AN AUTONOMY-BASED APPROACH TO SECTION 15(1) OF THE *CHARTER*

Rahool Parkash Agarwal*

The author proposes an alternative approach to the test provided in Law v. Canada (Minister of Employment and Immigration) *for section 15(1) of the* Charter. *Currently, the third branch of* Law *test maintains that a claimant must show an impairment to her human dignity to establish discrimination and a violation of her equality rights under section 15(1). The author argues that the notion of basic human dignity can be understood as the more precise concept of personal autonomy and, further, that personal autonomy is fully explanatory of the harms or wrongs that arise from differential or unequal treatment. Accordingly, personal autonomy ought to be regarded as the central interest under the third branch of the* Law *test. The author then addresses how an autonomy-based approach affects the application of section 15(1), in particular with respect to the four contextual factors and the relationship between section 15(1) and section 1.*

L'auteur propose une méthode différente au test donné dans Law c. Canada (Ministre de l'Emploi et de l'Immigration) au par. 15(1) de la Charte. À l'heure actuelle, la troisième question du test de Law maintient que le demandeur doit démontrer qu'il y a eu diminution de la dignité humaine afin d'établir qu'il y a eu discrimination et violation des droits d'égalité au sens du par. 15(1). L'auteur fait valoir que la notion de dignité humaine peut être considérée comme étant la notion plus précise d'autonomie personnelle et puis, que cette autonomie personnelle explique tout à fait les torts et les injustices découlant d'un traitement différent ou inégal. Par conséquent, l'autonomie personnelle doit être considérée comme le point central de la troisième question du test de Law. L'auteur aborde ensuite les effets d'une démarche basée sur l'autonomie sur l'application du par. 15(1), tout spécialement en ce qui concerne les quatre facteurs contextuels et la relation entre le par. 15(1) et le par. 1.

I. INTRODUCTION

In *Law v. Canada (Minister of Employment and Immigration),*[1] the Supreme Court of Canada established the current analytical approach to assessing equality rights claims made under section 15(1) of the *Charter of Rights and Freedoms.*[2] The *Law* test requires an equality claimant to show the following:

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* B.Comm. (Alberta), J.D. (Toronto), Student-at-law, Blake, Cassels & Graydon LLP, Toronto.
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1 [1999] 1 S.C.R. 497 [*Law*].

2 *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 15(1) states: "Every

(a) the existence of differential or unequal treatment; (b) that the differential treatment was made on the basis of a ground of discrimination enumerated under section 15(1) or analogous thereto; and (c) that the differential treatment amounts to discrimination. To establish "discrimination" under the third branch of the *Law* test, the claimant is required to demonstrate that the impugned law impairs her human dignity. Further, the Court provided four non-exhaustive, contextual factors to consider when determining whether a claimant's dignity has been impaired: (1) whether the claimant suffers from pre-existing disadvantage; (2) the relationship between the ground or grounds of alleged discrimination and the claimant's characteristics or circumstances (the "correspondence" factor); (3) the ameliorative purpose or effects of the impugned state action or law, if any; and (4) the nature of the interest affected by the differential treatment.[3]

The third branch of the *Law* test and its reliance on human dignity has been the most controversial part of recent section 15(1) jurisprudence. Critics of *Law* primarily advance two objections.[4] First, the concept of human dignity is vague and ambiguous, and therefore it does not provide sufficient guidance for assessing whether a particular state action violates section 15(1). Second, judicial interpretation and application of the *Law* test has evolved to incorporate a large part of the section 1 test, rendering the *Oakes* proportionality analysis[5] effectively meaningless for section 15(1) claims, and unduly placing the burden of justification on the shoulders of the claimant instead of on government.

The objective of this article is to, within the existing framework provided by *Law*, suggest an alternative way of understanding the content of the equality guarantee. In doing so, I hope to provide a more precise and useful way of analyzing section 15(1) that will also offer some answers to the various criticisms levied against the *Law* test and its reliance on human dignity. My basic position is that the concept of personal autonomy, understood as the empirical expression of human dignity, should be regarded as the central interest under the third branch of the *Law* test. To establish discrimination

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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."

3 *Law*, *supra* note 1 at para. 88.

4 See *e.g.*, Christopher D. Bredt & Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003) 20 Supreme Court Law Rev. (2d) 33 [Bredt & Dodek]; and Peter W. Hogg, "What is Equality? The Winding Course of Judicial Interpretation" (2005) 29 Supreme Court Law Rev. (2d) 39 [Hogg].

5 See *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], in which the s. 1 test is articulated.

and therefore a violation of section 15(1), the "autonomy-based approach" would require an equality claimant to show that the impugned state action impairs her autonomy.

I begin my analysis by describing the context of equality claims. As the first branch of the *Law* test indicates, equality claims arise in response to state action that results in unequal or differential treatment — the state treats, directly or indirectly, some individuals or groups differently than other individuals or groups. However, not all differential treatment will contravene the *Charter*. Rather, I take the position that only *unfair* differential treatment will violate an individual's equality rights; that is, only unequal treatment that harms or wrongs an individual is inconsistent with section 15(1).[6] On this view, the state's obligation under section 15(1) is not to treat individuals the same but, rather, to treat them fairly when making legislative classifications or distinctions. In my view, the basis for this obligation of fairness is the notion of basic human dignity.

Next, I suggest that, in addition to providing the rationale for fair treatment, human dignity can also serve to explain the potential harms of differential treatment. However, human dignity has such explanatory power only when interpreted as the more precise concept of personal autonomy. More specifically, I argue that autonomy should be understood as the empirical

6 To be clear, by "unfair" unequal treatment I mean unequal treatment that perpetrates a harmful effect against the individual. Unfairness in itself has no explanatory meaning or content; it is, rather, a way of describing a class of state action that harms individuals, and that, in the context of differential treatment, amounts to discrimination. Because it causes harm, the unequal treatment is regarded as unfair and is therefore impermissible under s. 15(1). The *Law* test identifies the harm of unfair unequal treatment as the impairment of human dignity. As I argue in Part III, I agree that human dignity has a role to play in explaining the harm of unequal treatment, but only when understood as the more precise and empirical concept of personal autonomy. See also Sophia R. Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 Univ. of Toronto Law J. 291 at 293, n. 7 [Moreau].

As an additional point, my use of the term fairness should not be confused with McLachlin J.A.'s (as she then was) use of same term in the B.C. Court of Appeal judgment in *Andrews v. Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600, aff'd [1989] 1 S.C.R. 143 [*Andrews*]. Justice McLachlin articulated the test for discrimination under s. 15(1) as "whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected" (at 609). She then went on to weigh the purposes of the legislation against its effects on the claimant, an analysis that closely resembled part of the proportionality test more appropriately conducted under s. 1. As a result, her analysis was criticized and ultimately rejected by McIntyre J. at the Supreme Court for improperly importing s. 1 considerations into s. 15(1). In contrast to McLachlin J.A.'s approach in *Andrews*, the autonomy-based approach focuses the analysis on the needs and interests of the claimant, to the exclusion of others, and therefore explicitly excludes s. 1 considerations at the s. 15(1) stage of analysis. I discuss this point in more detail in Part IV.

element of human dignity[7] and, on this basis, that differential treatment is unfair or harmful when it undermines personal autonomy. I then identify two distinct harms of unequal treatment, and argue that both can be explained as harms to personal autonomy. Autonomy thus presents a single, unified way of describing the ways in which the state cannot treat people in the context of differential or unequal treatment.

Following this theoretical analysis, I turn to an examination of section 15(1) from the perspective of autonomy. Specifically, I assess the impact of an autonomy-based conception of discrimination on the third branch of the *Law* test. I conclude with my suggestions for reframing the *Law* test in a way that reflects the importance of personal autonomy.

II. EQUALITY AS FAIRNESS IN DIFFERENTIAL TREATMENT

The Context of Equality Claims

When discussing the content of the government's potential obligation towards individuals under section 15(1), it is critically important to identify the context in which equality claims are made. Claims under section 15(1) are made in relation to any government action or program that allocates some good or opportunity to a certain class or classes of individuals, and consequently denies other individuals or groups that good or opportunity. Such schemes are necessarily predicated on legislative distinctions and differential treatment. The kinds of government programs most often challenged under section 15(1) are distributive schemes — that is, programs that distribute economic and social benefits. However, it is important to note almost all laws employ classifications of some type or another and could therefore engage section 15(1). For example, in *Halpern v. Canada (Attorney General)*, the Ontario Court of Appeal found that the common law definition of marriage violated the equality guarantee by excluding same-sex marriages from legal recognition.[8]

When crafting policies, the government will often make legislative

7 I should note that my intention is not to eliminate human dignity from our understanding of equality rights. I agree that human dignity provides the moral basis for the *Charter*'s equality guarantee. However, my position is that personal autonomy can and should be viewed as the expressive or empirical dimension of human dignity. Autonomy *is* human dignity, in its "real world" form.

8 (2003), 65 O.R. (3d) 161.

classifications on the basis of personal characteristics or attributes that serve as a qualification for the benefit at issue. For example, the classification could be based on age: in *Gosselin v. Quebec (Attorney General)*, welfare recipients under the age of thirty-one were eligible to receive only one-third of the province's full welfare payment.[9] There are also cases where legislation might fail to consider the needs of a certain individual or group and thereby indirectly cause differential treatment. In *Eldridge v. British Columbia (Attorney General)*, the B.C. government failed to provide sign language interpreters for deaf patients requiring medical services.[10] As a result, the quality of medical services available to deaf people was effectively undermined on the basis of a disability.

Differential or unequal treatment therefore serves the basis for claims made under section 15(1). However, it cannot be that all differential treatment constitutes a violation of the right to equality. The Supreme Court has, since *Andrews v. Law Society of British Columbia*, acknowledged this point in its approach to the equality rights: claimants must show that differential treatment amounts to "discrimination" in order to be successful under section 15(1).[11] To do otherwise — that is, to label every legislative distinction an infringement of equality rights – would deprive section 15(1), and in particular the section's words "without discrimination," of any significant content or meaningful analytical role. The result would be to shift all of the analysis to the justification stage under section 1.[12]

Requiring equality claimants to show more than differential treatment on the basis of an enumerated or analogous ground is also consistent with showing deference to the policy-making role of the legislative branch. It would be an excessive incursion into the legislative sphere to hold government accountable for *every* legislative classification and distinction it chooses to make. Indeed, failing to distinguish between fair and unfair legislative classifications would take the judiciary far into the realm of policy-making, as distributive schemes often involve questions regarding the allocation of scarce resources. As Justice La Forest noted in *Andrews*, "Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second-guess policy decisions."[13]

9 2002 SCC 84, [2002] 4 S.C.R. 429 [*Gosselin*].

10 [1997] 3 S.C.R. 624 [*Eldridge*].

11 *Supra* note 6; and *Law, supra* note 1.

12 *Andrews, ibid.* at para. 66.

13 *Ibid.* at para. 73.

The view that the harm of unequal treatment is something more than inequality is also supported by theoretical approaches to equality. As Sophia Moreau states, "No plausible theory of equality maintains that what is objectionable about unequal treatment is the mere fact that some individuals end up with more or less than others. Rather, such theories hold that unequal treatment is objectionable when, and to the extent that, this treatment is unfair."[14] With this understanding of equality, the obligation of government is not to justify all types of differential treatment as rational and proportional, but rather to justify only those distinctions that are unfair or illegitimate within the meaning of section 15(1).[15] For the purposes of this article, the pertinent question is, then, what makes certain types of treatment unfair or impermissible? Put another way, what are the potential harms of differential treatment, and why are they harmful? Responding to these and related questions will be my focus for the rest of this section and the next.

The Basis of the Obligation to Treat People Fairly

To identify and explain the harms of differential treatment, it is necessary to consider the basis of the government's obligation to be fair to individuals when making choices that result in unequal treatment. As stated earlier, the Supreme Court held in *Law* that the central concern of the equality guarantee is the protection of human dignity. Essentially, the view of the Court is that unfair and therefore impermissible legislative distinctions are those that undermine human dignity. But what is human dignity? Basic human dignity refers to the widely held, and largely irrefutable, assumption that all individuals possess intrinsic, incomparable, and indelible worth, in and of themselves, and under all conditions.[16] Dignity is not contingent on talent, beauty, intelligence, or any other personal characteristic. Rather, it is "non-derivative"[17] — ascribed to all human beings independent of their particular accomplishments or praiseworthiness. On that basis, essential human dignity is attributed to all persons automatically; it need not be earned and therefore cannot be lost.[18] It is a moral status of supreme value that is inherent to, and universally shared by, all human beings.

14 Moreau, *supra* note 6 at 293.

15 *Oakes*, *supra* note 5.

16 Denise G. Réaume, "Discrimination and Dignity" (2002-2003) 63 Louisiana Law Rev. 645 at 675 [Réaume]; Immanuel Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie Because of Philanthropic Concerns*, 3d ed., trans. by James W. Ellington (Indianapolis: Hackett Pub. Co., 1993) s. II.

17 Réaume, *ibid.*

18 *Ibid.* at 676.

The assumption that all individuals possess human dignity demands a particular response from others, including government. Ronald Dworkin describes the appropriate response as "equal concern and respect."[19] In his view, government is obligated to treat the citizens it governs with "concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."[20]

It is important to note that concern and respect are not enough for Dworkin — governments must show *equal* concern and respect. Benefits should not distributed according to whom the government in power deems to be worthy of more respect or consideration. As Denise Réaume explains: "To treat dignity as a quality of human beings grounds a principle of entitlement to respect that is fully universal and which therefore is owed to each equally."[21]

To be clear, the right to equal concern and respect is not the purely formal right to equality of outcomes, or in Dworkin's language "equal treatment." Rather, it is the more substantive right to "treatment as an equal," or equal consideration of a dignity-bearing individual's actual interests. Recognizing unique and individualized interests might necessarily result in unequal or differential treatment, but it would nonetheless be fair treatment because it respects human dignity. Therefore, because equal consideration might necessitate unequal treatment, equal concern and respect is an expression of substantive equality.

Human dignity thus grounds the belief that individuals cannot be treated unfairly by the state, where fair treatment is articulated in the duty to show individuals equal concern and respect. If the state fails to govern in accordance with this obligation, it harms individuals by not considering dignity, and therefore acts unfairly. Fairness is not necessarily equal treatment or the equality of distributive outcomes, but rather equal consideration of individuals as bearers of dignity.

Before moving on, I will address two objections that could be made to my analysis thus far. One is the fact that human dignity is not exclusive to

19 Ronald Dworkin, "What Rights Do We Have?" in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) 266 at 273 [Dworkin].

20 *Ibid.* at 272. While not explicitly invoking the notion of basic human dignity, concern and respect as described by Dworkin does implicitly endorse the view that all human beings share some type of core, moral status. It is fair to assume that Dworkin has in mind a status that is similar, if not equivalent, to dignity. Moreau makes a similar assumption (*supra* note 6 at 295).

21 *Supra* note 16 at 678-79.

equality rights. Donna Greschner argues that dignity "underlies the entire *Charter*, and therefore cannot serve to differentiate equality rights from other *Charter* rights."[22] This position was echoed by the Supreme Court in *Blencoe v. British Columbia (Human Rights Commission)*.[23] In assessing the role of human dignity in relation to section 7, Justice Bastarache, writing for the majority, held: "The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter*."[24]

I agree that dignity should be treated as an underlying *Charter* value, and that it can be located in a number of other *Charter* rights. Nevertheless, that general applicability does not negate its specific relevance to equality rights. In distinguishing between fair and unfair differential treatment, dignity must have a role to play in interpreting section 15(1) because it grounds the state's obligation to act fairly.

A second objection is that the term "equal" is unimportant to the ideal of "equal concern and respect."[25] The harm that Dworkin's ideal is concerned with does not stem from an inequality between individuals, but rather from a failure to show an individual the concern and respect he deserves. What a person deserves in terms of treatment by the state is based solely on his unconditional status as a bearer of dignity, and it is therefore wholly independent of what others have, relative to him. All that matters is whether the individual has been treated *unfairly* by the state. Equal concern and respect is therefore not really an account of *equality*, so the objection goes, because it does not seek to locate the relevant harm in comparative *inequality*.

While I agree that the notion of equal concern and respect does not derive its explanatory power from its ability to account for the differences in state-provided benefits (or opportunities between individuals), equality is relevant to Dworkin's ideal, and equality can be an account of the potential harms of differential treatment. The notion of equality I am concerned with does not depend on *how much* a person is given in relation to others. Otherwise, every government program that distributes benefits or imposes burdens would run afoul of the equality guarantee, because some individuals will necessarily receive more or less than others. Rather, as I have stated before, the appropriate approach to equality is concerned with situations when differential treatment

22 "Does Law Advance the Cause of Equality?" Case Comment (2001) 27 Queen's Law J. 299 at 312.

23 2000 SCC 44, [2000] 2 S.C.R. 307.

24 *Ibid.* at para. 76.

25 Moreau, *supra* note 6 at 301, n. 13, also identifies this objection.

is *unfair*. That unfairness, though, is not derived from what or how much individuals are given or denied as a result of the differential treatment, but instead is a consequence of how the state treats the affected individual when making legislative classifications. Thomas Scanlon provides a particularly helpful example to illustrate this point. He argues that while the common desire to help the worst-off in society is often cast in terms of equality, the actual motivating force is humanitarian.[26] It is not the magnitude of the gap — or even the existence of the gap — that is objectionable, but that a person's interests and concerns have not been adequately considered, which is unfair.[27]

Essentially, my response is that equality is not about what people are given relative to others, but rather about an entitlement to be treated in a certain way by the state. In Dworkin's words, individuals are entitled to be treated with concern and respect. Equality does not mean everyone should be given the same thing, but that each individual's interests are owed the same level of consideration as everyone else's. Because people have different needs and circumstances, equal consideration could, and likely should in many situations, result in unequal material outcomes. But this is still consistent with equality, because unequal treatment is unfair and inconsistent with equality only if it fails to accord to a person the level of concern and respect he deserves as a bearer of dignity.

This response raises a further objection: that establishing differential treatment (*i.e.*, by way of a comparator group) is unnecessary to ground a claim of discrimination. I will address this objection in the next section, following my discussion of specific types of unfair differential treatment.

III. AN AUTONOMY-BASED CONCEPTION OF DISCRIMINATION

The Role of Dignity in Explaining the Harms of Differential Treatment

Knowing why individuals should not be treated unfairly leads us to the next stage of inquiry: what *types* of differential treatment amount to unfair

26 "The Diversity of Objections to Inequality" (presented at the Lindley Lectures, University of Kansas, 22 February 1996) at 2.

27 *Ibid.*

treatment or a lack of equal concern and respect? Answering this question requires addressing a preliminary question of crucial importance: as the basis of the state's obligation to treat individuals fairly, and the central premise of the current analytical approach to finding discrimination under section 15(1), to what extent does human dignity explain why certain types of differential treatment are unfair or harmful and therefore constitute discrimination?

Réaume contends that human dignity is fully explanatory. For her, finding a violation of section 15 entails looking 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."[28]

On the other hand, while Moreau agrees that dignity explains why certain treatment by the state is impermissible, she believes that:

> "we cannot derive our conclusions about which forms of treatment these are, and about why exactly they are impermissible, from a single ideal, such as the ideal of concern and respect for dignity."[29] Her reasoning is that dignity "does not have sufficient content to explain the precise nature of the wrongs that are done to individuals who are not treated with equal concern and respect. That is because the mere idea that all human beings have unconditional worth does not tell us what kinds of treatment fail to show proper consideration for that worth."[30]

I do agree with Moreau that dignity, as currently conceived, is simply too vague to assist in identifying the nature of the harms that arise from differential treatment. To say that dignity is itself explanatory results in a vicious circularity—dignity requires respect, and respect is acknowledgement of human dignity. However, I do not agree that dignity *cannot* provide such an explanation. In my view, the content of human dignity can be understood in a way that explains how the government can and cannot treat people in the context of legislative classifications. As I will now argue, this content can be interpreted as the concept of personal autonomy.

Human dignity can be described as having both a moral, or internal, component and an empirical, expressive, or external, component.[31] The

28 *Supra* note 16 at 679.

29 *Supra* note 6 at 314.

30 *Ibid.* at 296.

31 See Réaume, *supra* note 16 at 674-76, and Michael J. Meyer, "Dignity, Rights, and Self-Control"

internal component is what I have already discussed—the moral assumption that all human beings have unconditional, supreme worth. The external element is how that supreme worth is manifested in the real world. It does not simply refer to having human dignity, but to living a life with dignity, or at least having the chance to do so.

In my view, this expression of human dignity is the exercise of personal autonomy.[32] As an empirical matter, dignity is not about the possession of an inherent and supreme moral status but rather the *knowledge and recognition* that one has such status — a "sense of self."[33] This self-recognition is necessarily depends on individual personal autonomy. A person with a sense of self is self-conscious and has a secure sense of his worth and place in the world, is in command of his life, and is not subject to anyone.[34] Indeed, a sense of self is aspirational — it is the promise of dignity and the tangible thing each individual ought to be entitled to by virtue of possessing human dignity. Fulfilling that aspiration requires that a person be, and be respected as, an autonomous agent.

What does personal autonomy entail?[35] As a general matter, Joseph Raz describes autonomy as a "life freely chosen."[36] Autonomy is the "power to determine which acts to perform and which experiences to have," as well as the "power to choose and power to bring about what one has chosen."[37] More specifically, autonomy can be understood as having a physical dimension and a psychological dimension.[38] On a physical level, autonomy is largely self-explanatory. It includes the ability to control one's body and health. In the context of the section 7 *Charter* right to liberty, autonomy has been defined as the ability to decide where one lives,[39] the right of a parent to refuse

(1989) 99:3 Ethics 520 [Meyer].

32 I fully appreciate that Iacobucci J. in *Law* includes "personal autonomy and self-determination" as an element of human dignity (*supra* note 1 at para. 53). However, my approach differs from Iacobucci J.'s in that I aim to recognize personal autonomy as the *central* interest of s. 15(1), not just one of many potential interests that could be included within the ambit of a broadly construed notion of dignity.

33 Réaume, *supra* note 16 at 674-76; and Meyer, *supra* note 31 at 529.

34 Réaume, *ibid* at 674-75.

35 For a seminal discussion on personal autonomy, see Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

36 *Ibid.* at 371.

37 *Ibid.*, citing Elizabeth L. Beardsley, "Privacy: Autonomy and Selective Disclosure" in J. Roland Pennock & John W. Chapman, eds., *Nomos XIII: Privacy* (New York: Atherton Press,1971) at 57.

38 This distinction is admittedly rather unclean, but I believe it is nonetheless helpful in comprehending autonomy's conceptual breadth.

39 *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

medical treatment for their child,[40] and the right to terminate a pregnancy.[41] Outside the *Charter* context, personal autonomy has been invoked to support the freedom of a pregnant woman to make lifestyle choices that might be detrimental to the fetus.[42] One could also argue that physical autonomy includes economic self-determination: having enough resources to live one's life without depending on anyone else.[43]

Psychologically, personal autonomy relates to the formation of self-identity. Moreau describes autonomy as the "power to define and direct [your] life in important ways,"[44] which I take to include making important life choices, such as where one decides to work or whom one decides to marry. She also states that autonomy includes a person's ability "to shape his own identity and to determine for himself which groups he belongs to and how these groups are to be characterized in public."[45] Similarly, Réaume argues that a sense of self requires "confidence in one's identity and the ability to participate in society."[46] In detailing her account of dignity, she stresses the capacity of human beings to develop a conception of the self and to formulate and revise a conception of the good.[47]

Understanding autonomy and self-determination as the external dimension of human dignity helps illustrate the nature of the government's obligation to show equal concern and respect to all individuals. The government's obligation cannot be to protect human dignity as a moral status, because dignity cannot be vitiated as such. As a moral matter, dignity is unconditional and can never be lost. However, it can be "dishonoured"[48] or undermined by a failure to respect an individual's autonomy. The harm to be concerned with therefore

40 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. Note that though it was found that proceeding with a blood transfusion for a child in spite of the parents' wishes constituted a deprivation of liberty on the basis of personal autonomy, the majority ultimately held that the deprivation was made in accordance with the principles of fundamental justice and therefore did not violate s. 7.

41 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at para. 241, Wilson J., concurring in the result but not on this point.

42 *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753.

43 The jurisprudence has thus far rejected the notion that the *Charter* protects self-standing economic rights: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*]; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 37 [*Egan*] ; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at para. 23; and *Gosselin, supra* note 9 at paras. 75-84. However, in *Gosselin* (at para. 82) McLachlin C.J.C. left open the possibility that the *Charter* could in the future be interpreted to encompass economic rights.

44 *Supra* note 6 at 299.

45 *Ibid.*

46 *Supra* note 16 at 675.

47 *Ibid.* at 677.

48 *Ibid.* at 676.

must be the impairment of the expressive dimension of human dignity, because it is the worst possible result of a failure to show equal concern and respect. It is true that society at large cannot guarantee to every person the healthy sense of self their innate human dignity entitles them to, but that does not mean that government should not be attentive to the ways in which its treatment of individuals undermines or impairs an individual's sense of self. As Réaume states: "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."[49]

On this basis, dignity *can* explain the nature and scope of the government's obligation to show equal concern and respect. The right to fairness in differential treatment is not simply an ambiguous entitlement to "respect." Rather, it is a tangible and comprehensible entitlement to the exercise of personal autonomy and self-determination.

How Unfair Differential Treatment Can Be Explained as Harmful to Autonomy

I now analyze the ways in which the wrongs caused by differential treatment wrongs can be explained as harms to personal autonomy. I shall focus on two particular types of state-perpetrated harms that arise in the context of differential treatment: the denial of a fundamentally important benefit and the legislative use of stereotypes and prejudice.[50]

The denial of a fundamentally important benefit

The most obvious type of unfair unequal treatment is the denial of the benefit, good, or opportunity itself. This is what most equality claimants want when making a claim under section 15(1): they want whatever they have been denied by the government. However, it cannot be that the denial of any

49 *Ibid.* [emphasis in original].

50 Moreau identifies two additional wrongs of unequal treatment: the perpetuation of oppressive power relations, and the diminishment of individuals' feelings of self-worth (see *supra* note 6). I choose to focus on the denial of fundamental goods and the use of stereotypes and prejudice because, in my view, these types of unfair treatment are implicated in most, if not all, situations where differential treatment is harmful. To a degree, Moreau agrees with this view: she admits that the harm of oppressive power relations almost always coincides with the use of stereotypes and prejudice, and that a diminishment of self-respect cannot by itself explain why differential treatment is unfair.

and all government-provided benefits constitutes a wrong worthy of *Charter* protection. A government program that distributed lollipops to people under the age of eighteen would deny adults a tasty treat, but could not plausibly be said to "harm" those excluded from the scheme. Clearly, it is only the denial of certain benefits that should fall within the ambit of discrimination.

But how do we ascertain which benefits these are? Autonomy provides a plausible answer to this question, because denying goods that are necessary for a person to live as an autonomous agent would constitute a remediable harm under section 15(1). The denial of goods that are necessary for, or substantially contribute to, control over one's physical self or the formation of one's identity impairs personal autonomy, therefore grounding a claim to redress under the *Charter*. Benefits such as full welfare payments,[51] medical services for pain relief,[52] legal protection from the crime of assault,[53] or the services of a sign-language interpreter to access the provincial health care system[54] could all be considered fundamental or basic goods that are essential to the exercise of an individual's autonomy and essential to living a life with dignity.

Similar to this point is Réaume's discussion of "dignity-constituting benefits."[55] She believes that some distributive benefits and opportunities are so crucial to living a life with dignity that denying them constitutes a harm in itself.[56] Restricting access to key institutions or significant benefits or opportunities denies individuals control over how their lives proceed, and therefore constitutes a profound disrespect for human dignity. Pointing to *Eldridge*, Réaume states that the denial of interpreters did more than simply reduce the quality of care received by deaf patients; it denied deaf patients their bodily autonomy, "one of the core rights of personhood."[57] Réaume's claim is 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."[58] I would go a step further and say that denying access to such benefits *explicitly* diminishes human dignity by undermining personal autonomy.

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51 *Gosselin*, *supra* note 9.

52 *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 [*Martin*].

53 *Canadian Foundation for Youth, Children and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 [*Foundation*].

54 *Eldridge*, *supra* note 10.

55 *Supra* note 16 at 686*ff*.

56 *Ibid.* at 688.

57 *Ibid.*

58 *Ibid.*

Inaccurate characterizations: the legislated use of stereotypes

Wrongs can also be perpetrated by the state's use, whether intentional or not, of inaccurate characterizations of individuals and groups—in other words, the legislated use of stereotypes. Stereotypes have played a central role in several section 15(1) cases decided by the Supreme Court. In *M. v. H.*, the claimant was ineligible for spousal support under the Ontario *Family Law Act* because the definition of "spouse" in the *Act* excluded individuals in same-sex relationships.[59] The Supreme Court ruled the definition to be constitutionally invalid, finding that it was based on the stereotypical belief that individuals in same-sex relationships were incapable of forming intimate, permanent relationships of economic interdependence.[60] In *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, the Court found that the prohibition in the *Indian Act* on non-resident Aboriginals from voting in band elections was inconsistent with section 15(1) because it was based on the inaccurate characterization that Aboriginals living off-reserve are not interested in maintaining meaningful participation in their band or in preserving their cultural identity.[61] The targeting of homosexual erotica by customs officers was found to violate section 15(1) by the Court in *Little Sisters Art and Book Emporium v. Canada (Minister of Justice)* because it promoted the stereotypical view that homosexual erotica is more likely to be criminally obscene than heterosexual erotica.[62] And, in *Martin*, the exclusion of chronic pain sufferers from Nova Scotia's workers' compensation scheme was ruled by the Court to undermine section 15(1) because it was motivated by the unfounded belief that persons affected by chronic pain do not suffer from a legitimate medical condition, but are rather faking for financial benefit or are simply weak individuals.[63]

Arbitrariness is a significant harm that arises from the use of stereotypes. When a legislative distinction or state action relies upon an inaccurate characterization to exclude an individual, the exclusion is arbitrary from her perspective because it is based on a consideration that does not apply to her.[64] Arbitrariness is a harm associated with autonomy — it reflects a lack of consideration by the government of the unique identity and actual situation of the claimant.

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59 *M. v. H.*, [1999] 2 S.C.R. 3. See also Ontario's *Family Law Act* R.S.O. 1990, c. F.3.

60 *M v. H.*, *ibid.* at paras. 69-70.

61 *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 18 [*Corbiere*]. See also *Indian Act*, R.S.C. 1985, c. I-5.

62 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at paras. 119-25 [*Little Sisters*].

63 *Supra* note 52.

64 Moreau, *supra* note 6 at 298.

A further, more troubling harm arising from stereotyping is one produced by the characterization itself — the identity imposed on the claimant by the government impinges on her autonomy even more severely than arbitrary treatment. Moreau, in agreeing with this sentiment, states that "someone who has [been] defined by another on the basis of a stereotype has been publicly defined by another group's image of him. Rather than being allowed to present himself and his circumstances as he understands them, he has been presented in the manner of another's choosing."[65] As mentioned earlier, developing one's own conception of self, both as inwardly viewed and outwardly presented, is a key element of personal autonomy. Legislation made on the basis of stereotypes and prejudice imposes an inaccurate characterization on the individual and the group of which she is a part, thereby undermining the claimant's self-identity and diminishing her personal autonomy and sense of self.

Important to note here is the powerful position government holds by virtue of its law-making capacity. Laws function to both regulate behaviour and transmit messages and beliefs about social and moral norms throughout society. For example, the criminal prohibition on sexual assault not only deters individuals from committing a harmful act, but also promotes the message that sexual assault is socially and morally reprehensible.

The particular danger here is that laws based on stereotypical assumptions about certain groups not only restrict the physical autonomy of those groups, but also place the considerable normative force of government behind the inaccurate characterization. Other individuals may take the government's word at face value and take the false representation as the truth. Even more problematically, members of the affected group may internalize the stereotype. They may begin to believe the stereotype and adopt the characteristics assigned to them through the inaccurate characterization. As a result, they may no longer see themselves as fully autonomous individuals, worthy of equal respect and consideration. It is for these reasons that government, above any other actor, must be diligent in its consideration and treatment of individuals.

Responses to Objections

Before moving to an assessment of section 15(1) in light of the autonomy-based conception of equality, I will address two potential objections to the approach I have taken. The first objection is that the importance I attach to certain fundamental goods logically implies a positive right against the

65 *Supra* note 6 at 299.

government to provide goods or services that are necessary for preserving autonomy.[66] It is important to point out that the Supreme Court has confronted the issue of positive rights under the *Charter* on several occasions. Although the Court has found that the *Charter* requires government to take positive steps in certain circumstances, a majority of the Court has never held that *Charter* rights can impose positive obligations on the state in the complete absence of state action.[67]

In my view, it is sufficient to view concerns over positive rights as limiting the scope of section 15(1). I agree with Moreau in saying that the equality guarantee can be coherently limited by "the need to defer to the government's choice of whether or not to legislate in a particular area and to provide particular benefits to the public."[68] Although individuals may suffer from impaired autonomy in the absence of state action, the government is open to constitutional scrutiny only after it has *already* legislated in a particular area. Currently, there is no obligation on the state to remedy an impairment to personal autonomy independent of existing state action. The obligation would be that *when* the government decides to get into the business of creating distributive schemes that benefit some but not others, it must do so in a way that does not unduly impair personal autonomy. A complete lack of legislation in given policy area would not give rise to a claim of discrimination.

The second objection — one that I identified earlier — is that the autonomy-based approach is not consistent with the need to establish a comparator group. If all that really matters is the effect of state action on an individual's

66 There are numerous theoretical and practical arguments for and against the imposition of positive obligations upon a modern, liberal state, and about the institutional competence of courts to adjudicate such rights claims. Resolving these debates does not fall within the scope of this article.

67 See, *e.g.*, *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, where the Court held that when the government provides a platform for expression, it must do so in way that is consistent with the *Charter*; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, where the Court held that s. 7 provided a positive right to state-funded counsel in the context of a child custody hearing; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, where the Court held that the freedom to associate imposed an obligation to extend protective labour relations legislation to agricultural workers that were excluded by the legislative scheme; *Gosselin, supra* note 9, where Arbour J., in dissent, held that s. 7 includes a positive dimension requiring the state to provide a minimum level of welfare, and where the majority, despite finding that the circumstances of the case did not warrant interpreting s. 7 as imposing a positive obligation on the state, left open the possibility that a positive obligation to sustain life, liberty and security of the person may be made out in special circumstances; and *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, where LeBel J. held, in dissent, that the freedom of religion required a municipality to take positive steps to make available land for the construction of a place of worship.

68 *Supra* note 6 at 309.

autonomy, the presence of a distributive scheme or legislative classification amounting to differential treatment is irrelevant and the identification of a comparator group is of no use to the analysis.

There is some degree of truth to this claim. As I have discussed, the harm of differential treatment stems not from the difference that exists between individuals, but the way the state treats an individual when making a legislative classification. In that sense, the identification of a comparator group does little, if anything, to explain why the treatment of the claimant may be unfair.

However, identifying a comparator group can still serve a valuable evidentiary function,[69] because it is the context of legislative classifications and distributive schemes that give rise to the forms of harm I have identified. As Moreau puts it, they are "forms of unfairness in the context of distribution."[70] It is almost always true that a legislative classification will result in one group receiving a benefit or suffering a burden. Establishing differential treatment alerts courts to the existence of such legislative schemes and thereby focuses the analysis on the potential harms of differential treatment: that is, whether autonomy has been infringed by the denial of a fundamental good or the use of a stereotype. Indeed, there is no doubt that autonomy can be harmed in some other form and independent of differential treatment. But the point here is that autonomy can be infringed in a specific way in the context of distribution, and establishing a comparator group is useful—perhaps even necessary—in determining if we are in fact dealing with a distributive scheme.

IV. AN AUTONOMY-BASED APPROACH TO SECTION 15(1)

As my analysis suggests, my position is that personal autonomy, understood as the empirical expression of human dignity, fully explains the harms that arise from differential treatment. Personal autonomy should therefore be the central focus when determining whether an impugned state action constitutes discrimination under section 15(1). In this section, I will address the implications of applying an autonomy-based conception of discrimination to the third branch of the *Law* test. I will first discuss the "appropriate perspective" and then turn to the *Law* factors. I will tackle the four contextual factors in the following order: i) the nature and scope of the interest affected; ii)

69 Moreau makes the same point (*ibid.* at 318).
70 *Ibid.*

the correspondence between the ground of discrimination and the claimant's actual situation; iii) the existence of pre-existing disadvantage; and iv) the potential ameliorative purpose or effects of a piece of legislation. I shall also comment on how the autonomy-based approach affects the scope of section 15(1) and the relationship between section 15(1) and section 1. To conclude this section, I will discuss whether the autonomy-based approach improves upon the *status quo* by assessing it in light of criticisms made against the *Law* test.

The Appropriate Perspective

In *Law*, Justice Iacobucci made clear that the appropriate perspective from which the section 15(1) discrimination analysis should be conducted is subjective-objective.[71] He adopted Justice L'Heureux-Dubé's formulation from *Egan v. Canada,* where she proposed that the relevant viewpoint is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to and under similar circumstances as the claimant.[72] The "reasonable equality claimant" is informed of and rationally takes into account the various contextual factors that determine whether an impugned law undermines human dignity as understood for the purpose of section 15(1).[73] In its post-*Law* section 15(1) jurisprudence, the Supreme Court has not deviated from applying the subjective-objective perspective when determining claims of discrimination, though there have been occasional disagreements among members of the Court as to how the perspective ought to be applied.[74]

An autonomy-based conception of human dignity does not require this perspective to be modified. Personal autonomy, as described here, is properly viewed as having both subjective and objective components. When assessing whether autonomy has been infringed, the appropriate question is whether the claimant has sufficient control of his life. There are relevant objective components to this question: has he been given a reasonable opportunity to create his own identity, and does he have the goods necessary to live as an independent, autonomous agent? Importantly, though, this question is also localized to the circumstances of the claimant. The subjective component is crucial — one person's view of the good life will likely be different from

71 *Supra* note 1 at paras. 59-61.

72 *Egan, supra* note 43 at para. 41.

73 *Law, supra* note 1 at para. 61.

74 See *e.g., Lavoie v Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769 [*Lavoie*]; and *Corbiere, supra* note 61.

another's, but the promise of equal concern and respect and substantive equality ensures that each is respected as equally worthy. However, it cannot be that a claimant has been discriminated against every time he *feels* his autonomy has been undermined. Determining whether discrimination exists must focus on the claimant, but cannot ignore the social and political context in which the alleged discrimination occurred. This tension between the needs of the claimant and societal factors necessitates the use of the modified perspective.

The Contextual Factors

Nature of the interest affected

The fourth contextual factor outlined by Justice Iacobucci in *Law* is the "nature and scope of the interest affected by the legislation."[75] Influenced largely by the reasoning of Justice L'Heureux-Dubé in *Egan*, this factor reflects the belief that the discriminatory calibre of differential treatment cannot be assessed without an appreciation of how localized and severe the consequences are to the affected individual and group; the economic, constitutional, and societal significance of the interest adversely affected; and, whether the distinction restricts access to a fundamental social institution, affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.[76]

This factor is consistent with the autonomy-based conception of discrimination in two ways. First, it emphasizes the impact of the treatment on the individual claimant, as opposed to a consideration of extraneous interests. This emphasis demonstrates respect for the individual as an autonomous agent who is not dependent or defined by others. Second, the interests it emphasizes — economic, constitutional, and societal — correlate with the type of goods, opportunities, and benefits that I argue are crucial to the exercise of personal autonomy. Having sufficient economic goods or resources, proper access to constitutional protections, and the ability to participate meaningfully in one's community and larger society are hallmarks of personal autonomy and self-determination. In other words, this factor reiterates the foundational harm of differential treatment: the denial of a fundamental good. Informed by the notion of personal autonomy, this contextual factor could be reworded as: does a denial of the benefit at issue undermine personal autonomy by virtue of its economic, constitutional, or societal significance to the claimant? The Supreme Court's jurisprudence has, for the most part, borne out the

75 *Supra* note 1 at para. 74.
76 *Ibid.* at para. 74.

correlation between autonomy-based interests and fundamental goods where application of this factor has pointed to a finding of discrimination. Access to spousal support,[77] the ability to vote in band elections,[78] access to erotic materials central to one's culture,[79] employment,[80] legal acknowledgement of fatherhood,[81] and compensation for debilitating chronic pain[82] are all benefits that enhance one's personal autonomy. In Réaume's language, they are "dignity-constituting benefits."

There are two ways in which the application of this factor can be improved in light of the autonomy-based conception of discrimination. First, this factor should include consideration of the claimant's "needs." On an autonomy-based conception of discrimination, the question of needs is actually an assessment of whether the benefit at stake is fundamental or needed for the exercise of personal autonomy. For the purposes of discrimination analysis, only these needs count — what one needs to exercise personal autonomy, to live a life with dignity.[83] Moreover, this refinement would properly focus the needs analysis on the denial of the *specific* benefit and the impact of the exclusion on the claimant, as opposed to broader, societal needs more akin to justificatory legislative objectives.[84]

Second, this factor should be sufficient to ground a claim of discrimination. Justice L'Heureux-Dubé applied similar reasoning in her dissenting opinion in *Gosselin*. In that case, she advocated for an "effects-first" approach that held that "the severe impairment of an extremely important interest may be sufficient to ground a claim of discrimination" despite the absence or presence of other contextual factors.[85] She further explained this approach in the context of the facts in *Gosselin*:

> It may be that particularly severe negative effects, as assessed under the fourth contextual factor in the third step of the *Law* test, may alone qualify a distinction as discriminatory. It is at least conceivable that negative effects severe enough would

77 *M. v. H.*, *supra* note 59.

78 *Corbiere*, *supra* note 61.

79 *Little Sisters*, *supra* note 62.

80 *Lavoie*, *supra* note 74.

81 *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835.

82 *Martin*, *supra* note 52.

83 As mentioned above, this is exactly the inquiry that has been undertaken by the Court when considering the "nature of the interest affected."

84 See my later discussion of the correspondence factor, where I argue that the courts have wrongly conflated the claimant's needs with broad societal objectives more properly considered under section 1.

85 *Supra* note 9 at para. 128.

> signal to a reasonable person possessing *any* personal characteristics, with membership in any classificatory group, that he or she is being less valued as a member of society. Therefore, even if we accept for the moment that youth are generally an advantaged group, if a distinction were to severely harm the fundamental interests of youth and only youth, that distinction would be found to be discriminatory.[86]

Justice L'Heureux-Dubé also addressed the potential conflict between her application of the fourth factor and the correspondence factor:

> [T]here should be a strong presumption that a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of their possessing a characteristic which cannot be changed does not adequately take into account the needs, capacity or circumstances of the individual or group in question . . . a legislative scheme that exposes the members of an enumerated or analogous category, and only those members, to severe poverty *prima facie* does not take into consideration the needs of that category's members.[87]

The effects-first approach is the appropriate interpretive methodology for an autonomy-based conception of section 15(1). As I have argued, the interests considered under this factor are closely linked to personal autonomy. It follows that a severe impairment of a significant interest would also constitute a severe impairment of personal autonomy. No such impairment could rationally be said to properly consider the needs, capacities, or circumstances of the individual claimant.

I should clarify that I do not propose this be an absolute rule. Only *severe* impairments of significant interests would be sufficient to establish violations of section 15(1). Moderate impairments of the particular interest would still be relevant, but not conclusive, and the other contextual factors could still be considered. Trivial impairments to a significant interest would not be relevant to assessing discrimination, leaving claimants to argue discrimination on the basis of the other contextual factors. Of course, determining the severity of an impairment would be a matter for the courts to decide, based on the facts of a particular case. Nonetheless, this approach is preferable to the *status quo* in that it places the core of the equality guarantee — the dignity of the individual claimant as expressed by their personal autonomy — at the forefront of the analysis.

A review of the decision in *Canadian Foundation for Children, Youth and the Law v. Canada* illustrates the operation of an autonomy-focused effects-

86 *Ibid.* [emphasis in original].

87 *Ibid.* at para. 135.

first approach to section 15(1).[88] In *Foundation*, the complaint pertained to section 43 of the *Criminal Code*, which creates a statutory defence against assault charges for parents and teachers who use "reasonable" physical force "by way of correction" on children.[89] The claimant argued that the provision violated section 15(1) in that the age-based legislative distinction undermined the human dignity of children by denying them protection from intentional physical force. For the majority, Chief Justice McLachlin agreed quite readily that three of the contextual factors militated toward a finding of discrimination:

> The first *Law* factor, vulnerability and pre-existing disadvantage, is clearly met in this case. Children are a highly vulnerable group. Similarly, the fourth factor is met. The nature of the interest affected — physical integrity — is profound. No one contends that s. 43 is designed to ameliorate the condition of another more disadvantaged group: the third factor.[90]

Nevertheless, Chief Justice McLachlin held, after reading in a number of caveats to the provision, that section 43 corresponded to the "needs" of children and, therefore, did not violate section 15(1). In coming to this conclusion, she found that the decision not to criminalize corrective physical force "is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process."[91] For the majority, the age-based legislative distinction immunizing adults from criminal prosecution corresponded to the needs of children for a stable family life by insulating families from the heavy hand of the criminal law.

From the vantage point of the autonomy-based conception of discrimination, the majority judgment erred in its reliance on Chief Justice McLachlin's overly generous articulation of "needs." Properly applied, the fourth *Law* factor focuses the question of need on whether the specific benefit denied reflects a significant economic, constitutional, or societal interest. A significant interest is one that contributes to the exercise of personal autonomy and self-determination. On the facts of *Foundation*, the relevant benefit of section 43 should not be the broader social objective of maintaining stable families, but protection from intentional physical force. Though not dispositive, the majority found that protection from assault implicates an

88 *Supra* note 53. *Foundation* has also been referred to as the "spanking case."

89 *Criminal Code*, R.S.C. 1985, c. C-46, s. 43.

90 *Supra* note 53 at para. 56.

91 *Ibid.* at para. 62.

interest of "profound" significance — physical integrity. That finding accords with the autonomy-based approach. The maintenance of physical integrity, particularly of a highly vulnerable group such as children, is central to the exercise of personal autonomy, both bodily and psychological. Given the importance of the interest and the severity of its impairment, an application of the effects-first approach would strongly favour a finding of *prima facie* discrimination. In that instance, there would be no need to consider the other contextual factors.[92]

What of the stable families objective, or need, relied upon by the majority? Such concerns are more appropriately considered under section 1, as noted in the separate opinions of Justices Binnie, Arbour, and Deschamps. Ultimately, the point is that societal objectives have no place in the interpretation of section 15(1) because they are not relevant to the exercise of personal autonomy of the individual claimant. Interests other than the claimant's, such as those of the state or other individuals or groups, are properly considered *only* under section 1.

Correspondence to the needs, capacities, and circumstances

Given the broader reach of the "interest-affected" contextual factor afforded by the autonomy-based approach, what do we do with the correspondence factor? To answer that question it is important first to understand how the correspondence branch was intended to work, and how it currently operates. In *Law*, the Court held that "legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on human dignity."[93] The rationale for this reasoning is that some enumerated or analogous grounds, such as disability, sex, or age, have the potential to correspond with the need, capacity, or circumstances of the individual claimant. Put simply, in some cases it is appropriate to differentiate between people on the basis of personal characteristics because those characteristics speak to real, policy-relevant differences. In that sense, correspondence is meant as a response to allegations of stereotyping or prejudice. Showing that a state-sanctioned distinction is based on an accurate description nullifies the assertion that the impugned legislation inaccurately characterizes the claimant. This function is consistent

92 It is possible that, regardless of the approach adopted, Chief Justice McLachlin might have still found that s. 43 did not violate s. 15(1) of the *Charter*. However, my point here is not to show that an autonomy-based approach would *necessarily* lead to a different conclusion in *Foundation*, but rather that focusing on autonomy is useful in recognizing that only the individual claimant's interests, as opposed to societal interests or objectives, are the appropriate focus of s. 15(1).

93 *Supra* note 1 at para. 70.

with an autonomy-based approach to discrimination. Stereotypes and prejudice are harmful to personal autonomy, but accurate characterizations that consider the *actual* needs, capacities, and circumstances of the affected individual enhance and contribute to self-identity and self-determination.

On a more conceptual level, the correspondence branch could be seen as embodying Dworkin's right to treatment as an equal. As stated above, Dworkin held that one's right to equal concern and respect was driven by the right to consideration of and respect for one's actual interests. A law that corresponds to a claimant's needs, capacities, or circumstances could be said to adequately consider her interests, even if the outcome results in exclusion from an opportunity or the denial of a benefit. Correspondence can therefore be seen as explicitly articulating substantive equality: equal consideration of the different needs and experiences of individuals may necessitate formally unequal treatment.[94]

Despite its unassuming origins, the correspondence branch has grown into the single most important contextual factor in discrimination analysis. Since *Law*, in an overwhelming majority of section 15(1) cases decided by the Supreme Court, the correspondence factor has been decisive in determining whether a claim succeeds or fails.[95] *Foundation* presents a vivid demonstration of this trend: as noted above, despite finding that the other three factors pointed towards discrimination, Chief Justice McLachlin held that the impugned provision did not violate section 15(1) because it corresponded to the needs of children.

This trend can be criticized on two related grounds. First, the heavy reliance on correspondence undermines the original articulation in *Law* of how the contextual factors should be applied.[96] Justice Iacobucci, for a unanimous Court, made clear in *Law* that "not all four factors will necessarily be relevant in every case" and that the factors should not be applied in a "formalistic or mechanical" manner.[97] Using the correspondence factor to essentially trump the other factors undermines the Court's initial intention to apply a purposive and contextual approach to claims of discrimination.

94 Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 Dalhousie Law J. 5; also see *Foundation*, *supra* note 53 at para. 96, Binnie J.

95 Bruce Ryder, Cidalia C. Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of *Charter* Equality Rights Decisions" (2004) 24 Supreme Court Law Rev. (2d) 103 at 121-122 [Ryder, Faria & Lawrence].

96 *Ibid.* at 123-25; see also *Foundation*, *supra* note 53 at paras. 97-98, Binnie J.; and *Gosselin*, *supra* note 9 at para. 126, L'Heureux-Dubé J.

97 *Supra* note 1 at paras. 62, 88.

Second, the Court's application of correspondence often goes beyond an analysis of the specific benefit at stake to include considerations that are more appropriately addressed under section 1 as "reasonable limits . . . demonstrably justified in a free and democratic society." This development raises serious concerns with respect to the burden placed on the claimant. As Justice Binnie bluntly notes in his dissent in *Foundation*, this approach to correspondence "just incorporates the 'legitimate objective' element from the s. 1 *Oakes* test into s. 15, while incidentally switching the onus to the rights claimant to show the legislative objective is not legitimate, and relieving the government of the onus of demonstrating proportionality, including minimal impairment."[98]

A related concern is that correspondence as currently applied is effectively a reversion to the "relevance test."[99] Before *Law*, several members of the Court contended that a claim under section 15(1) could be defeated if it was shown that the legislative distinction was "relevant" to the achievement of a legislative objective.[100] This approach, never adopted by a majority of the Court, was eventually rejected, for reasons that Justice McLachlin made clear in *Miron v. Trudel*: "Relevance as the ultimate indicator of non-discrimination suffers from the disadvantage that it may validate distinctions which violate the purpose of s. 15(1). A second problem is that it may lead to enquiries better pursued under s. 1."[101] A broad correspondence test applies reasoning similar, if not identical, to the relevance test, as an expansive view of correspondence has the dangerous potential to conflate the "needs" of the claimant with broad legislative objectives. Instead of asking only whether the benefit in question is relevant to or necessary for the circumstances of the individual, the Court imports broader societal needs into its judicial calculus: for example, in *Foundation*, the need for a stable family. Such objectives are undoubtedly legitimate considerations, but they do not belong at the initial stage of determining whether discriminatory treatment has occurred.

An autonomy-based conception of discrimination modifies the correspondence branch in a way that mitigates these problems. Giving

98 *Supra* note 53 at para. 101.

99 Ryder, Faria & Lawrence, *supra* note 95 at 119-20.

100 To be clear, the "relevance" test was never adopted by a majority of the Court. The closest the Court came to such a ruling was in *Egan*, *supra* note 43, where four judges – Lamer C.J.C. (as he then was), Gonthier, La Forest, and Major JJ. – found that the denial of old age spousal allowance to same-sex couples did not violate s. 15(1) because the distinction was relevant to the functional objective of the legislation. The other five members of the Court disagreed with that application of s. 15(1), but one – Sopinka J. – found that the law was justified under s. 1, which resulted in a 5-4 majority upholding the impugned law.

101 *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para 127.

primacy to respect for autonomy would require this factor to concentrate on the needs of the claimant as it pertains to the benefit itself. The relevant question would be this: given the circumstances, does the claimant need the benefit he has been denied? Legislative objectives achieved by differential treatment, whether incidental or intentional, would be considered only at the section 1 stage of analysis. Such an approach respects personal agency by not balancing the individual's need against other societal concerns that may or may not be beneficial to him. The individual is recognized as an autonomous person with unique needs worthy of respect independent of social interests. This reformulation also reduces the potential for correspondence to dominate the section 15(1) analysis by excluding considerations better suited for section 1, and it reorients the correspondence factor towards substantive equality by focusing exclusively on the individual needs of the claimant.

Pre-existing disadvantage

In *Law*, Justice Iacobucci stated that "probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group."[102] It seems that this factor was intended to operate in two distinct ways. First, this factor is clearly directed at uncovering stereotypes or prejudices within impugned legislation. The Court in *Law* believed that differential treatment based on stereotyping or prejudice is the most likely way to infringe section 15(1): such legislation "reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society, resulting in further stigmatization of that person of the members of the group or otherwise in their unfair treatment."[103] Pre-existing disadvantage is relevant in that it is more likely that the denial of a benefit that targets a historically mistreated group is based upon embedded misconceptions. Essentially, then, this factor asks courts to give closer scrutiny to legislation involving such groups.[104]

Second, differential treatment of a group that suffers from pre-existing disadvantage will contribute to the further subordination of that group, independent of the use of stereotypes or prejudice. In Justice Iacobucci's

102 *Supra* note 1 at para. 63.

103 *Ibid.* at para. 64.

104 However, Justice Iacobucci also notes that the presence of stereotypes, regardless of group membership or previous treatment, points towards of violation of section 15(1) because inaccurate characterizations are harmful to all people (*ibid.* at paras. 64-65).

words: "[I]t is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable."[105]

Is the operation of this factor modified by the autonomy-focused approach to discrimination? To a large extent, the answer is no. The objective of this factor, which is the discovery of stereotypes and prejudice, is consistent with the autonomy-based conception of discrimination. As discussed earlier, inaccurate characterizations impose unwanted identities on individuals, resulting in potentially severe impairments of personal freedom and self-determination. However, in the context of the autonomy-based approach, the second intended objective of this factor is somewhat misplaced. Whether the denial of a benefit will further subordinate a historically disadvantaged group is more suitably addressed when assessing the nature and scope of the interest affected. As described earlier, that factor is localized to the needs of the claimants and whether the differential treatment impairs an interest relevant to the exercise of personal autonomy. There is no doubt that pre-existing disadvantage and the potential of further subordination are germane to this inquiry. Group members who already suffer from disadvantage are also likely to suffer from a reduced capacity to form their own identities and participate in society, which is indicative of a diminished sense of self. Further differential treatment can further impair their significant interest in societal inclusion and recognition, thus exacerbating their lack of self-determination.

Ameliorative purpose or effects

The third contextual factor discussed in *Law* considers the possible ameliorative purpose or effects of the impugned legislation. Justice Iacobucci states that such a purpose or effect "which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need of the different circumstances experienced by the disadvantaged group being targeted by the legislation."[106] Notably, despite this factor, the Court left open the possibility that section 15(2) could have independent application, depending on the circumstances. Subsequently, however, the Court concluded in *Lovelace v. Ontario* that section 15(2) is not a stand-alone provision with independent interpretive scope, but rather only

105 *Ibid.* at para. 63.
106 *Ibid.* at para. 72.

confirmatory of and supplementary to section 15(1).[107] Therefore, consideration of a potential ameliorative purpose or effect should occur within the section 15(1) inquiry. Furthermore, the Court in *Lovelace* also held that where the individual excluded is also part of a disadvantaged group, discrimination is unlikely to occur unless the exclusion is based on a misconception of their actual needs, capacities, or circumstances.

An autonomy-based conception of dignity renders the application of this factor inappropriate at this stage of the inquiry. Essentially, the rationale of this factor is that the reasonable equality claimant will not assert that her human dignity has been infringed if her exclusion from a particular benefit is intended to assist or improve the situation of a disadvantaged group. If a given legislative distinction infringes a person's autonomy by using a stereotype or denying a fundamental benefit, it is irrelevant to a finding of discrimination that the objective of the legislation is to help another group. Discrimination, particularly on the autonomy-based conception, is localized to the individual claimant and the impact of the exclusion on that person. That the objective of the legislation is to improve the situation of others does not negate the fact that the claimant has suffered discrimination. To maintain the *status quo* places an enormous burden of *disproof* on the claimant: she must first prove that the legislation *does not* have an ameliorative purpose; failing that, she must prove that her exclusion *does not* advance that purpose. Further, this analysis quite blatantly imports the first two steps of the *Oakes* test into the section 15(1) inquiry, transferring the onus of proof from the government to the claimant. The balancing of individual versus societal and collective interests that is supposed to occur at the justification stage is now the responsibility of the individual claimant when attempting to show a rights infringement. In light of these concerns, the ameliorative purpose or effects of the impugned legislation are better suited for consideration under either section 15(2) as an exception to section 15(1), or section 1, where the government carries the burden of justifying legislation in light of broader social interests.

Two cases since *Law* that demonstrate the unsuitability of this factor for the section 15(1) analysis are *Lovelace* and *Granovsky v. Canada (Minister of Employment and Immigration)*.[108] In *Lovelace*, the government program at issue was a casino project jointly operated by the Ontario government and Ontario's First Nations communities. It was decided that the proceeds from the project would be distributed only to First Nations communities registered as "bands"

107 2000 SCC 37, [2000] 1 S.C.R. 950 [*Lovelace*].
108 2000 SCC 28, [2000] 1 S.C.R. 703 [*Granovsky*].

under the *Indian Act*.[109] The claimants were ineligible to be registered as bands under the *Act* and thereby excluded from receiving any of the proceeds from the project. Justice Iacobucci held for a unanimous Court that the purpose of the program was ameliorative in nature, as it sought to provide resources to First Nations bands for the improvement of "social, health, cultural, education and economic disadvantages"; contribute to "fiscal autonomy"; and support the ameliorative objective of "achieving self-government and self-reliance."[110] I do not challenge the significance of these concerns, but they do not belong in an analysis of the *Charter* rights of the excluded group — non-band Aboriginal communities. Such concerns do not speak to the claimants' autonomy but are, rather, "pressing and substantial" objectives relevant to the section 1 justification. The correct question for the purposes of section 15(1) is whether the autonomy of the claimants was undermined. On that basis, the judgment should have turned on whether denial of access to revenues from the casino project constituted a denial of a benefit fundamental to the claimant group's autonomy and self-determination.

Granovsky presents a similar case. There, the Canada Pension Plan's disability benefits scheme was challenged as discriminatory because it relaxed contribution requirements for permanently disabled workers but not for temporarily disabled workers. The scheme was held to be consistent with section 15(1) in part because it was characterized by the Court as ameliorating the situation of a group more disadvantaged than the claimant group.[111] In short, the Court balanced the interests of two disadvantaged groups against each other. This is an exercise that squarely falls within the ambit of section 1, where the government can justify the challenged allocation of scarce resources. The autonomy-based approach to section 15(1) would find discrimination on the basis of whether the disability benefits were necessary for the exercise of personal autonomy in that situation, not whether another disadvantaged group was suffering *more* than the claimant.

A potential objection to this line of reasoning is that it is equally applicable to the current definition of discrimination — that is, an evaluation of human dignity in its abstract, ambiguous form also requires consideration of the ameliorative dimensions of the challenged legislation to occur outside of section 15(1). My response to this objection is that it is unclear if the abstract notion of human dignity currently employed by the Court can conclusively exclude the consideration of others. It may

109 *Supra* note 61.

110 *Supra* note 107 at para. 87.

111 *Supra* note 108 at paras. 65-67, 79.

even be that the dignity of individuals can be enhanced through knowledge that the situation of others has been improved. For example, in *Corbiere*, Justice L'Heureux-Dubé held that the reasonable claimant "understands and recognizes not only the circumstances of those *like* him or her, but also appreciates the situation of others" and would therefore consider "the particular experiences and needs of all of those groups" when assessing an impact on personal dignity.[112] While it is plausible that a claimant might feel less harmed by a law that excludes her for the benefit of another, perhaps more disadvantaged group, an autonomy-based view of discrimination focuses the inquiry squarely on the situation of the claimant. Others are relevant only insofar as they contribute to the self-identity of the individual claimant, which would not be the case in the context of an ameliorative program that excludes the claimant from benefits or opportunities to which he wants access. In short, an ameliorative purpose or effect is *unlikely* to be relevant to human dignity, but it would *certainly* not be relevant to personal autonomy.

The Scope of Section 15(1) and its Relationship to Section 1

As I have suggested throughout my analysis, applying an autonomy-based approach to equality rights will affect the scope of section 15(1) and, consequently, the relationship between section 15(1) and section 1. The pertinent task at this point is to determine which types of interests fall within the ambit of personal autonomy and which interests are more appropriate for consideration under section 1. For example, how would the autonomy-based approach address conduct that an individual claims to be central to his autonomy but that is harmful to others?

An illustrative example is that of Warren Jeffs, leader of the Fundamentalist Church of Jesus Christ of Latter-day Saints, a Mormon sect that endorses marriage and sex with underage girls. Jeffs was arrested on 28 August 2006 and indicted in Utah for being an accomplice to rape in connection with the arranged marriage of an underage girl to an adult man.[113] What if Jeffs was within Canadian criminal jurisdiction? It would be open for him to argue that the criminal prohibition on sex with minors[114] violates his rights under section 15(1). The law quite clearly creates differential treatment, and Jeffs would have a strong argument that the differential treatment is based

112 *Supra* note 61 at para. 65 [emphasis in original].

113 "A chance for the wives to rebel" *The Economist* 380: 8494 (9 September 2006) 34.

114 *Criminal Code*, *supra* note 89, s. 151.

on his religious views, an enumerated ground of discrimination. More importantly for the purposes of this article, Jeffs could argue that the law inhibits his autonomy in that it denies him the ability to express himself and his religious views in a way that is central to his identity.

However, his assertion of personal autonomy significantly threatens the autonomy of underage girls, a highly vulnerable group. How should section 15(1) mediate these seemingly contradictory claims of personal autonomy? There is a strong possibility that the current framework for section 15(1) would filter out such a claim before even getting to section 1 because of the generous consideration afforded to societal interests at the section 15(1) stage of analysis. However, that outcome would undermine the principled notion of equality that I have advanced in this article. The autonomy-based approach would favour Jeffs's assertion and find that the prohibition on sex with minors violates his equality rights. It would then be left to government to justify the infringement under section 1, where the protection of underage girls would be advanced as a pressing and substantial objective. Though encompassing such obviously objectionable claims within the ambit of *Charter* rights might be unsettling, a principled and consistent view of section 15(1) requires such a result. The autonomy-based approach places the needs and concerns of the individual at the forefront of the section 15(1) analysis, and *any* consideration of the interests of others, legislative objectives, or a law's ameliorative effects are more appropriately analyzed under section 1.[115]

Objections to the *Law* Test

The *Law* test has been maligned by a number of commentators, and I have already briefly presented some of these criticisms. I will now turn to an assessment of the autonomy-based approach in light of these criticisms in an effort to determine if it has improved on the *Law* test or simply replicated its alleged flaws.

As I stated at the outset of this article, critics of the *Law* test advance two main objections. The first objection is that human dignity is too ambiguous and complex for *Charter* analysis. Peter Hogg argues that the

115 It is worth noting that the Court has adopted a similarly inclusive, though much broader, approach for the freedom of expression under s. 2(b) of the *Charter*. The Supreme Court has interpreted s. 2(b) to encompass virtually all forms of expression, including hate propaganda and child pornography. See *R. v. Keegstra*, [1990] 3 S.C.R. 697; and *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45. The s. 1 *Oakes* test is then applied robustly for the purposes of preserving worthwhile, albeit rights-infringing, legislation.

Supreme Court "has often disagreed with lower courts and disagreed among itself on the question whether the challenged law impairs the human dignity of the claimant."[116] Christopher Bredt and Adam Dodek claim that "[t]he *Law* methodology is overly complex and fails to articulate a workable standard that can be applied with any degree of objectivity."[117] In their eyes, "Human dignity is a hopelessly abstract concept."[118] This complexity and abstractness create an indeterminacy that "undermines the rule of law."[119]

The second objection is that the *Law* methodology incorporates a large part of the section 1 *Oakes* test, thereby unfairly burdening the rights claimant and usurping the role of section 1. Specifically, when assessing correspondence and the ameliorative purpose or effects of the legislation, the Court regularly considers the purpose of the impugned legislation and whether the means adopted — *i.e.*, the impugned legislative distinction — are rationally connected to the legislative objective.

Each of these critiques can be addressed by the autonomy-based approach to discrimination. First, personal autonomy is conceptually more precise and less malleable than human dignity. As I have already indicated, it focuses on more tangible indicators like physical integrity, economic self-determination, an ability to make fundamental life choices, and participation in the community. Additionally, autonomy is not an alien concept — courts are familiar with its application, particularly when interpreting section 7 of the *Charter*.[120]

Second, the autonomy-based approach makes a pointed effort to concentrate the analysis on the effect of the legislative distinction on the claimant, and exclude from section 15(1) any considerations more traditionally associated with section 1. Narrowing the correspondence factor and shifting consideration of ameliorative purposes to section 1 is meant to achieve this objective. I admit that some overlap might occur; however, equality, by its very nature, is a complex concept, and analytically clean distinctions may not be possible without artificially truncating the analysis and leaving section 15(1) empty of any meaningful content.

116 Hogg, *supra* note 4 at 56.
117 Bredt & Dodek, *supra* note 4 at 46.
118 *Ibid.* at 47.
119 *Ibid.* at 46.
120 See text accompanying notes 38-41.

V. CONCLUSION

This article has argued that the notion of personal autonomy is one way of understanding how the state should treat individuals in the context of legislative classifications. Viewed as the expressive and empirical dimension of basic human dignity, personal autonomy presents a more precise and cognizable way of interpreting section 15(1) and defining discriminatory treatment. In conclusion, I will identify the three principal ways in which the autonomy-based approach to equality can be used to reformulate the third branch of the *Law* test.

First, personal autonomy requires that the nature of the interest affected — the fourth contextual factor in *Law* — be given primary consideration when determining if a given legislative distinction amounts to discrimination. An individual's autonomy can be significantly impaired if she is denied a good or opportunity that is fundamental to her life. Often, determining what is fundamental is achieved by examining the interest related to the particular benefit denied by the impugned legislative classification. In addition, the autonomy-based approach endorses Justice L'Heureux-Dubé's "effects-first" understanding of discrimination: if the denial of certain goods results in a severe impairment of personal autonomy, no further inquiry under section 15(1) is necessary. No law that severely impairs personal autonomy should escape the charge of discrimination.

Second, the fact that a disadvantaged group making a claim under section 15(1) has suffered from historic disadvantage is better suited for consideration when assessing the nature of the interest affected. Historical mistreatment and subordination speak more to the important interests of social inclusion and societal recognition. The pre-existing disadvantage factor should thus be reframed to concentrate exclusively on determining if the claimant group has actually been the victim of stereotypes or prejudice.

Finally, the consideration of broad social objectives has no place in an autonomy-based conception of discrimination under section 15(1). What matters is how the impugned state action affects the individual, and more specifically how it affects her personal autonomy. State objectives that are extraneous to the individual's needs, capacities, and circumstances are more appropriately considered under section 1, where the government has the burden of justification.

Properly placing consideration of social objectives under section 1 is relevant to both the correspondence factor and the consideration of a law's

ameliorative purpose or effects. With respect to correspondence, the fact that a legislative distinction satisfies a social benefit does not prevent a finding of discrimination. To hold otherwise, as is the practice in the *status quo*, actually serves to undermine the claimant's autonomy by conflating her interests with the broad interests of the state. Similar reasoning can be applied to considering the ameliorative character of legislation. Ameliorative legislation is undoubtedly a necessary tool in the pursuit of substantive equality. However, the equality analysis is undermined when the interests of other groups are balanced against those of the claimant within section 15(1). Personal autonomy necessitates that the claimant's interests, and only her interests, be the focus of the discrimination inquiry. The fact a law has been created to assist a disadvantaged group is more properly considered under section 1, where courts can assess whether the law's objective can be justified.