. However, it should not be forgotten that it is also the reason why claims succeed. While the Court has perhaps tended to pay more attention to the concept of dignity when it is needed to deny a claim than when it serves to explain why one is upheld, its role on both sides of the argument must be fully considered in any assessment of its value in equality jurisprudence. A full analysis of whether dignity is necessarily a conservative force in equality jurisprudence would require a close analysis of its use in all the cases since Law. I will not undertake that analysis here, partly for the sake of brevity, but partly because I think the Court has been less than helpful in articulating the concept in such a way as to explain how it functions to justify the denial of claims. Instead, I propose to start from first principles, constructing a concept that I think is sound and grows out of the central considerations that the Court has relied on over the years to guide its decision-making. Although this concept may not take equality law as far as some might wish, it is far from an inherently conservative idea.

**Defining Dignity**

Many of the indicators of discrimination identified in the case law probe the issue through asking whether the personal characteristic used by the legislation is an acceptable basis for distinction. This, in turn, opens up the question of what sorts of harm or deprivation s. 15 seeks to prevent, and that question has now been answered by saying that it is the harm of violating human dignity that s. 15 protects against. It is an understanding of this harm that must drive the recognition of analogous grounds; it is equally crucial to distinguishing discriminatory uses of enumerated characteristics from non-discriminatory ones; that is, the kinds of impact on people’s lives capable of grounding a s. 15 claim. Harm to dignity becomes itself a kind of harm, independent of the denial of the specific benefit distributed by the legislation. We are looking, then, for distinctions and deprivations that constitute this harm. What, then, is dignity and how is it violated?

In trying to define discrimination, the early cases repeatedly returned to several themes or factors which are consciously brought together and attached to the concept of dignity in the decision in Law. **(Attorney General),** [2002] S.C.C. 84. In all of the last six of these, the claim was denied on the basis that the legislative distinction did not violate human dignity.
However, the connections between dignity and the developing list of factors that indicate its violation remain elusive. I will not try, systematically, to explain or criticize all of the Canadian case law in terms of my explication of the concept of dignity. Instead, I will attempt to provide a plausible reconstruction of the most important features of the Court’s analysis of equality. My aim is to show that a dignity-based analysis has the potential to give equality rights law some real substance. I do not claim that this potential has always been lived up to in the decisions to date. It follows from the analysis I propose that discerning the meaning of a legislative distinction always relies on a close analysis of the context of the specific legislation, the benefit involved and the group deprived. Thus, a complete analysis of the concept of dignity requires a detailed exploration of all the cases to see how carefully the contextual factors have been read. The exercise here is designed to set up that larger task.

A. The Jurisprudence Reconfigured: Three Forms of Indignity

The central insight in a dignity-based account is that valuing human dignity means acknowledging the inherent worth of human beings; therefore, violating dignity involves conveying the message that some are of lesser worth than others. The Supreme Court has, so far, concentrated on elaborating a list of apparently independent, though overlapping, contextual factors said to be capable of revealing violations of dignity. I argue that we can detect in these factors three forms of indignity or denial of worth that can be inflicted by a legislature or state actor. The first two are fairly obvious and explain most of the case law decided so far: the grounding of legislation in prejudice and the use of stereotype. A third form of indignity is only slowly emerging: it involves exclusion from benefits or opportunities that are particularly significant because access to them constitutes part of the minimum conditions for a life with dignity. In this case, it is the nature of the benefit itself that makes its denial a violation of dignity. When prejudice or stereotype motivates the exclusion from such benefits and opportunities, the indignity is exacerbated. Our prejudice and stereotype detectors may be more sensitive to more minor instances of tainted legislation in such cases.

Any of the three forms can be inflicted through the explicit use of a characteristic important to personal and group identity, or through the adoption of uniform, facially neutral standards that fail to take account of the diverse circumstances of various groups. In asking how the legislature can convey a message of lesser worth,
the various factors commonly referred to in the cases then fall into place as interpretive guides or diagnostic tools for discerning whether one of these forms is present. This account draws the conceptual map of equal protection law differently than the Supreme Court’s three part test plus four contextual factors, but I hope that it enables the development of a more meaningful concept of dignity.

So far, the Court has dealt most often with the first two forms of denial of worth, and hence, the factors identified as markers of the violation of dignity have tended to be ones that should alert us to the presence of prejudice or stereotype, in society and as reflected in legislation, or help us to contextualize the harm they do. They are relevant not in their own right, but because they help us sniff out prejudice and stereotype. This explains why the Court has repeatedly stated that the various relevant factors are neither necessary nor sufficient conditions of a finding of discrimination. The presence of these features of context do not constitute discrimination; they simply help us read the implicit meaning of legislative distinctions imposing burdens or denying benefits to see whether it connotes the inferiority of a group. Exhibiting prejudice and stereotype are core cases of impugning the moral worth of others. I argue, however, that the Canadian approach understands what it means to treat another as less valuable not as a subjective attitude and corresponding psychological consequences, but as an objective meaning or import arising out of certain forms of legislative classification.

Further, from the beginning, a link has been made between stereotyping and its tendency to undermine its victims’ “personal development.” This points in the direction of self-fulfillment as a human good that equality rights are designed to protect, and suggests a connection between dignity and autonomy. Respect for dignity includes respect for agency as a fundamental characteristic of humanity. References to the importance of self-determination or personal fulfillment recognize human beings as choosers and planners, as beings with projects and dreams who make commitments and attachments and at least partly measure their own sense of worth according to their ability to exercise their capacities and realize their dreams. Behavior based in prejudice or stereotype often impairs autonomy. However, there are ways of restricting self-fulfillment that are themselves sufficiently harmful to constitute a violation of dignity, even absent an underpinning in prejudice or

stereotype. The launching pad for the further development of this line of thinking is the inclusion of the nature of the interest affected by the legislation on the list of contextual factors, a factor first suggested as relevant by L'Heureux-Dubé J. The idea that we should ask whether legislation affects membership in society in a basic way or denies participation in important social institutions suggests that these forms of participation are crucial in their own right to a life with dignity.

B. Dignity as Inherent Worth

In some shape or form the concept of dignity has been part of the foundation of most major modern political and moral theories since the Enlightenment. In its modern guise, its role has been to give an egalitarian twist to notions of worth that had previously been defined by hierarchical understandings of relations between people. Before the Enlightenment, worth was identified with honor, which cannot be equally distributed without destroying its meaning. Those honored were the social superiors of those not. The introduction of the concept of dignity democratized or universalized the idea of human worth. Dignity refers to a somewhat ineffable quality that we ascribe equally to all human beings in virtue of which we accord them a special kind of worth. One might say this involves a sort of “leveling up,” raising common people up to the moral status previously enjoyed only by the aristocracy.

It is commonly said that dignity refers both to a set of empirical qualities or characteristics and to a moral quality of persons as such. When we think of dignity as an empirical attribute, we think, as Aurel Kolnai suggests, of a range of characteristics having to do with composure, self-control, invulnerability, and self-assuredness. As an empirical matter, these are characteristics that individuals exhibit in greater or lesser abundance, but they point us in the direction of a characterization of dignity as a moral quality, as an entitlement we can all claim. For they are all character or behavioral side-effects of an underlying sense of self that we associate with dignity. They describe a person who is a self-conscious being with a secure sense of his or her worth and place in the world, in command of his or her life and under no one’s thumb. To enjoy this sense of worth requires

99. Id. at 57–59.
that a person be secure in his or her identity as an individual, including as a member of those communities with which he or she identifies. He or she must feel a sense of belonging in his or her society, entitled to participate in its institutions and endeavors. Thus, a secure sense of self requires both confidence in one's identity and the ability to participate in society. This sense of self-worth can describe an empirical state of affairs, yet we know that not every human being is fortunate enough to actually enjoy such a healthy self-image. We nevertheless think something like this sense of self is every person's birth right. We therefore ascribe dignity, in this aspirational sense, in the sense of what each individual is entitled to, to all human beings.

To ascribe dignity to human beings not as an empirical matter, but as a moral matter—that is, to treat it as an inherent aspect of humanity—is to treat human beings as creatures of intrinsic, incomparable, and indelible worth, simply as human beings; no further qualifications are necessary. In this basic sense, dignity is ascribed to human beings independently of their particular accomplishments or merits or praiseworthiness. It refers to a kind of worth that is not contingent on being useful, or attractive, or pleasant, or otherwise serving the ends of others. Dignity means worthiness, but not in the sense of pointing to some other form of value that makes one worthy. Kolnai nicely captures the non-derivative nature of this kind of worth:

Dignity means "being worthy of . . . ", the completion that most aptly suggests itself would seem to be "worthy of being appreciatively acknowledged as worthy to be thus acknowledged and appreciated, sans plus."

Of course, some may be able to jump higher than others, or knit faster, or may be kinder to their neighbors; nevertheless, there is a basic respect in which worth is attributed to human beings automatically, not as a matter of degree, but rather equally to all persons. Just as it need not be earned, it also cannot be lost. This deep sense of moral worth is simply part of our conception of the person. The possession of dignity calls for a particular moral


response: respect for the intrinsic worth it signifies. "Humanity," as Thomas Hill puts it, "should be honored and respected or at least not mocked, dishonored, or degraded."103 Out of this can be developed prescriptions about how to treat others in such a way as to show respect for their dignity.

As something inherently "possessed" by human beings, dignity cannot be taken away. It can, however, be dishonored through a failure to show respect, through the treatment of others as less than creatures of inherent worth. Thus dignity is violated by such a failure of respect, whatever the empirical consequences of that failure for those affected. Harm to dignity need not be contingent upon a showing of other specific effects, whether psychological or material. At the same time, violations of dignity do often have psychological and material consequences, which in turn have implications for the subsequent ability of people to live in dignity. Dignity may be an inherent quality of human beings, but a subjective sense of self-worth is an empirical psychological and emotional state that has enormous implications for the quality of life. And a person's subjective sense of self as someone of worth is crucially tied to how she is treated by others.104 We may not be able to guarantee that people actually feel the sense of worth to which they are entitled, but we can aspire to a state in which empirical realities strive to match inherent moral entitlements, in which at least it is not state policy that presents the obstacle to people enjoying the subjective sense of self characteristic of those whose dignity is respected. To protect dignity, we must be attentive to the ways in which our treatment of others diminishes self-respect. These two sides of the equation—how one treats others and the response that treatment provokes—must both shape our examination of what the protection of dignity requires.

What it is in the human person that grounds the attribution of worth associated with the concept of dignity is, of course, an issue of enormous philosophical dispute, which cannot be finally resolved here. Nor should it be necessary to have a complete philosophical account of dignity in hand in order to say something useful about how the concept can illuminate equality jurisprudence. We are at the beginning of what should be a continuous process of debate about and refinement of the concept. The brief account presented here draws upon several themes in the common currency of thought about dignity to develop a concept that is attractive and that finds significant resonance in the key elements of the Canadian jurisprudence.


104. For just two of the many political theorists who have noted this connection, see John Rawls, A Theory of Justice 62 (1972); Taylor, The Politics of Recognition, supra note 97, at 25–26.
This account highlights two aspects of human personality in virtue of which human beings are valued and to be treated as worthy of respect. These are not necessarily the only relevant aspects, simply the two that seem to me most helpful in illuminating the equality jurisprudence so far. First, human beings are capable of having a conception of the self. This makes respect for identity crucial to respect for dignity. Second, humans are capable of formulating and revising a conception of the good. This makes respect for people's plans and projects relevant to protecting dignity. These two aspects of personality are connected, since one develops an identity partly through the life one creates for oneself, and a conception of the good partly in the context of one's sense of who one is. Both aspects of personality can be understood as abstract capacities that all human beings have, but respect for the capacity requires some measure of respect for its use as well; people must be given some scope to be who they are and conduct their lives as they see fit. Some limits on this freedom are inevitable, since it is obviously possible for people to adopt conceptions of the self and projects and plans that are unworthy of the approbation or even tolerance of others. For now, it is enough to note that these limits will eventually need to be negotiated.

The integration of the exercise of human capacities into the concept of dignity is meant to ward off an overly abstract conceptualization whose failure to make room for the particularities of human experiences of identity and life projects would make respect for dignity a homogenizing force. Highlighting these two

105. Indeed, there is an even more basic form of respect for dignity than the one I explicate here, one which governs treatment of those who may, temporarily or permanently, be deprived of the capacity for full-fledged autonomy that figures prominently in the following analysis. This more basic form requires respect for the integrity and essential needs of the human person whatever his or her capacities, and is the backbone of any concept of dignity. It may at some point be necessary to bring this to the surface and subject it to more careful scrutiny and elaboration, but this has not been necessary in the equality contexts examined in this article.

106. See, for example, Taylor's association of Kantian conceptions of dignity as grounded in the universal capacity for rational agency with a conception of rights that insists on uniformity—each individual to enjoy an identical bundle of rights and entitlements. In The Politics of Recognition, supra note 97, at 37–44, Taylor correctly notes that this kind of approach is hostile to any kind of special rights or any deviation from universality in the interpretation of a given right. I take issue, however, with his labeling of such approaches as a "politics of dignity," since it gives the impression that the concept of dignity is integrally tied to this model of rights. My articulation of an alternative is meant to show that dignity can take account of the importance of recognizing the capacity for rational agency without adopting this homogenizing approach. In other words, I seek to unite the two streams that Taylor labels the "politics of dignity" and the "politics of recognition" and which he treats as seriously at odds with one another.
key aspects of human personality also avoids an excessively individualistic account. Both identity development and formulation of a conception of the good are undertaken by individuals, but they are undertaken in large part with and through relationships with others.\textsuperscript{107} For this reason, involvement in communities of various sizes and scopes can be crucial to the individual enjoyment of self-worth. That dependency must be recognized by any account of what respect for the dignity of others requires.

\textit{C. Dignity and Equality}

It is easy to see how a concept of dignity along the lines sketched above would be relevant to a range of human rights—how it might help explain our sense of the inviolability of the physical person, or the importance of certain freedoms.\textsuperscript{108} Can it also help explain equality rights?\textsuperscript{109} Remember that equality claims arise in a context in which the legislature has distributed some benefit and a plaintiff contests the basis for that distribution. In order to be able to challenge the chosen distributive criteria, one must be able to point to some wrong that distribution commits, independent of the denial of the concrete benefit itself—some independent right that the exclusion infringes which is best corrected by redistributing the concrete benefit at issue. To treat dignity as a quality of human

\textsuperscript{107} This is meant to signal disagreement with Taylor's assumption, in The Politics of Recognition, supra note 97, at 56–58, that an autonomy focused conception of dignity must be individualistic in the sense of valuing individual rights above any collective goals. Obviously, this requires much fuller argument than I can provide here, but since it seems to me that it is often the perceived individualism of classic conceptions of dignity that motivate suspicion about the concept, it is important to at least stake out a conception that is not rigidly individualistic.


\textsuperscript{109} It has sometimes been said that the fact that dignity ultimately underpins all human rights makes it an insufficiently specific value to guide thinking about equality. See, for example, Greschner, Does Law Advance the Cause of Equality, supra note 5, at 312; Greschner, The Purpose of Canadian Equality Rights, supra note 100, at 316–17. I am unpersuaded that the fact that dignity may have something to tell us about the foundation of the right to security of the person and freedom of expression etc., means it cannot inform equality as well. A fully fleshed out concept of dignity should help explain a range of, if not all of, the human rights typically entrenched in constitutions, just as the value of liberty does. Different rights will reflect different aspects or dimensions of the concept. However, this concern is a useful reminder that we need to be looking for the dimensions of dignity that help with the work of s. 15 in particular.
beings grounds a principle of entitlement to respect that is fully universal and which therefore is owed to each equally. In virtue of having dignity, each person is owed respect as a creature of inherent worth. This approach does not give us a comprehensive set of correct principles of entitlement against which to directly judge every specific benefit distributed through legislation, but rather identifies an underlying good—respect for dignity—that is properly distributed in equal shares. In order, then, to find violations of s. 15, we should look for distributive criteria which, in distributing the concrete benefit with which they are concerned in a particular way, thereby fail to accord equal respect to all persons as bearers of dignity, as persons of equal moral status. Legislation that conveys the implication that the members of a particular group are of lesser worth, not full members of society, violates dignity.

1. Prejudice

Let us start with an examination of prejudice to begin an account of what constitutes a violation of dignity and why. To treat state reliance on prejudice as wrongful implies that there is some harm in prejudice. The idea of violation of dignity attempts to capture this harm. A legislative distinction based on prejudice denies a class of persons a benefit out of animus or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status. Legislated prejudice denies a benefit for the sake of causing harm to those denied. It thus treats members of a group as loci of intrinsic negative value, rather than intrinsic moral worth. Such treatment not only deprives them of the concrete benefit at issue, but also, through doing so, treats them as unworthy of basic human respect. It thus constitutes an insult to their humanity or their dignity as persons. Distinctions that make an important aspect of human identity the target of stigmatization, humiliation, and the excuse for deprivation violate dignity in this way.

Prejudice works through the attribution of negative worth to personal characteristics that are important aspects of identity; it thus constitutes an assault on the sense of self of its victims. Personal identity has both an individual and a social dimension. The kinds of characteristics that people regard as important to their sense of self tend to be, at the same time, characteristics by which they define themselves as individuals and through which they identify as members of a group.\textsuperscript{110} This group affiliation is as important to

\textsuperscript{110} Greschner, \textit{The Purpose of Canadian Equality Rights}, supra note 100, at 298. It should be remembered, of course, that individuals can identify with more
human identity as any purely individual understanding of the self. We develop a sense of self only through our interactions with others, and our most intimate and formative interactions are frequently with people who share a cultural or ethnic identity that distinguishes them from other such clusters of people in society. And we know from our social and political history that it has tended to be precisely this aspect of identity that has often been targeted for contempt—individuals have been denied respect through use of a characteristic identifying them as part of a group that is devalued.

This explains the grounds listed in s. 15 whose use is a likely indicator of discrimination, and supports the use of a group-based focus in discerning discrimination. Race, national or ethnic origin, color, religion, and sex are all aspects of personal identity that are socially understood as aspects of self in which people are entitled to take pride, but have nevertheless been used to classify groups as unworthy.111 Age and mental or physical disability are characteristics that have been unfairly used to characterize the whole person to the exclusion of other attributes and capacities, thus reducing the person to one aspect of his or her identity. Our knowledge of how this has been done in the past can guide our reading of current legislative treatment to see if past practices and attitudes are being reinforced, and can enable us to detect other, unenumerated, ways of categorizing that threaten to subject members of a group to contempt in a similar way. The sorts of factors often relied upon to determine whether a new ground should be recognized as analogous to those listed in s. 15 operate as more concrete signposts. Thus, the characteristics that are important to one’s sense of self are typically actually or constructively immutable. Long-term disadvantage is taken as an indicator, and result, of past prejudices previously translated into legal disabilities. Status as a chronic minority is a warning signal because it renders a group vulnerable to such prejudice.

So far, this description of the wrong of prejudice locates it in the subjective attitudes of the actor. It is the intended imputation of inferior moral status that makes action on that basis wrong. If this was all there were to dignity, ascertaining whether a particular legislative distinction was constitutional would require an assessment of what was going on in the minds of the legislators who enacted it—what they meant by the use of the distinction. There is no doubt that such subjective intentions to subordinate fellow human beings constitute a denial of dignity, but this is only a start. Violation of dignity has meaning not only subjectively, from the legislator’s point than one such group.

111. Id. at 304–05.
of view, but according to the objective or social meaning of certain forms of behavior, including the use of particular legislative distinctions. Prejudice makes vivid a specific social meaning of contempt and therefore a kind of harm not fully recognized before—being treated as unworthy. Recognizing this should alert us to be on the lookout for other ways in which lack of respect for human dignity can be conveyed, including ways in which this can be done unwittingly. Entrenched prejudice can unleash social forces that devalue members of particular groups even when those acting within the practices shaped by those social forces have no subjective desire to show contempt. The sorts of distinctions and denials that constitute an infringement on dignity are, then, a matter of social construction. To understand the violation of dignity in its entirety, we must look to the meaning of government action, which is always something that must be socially constructed rather than merely treated as a matter of one-sidedly plumbing the content of the actor’s mind. Seeing dignity and its violation as socially constructed allows for the inclusion of stereotype under the umbrella of discrimination.

2. Stereotype

Stereotypes are inaccurate generalizations about the characteristics or attributes of members of a group that can usually be traced back to a time when social relations were based more overtly on contempt for the moral worth of the group. Stereotypes partly stem from backhanded recognition that acting on prejudice is a violation of human dignity. Negative characteristics, such as lack of intelligence, laziness, being fit for some pursuits rather than others, predisposition to criminality, avarice, vice, etc., which are in fact distributed throughout the human race, are falsely attributed predominantly to members of a particular group. It is then the negative characteristic that becomes the focus of contempt. Nevertheless, inaccurate assumptions and stereotypes about the capacities, needs, or desires of members of a particular group can carry forward ancient connotations of second class status, even if the legislators did not intend that meaning. The overt hostility may have come to be washed out of the picture with the passage of time or the ‘normalization’ of such attitudes, but the implication that those to whom the stereotype applies are less worthy than others remains.

Once this construction of a group has set in, others are likely to treat members of that group disadvantageously out of an honest belief that this merely reflects their just deserts or even simply because that is how everyone treats them, without ever thinking about the insult involved. They may even understand their conduct, as with certain traditional sexist practices, as a positive effort to accommodate the
‘natural weaknesses’ of the stereotyped group. However, neither the absence of contempt as a subjective matter nor well-meaning paternalism prevents the use of stereotype from violating dignity. To be denied access to benefits or opportunities available to others on the basis of the false view that because of certain attributes members of one’s group are less worthy of those benefits or less capable of taking up those opportunities can scarcely fail to be experienced as demeaning because it is demeaning. The message such legislation sends is that members of this group are inferior or less capable, and such a message is likely, in turn, to reinforce social attitudes attributing false inferiority to the group. Legislative distinctions which are best understood as grounded in stereotype simply do violate dignity, however well-meaning the legislators may have been.\textsuperscript{112}

Given that negative stereotyping means the attribution of inferiority, if legislation is grounded on and stands to reinforce false stereotypes, to leave it in force would itself reinforce its discriminatory social meaning. Antecedent good intentions cannot wash that negative meaning away.\textsuperscript{113} In other words, government action, certainly action in the form of law-making, should not be regarded as a series of discrete acts to be assessed at the time of the action, i.e. the passing of particular legislation. Legislators may not have been consciously aware of the stereotypical assumptions grounding their conduct in enacting legislation to begin with, but once these assumptions are brought to the surface through litigation, the issue becomes what message is sent by continuing to enforce such legislation.

Inaccurate assumptions about the attributes or capacities of a group are the stuff of stereotype. Such inaccuracy may, in turn, render use of

\textsuperscript{112.} In many every day contexts, we understand the socially constructed nature of indignity more readily than is often the case in the constitutional context. For example, in some societies showing another person the palm of one’s hand is an insult. This is the case even if the actor does not intend to show disrespect. On a first occasion, he might be forgiven the insult—even though the fact of the insult remains—but if he continues to act this way, no one would accept the excuse that he does not mean to insult. The meaning of the action is a question of how it is socially understood, not a matter of the actor’s intention. Such social meanings are open to change—new forms of insult develop and old ones fade in significance. So, for example, I would argue that the apparently innocent question, “where are you from” asked of a non-white immigrant to Canada has become an insult because it has come to stand for an assumption that immigrants do not really belong, especially if they are non-white. It is the experience of many racialized people in having to answer the question too frequently, including people who were born in Canada but are taken to be immigrants, that has turned the question into an insult. However innocently someone asks it now, it is insulting. Contrarily, it is no longer taken as insulting to the Irish to refer to a police wagon as a “paddywagon.”

\textsuperscript{113.} As Richard Wollheim remarks, “Good intentions in a ruler are of little interest except in so far as they augur good results.” Richard Wollheim, \textit{Equality and Equal Rights}, in Justice and Social Policy, \textit{supra} note 10, at 116.
a particular characteristic irrelevant to the legislative objective at hand (assuming to begin with that the objective is a valid one). This explains why so many of the cases turn on an assessment, within the s. 15 analysis, of the relationship between the criterion used and the purported legislative objective. If the proffered objective is not itself discriminatory, but the criteria used to distribute the statute’s benefit do not serve it very well, it is a signal that the use of that criterion may well indicate the implicit acceptance of derogatory stereotypes.

Treating violations of dignity as a matter of the social meaning of certain distinctions also makes it clear that the harm involved is not primarily a matter of harm to the feelings of those affected by a distinction. Prejudice and stereotype stigmatize and often humiliate. The connection between prejudice and the humiliation it often causes makes it easy to slip into treating the harm to be protected against as a kind of emotional harm—the bad feelings typically aroused in the victims of prejudice and stereotype. But this would be to subjectivize the nature of the interest at issue. Instead, the harm should be understood to inhere in the denial of respect per se. In other words, harm to dignity is better understood as an independent, objective harm, not a matter of hurt feelings. Feelings of worthlessness may be a common symptom of being treated with disrespect, and may be relevant diagnostically, but the evil to be prevented or remedied is conveying the implication of worthlessness.

This account is roughly consistent with the Supreme Court’s characterization of the appropriate perspective from which to judge the impact of legislation as “subjective-objective”: “the reasonably held view of one who is possessed of similar characteristics [to those affected by the legislation], under similar circumstances, and who is dispassionate and fully apprised of the circumstances.”\footnote{114. Egan v. A-G. Canada, [1995] 2 S.C.R. 513, ¶ 41, per L’Heureux-Dubé J. This way of formulating the appropriate perspective was adopted by the Court as a whole in \textit{Law}.} The viewpoint of those affected by the use of a distinction to deny benefits must be taken into account and the Court must try to put itself in the shoes of members of this group rather than simply adopting the perspective of the legislator. At the same time, more than the affected group’s say-so is required. The Court must be satisfied that their interpretation captures the legislation’s real meaning, that its import is to attribute lesser worth to some group. However, I would register one note of caution: The Court occasionally slips into the language of “feelings” to describe the appropriate standard—whether the legislation might reasonably make members of a group “feel” demeaned or devalued.\footnote{115. \textit{See, for example}, id. at ¶ 39 per L’Heureux-Dubé J.; Gosselin v. Québec} Indeed, one might argue that the device of
adopting the perspective of those affected by the legislation, albeit an objective version thereof, pulls the analysis inevitably in the direction of ascertaining their feelings and then assessing their reasonableness. This undoubtedly has the laudable objective of forcing the Court to take into account the perspective of vulnerable groups, and this is crucial when the task is to assess whether the import of legislation is to impugn the dignity of a possibly oppressed minority. However, unless judges are careful, it risks reducing the question of the relevant impact of legislation to its psychological effects rather than keeping the Court focused on the meaning of dignity and its impairment.

In the final analysis, the question of what constitutes a violation of dignity is a normative question, not an empirical one about psychological effects. It is the Court's responsibility to make the normative judgments about the meaning of certain forms of treatment, not implicitly put the onus on claimants to have 'reasonable' reactions to their treatment. Especially in the case when a claim is rejected, it seems to me more constructive, or at least less loaded, for the Court to tell a claimant that he or she is wrong about the social meaning of the challenged legislation than to imply that the claimant's feelings are unwarranted or unreasonable. At the same time, it bears repeating that a court must always be sensitive to the meaning legislation has for those negatively affected by it in order to have any hope of avoiding simply ratifying dominant, potentially oppressive, understandings of social relations. The project of constructing the concept of dignity is actively normative, requiring critical reflection on existing social relations. It cannot be reduced either to a question of the legislature's intentions or to a sampling of popular opinion.  

The search for the social meaning of legislation for violations of dignity requires an interpretive exercise that takes account of the entire social context within which the challenged legislation operates. Indeed, we must consider the whole social context because, once we eschew reliance on the legislator's subjective understanding, it is the whole context that determines the social meaning of particular legislative conduct. Neither prejudice nor stereotype typically operates in discrete, isolated circumstances. Instead the wholesale classification of a group as unworthy of full moral status, when it is in force, operates to subordinate members of the group in ways that stand to affect every corner of their lives, infect every attitude and

(Attorney General), [2002] S.C.C. 84, ¶ 245 per Bastarache J.

116. From this perspective, the majority opinion in Gosselin gives reason for worry. Not only was the question of whether prejudice or stereotyping might have been operating not very sensitively handled, (see the analysis at footnote 130, infra), but the majority's deployment of the subjective-objective standard comes perilously close to collapsing into an assessment of the legislature's bona fides.
predisposition toward them. The web of restrictions and exclusions created subjects members of the group to the pervasive message that the social meaning of the most intimate aspects of their personality is one of inferiority. The social relations that ensue give birth to the stereotypes that feed the next round of putative justifications for continued exclusion. The effects of such pervasive and long term cramping of the lives of the members of such a group is not easily undone; the social meaning of imposed inferiority is not easily eradicated. Even once the most egregious exclusions have been remedied, the fact of having been associated with a wide array of negative meanings in the past makes the group more vulnerable to continued devaluation even as a result of fairly minor exclusions. Pockets of negative meaning may remain here and there in the law long after the central institutions of discrimination have been removed.

This seems to me to be the insight lying behind La Forest J.'s nuanced analysis in Andrews of the ways that immigrants have been systematically excluded from the best employment opportunities throughout much of our past. It is against this backdrop that the apparently isolated use of citizenship as a criterion for admission to the legal profession must be read, and against this history it inevitably takes on connotations of attributing lesser worth to the non-citizen, even though this sort of use of citizenship has largely faded from the scene. L'Heureux-Dubé J. has shown herself to be especially attuned to the importance of context and past history in revealing continuing prejudicial implications of rules excluding women, gays and lesbians, and other long subordinated groups. Her judgments have carefully examined the import of current distinctions against past practices of exclusion. On the other hand, bases for distinction that do not have such a monolithically negative track record of being used to subordinate, such as age, do not as easily attract such a meaning.

The explicit use of the characteristics enumerated in s. 15 or ones analogous to them is not the only way that prejudice or stereotype can manifest itself in legislation. Rejecting the adoption of the legislature's subjective viewpoint in interpreting the meaning of legislation allows us to see how prejudice and stereotype can operate

117. In Lavoie v. Canada, [2002] 1 S.C.R. 769, the Court had another opportunity to consider a citizenship-based restriction on employment – this time with respect to federal civil service jobs. A majority of the Court (seven Justices) held the restriction to be a violation of dignity. However, the restriction was upheld because four members of the s. 15 majority found the distinction to be justified under s. 1, these votes combining in result with the two judges denying a s. 15 violation. The interplay of s. 15 and s. 1 arguments in this case complicates the dignity issue in ways that go beyond the scope of this article to untangle.
even in facially neutral legislation. Thus, some adverse impact claims can ground valid discrimination complaints as instances of the violation of dignity through the use of stereotype or prejudice. While not every distinction that has a disproportionate impact on an identifiable group is ultimately grounded in stereotype or prejudice, some are. Many adverse impact claims involve situations in which a facially neutral rule is in fact informed by traditional assumptions about who is qualified for certain benefits, which assumptions themselves may be grounded in old prejudices or stereotypes. The qualification may be stated without reference to a criterion like race or sex and yet be linked to it through using attributes more common in one group than another. This implicit use of the attributes of a dominant group in setting criteria for distribution can often be traced back to an understanding of the enterprise being regulated that more openly excluded certain groups or simply assumed they were unfit to participate, even if there is no current conscious intent to continue past exclusionary practices. In other words, rules that implicitly appeal to attributes of the dominant group to define who gets access to benefits can carry forward the meaning of lesser worth rooted in prejudice or stereotype.

3. Dignity-Constituting Benefits

More significantly, facially neutral rules that simply overlook the circumstances of particular groups can also imply their lesser worth. If a good case cannot be made for the relevance of the qualification used, to uphold its use itself potentially sends out a message that the well-being, the life chances, the opportunities, and aspirations of those excluded do not count for much. They are allowed to be outweighed by minor concerns such as the convenience of maintaining habitual practices. Public institutions and programs built, even unwittingly, in the image of a dominant group convey the message that others are not equally entitled to participate in society and its enterprises, and are not equally members of its institutions. This kind of indignity depends in part on the significance of the benefit denied. Every facially neutral rule excludes some group from

118. For a more extended analysis of this phenomenon in the context of gender biased rules, see Denise G. Réaume, What's Distinctive about a Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law, 2 Legal Theory 265 (1996).

119. It follows from this argument that I must disagree with L'Heureux-Dubé J.'s claim in Gosselin, [2002] S.C.C. 84, ¶ 120, that "[a] neutral distinction, or one that ‘unwittingly’ yields negative effects, is by definition not premised on a negative stereotype." An unwittingly negative distinction shows no intention to discriminate, but it does not necessarily show no stereotyping.
its benefit. If the exclusive effect cannot be tied back to prejudice and consequent stereotypes, it is wrongful only if the benefit at stake is important to a life of dignity.

Again, the point in time to properly assess the social meaning of the legislation is not the point of enactment, but the point at which its consequences for the dignity of those it affects have been tested and recognized. Once the courts have authoritatively decided that the legislation unjustifiably excludes members of a group from benefits or opportunities that are constitutive of dignity in our society, the government cannot seek to uphold the legislation merely because those consequences were unanticipated or unintended without thereby cementing the indignity.

The leading Supreme Court decision dealing with an indirect discrimination claim illustrates how the fact of being left out, even through mere oversight rather than as the ultimate product of prejudice or stereotype, can violate dignity. In Eldridge v. British Columbia Attorney-General, the failure to provide sign language interpreters for the deaf in hospitals was held to be a violation of s. 15. The relevant legislation and regulations did not specifically exclude medicare coverage for sign language interpreters; it simply neglected to include the service. Specifically noting that the Court "has staked out a different path than the United States Supreme Court," La Forest J. proclaimed, "A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law." Although noting that the disabled have frequently been subjected to prejudice and stereotyping, La Forest J. recognizes that we do not require such an explanation of how their needs have come to be ignored in order to see how that failure creates obstacles to their participation in society. It is the failure to accommodate their special needs and the consequences of that failure for full participation that constitute the discrimination. He borrows the following statement of the position from Sopinka J. in Eaton v. Brant County Board of Education:

Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a

121. Id. at ¶ 62.
122. Id.
library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather it is the failure to make reasonable accommodation, to fine-tune society so that its structure and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.\textsuperscript{124}

This locates the indignity in the denial of participation in social life itself, bringing to the surface the third form that a violation of dignity can take.

The argument depends on the idea that there are some benefits or opportunities, some institutions or enterprises, which are so important that denying participation in them implies the lesser worth of those excluded. La Forest J. argues that interpreters are necessary to give deaf patients the same quality of care that hearing patients receive.\textsuperscript{125} The quality of medical care is certainly important, but this underplays the violation of dignity involved in this situation. More fundamental is that without interpreters, deaf patients are denied one of the core rights of personhood—the right to decide what will and what will not be done to their body. The idea that people have the right to grant or refuse consent to medical treatment is fundamental to our concept of dignity. To deny deaf patients the means of understanding what medical treatment is being proposed denies them the very possibility of meaningful consent, and therefore treats them like children, lacking capacity to decide where their best interests lie.\textsuperscript{126} The insult to dignity is profound, and it is not mitigated by the fact that the decision-makers may not have thought about it this way. What matters is that when we do think about it, we can see that it is simply unacceptable to treat deaf patients as though their consent to medical treatment does not matter. It is the participation in the exercise of the power to give or refuse consent that is the important institution to


\textsuperscript{125} Eldridge, [1997] 2 S.C.R. 624, ¶ 71.

\textsuperscript{126} Although La Forest J. briefly mentions the duty of physicians to disclose the risks and benefits of medical treatment, he concentrates more on the fact that the absence of interpreters may put doctors in the position of being unable to treat deaf patients without breaching their professional responsibilities than on the denial to patients of the opportunity to consent or refuse consent. \textit{Id.} at ¶ 70.
which access is denied by the failure to provide sign interpreters as much as the receipt of adequate medical treatment.

This point about the importance of participation in key institutions or access to significant benefits and opportunities can be generalized. Our conception of human dignity includes the idea that individuals should have at least a fighting chance of crafting a life for themselves. Respect for autonomy is part of respect for the inherent worth of persons. Control over the major determinants of how one's life goes is part of what gives one's existence meaning and value. When denial of autonomy is combined with prejudice or stereotype, the indignity is exacerbated, so that this form of indignity can flavor the analysis in a case even when, strictly speaking, it is not necessary to the result. Cutting off significant opportunities because of prejudice or inaccurate assumptions about those persons being denied undermines the ambition to make one's own life. It says that some people are incompetent to shape the character of their life, but rather should have it dictated to them by others. This is one way to read the result in Andrews. Work is of fundamental importance to most people. Choice of occupation is an important part of each person's definition of his or her life. Access to a particular occupation, especially one as socially and politically significant as law, should not be categorically denied on the basis of characteristics that have nothing to do with one's ability to undertake the responsibilities of the profession. Treating people according to a stereotyped view of who they are not only mistakenly underestimates their qualifications; it participates in a social practice that confines them to a way of life not of their making, one whose social meaning is bound up with markers of inferiority. It is hard to see how people who have been so denied can see themselves and be seen otherwise than as second-class citizens, especially if such exclusion has been a systemic feature of their experience. Their lives will reflect a lower level of accomplishment and worth than they were capable and desirous of, and this shortcoming is likely to be falsely attributed to them rather than to the conditions to which they are subjected. This will create a feedback loop that is likely to lead to future treatment reinforcing a status of lesser worth.

Even absent prejudice, sometimes the importance of specific opportunities or benefits to the ability to craft one's own life means that denying access itself implies the lesser worth of those denied. The specific benefit distributed by the legislation is seen as a means to the underlying benefit of autonomy. To the extent that our conception of humanity incorporates notions of autonomy, we will be disposed towards the view that our law should at least aim at its equal distribution. It is clear that equal opportunity to craft a life is denied when the rules are designed, however unwittingly, in ways that
prevent the participation of some people in institutions of major significance to the quality of life. While it may not be possible for the courts to police this in any very finely grained way, they may nevertheless respond to the categorical denial of opportunity as a violation of equality.

Findings of the violation of dignity on this ground may be more open to contest than ones grounded in prejudice or stereotype. It may not always be easy to detect prejudice or stereotype, but once it is acknowledged, the insult in the legislation incorporating it is clear. The issue of which social institutions and opportunities are important enough to be regarded as constituting dignity involves still more delicate interpretive questions. That may be why, in identifying the nature of the interest affected as one of the factors to be considered in finding discrimination, the Court has tended to pinpoint as problematic legislation that “restricts access to a fundamental social institution,” or affects “a basic aspect of full membership in Canadian society,” or “constitute[s] a complete non-recognition of a particular group.”

This sets the bar quite high, but we may hope for it to be lowered as courts develop more familiarity with interpreting this form of violation of dignity.

So far, this theme has remained relatively underdeveloped in Canadian jurisprudence. It has the potential to increase the scope of the equality rights in the Charter. Unfortunately, that potential was not fulfilled in Gosselin v. Québec (Attorney General). The case involved a challenge to the social assistance regime in place in Québec between 1984 and 1989. That regime declared that welfare recipients under the age of thirty were entitled only to one-third of the benefits provided to those over thirty. Regular benefits were not exactly generous, being set at what the government regarded as subsistence level. Thus, someone under thirty received a fraction of a subsistence level income. The scheme then provided that younger recipients could qualify to have their benefits raised by participating in remedial education programs or job training programs. Participation in the former would bring one’s benefits up to about 75% of the regular benefit, while participation in the latter would put one on a par with those over thirty. In a 5–4 decision, the Supreme Court held that the scheme was not discriminatory—in particular, it did not violate the dignity of those under thirty, but was aimed at supporting their dignity by providing an incentive to young people to participate in programs that would improve their chances of

129. See the overview of the scheme provided by Bastarache J. in his dissenting judgment. Id. at ¶¶ 155–71.
integrating into the workforce. In the context of the high rate of youth unemployment in the early 1980s, this was held to be important to their long term well-being.

The case demonstrates that it is not only indirect discrimination cases of the *Eldridge* sort that can exemplify a culpable indifference to the needs of a particular group serious enough to constitute a violation of dignity. *Gosselin* involved the explicit use of age as a criterion determining the level of social assistance benefits. In most cases in which an enumerated characteristic is explicitly used, the analysis revolves around whether its use is grounded in prejudice or stereotype. The presence of either of these features is sufficient to decide the case in the complainant's favour (absent s.1 justification). The consensus on the Court seemed to be that those under thirty are not likely victims of prejudice or stereotyping; hence, if violation of dignity was to be found it had to be because the benefit denied to those under thirty could be regarded as important enough to be dignity constituting.

The majority, in a judgment written by McLachlin C. J., relies very heavily on the findings of the trial judge that no "adverse effects" on the claimant or the class she represented had been proven. This conclusion seriously misunderstands the nature of the benefit at stake here that might be classified as dignity constituting. The majority conclusion is in part based on the fact that the Court did not have detailed evidence about precisely how many eligible welfare recipients under thirty might have been denied access to one of the programs that would have qualified them for a top-up of benefits, nor

130. This issue was not as carefully attended to as one might like, but I will leave that aside for purposes of the present discussion. Briefly, the conclusion of the majority that there was no prejudice or stereotyping here was premised on a refusal to take into account that the group affected by the legislation was not simply those under thirty, but welfare recipients under thirty. If one asks whether welfare recipients constitute a group which has historically been subjected to prejudice and stereotype, and whether this might have led the government to impose a special hardship on the subset of welfare recipients under thirty, the answer might well be different. Bastarache J. mentions in passing that the legislation seemed to be premised on the assumption that those under thirty were in greater need of incentives to improve their job prospects than those over thirty (*Gosselin*, at paragraph 250), but he makes little, in his reasoning, of the insult embedded in that assumption—that young people are less motivated to pursue self-sufficiency. Nevertheless, I accept for the sake of argument that if there is prejudicial thinking lying behind the legislation, it is merely a tinge. The firmer ground for finding a violation of dignity is in the importance of the benefit at issue.

131. *Gosselin*, [2002] S.C.C. 84, ¶¶ 46-47. The case was brought as a class action on behalf of 75,000 persons under thirty eligible for welfare during the relevant period. The only evidence presented as to concrete effects on individuals was as to the personal circumstances of Louise Gosselin, the named plaintiff.
on the exact economic consequences of this. This argument systematically blurs the question of whether a violation of s. 15 had been shown and that of the appropriate remedy for any such violation. Given that the claimant was asking for monetary damages on behalf of the entire class, one might argue that the quantification of such damages is impossible without more information about numbers and precise effects. But that remedial difficulty should not have been allowed to determine the question of whether there was a violation of equality rights to begin with. This confusion seems to have prevented the majority from really grappling with the issue of whether there was a denial of a dignity constituting benefit here.

In fact, the scheme was designed in a way that certainly placed those under thirty at risk of deprivation of an important benefit—the means of basic subsistence. This conclusion is supported by three features of the scheme. First, there were significantly fewer places in education and job training programs than there were eligible welfare recipients under thirty. Second, there were restrictions on eligibility for these programs and on their length, making it impossible for someone under thirty to access the programs seamlessly and maintain the higher benefit level. Finally, the government offered no evidence for its hypothesis that the level of financial need was lower for those under thirty because many of them had the option of living with their parents. While not everyone under thirty would suffer under this scheme, that group was at greater risk of being plunged into abject poverty than those over thirty; nor was the risk merely hypothetical, as Ms Gosselin’s own circumstances showed. The majority’s premature worry about the appropriate remedy seems to have distracted it from noticing that there was a real risk here and that for those for whom it materialized the consequences would be devastating. The real question, then, was whether creating a serious risk for those under thirty that they might end up with no more to live on than $170 per month in an economic context of high unemployment show sufficient lack of regard for their welfare to qualify as a violation of dignity. It is hard to imagine how anyone could live a life with dignity under such circumstances. In addition, as Bastarache J. notes in dissent, the

132. Id.
133. The gap was very large—30,000 placements originally established when there were 85,000 eligible welfare recipients under 30. Id. at ¶283, per Bastarache J.
134. Id. at ¶164–70, per Bastarache J.
constant fear of being reduced to such dire straights was itself likely to impair the dignity of its victims.\(^{136}\)

I would go further still and argue that there is another layer of indignity inflicted by this legislative scheme. In order to find a violation of dignity, Bastarache J. focuses mainly on the economic hardship imposed on those who are unable to rely on their family for support.\(^{137}\) In so far as he attends to the assumption lying behind the legislation that many young people would be able to live with their parents, it is in order to point out that the government provided no proof of its accuracy and did not make reduction of benefits contingent on whether parental support was available to an applicant.\(^{138}\) This is designed to set up his analysis of what he sees as the indignity of the scheme—subjecting young people to severe poverty.\(^{139}\) I would argue that the assumption that anyone under thirty should live with his or her parents if unable to find work constitutes a violation of dignity even to those who are fortunate enough to have parents willing and able to provide living accommodations. It suggests that nothing of any significance is lost in remaining under parental authority until one reaches the age of thirty. This surely requires closer examination. In the worst case scenario, the scheme may have put some young people to the choice of life in an abusive family situation or abject poverty. Even if we postulate reasonably healthy relations between young welfare recipients and their parents, the prospect of living with one’s parents means foregoing any aspiration to an independent life. It means

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137. Bastarache J. wrote the main dissenting judgment on the equality issue, Arbour J. and LeBel J. agreeing with his analysis. L’Heureux-Dubé J. wrote separate reasons concurring with Bastarache J. in the result, focusing equally strongly on the nature of the benefit—freedom from poverty—denied by the legislation. Bastarache J. treats the stipulation that those under thirty should get a reduced benefit as the violation of s. 15 and the creation of remedial programs permitting one to increase one’s benefit to the regular level as the government’s attempt to mitigate the rights violation. He therefore examines the satisfactoriness of this effort under the rubric of his analysis of whether the impairment of s. 15 had been minimal so that it can be justified, concluding that the gaps in access to the remedial programs showed that the impairment was not minimal. This allows him to treat the right violation more categorically—not as the mere imposition of a risk of poverty, but as a certainty of poverty. My characterization of the s. 15 violation has been more modest, considering the entire scheme as a whole, but nevertheless arguing that the imposition of a real risk of severe poverty on one class of citizens should be sufficient to conclude that a dignity-constituting benefit has been denied.


139. Most of this analysis takes place under Bastarache J.’s consideration of the fourth contextual factor—the nature of the interest affected, confirming my hypothesis that this fourth factor is likely to be the vehicle for arguments that the denial of some benefits can themselves constitute a violation of dignity. *Id.* at ¶¶ 251–59.
postponing until age thirty (or a dramatic turn-around in the economy) many of the experiences that we regard as formative of young adulthood; it means retaining a child-like status until age thirty. This, in itself, constitutes some harm to dignity. This is a kind of harm that is not acknowledged at all in the majority judgment, making it easier for it to treat as fatal to the claim whatever imperfections there may have been in the factual record about the degree and extent of the purely economic deprivation inflicted by the scheme.

Although the dissenting judgment of Bastarache J. comes much closer to seeing the real issue in this case, he sticks very closely to the conventional post-Law format for equality analysis, and this inhibits a clear expression of the idea that the third form of indignity that counts as a violation of s. 15 is the denial of benefits so important as to be integral to dignity. He proceeds systematically through a discussion of each of the four contextual factors laid down in Law, even though the crux of his argument falls under the fourth factor—the nature of the interest affected. Some of the reasons that support the conclusion that the interest affected is crucial to dignity are sprinkled throughout the analysis of the other factors, particularly the first and second, obscuring their significance. Recognizing that there are three forms of indignity and that some of the Law contextual factors are more relevant to some than to others would make it easier for courts to zero in on the essential features of a particular case.

**CONCLUSION**

This analysis of equality claims places an enormous responsibility on the courts, because they are the ultimate arbiters of the social meaning of the distinctions used to define entitlement to various benefits. They must decide, and try to justify to the rest of us, when use of a distinction attributes lesser worth and when it does not. The Supreme Court has begun to define some of the contextual features that can help us interpret the meaning of a given legislative distinction. These are usefully grouped, as suggested by L’Heureux-Dubé J.’s suggested framework for analysis, according to whether they direct our focus to the nature of the excluded group itself or to the nature of the benefit denied them. The former typically lead us to reasons to suspect that prejudice or stereotype may have been operating in the drafting of the legislation. The latter should lead to a debate over whether the benefit denied is crucial to a life with dignity.

The key factor coming out of an examination of the group itself is whether it has been historically marginalized from the mainstream. The more we are aware of a lengthy past practice of exclusion, the
more wary we should be that any modern exclusion, even a seemingly minor one, may reinforce old attitudes and values. Similarly, the more widespread and systematic past practices of exclusion have been, the more careful we should be to ferret out any whiff of continuing attribution of lesser worth. The systemic imposition of disadvantage can create social dynamics that reinforce exclusion without being directly tied to the initial contexts of discrimination. Courts should be alert to ensure that new distinctions do not contribute to such dynamics because they are as capable of creating an aura of inferiority around a group as direct imputations to that effect. Noticing that a group is in a chronic minority status in the society operates in a similar fashion, since its lesser political power makes it members vulnerable to victimization. On the other side of the ledger, the more important a particular benefit is to one’s ability to participate fully in society, or the more it is a marker of true belonging in society, the more one should worry that exclusion from it will carry the connotation that members of the excluded group deserve less respect.

None of this produces a bright line test for discrimination nor a simply strategy for encouraging better judging. None is possible, or even desirable. Rigid formulas cannot capture the interpretive exercise that is at the heart of a determination as to whether equality rights have been violated. Rather, we more urgently need to begin a social conversation about dignity and its meaning in our political culture. Its meaning will vary from one set of social circumstances to another, making context crucial to the discussion in any given case. Legal argument should focus on connecting the meaning of legislative distinctions in the lives of the people they affect to one of the three forms of indignity and fleshing out the implication of inferiority they contain. The discrete factors identified by the case law so far can be used as shorthand when appropriate, but they should not substitute for an analysis of how the distinction can be tied back to dignity. It is out of the close study of the political, historical, and social contexts within which distinctions between groups arise that we will develop an increasingly rich concept of dignity, one which will, over time provide increasingly greater guidance to future courts.