Dignity and Equality: *Law’s* Reasonable Claimant and Human Dignity under Section 15

by

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ABSTRACT
The concept of human dignity is an essential and inextricable element of equality rights.
In Law v. Canada the Supreme Court united around the concept of dignity to determine section 15(1) cases. This test was abandoned in R v. Kapp, deciding that dignity was too abstract and subjective. This paper argues that the problems with the Law test did not come from the concept of dignity itself, but rather from the reasonable claimant test which focused on subjective feelings and legislative intentions. This paper presents an alternative conception of human dignity, which proposes that substantive equality should be a matter of equal concern based on two principles of human dignity: the principle of equal intrinsic value and the principle of personal responsibility. The analysis must be truly contextual, focused on the objective consequences of discrimination and the circumstances that create and foster inequality.
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1) Introduction

No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community.¹

Equality is a fundamental value in Canadian society. Equality rights are guaranteed to everyone under section 15 of the Canadian Charter of Rights and Freedoms [“Charter”]. Courts and legislatures in Canada have demonstrated a commitment to the promotion of equality and the prevention of discrimination in all aspects of Canadian society. There is judicial consensus that this project must be geared towards promoting substantive equality rather than the Aristotelian idea of formal equality. Formal equality is concerned with treating likes alike, and different people differently, whereas substantive equality requires accommodating differences between individuals and groups.² Promoting substantive equality is not a straightforward task; substantive equality is an extremely complex and malleable concept, capable of many interpretations. The concept of human dignity is an essential and inextricable component of substantive equality; Human dignity is the foundational value upon which equality rights are based.

The relationship between human dignity and equality in Canadian law predates the Charter; however, it was not until 1999, in Law v. Canada³, that the Supreme Court of Canada united around the concept of human dignity as the critical element in determining questions of substantive equality. This was met with a vast amount of criticism and was

³ Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497
subsequently abandoned by the same Court a decade later in *R v. Kapp*. This paper argues that the problems inherent in the *Law* test for discrimination did not come from the concept of dignity itself, but rather from the way that the Court structured the analysis of how to determine whether human dignity had been infringed. *Law* sets out a framework for determining whether there has been substantive discrimination that involves asking whether “the reasonable person” in the position of the claimant would *feel* that his or her human dignity had been infringed by the impugned legislative distinction.

The framework set out in *Law* shifts the focus of the dignity interest from the objective effects of discriminatory treatment to the subjective feelings and intentions of the parties involved in three ways. First, it locates the evil of discrimination in the individual claimant or group, rather than in the social relationships and objective consequences of such distinctions. This trivializes both the importance of equality rights in our society and the grave and systemic consequences that it has on the people affected. Secondly, the exercise of discerning the legitimate feelings of the hypothetical “reasonable person” is a meaningless artificial process. It is demeaning to the claimant and perpetuates existing stereotypes and prejudices, as the objective perspective of what is “reasonable” is tied to dominant norms. Finally, the “reasonable claimant” test opens the door for cases to be determined based on the intentions of the legislature. This moves courts even further away from recognizing the objective material harms of discrimination. The *Law* test locates the evil of discrimination in the feelings of the individual claimant, and locates

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5 *Law, supra* note 3 at para 60.
the wrong to be prevented in the intentions of the legislature. Including legislative intentions under the s. 15(1) analysis does serious damage to the equality guarantee under the Charter.

The human dignity approach was rejected in Kapp without any mention of these problems. The Court concluded that the problems that flowed from Law were wholly the fault of the “abstract and subjective”\textsuperscript{6} concept of human dignity, and decided to advance a practically identical analysis, which simply substitutes the focus on human dignity for new a new focus on “disadvantage by perpetuating prejudice” and “stereotyping”. However, what the Court failed to recognize, is that the problem with the Law analysis lie not with the concept of human dignity itself, but with Law’s inadequate presentation of how human dignity relates to the objective wrongs of discrimination. The criticism in Kapp that Law’s dignity analysis is “abstract and subjective” is an accurate description, but one that should be attached to the reasonable claimant test and not to dignity itself.

This paper presents an alternative way of conceiving of human dignity in equality law that understands dignity as an objective value in society. Looking at human dignity through an objective lens incorporates into the analysis of discrimination an examination of the outward material consequences of discrimination and a consideration of why discrimination must be prevented and remedied in our society. The understanding of human dignity presented here comes from Ronald Dworkin’s theory of human rights. Substantive equality should be a matter of equal concern based on two twin principles of

\textsuperscript{6} Kapp, supra note 4 at para 22.
human dignity: the principle of equal intrinsic value and the principle of personal responsibility.\(^7\)

The twin principles of human dignity can guide our understanding of substantive equality under the *Charter*. The analysis must be truly contextual, focused on the objective consequences of discrimination and the circumstances that create and foster inequality. One element that is central to human dignity is the value of autonomy and self-determination. However, it is critical to understand that in the context of equality, respect for autonomy is not simply a matter of respecting the *right* to personal autonomy, but of providing the resources and circumstances necessary to enable members of society to make meaningful use of this right. Such a task requires looking at the benefits and advantages in question, and what role they play in promoting the principles of human dignity. This is a matter of the distribution of benefits, the right to access to institutions, and the right and ability to participate fully in Canadian society. Thus, human dignity does not provide a formula or test for discrimination. It provides a foundational interest upon which substantive equality is built. In order to serve as a unifying guiding interest for s. 15, the abstract nature of human dignity is a blessing, not a curse.

2) Dignity under Section 15(1) of the *Charter*

A) The Groundwork: *Andrews and Substantive Equality*

The *Charter* was enacted in 1982 as Part I of the *Constitution Act, 1982*.\(^8\) and the equality right, found in s. 15(1) of the *Charter*, was intended to remedy the perceived problems

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\(^7\) *Sovereign Virtue*, supra note 1.
with equality rights under the *Canadian Bill of Rights*. Section 15 of the *Charter* provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

S. 15(1) expanded the equality guarantee that existed under the *Bill of Rights*, which only provided “equality before the law” and “the protection of the law.” If a claimant is able to successfully make out a violation of s. 15(1), the state has the opportunity to save the impugned legislation by showing that it is “demonstrably justified in a free and democratic society” under section 1 of the *Charter*.

The first decision of the Supreme Court on s. 15(1) was in 1989 in *Andrews v. Law Society of British Columbia*. Mark Andrews was a British lawyer and permanent resident of Canada who had met all of the requirements for admission to the Bar in British Columbia, except for being a Canadian citizen. He argued that the admission requirements of the Law Society of British Columbia constituted discrimination on the basis of citizenship contrary to s. 15(1) of the *Charter*. While the Court was divided on the question of whether such a distinction could be justified under section 1, it was unanimous in holding that the distinction infringed Andrews’ s. 15(1) rights. Justice

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12 *Andrews, supra* note 2.
13 McIntyre J. held that the distinction could be justified under section 1 of the *Charter*. 
McIntyre outlined the purpose of s. 15 and the definition of discrimination. This judgment has been consistently championed by courts at all levels and has never been explicitly overruled.

In *Andrews*, Justice McIntyre discussed the shortfalls of the approach to equality under the Canadian *Bill of Rights* and rejected several proposed approaches to equality under the *Charter*. *Andrews* established that section 15(1) is committed to substantive rather than formal equality. Justice McIntyre rejected the “similarly situated” test that existed under the *Bill of Rights*, which required treating like people alike and different people differently. He argued that such an approach to equality could be used to justify such things as the treatment of Jews in Nazi Germany.\(^{14}\) He acknowledged that achieving substantive discrimination will often require treating people differently, and that identical treatment can often create inequality.\(^{15}\) Achieving substantive equality requires accommodating differences between people in society.\(^{16}\)

Furthermore, in *Andrews*, Justice McIntyre established that the purpose of section 15(1) is the “promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”\(^{17}\) He then defined discrimination as:

> A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or

\(^{14}\) *Andrews*, *supra* note 2 at para 28  
\(^{16}\) *Ibid.* at para 31  
\(^{17}\) *Ibid.* at para 34.
group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.\textsuperscript{18}

The stated purpose and definition of s. 15(1) and discrimination from \textit{Andrews} has never been explicitly rejected. The Court in \textit{Kapp} held that this template has “been enriched but never abandoned.”\textsuperscript{19} However, though it may be fair to say that Court has not explicitly abandoned this “template” for substantive equality in subsequent decisions, subsequent jurisprudence has muddled the template through misinterpretations and the adding of new, formulaic tests to the original model. As a result, the template set out in \textit{Andrews} no longer governs the analysis of section 15(1).\textsuperscript{20}

Human dignity was a recurring theme in post-\textit{Andrews}, pre-Law s. 15(1) cases decided by the Supreme Court.\textsuperscript{21} However, this period of s. 15(1) jurisprudence suffered from a lack of consistency both in the Court’s understanding of the role of dignity in the s. 15(1) analysis of discrimination and in the Court itself, as s. 15(1) decisions from this era show a bench divided in its approach to the s. 15(1) analysis. The division in understandings and analyses of s. 15(1) was most acutely demonstrated in the 1995 “Trilogy” cases of \textit{Miron v. Trudel, Egan v. Canada, and Thibaudeau v. Canada}.\textsuperscript{22} In \textit{Thibaudeau} the Court was divided 5-2 in finding no violation of s. 15(1) and was divided 5-4 in both \textit{Miron} and \textit{Egan}. While human dignity played a prominent role in the understanding of equality in

\textsuperscript{18} \textit{Ibid.} at para 37.
\textsuperscript{19} \textit{Kapp, supra} note 4 at para 14.
\textsuperscript{20} This will be discussed in more detail in the following sections.
many cases in the 1990s, it was not until the 1999 decision of *Law v. Canada* that the Court united around a single approach to s. 15(1).

**B) The Dignity of Law**

In the unanimous decision of the Supreme Court in *Law v. Canada*, Justice Iacobucci presented a new test for s. 15(1) centered on the concept of human dignity. The claimant, Nancy Law, was a 30-year-old widow. She challenged provisions of the *Canadian Pension Plan*, which denied survivor benefits to spouses under the age of 35 who were able-bodied and without dependent children at the time of the contributing spouse’s death. If claimants were 45 or older at the time of the contributing spouse’s death they were entitled to survivor benefits. These benefits were gradually decreased for spouses between the ages of 45 and 35 and were cut off completely for those under 35. Mrs. Law argued that this constituted discrimination on the basis of age in violation of her s. 15(1) rights.\(^{23}\)

Reaffirming the commitment to substantive equality articulated in *Andrews*, Iacobucci J. outlined an approach to section 15(1) that involves three broad inquiries:

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

2. Was the claimant subject to differential treatment on the basis of one or more enumerated or analogous grounds? And,

\(^{23}\) *Law*, *supra* note 3 at para 8-11.
(3) Does the differential treatment discriminate in a substantive sense, bring into play the purpose of s. 15(1) in remedying such evils as prejudice, stereotyping or historical disadvantage?\textsuperscript{24}

The third inquiry is where the concept of human dignity enters the analysis.

Discrimination in a substantive sense means more than just a distinction based on an enumerated or analogous ground – there are many distinctions made on the basis of characteristics such as age, gender or disability that do not amount to discrimination. In order to identify substantive discrimination, Iacobucci J. stated that the claim must be assessed in light of the underlying purpose of the equality guarantee.

Drawing on previous cases, Justice Iacobucci identifies the purpose of s. 15(1):

To prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.\textsuperscript{25}

A careful reading of this passage reveals a departure from the purpose of s. 15(1) articulated in \textit{Andrews}, which was stated in much simpler terms. Justice Iacobucci introduced the concepts of prejudice and stereotyping, as well as the concept that individuals are “equally capable”. The new purpose articulated in \textit{Law} is significant, as the Supreme Court has argued that \textit{Law} is consistent with \textit{Andrews},\textsuperscript{26} and the concepts of prejudice and stereotyping were picked up in \textit{Kapp} as being the focus of s. 15(1) in

\textsuperscript{24} \textit{Ibid.} at para 39.
\textsuperscript{25} \textit{Ibid.} at para 88.
\textsuperscript{26} \textit{Kapp, supra} note 4 at para 24.
Andrews. Assessed in light of this purpose, the new test for substantive discrimination was whether the impugned law violates “the human dignity” of the claimant.

So what is human dignity according to Justice Iacobucci? The “specific, albeit non-exhaustive” definition was drawn from previous s. 15(1) jurisprudence:

[The] equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, and merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?²⁷

This is by no means a simple explanation of dignity; it posits a concept of dignity which is concerned with: (1) autonomy and self-determination, (2) self-respect and self-worth, (3) how a person “legitimately” feels, (4) the relationship between personal traits and circumstances and needs, capacities and merits, and (5) treatment that involves being marginalized, ignored and devalued. There are elements of this definition of human dignity that correspond to the theory of human dignity being advocated in this paper,²⁸

²⁷ Law, supra note 3 at para 53.
²⁸ Specifically (1) autonomy and self-determination, (4) the relationship between personal traits and circumstances and the needs, capacities and merits of the claimant, and (5) treatment that marginalizes ignores and devalues members of society. The notions of self-
however, this paper argues that the component of dignity that asks how the claimant “legitimately feels” when confronted with a discriminatory law severely undermines the rest of Law’s understanding of human dignity. The other elements, such as autonomy and self-determination and treatment that marginalizes and devalues, are analyzed according to whether the claimant *legitimately feels* that the law diminishes autonomy or treats him or her in a way that marginalizes or devalues. Instead of focusing on outward harm, this understanding of human dignity locates the impact of discrimination, and the impact on autonomy, within the psyche of the claimant.

Perhaps recognizing the lack of clarity in his definition of dignity, Justice Iacobucci provided four “contextual factors” meant to assist future courts in determining whether the claimant’s dignity is harmed by the impugned legislation. The four contextual factors are:

(1) pre-existing disadvantage, vulnerability, stereotyping, or prejudice;
(2) correspondence between the distinction and the actual needs, merits and circumstances of the members of the group affected by it;
(3) whether the impugned provision has ameliorative purposes for a more disadvantaged group; and
(4) the nature of the interest affected by the distinction.\(^{29}\)

Justice Iacobucci was careful to stress that these factors should be used to provide guidance to the analysis and not as a formal test or checklist; thus, they are neither necessary nor exhaustive in determining a violation of human dignity.\(^{30}\) However, the relationship between these factors and the dignity interest has never been clearly defined.

\[^{29}\] *Law*, *supra* note 3 at para 88.

As a result, subsequent cases have done exactly what was cautioned against. Following Law, the contextual factors have been applied as a formal test and cases have been decided on the basis of one or more of these factors rather than through analysis of the impact of legislation on dignity itself.

The aforementioned elements of Law’s analysis of human dignity and the problems they create have been the focus of much academic and judicial comment. However, the often overlooked feature of Law that truly undermines the value of human dignity to the understanding of equality is the perspective from which the impact on human dignity is to be assessed. According to the Court in Law, the above inquiries and contextual factors are to be approached from a subjective-objective perspective. Specifically, in order to determine whether the impugned legislation violates s. 15(1), the court must ask whether the “reasonable person, dispassionate and fully apprised of the circumstances” would feel that the legislation had the effect of demeaning his or her dignity. The Court also indicated that the reasonable claimant would take legislative objectives into consideration when deciding how a distinction would make them feel.

Ultimately Nancy Law failed to make out a violation of s. 15(1). The Court concluded that a reasonable person in her position would not feel that the impugned provisions

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33 Law, supra note 3 at para 60.
violated her human dignity. This decision largely turned on the fact that the objective of the distinction in the Canada Pension Plan was to provide long-term financial assistance to older surviving spouses who were in a position of disadvantage relative to younger surviving spouses.\footnote{Ibid. at 140.} Given that this benevolent objective would be factored into how the reasonable claimant would feel about the distinction, the reasonable claimant would not feel that her dignity had been violated. The conclusion reached in Law demonstrates the weaknesses of this approach to equality and human dignity. Trying to assess the legitimacy of a hypothetical person’s feelings, taking into account the contextual factors as well as the legislative objectives, proved to be a divisive and unpredictable task. These problems materialized again and again in subsequent decisions and ultimately, a decade later, the human dignity analysis was abandoned.

Part 3 of this paper will outline the problems involved in the “reasonable claimant” test and how this test undermined the value of human dignity to the equality analysis. It is important to note, however, that the criticisms leveled here against Law’s dignity do not hold true for the concept of human dignity as a whole, and an alternative approach to equality using human dignity, which avoids the pitfalls inherent in the Law analysis, is possible.

3) The Reasonable Claimant Test

The Reasonable Claimant test advocates a subjective-objective perspective to conceptualize the impact an impugned law has on human dignity. Though the Reasonable
Claimant test as a whole was first articulated in *Law*, the subjective-objective perspective did not constitute a novel approach to s. 15(1). The judicial architect of this element of the equality analysis was Justice L’Heureux-Dubé in her dissenting judgment in *Egan v. Canada*.35 According to her, a legislative distinction is discriminatory if it is “capable of either promoting or perpetuating the view that the [claimant] is less capable, or less worthy of recognition or value as a human being or member of Canadian society, equally deserving of concern, respect or consideration.”36 She continued to say that this analysis should be considered from a “subjective-objective perspective,” from the point of view of a reasonable person, “dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the [claimant].”37 For Justice L’Heureux-Dubé the focus of s. 15(1) is on the “scar” that the legislative distinction leaves on the claimant.38 The rationale for this approach is that a distinction can have a different impact on different people. She uses the metaphor of a projectile being thrown against a soft surface and against a resilient surface, the same force will leave a different mark depending on what it is hitting.39 However, unlike the Reasonable Claimant test under *Law*, the focus of Justice L’Heureux-Dubé’s analysis was not to determine what a “reasonable person” would “legitimately feel” when confronted with the law. The “scar” she was concerned about was not an emotional scar, but the actual impact on interests relevant to equality cases. Her analysis encompassed both economic and non-economic interests, including access to social institutions and membership in society, all of which

are only important as they are incidental to protection the “worth and dignity of the human person.”

_Law_ embraced the subjective-objective perspective in order to determine what, at first glance, appeared to be the same idea Justice L’Heureux-Dubé was focused on in *Egan*: the impact of the distinction on the human dignity of the claimant. Unfortunately, the definition of dignity in _Law_ was focused on emotional scars rather than material scars, changing the reasonable person test substantially. Ultimately, the test in _Law_ asks whether “the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant,” would “legitimately” _feel_ that the legislation “which imposes differential treatment has the effect of demeaning his or her dignity”. Formulating the analysis of equality and dignity around this question is extremely problematic and severely undermines the utility of the concept of dignity in equality cases.

The first fundamental problem with the _Law_ analysis lies in the true purpose of s. 15. The purpose of s. 15 is not to protect individuals from the potential emotional damage caused by law and policy. Rather, s. 15 is concerned with objective interests and wrongs. The _Law_ test undermines this purpose by equating dignity with feelings. Secondly, the subjective-objective perspective provides for unpredictable results. It is an artificial exercise in which the values and life experiences of the decision-makers inevitably manifest themselves in deciding how the “reasonable person” would feel. This allows

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41 _Law, supra_ note 3 at para 60.
prejudice and stereotyping to sneak, undetected, into the “reasonable claimant” perspective. The subjective-objective perspective also leads to extremely divided courts and an inconsistent understanding of what harms dignity. Finally, the Reasonable Claimant test allows judges to import considerations of legislative intent into the s. 15(1) analysis, by arguing that the “reasonable claimant” would take such things into consideration. This disrupts the legislative distinction between s. 15(1) and section 1 justifications, increasing the burden on the claimant of what they are required to demonstrate in order to make out a violation of s. 15(1). More importantly, it allows stereotypes and prejudice to escape undetected by accepting unproven “generalizations” and “assumptions” to ground policy decisions. Taken together, these three consequences of the Reasonable Claimant test undermine the overall utility of the concept of human dignity for an analysis of substantive equality.

A) Dignity and Feelings

The concept of dignity presented in Law is heavily focused on subjective feelings. Justice Iacobucci stated that human dignity is concerned with “self-respect” and “self-worth,” and the analysis turns on what the court decides a “reasonable” claimant would legitimately feel when confronted with the challenged law. Instances of discrimination will undoubtedly have an impact on the subjective feelings of self-worth and self-respect of those adversely affected, however, this is not the harm s. 15(1) is meant to prevent.\(^{42}\) Analyzing the harm perpetrated on human dignity in terms of the feelings of the claimant

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treats harm to dignity as an “abstract emotive feeling.”\textsuperscript{43} The \textit{Charter} is not in the business of protecting individuals from hurt feelings. To reduce the s. 15(1) guarantee to mere protection of feelings would be to trivialize the awesome importance of equality rights protected by the constitution.

The concept of dignity articulated in \textit{Law} has been criticized for reducing the interest at stake to an “experiential good,”\textsuperscript{44} which locates inequality “in individuals rather than in the social relations \textit{structured by law} that have material impacts on an individual,”\textsuperscript{45} and on society in general. The analysis of substantive equality must be focused on concrete objective harm. It must look to the structure of societal relationships and the impact differential treatment has on the needs, opportunities and lives of members of society. The interest that s. 15 protects is not the subjective feeling of worth or respect, but the objective interest of treating every individual as objectively valuable, equally deserving of “concern, respect and consideration.”\textsuperscript{46} A law or policy may have discriminatory effects even if a particular individual against whom it discriminates does not \textit{feel}


\textsuperscript{46} Andrews, supra note 2 at para 34.
demeaned or disrespected; likewise, a law may violate s. 15(1) “even if it fails to bring the targets down in their own estimation.”  

Of course, objective wrongs have an impact on individual feelings and discriminatory treatment will generally involve feelings of lesser worth and loss of self-respect. However, the outcome of a case must not be determined on such a basis. For example, in *Eldridge v. British Columbia*, 48 (a pre-Law decision) legislation that failed to provide sign language interpreters to deaf persons in hospitals was found to violate s. 15(1). A wrong associated with the failure to provide sign language interpreters is in the paternalistic attitude towards people with disabilities and the fact that it denies affected persons an effective voice to make decisions regarding their medical treatment. 49 This would obviously affect feelings of self-empowerment and respect. However, the Court did not focus on how such treatment makes people feel, but on the consequences of such attitudes: the “persistent social and economic disadvantage” faced by the disabled, judged by statistical information about education and employment. 50 The basis for finding a violation of s. 15(1) in this case was that that denying this service resulted in deaf persons receiving a lower standard of medical treatment. 51 For this reason, *Eldridge* provides a compelling example of why it is the outward, objective harm that must be determinative of the discrimination issues.

47 Réaume, *supra* note 42 at para 51.
Self-worth and self-respect are far too subjective to be provided meaningful protection by the law. Courts should not be in the business of judging claimants’ feelings. Feelings are personal and subjective and as such are not capable of being objectively evaluated. Moreover, articulating the question as a matter of how the “reasonable” person in the position of the claimant would “legitimately” feel can be an insulting process. If the conclusion is that the reasonable person would not feel that his or her dignity has been violated, this is in essence saying that the claimant is not a reasonable person and his or her feelings are not legitimate; essentially, the reasonable person test often implies that the actual claimant is unreasonable. The paradox inherent in the Reasonable Claimant test is that, on one hand, equality cases cannot be decided on the word or opinion of the claimant alone, and on the other hand, the Reasonable Claimant test effectively denies the legitimacy of the claimant’s own feelings about his or her experience of the challenged law if those feelings do not correspond to what the Court concludes the theoretical reasonable claimant would feel. Refocusing the analysis on objective interests, rather than feelings, avoids conveying this message. Where a claim is rejected, “it is more constructive, or at least less loaded, for the Court to tell a claimant that he or she is wrong about the social meaning of the challenged legislation than to imply that the claimant’s feelings are unwarranted or unreasonable.”

While the test purports to be about determining the feelings of the claimant (if he or she were reasonable and those feelings were legitimate), the Law test subsequently “filters

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52 Réaume, supra note 31 at 153.
out” the subjective aspect of feelings through the use of the contextual factors.\textsuperscript{53} The Court has never satisfactorily explained the actual relationship between the contextual factors and the interest of human dignity. As a result, cases tend to turn on one, or a combination of, the contextual factors rather than on the actual impact on the claimant’s feelings. The test moves the focus away from the subjective feelings of the claimant and “abstracts from the individual to the hypothetical.”\textsuperscript{54} The first stages of the Law test trivialize the wrong of discrimination enough by making it about the subjective feelings of the claimant, but the imposition of the contextual factors add insult to injury, resulting in a test that is more about hypothetical feelings than anything else. We are left with a test that not only ignores concrete wrongs, it ignores real feelings as well.

The Court is obviously aware that s. 15(1) is not simply a matter of the claimant’s subjective feelings. The claimant’s assertion that the law made her feel like her dignity was demeaned must be supported by “an objective assessment of the situation.”\textsuperscript{55} This was expressed by Justice L’Heureux-Dubé in Egan:

[Al]though the utopian ideal would be a society in which nobody is made to feel debased, devalued or denigrated as a result of legislative distinctions, such an ideal is clearly unrealistic. The guarantee against discrimination cannot possibly hold the state to a standard of conduct consistent with its most sensitive citizens. Clearly, a measure of objectivity must be incorporated into this determination.\textsuperscript{56}

While it is unquestionably true that a case cannot turn on the opinion of the claimant alone, in the realm of feelings an objective perspective is untenable.

\begin{itemize}
\item \textsuperscript{53} Fyfe, R. James, “Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada” (2007), 70 Sask. L. Rev. 1, at 13.
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} Law, supra note 3, at para 60.
\item \textsuperscript{56} Egan, supra note 35, at para 41.
\end{itemize}
Moreover, any attempt to focus the s. 15(1) analysis on the claimant’s feelings would trivialize the importance of equality rights. Such an analysis would reinforce the notion that equality claimants are whiners in the business of bringing frivolous complaints against the government. Locating the harm of discrimination within the psyche of the individual complainant “erodes the recognition of the material harms of inequality,” which should be at the heart of our understanding of equality. Nancy Law was not challenging the Canada Pension Plan because it made her feel less worthy or a lowered sense of self-respect. Following her husband’s death, she was unable to sustain her business and faced serious financial hardship. She challenged the law because it denied her benefits that were important to her livelihood and had a significant impact on her life.

B) The Artificial “Reasonable” Person

The “reasonable person” test is not unique to equality law; it is a dominant concept in other areas of law including criminal law and the law of negligence. The objective standard of reasonableness has been criticized in relation to these other areas of law, and some of these criticisms hold true for equality law. An objective standard of “reasonableness” opens the door to unarticulated prejudices and stereotypes. This occurs because the standard of reasonableness is deeply intertwined with ideas of “normalcy” and “ordinariness”. When asking what the “reasonable” claimant would feel (or how the reasonable person would act) in the situation, the court is often actually asking what

57 Moreau, supra note 45, at 17.
58 Law, supra note 3, at para 10
59 Moran, Mayo, “Rethinking the Reasonable Person: Custom Equality and the Objective Standard” (1999) University of Toronto, Graduate Faculty of Law, 128.
the “normal” person would feel (or do) in the situation. This is compounded by the fact that the standard of what is normal or reasonable is often derived from judicial “common sense”. \(^{60}\) As a result, the reasonable claimant test affords the court with a great deal of discretion to determine questions by recourse to common sense and judicial notice. Stereotypes and prejudices also inform the subjective element of the Reasonable Claimant’s perspective, as what is deemed “reasonable” or normal for the particular claimant can be ripe with stereotypical understandings of what is perceived to be “normal” the group to which the claimant belongs. As the court is entitled to rely on common sense and unproven generalizations, what is considered “reasonable” for a given claimant risks perpetuating unconsciously held prejudices and stereotypes in the minds of judges. The subjective-objective perspective cannot be divorced from the values and experiences of the presiding judge(s); thus, the task of imagining what the hypothetical reasonable person in the position of the claimant would feel leads to divisive and unpredictable results.

Academics have commented that the standard of reasonableness is not actually “objective”. It is deeply intertwined with notions of “normal” and “ordinary” which are dictated by dominant standards of able-bodied, white heterosexual men.\(^{61}\) The reasonable claimant test thus operates to reinforce dominant norms, which exacerbate already existing inequalities. It sends the message that the claimant ought to feel or act the way the “normal” person would in the same situation. It does not accommodate for differences between individuals, groups of claimants, and the dominant norm of what is perceived as

\(^{60}\) Ibid.
\(^{61}\) Ibid.
ordinary. The standard of reasonableness being tied up with notions of normalcy and ordinariness is a “primary mechanism through which inequality operates.”\textsuperscript{62} It is troubling in other areas of law, but even more so in equality law, where it appears that though the goal of the analysis is to prevent discrimination, the framework used may in fact perpetuate inequality.

Fiona Sampson illustrates how this problem operates in the case of gendered disability claimants.\textsuperscript{63} The objective element of the analysis is problematic for many claimants because “the concept of reasonableness is a product of non-disabled male perspectives and experiences imposed on the law as an allegedly “neutral” standard.”\textsuperscript{64} What is “reasonable” for a disabled woman may be very difficult for a judge who has not had a similar life experience to understand. Sampson explains that the subjective-objective perspective of the reasonable claimant ultimately becomes a question of “how would I respond in that situation?”\textsuperscript{65} How a judge would feel, even if they tried to imagine that they were standing in the claimant’s shoes, will inevitably reflect their own values and experiences, which most often \textit{substantially} differ from those of the claimant and will often reflect unarticulated stereotypes of what is “normal” or “ordinary”.

The other side of the coin is that stereotypes and prejudices operate to determine what is reasonable for a particular class of claimant. Mayo Moran examines the problems with the objective standard in the area of negligence as it impacts on gender inequalities,

\begin{itemize}
  \item \textsuperscript{62} \textit{Ibid.} at 144.
  \item \textsuperscript{63} Sampson, \textit{supra} note 32, at 245.
  \item \textsuperscript{64} \textit{Ibid.} at 258.
  \item \textsuperscript{65} \textit{Ibid.} at 259.
\end{itemize}
children and the mentally disabled. She explains that an objective standard of reasonableness can be used to justify characterizing women as weak and the mentally disabled as incompetent.\(^{66}\) A problem with the subjective aspect of the test is that it requires the claimant to paint herself as a victim, as “damaged and pitiful,” which many find offensive.\(^{67}\) This not only impacts an assessment of how the reasonable woman or mentally disabled claimant would feel, but also justifies treating these groups of claimants accordingly.

The operation of prejudice and stereotyping in the two sides of the reasonable claimant test – the objective standard of what is reasonable and the subjective standard of what is reasonable for that class of claimant – is compounded by the fact that courts are entitled to based conclusions on common sense and judicial notice.\(^{68}\) The risk of basing understandings of what is “reasonable” on stereotypes is significantly increased when considerable deference is given to the common sense and logic of the judges. Not only can “reasonable” be equated with “normal”, the attributes ascribed to the reasonable (or normal) claimant do not even need to be demonstrated by way of evidence.

Feelings are such a personal and subjective concept, that any imagining of how a claimant would or should feel cannot be divorced from subjective understandings of society defined by a person’s own lived experience and values.\(^{69}\) It is unrealistic to think that a hypothetical exercise of imagining how a “reasonable person” in the position of the

\(^{66}\) Moran, supra note 59, at 146-52.
\(^{67}\) Sampson, supra note 32 at 257-8.
\(^{68}\) Moran, supra note 59, at 144.
\(^{69}\) Keene, supra note 43.
claimant would feel when confronted with a given law could provide an accurate picture of the impact of such a law on the dignity of the claimant. As a result of the background and values of the judge(s) in question, as well as the approach taken to the issues and the weight given to different factors, it is obvious that what he or she would consider to create feelings of harm to dignity may not reflect what a person from a completely different background would feel to be harmful to dignity. Something that is essential to a person’s identity and considered of paramount importance in their life may be completely trivial and insignificant to someone else. This is even true amongst different judges.

The artificial nature of a test that asks judges to apply their own notions of reasonableness is demonstrated by the fact that judges have often been divided on what the reasonable claimant would feel when confronted with the law. In *Gosselin v. Quebec (Attorney General)*, the Court was divided on this question. Louise Gosselin was a welfare recipient in Quebec who challenged the Quebec *Social Aid Act*. She alleged that the Act discriminated on the basis of age contrary to s. 15(1) because it provided for a significantly lower monthly amount of assistance for applicants under 30 years of age. Applicants under 30 were able to bump up the monthly amount by participating in employment and education programs established by the Act.

The majority of the Court concluded that the reasonable claimant would not feel that the challenged provisions of the welfare scheme violated her dignity. This opinion turned

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on the fact that the reasonable person would take into account the legislative objective of the challenged law. The Court found that, “as a matter of common sense,” if a law is designed to promote self-sufficiency and autonomy, the reasonable person would not feel that it violated her dignity.\textsuperscript{73} However, this analysis assumes that the “reasonable person” weighs the legislative intent equally, if not more, than her own lived experience when considering the impact on her dignity. While it may be natural for judges who have spent their lives studying law and policy to put considerable weight on legislative intent, it is not likely that the average member of society would take the same considerations into account. To use the majority’s own phrase, “as a matter of common sense,” if a law has the impact of depriving an individual of the minimum benefits necessary for survival on the basis of a personal characteristic that they cannot change, it is likely that this person is less concerned with why the legislation makes this distinction and more concerned with how the distinction impacts their life.

The minority’s application of the exact same test to the facts in \textit{Gosselin}, yielded the opposite conclusion. Justice L’Heureux-Dubé focused her analysis of the reasonable claimant on the effects of the distinction. The evidence demonstrated that 88.8% of those who were eligible to participate in the incentive programs were not able to bump up their benefits to the level of those over 30.\textsuperscript{74} At the time \textit{Gosselin} was decided, individuals over the age of thirty and receiving social assistance through the Quebec \textit{Social Aid Act} were being provided with assistance at a level which the Quebec legislature characterized as the \textit{minimum} amount needed to survive; thus, 88.8% of those eligible for the program

\textsuperscript{73} \textit{Ibid.} at para 27.
\textsuperscript{74} \textit{Ibid.} at para 130.
were forced to live on less than the minimum amount required for survival.\textsuperscript{75} This treatment exposed individual applicants under the age of thirty to poverty and related psychological and physical harms.\textsuperscript{76} Justice L’Heureux-Dubé concluded that the reasonable claimant would likely have been part of this 88.8\% and so would view the legislative distinction as a violation of her dignity.\textsuperscript{77} The crucial difference between the two approaches taken by a split Court in \textit{Gosselin} is that Justice L’Heureux-Dubé considered how the hypothetical objective claimant would be impacted by the discriminatory distinction, rather than how they would \textit{feel} about the distinction. This is because their subjective beliefs of what factors were significant coloured the analysis of what would be considered important to the hypothetical reasonable person.

Another artificial aspect of the Reasonable Person test’s assessment of the legitimate feelings of the hypothetical claimant is that the perspective adopted is to be that of a “dispassionate” person.\textsuperscript{78} Attaching the characteristic of dispassion to a process aimed at evaluating emotional harm is problematic; if the claimant were truly dispassionate about the issue in question, there would be minimal emotional impact. This is not to say that s. 15 cases should not be considered from a reasonable and dispassionate perspective – it merely emphasizes the untenable nature of defining discrimination in terms of emotional impact. Emotional reactions are not objective, nor are they dispassionate. The judicial task of discerning the legitimacy of a hypothetical reasonable person’s feelings in the face of a legislative distinction is impractical. It conjures up the image of parties in an

\begin{footnotesize}
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\textsuperscript{75} \textit{Ibid.} at para 251.
\textsuperscript{76} \textit{Ibid.} at para 130.
\textsuperscript{77} \textit{Ibid.} at para 132.
\textsuperscript{78} \textit{Law, supra} note 3 at para 60.
\end{footnotesize}
argument where one expresses feelings of upset and the other tells them that they should not feel that way. The common response is “don’t tell me how to feel!” The reasonable person analysis from Law can produce a conclusion about how the judge would feel in the situation of the claimant, with the corresponding message that this is how the claimant should also feel. What reaction could be expected other than “don’t tell me how to feel?” In both Law and Gosselin, the Court was effectively telling Mrs. Law and Ms. Gosselin that they should not feel like the legislative distinctions violated their dignity.

C) Legislative Intent

Since even before the enactment of the Charter, it has been established that a finding of discrimination or no discrimination turns on the issue of the effects of the law or policy in question, and not the purpose and intentions of the legislation. In Andrews, McIntyre quoted, with approval, the emphasis on effects from the human rights case O’Malley v. Simpsons-Sears:

[N]o intent [is] required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.

The purpose of human rights legislation, and section 15 of the Charter, is to protect people from discrimination, rather than to punish the discriminator. As such, an intention to discriminate is not a necessary element of a section 15 claim, just as a

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80 Andrews, supra note 2 at 37.
81 O’Malley, supra note 79.
benevolent intention will not save an otherwise discriminatory law.\textsuperscript{82} Legislative intentions and objectives are relevant when determining whether the distinction is reasonable or justified, and such considerations properly take place when determining whether the impugned provision can be saved by section 1 of the \textit{Charter}.

In \textit{Andrews}, McIntyre J. stressed that an essential feature of the \textit{Charter} is that “the right guaranteeing sections be kept analytically separate from s. 1.”\textsuperscript{83} In the years between \textit{Andrews} and \textit{Law}, many did not heed this warning, and considerations of legislative objectives crept into various judicial approaches to s. 15(1).\textsuperscript{84} For example, in \textit{Law}, “the maintenance of separate functions for section 15(1) and section 1 does not appear as one of the basic interpretive principles.”\textsuperscript{85} Some judges continued to resist the inclusion of legislative intent under s. 15(1),\textsuperscript{86} but, for those who sought to make use of this factor, the Reasonable Claimant test provided a license to consider legislative intent as part of what the reasonable claimant would take into account in his or her evaluation of the impugned law.

In \textit{Gosselin}, Chief Justice McLachlin stated:

\textsuperscript{82} \textit{Ontario (Disability Support Program) v. Tranchemontagne}, 2010 ONCA 593, at para 154.
\textsuperscript{83} \textit{Andrews}, supra note 2 at para 40.
\textsuperscript{84} Gonthier J. in \textit{Miron}, supra note 21, and LaForest J. in \textit{Egan}, supra note 35, both considered the fact that the legislative distinctions in question were intended to promote and foster the traditional family relationship, which was deemed to be a proper objective and so the exclusion of other forms of relationships (same-sex and unmarried couples) was not held to be discriminatory.
The purpose of the distinction, in the context of the overall legislative scheme, is a factor that the reasonable person in the position of the claimant would take into account in determining whether the legislator was treating him or her as less worthy and less deserving of concern, respect and consideration than others.\textsuperscript{87}

This illustrates a point from the previous section that the “objective” perspective cannot, in reality, be divorced from the decision-maker’s own values and experiences. It may be reasonable to assume that a judge would place a great deal of weight on the legislative objective or intention, but it is not reasonable to expect the same of the rest of the population. In the words of Justice L’Heureux-Dubé, “most people are not lawyers.”\textsuperscript{88}

The problem with including legislative objectives and intentions in the analysis of how a distinction impacts human dignity is that it locates the wrong of discrimination in the mind of the actor. In doing so, it ignores the material impact of discrimination. It is arguable that legislative objectives and intentions should have no place in the s. 15(1) analysis, because, in theory, a violation of substantive equality should turn on the effects of a distinction and not the intentions of the legislature – legislative intentions are only relevant if there was an intention to discriminate, which is extremely rare. However, the Supreme Court appears to be steadfast in accepting that such considerations are relevant under s. 15. If the Court cannot be convinced to remove this element from the s. 15(1) analysis, it is crucial that the analysis of legislative objectives be conducted in a careful and critical manner.

\textsuperscript{87} Gosselin, supra note 70 at para 26.

\textsuperscript{88} Walsh, supra note 86 at para 143.
The role that legislative objectives have played in the Law test creates several problems. First, in general the courts do not engage in an analysis of whether the objective is itself discriminatory. Second, courts are permitted to accept legislative objectives based on unproven generalizations and assumptions. Unproven generalizations and assumptions create an evidentiary hole through which stereotypes and prejudices can creep into the analysis and influence the outcome of cases. Finally, it allows legislative intent to dictate the outcome of the s. 15(1) claims by retreating into the problematic “rational connection” or “relevance” analysis of Justice Gonthier in *Miron v. Trudel*. 89 By including the objectives and intentions of the legislature in the Reasonable Claimant test, the court displaces consideration of objectives out of the s. 1 justification analysis into the psyche of the reasonable claimant. This enables the intentions of the legislature to dictate what the court considers the impact of the distinction to be; if there is a rational connection between the distinction and the stated objective, even if the objective is itself discriminatory and premised on generalizations and assumptions, the “reasonable” claimant would not consider this to be an affront to his or her dignity.

**i) Discriminatory Objectives**

The Court repeatedly accepts that the reasonable claimant would consider the legislative objective in deciding whether the impugned law violates his or her dignity. A problem arises when the objective that the Court assumes that claimant will take into consideration is itself discriminatory. One way that this problem manifests is when the

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89 *Miron v. Trudel*, *supra* note 21.
Court defines an objective in narrow terms so as to avoid a finding of discrimination. This occurred in Law and was repeated in Gosselin.

In Law, the Court concluded that the provisions of the Pension Plan were not discriminatory because the purpose of these provisions was to meet the long-term needs of older widows and widowers, and not the immediate financial needs of surviving spouses.\(^{90}\) The Court did not consider whether giving preference to the long-term needs of older spouses over the immediate needs of younger spouses was itself discriminatory. The claim failed because the Court decided that the age distinction did in fact correspond with the long-term needs of younger surviving spouses and older surviving spouses.\(^{91}\) While it may be true that the statistics show that in the long-term, older spouses require more assistance than younger spouses, this does not make it acceptable for the legislature to ignore the immediate needs of younger spouses. The preponderance of Supreme Court jurisprudence clearly shows that the Court recognizes that different individuals have difference needs; paradoxically, this decision is effectually saying that the overall needs of younger spouses are not worthy of the same concern as the overall needs of older spouses. If, in the opinion of the Court, “ensuring a basic level of long-term financial security” is “so important to life and dignity,”\(^{92}\) how can it not also be evident that immediate and continuing financial security is also important to life and dignity?

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\(^{90}\) Law, supra note 3 at para 100.  
\(^{91}\) Ibid. at para 102-105.  
\(^{92}\) Ibid. at para 103.
The Court in *Law* failed to consider the impact or potential impacts of ignoring the immediate needs of the younger spouses in its analysis of dignity. Iacobucci J. concluded that while the distinction does impose a disadvantage on younger spouses, this is “unlikely to be a substantive disadvantage, *viewed in the long-term.*”\(^93\) The qualifier “in the long-term” is essential because it would be hard to argue that it would not impose a *substantial* disadvantage *in the short-term.* Here, the Court’s focus was on the legislative objective, which locates discrimination in the mind of the actor, a notion that has been expressly rejected by the Court. Locating harm to dignity in the intentions of the legislature narrows the interests that s. 15 aims to protect. The Court implicitly acknowledges that absent the acceptance of the legislative objective, the distinction would demean the claimant’s dignity:

> The law on its face treats such younger people differently, but the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect and consideration, *when the dual perspectives of long-term security and the greater opportunity of youth are considered.*\(^94\)

Without the perspective of the legislature, the differential treatment does treat the needs of younger people as less deserving of concern, respect, and consideration.

While ignoring the short-term needs of younger surviving spouses is itself discriminatory and harmful to dignity, in accepting that the legislative objective was to account for long-

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\(^93\) *Ibid.* at para 102 [emphasis added].

\(^94\) *Ibid.* There is also a problem with the language of “equally capable”. While it is true that the distinction did not treat younger spouses as less capable, it in fact treated them as more capable, substantive equality requires acknowledging that different individuals are not actually equally capable of full participation in society. The language of equally capable runs the risk of allowing the government to ignore its responsibility of accommodating these differences in people’s capacities in order to achieve actual substantive equality.
term needs only, the Court should have considered how ignoring short-term needs of younger spouses might impact their ability to replace the lost income of a spouse in the long-term. The sudden drop in household income following the death of a spouse is will necessarily have a serious financial impact on the surviving spouse. If the surviving spouse is not provided with financial support to bridge the gap between partial or total financial dependency to full self-sufficiency, he or she is faced with the need to support themselves immediately. This will severely restrict his or her choice of employment, as higher-paying jobs require time and resources to train for. As a result the surviving spouse will often end up in a low-paying job, possibly permanently. Without training and education, the ability to replace the income of a spouse in the long-term is not realistic. Without the income of a spouse or the support of the government, it is unlikely that a surviving spouse who is not already financially independent will be able to meet the financial demands of his or her established lifestyle. This can result in the loss of a home, and presents the risk of a “downward spiral into poverty” that he or she may never recover from. Viewed in this light, denying benefits to meet the short-term needs of younger surviving spouses greatly impacts their financial security in the long-term. Thus, the effects of the legislative distinction itself undermine the assumption upon which it is grounded.

Ms. Gosselin faced a similar wall in her claim. The majority in Gosselin took a cue from Law and accepted the legislative objective of promoting long-term self-sufficiency of younger welfare recipients. The same criticisms attach to this case as in Law. The Court

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95 Réaume, supra note 42, at 182.
failed to consider whether it was discriminatory to give priority to long-term needs over immediate needs, and did not turn its mind to whether the effects of the scheme could undermine the long-term objective. A young person who is subjected to conditions of extreme poverty will likely suffer harmful physical and psychological effects that could substantially impede his or her likelihood of ever becoming independent and self-sufficient.

ii) Unproven Generalizations and Assumptions:

Including legislative objectives in the category of factors that the “reasonable” claimant would consider opens the door to allowing stereotypes and prejudices to go unnoticed by the Court. This occurs in the form of “generalizations” and “assumptions” made by the legislature in articulating the objectives of the challenged law. In Law the Court stated:

Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the Charter and being required to justify its position under s. 1.96

The considerable latitude in using generalizations to inform the s. 15 analysis awarded to the Court in the passage above was expanded in the preceding paragraph of Law which states that the Court does not require perfect correspondence between these “informed” generalizations and the needs of the claimant.97 Even critics of the Law test accept that not all generalizations are bad; specifically, the ones that treat “one feature as a proxy for another” that do not carry negative connotations and are “necessary” because individualized consideration would be difficult.98 However, this interpretation raises

96 Law, supra note 3 at para 106.
97 Ibid. at para 105.
98 Moreau, supra note 44 at 38.
questions about unproven generalizations that the Court has not addressed. How inaccurate does a generalization have to be to count as a stereotype? Does a generalization have to be negative in order to count as a stereotype? It also raises the question of whether *Law* is allowing justifications of administrative convenience, which would not be acceptable under s. 1, slip through the backdoor of s. 15(1).99

Generalizations can operate to perpetuate existing inequalities in a manner similar to the operation of the standard of “reasonableness” discussed above. Generalizations and assumptions about classes of claimants are often tied to dominant male norms. This can be seen in *Law* when the claim is looked at on the basis of age and sex.100 The Court accepted the generalization that surviving spouses under the age of 35 were in a better position to replace the lost income of a spouse in the long term.101 While it may be an acceptably accurate generalization to say that very few men under the age of 35 suffer financial dislocation on the death of a spouse, the same generalization should not be uncritically extended to women as well. The statistics demonstrate that women continue to be paid lower wages than men, continue to be underrepresented in high-paying jobs, and continue to contribute less than men to the total income of two-income households.102 Equating the needs of surviving men and women without considering the real differences between their circumstances in society is stereotyping. Creating a legislative policy that is structured around the needs of the de-gendered younger spouse does not correspond to the needs, capacities and circumstances of young widows and thus is demeaning to their

100 As was done in the Women’s Court of Canada decision, supra note 42.
102 Réaume, supra note 42, at 181-2.
dignity;”\(^{103}\) “[t]reating women the same as men when the circumstances of their lives are different tends to entrench existing disadvantage.”\(^{104}\) This illustrates the danger of accepting “informed” generalizations and assumptions uncritically, as uncritical acceptance can result in the real circumstances of claimants being ignored and actual disadvantaging effects overlooked.

Another problem associated with the use of generalizations in Law’s Reasonable Claimant test arises under the second prong of the test, which asks future Courts to consider several contextual factors. The second contextual factor presented in Law (whether the distinction corresponds to the actual needs, capacities and circumstances of the claimant) is of little use when the needs, capacities and circumstances of the claimant are uncritically assumed and generalized. This results in strengthening stereotypes rather than challenging them, despite the fact that challenging stereotypes is part of the stated purpose of s. 15. This is apparent from the fact that the acceptance of a particular stereotypical notion of young people in Law provided authority for the Court to uncritically accept the same stereotype in Gosselin.\(^{105}\)

In Gosselin the majority took the position that young people do not suffer from pre-existing disadvantages, prejudice or stereotyping. McLachlin CJ. stated that there was no evidence of negative stereotypes of youth, rather that the “opposite” was “more

\(^{103}\) Ibid. at 184.
\(^{104}\) Ibid.
\(^{105}\) Gosselin, supra note 70, at para 34.
plausible”.\(^{106}\) She argued that she was not capable of taking judicial notice of the existence of negative stereotypes of youth because of a lack of evidence to this effect, but was happy to take judicial notice of “the opposite” without any supporting evidence. The basis for the opposite conclusion was that the differential treatment of those under 30 was premised on “a view of the greater long-term employability of under-30s.”\(^{107}\) This view was accepted uncritically by the Court as an “informed generalization.”

A stereotype is simply an inaccurate generalization, but given that generalizations do not have to be perfectly accurate for section 15 purposes, it is difficult to discern the line between an acceptable generalization and a stereotype. The implied, though unstated, position of the majority in *Gosselin* seems to be that an inaccurate generalization must be negative in order to count as a stereotype. The Court accepts that the view that people under 30 are more employable is not accurate of all people under 30, but never calls this a stereotype. The premise that a generalization must be negative in order to be a stereotype, and therefore unacceptable under s. 15, is dangerous. This is obvious from the undesirable results in *Law* and *Gosselin* which both involved *positive* generalizations about younger people.

### iii) Rational Connection

*Law* established that one of the “contextual factors” to be considered in the dignity analysis is the “correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual needs, capacity, or circumstances of the claimant or


\(^{107}\) *Ibid.*
others.”\textsuperscript{108} The “correspondence” factor has sometimes created a defence to discrimination based on the principle of “rational connection”. By including the legislative intention under the section 15(1) analysis, the correspondence factor has ended up asking: does the legislative purpose correspond to the needs and circumstances of the claimant as identified by this purpose? If we accept the legislative objective uncritically then it is very easy for the government to demonstrate that there is a rational connection between the distinction and the stated objective. This is especially true when the government is also entitled to demonstrate correspondence through unproven generalizations and assumptions.

\textbf{4) R v. Kapp: A Missed Opportunity}

Since \textit{Law}, the concept of dignity was more often than not used to deny section 15(1) claims. Moreover, the concept of dignity was widely criticized by academics for various reasons, and was seen by many to narrow the equality guarantee under the \textit{Charter}. Ten years after \textit{Law} the Supreme Court revisited the test for s. 15(1) in \textit{R v. Kapp}. While the majority championed \textit{Law} for its role in creating a unified approach to equality cases and for reaffirming the commitment to substantive equality from \textit{Andrews}, the concept of dignity was identified as the problem for equality cases. Writing for the Court, Justice Abella and Chief Justice McLachlin acknowledged that human dignity is the “lodestar” of all rights protected under the \textit{Charter}. However, they went on to described it as an “abstract and subjective notion” that had become “difficult and confusing to apply,” even

\textsuperscript{108} \textit{Law}, supra note 3 at para 88.
with the guidance of Justice Iacobucci’s four contextual factors. They concluded that human dignity as the standard for establishing substantive discrimination had proven to be “an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.”

This characterization of the role that human dignity played in discrimination cases following Law cannot be denied; however, the fault lies not with the concept of human dignity itself but rather the Court’s failure to properly articulate the specific conception of dignity appropriate for equality analysis. Unfortunately the Court in Kapp did not acknowledge its role in creating this “additional burden”:

Curiously, in spite of rejecting the Law test, the majority nowhere explicitly acknowledges that it had endorsed this test. The majority speaks of the Law test as though it were a misreading of what the Law case actually said, rather than a formulation that the Court itself, and some of the very same judges, had proposed. This is a disappointing feature of the judgment. It does not make the Court seem infallible to pretend that this reading of Law was not its own; it just makes it seem dishonest.

By refusing to shoulder the responsibility for steering the s. 15(1) analysis off course, the Court avoided an actual analysis of what had gone wrong and what about the Law test’s consideration of human dignity was causing the problems. As a result, the Court endorsed a “new” test for s. 15(1) that in substance is virtually identical to the test from Law. This test has been upheld and followed in recent Supreme Court decisions.

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109 Kapp, supra note 4 at para 22.
110 Ibid. at para 22.
The *Kapp* approach to s. 15(1) substitutes two new requirements into the test where formerly the Court would have considered a violation of dignity. In the new test, the claimant must show that the distinction (based on an enumerated or analogous ground) caused a disadvantage to them by either perpetuating prejudice or by stereotyping. In *Kapp*, the Court states this test is the same test that Justice McIntyre proposed in *Andrews*; however, with all due respect, this cannot be said to be an accurate portrayal of Justice McIntyre’s original test in *Andrews*. In *Andrews*, McIntyre J. defined discrimination in terms of prejudice, stereotyping or disadvantage. Disadvantage was an alternative to prejudice and stereotyping, the existence of prejudice or stereotyping are not essential elements of substantive discrimination. It is very difficult to prove prejudice, and also burdensome to establish stereotyping, especially when the court is prone to accept “unproven assumptions” as part of the analysis. This could be described as an “additional burden on equality claimants” in the same way that dignity was so characterized by the Court in *Kapp*. The test as *perpetuation* of prejudice is another way in which this approach departs significantly from *Andrews*. The court has long established that historical disadvantage is not a requirement for discrimination. However, the language of perpetuation implies that the claimant or claimant group must already be in a position of disadvantage.

Dignity was simply replaced with perpetuation of prejudice and stereotyping, which is to be analyzed with reference to the same four contextual factors from *Law*. The caution from *Law* that these factors should not be applied as a formal checklist was echoed in *Kapp*, but there is little reason to believe that the warning will be heard this time when it has been consistently ignored in the past. Thus, it is clear that *Kapp* changed little in the approach to s. 15(1), other than semantics.

The practical result of the decision in *Kapp* was to significantly restrict the equality guarantee in Canada. First, by limiting the focus of s. 15(1) to prejudice and stereotyping, the court ignores the other ways in which people can suffer from discrimination, for example, by being denied goods and opportunities not on the basis of prejudice or stereotyping. Secondly, by continuing to endorse an analysis that focuses on the four contextual factors from *Law*, the court ensured that the formalistic approach to equality that emerged would continue. Instead of actually acknowledging past mistakes and conducting a full analysis of what went wrong in equality cases after *Law*, the Court placed the blame entirely on dignity. This was a significant missed opportunity on the part of the Supreme Court, one that failed to clear up the confusion and which promises an even more conservative approach to equality claims. *Kapp* should have revisited the concept of dignity from *Law* in light of subsequent cases and academic commentary and revised the theory of dignity instead of simply abandoning it. It is not possible to separate dignity from any theory of equality as it is “an essential value underlying the s. 15

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equality guarantee,“ and so the solution must lie in a clearer understanding of dignity and its relationship to equality.

5) Dignity and Equality

Dignity is an inextricable element of any theory of equality, just as equality is an inextricable element of any theory of dignity. The theories of dignity and equality, and the relationship of the two concepts, vary significantly, and the specific theories chosen to guide an analysis will produce very different consequences. What is needed is a clear understanding of what the section 15 equality guarantee is about in order to understand what types of actions and social structures are constitutionally unacceptable. The broad and abstract concept of equality and the specific concrete instances of its violation must be connected for the right to have any coherence. Equality is a human right tied to some human interest that is deemed to be equal for all. As with most other rights, the human interest that is the foundation for the right is human dignity; “[t]he task ahead is that of showing how the concept of dignity can help bridge the gap between a concrete benefit claimed and the human right to equality.”

The concept of dignity from Law has been met with a vast amount of criticism; many have reacted to Law by rejecting human dignity as a valuable concept in equality cases altogether. While Law’s dignity cannot provide a comprehensive approach to equality cases, a different understanding of the interest of human dignity is crucial and valuable to the s. 15 analysis. The critiques of Law highlight the Court’s failure to engage in an

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115 Kapp, supra note 4, at para 21.  
116 Réaume, supra note 42, at 163.
examination of dignity’s historic and philosophical meanings. Justice Iacobucci was content to simply acknowledge “there can be different conceptions of what dignity means,”\(^{117}\) without any examination of these different conceptions in order to determine what is and what is not appropriate for section 15. The result, as we have seen, is that the definition provided “involves a medley of dignity conceptions, which not surprisingly is reflected in subsequent s. 15 decisions.”\(^{118}\) Sometimes dignity is equated with autonomy and sometimes with physical and psychological integrity. Sometimes dignity is about effects and sometimes it is about intentions.

The place of dignity is not unique to equality rights; dignity is a crucial element of virtually all human rights. The concept of dignity was historically understood in relation to social status and honour but this is not the same understanding of dignity that operates in the sphere of human rights. As a reaction to the atrocities committed by the Nazis in World War II, the global community united around the belief in the equal and inalienable worth of all members of the human family. The Universal Declaration of Human Rights is a statement of the commitment to protecting this human value, which is called human dignity. This concept of dignity is not tied to any characteristics of the individual person; everyone possesses it equally by virtue of simply being human. Human dignity does not have to be earned and it cannot be lost; it is not dependent on living a certain way. It can, however, be violated; human rights law exists to prevent these violations from occurring. Though this idea of dignity as equal and inalienable worth has a fairly consistent place in Charter cases, the substance of the concept varies greatly. There are two predominant

\(^{117}\) Law, supra note 3 at para 53.  
\(^{118}\) Fyfe, supra note 53, at 10.
concepts of dignity that appear in discussions of human rights: 1) that human dignity represents the sanctity of human life, and; 2) that dignity represents human being’s capacity for reason and their autonomy.

The concept of dignity as the sanctity of human life has its historical roots in Jewish-Christian traditions where the terms ‘dignity’ and ‘sanctity’ are often treated as synonymous, both of them referring to the ‘incalculable worth of all human beings’\(^\text{119}\). The concept of dignity as tied to the sanctity of life is deeply concerned with the value of the corporal being. It has been used in areas about the start and end of life to condemn abortion, infanticide, euthanasia, the death penalty and assisted suicide. It has also been used to limit self-determination over how to use and treat one’s own body.

The other popular concept of dignity is that dignity is synonymous with individual autonomy and self-determination. This definition can be traced back to the Classical philosophers who believed that human beings’ special status in the world came from the fact that we are endowed with reason, and the ability to make decisions for ourselves and determine our own fate\(^\text{120}\). This notion of dignity is directly credited to the philosophy of Immanuel Kant who associates dignity with reason. It is humanity’s capacity for self-determination and the ability to choose to act morally that endows every person with


dignity: “[a]utonomy is therefore the ground of the dignity of human nature.”\textsuperscript{121} Under this theory of dignity, to treat individuals with dignity is to treat them as autonomous persons capable of determining their own fate. Protecting dignity in this context requires protecting individual freedom of self-determination from all interference by the State.

It is clear that neither of these conceptions of dignity are appropriate for equality law or s. 15(1) analysis; as such, a different approach is required.

\textbf{A) Dworkin’s Two Principles of Human Dignity}

Human dignity was rejected in \textit{Kapp} as being an abstract and subjective notion.\textsuperscript{122} This characterization is true of the concept of human dignity that evolved out of the reasonable claimant test but is not necessarily true of human dignity as a concept as a whole. This paper presents a conception of human dignity as an objective value that has sufficient substantive content to provide meaningful guidance to equality cases. The theory of human dignity advanced in this paper was first articulated by Ronald Dworkin. Dworkin’s political theory is grounded in two principles of human dignity: the principle of intrinsic value and the principle of personal responsibility.\textsuperscript{123} Taken together, these principles form the basis and justification for the theory of equality.\textsuperscript{124}


\textsuperscript{122} \textit{Kapp}, supra note 4 at para 22.

\textsuperscript{123} \textit{Sovereign Virtue}, Supra note 1, and Dworkin, Ronald, \textit{Is Democracy Possible Here?} (New Jersey: Princeton University Press, 2006) [Hereinafter \textit{Is Democracy Possible}].

\textsuperscript{124} \textit{Ibid}. 
The first principle, the principle of intrinsic value, claims that every human life has a special kind of objective value that is equal for all people.\textsuperscript{125} It does not assume that human beings are actually the same or equal in anything – they are not equally skillful or equally rational or equally good – however, the theory does assume that it is equally important that every life amount to something of value rather than being wasted. The equal value of every life is in its potential.\textsuperscript{126} Once the life of a human being has begun, it matters how that life proceeds; it is good when potential is realized and bad when potential is wasted. Actualization of potential is not only valuable to the individual whose life it is, it is objectively valuable to all other members of the community.\textsuperscript{127} This notion echoes Kant’s theory of dignity: that respect for one’s own humanity entails respect for humanity in general and, thus, treating others as “means” that lack intrinsic value, demeans the value of your own life.\textsuperscript{128} The intrinsic value of an individual life comes from the sole fact that it is a human life; there are no other individual characteristics that have any bearing on this value. Nothing about any particular life makes it more potentially valuable than any other. According to Dworkin, if one look at ones own life and finds that it is valuable, and that this value is not tied to ones individual accomplishments or skills, but is simply a value in its own right, we must accept the first principle human dignity. Further, if we accept that there is nothing about any individual that makes the success of his or her life of any greater importance than anyone else’s, we

\textsuperscript{125} Is Democracy Possible, supra note 123 at 9.
\textsuperscript{126} Ibid.
\textsuperscript{127} Ibid. 11-17.
\textsuperscript{128} Kant, supra note 121.
must accept the first principle of human dignity.\textsuperscript{129} Therefore, respecting the intrinsic value of your own life means that you acknowledge the equal value of every other life.\textsuperscript{130}

The second principle of human dignity is the principle of personal responsibility. Each person has a special responsibility to first of all define the potential value in her or his own life and then to determine how to realize that value.\textsuperscript{131} This principle does not endorse or condemn any choice on ethical grounds. The principle of personal responsibility requires that every person use his or her judgment to define what a life of value be for them.\textsuperscript{132} They must not accept that anyone else, including the state, has the right to impose such judgment on them without their consent. Individuals are entitled to make these judgments under the guidance of religious or cultural values, but such deference must be as a result of a willing and self-conscious choice; “[w]e must not accept the right of anyone else to force us to conform to a view of success that, but for that coercion, we would not choose.”\textsuperscript{133} The influence of culture and society on our decisions is unavoidable and is an acceptable kind of influence that does not run afoul of the principle of personal responsibility so long as it does not amount to subordination.\textsuperscript{134}

The principle of personal responsibility obviously represents the interests of autonomy and self-determination inherent to human dignity. However it is limited to a specific class of decisions. It should not be confused with absolute freedom to do whatever one...
chooses. The state has the right to limit what choices people can make in specific areas. Dworkin makes a distinction between ethics and morality in regards to what power the state legitimately has in limiting the principle of personal responsibility. Ethical convictions are how we define what counts as a good life for ourselves and moral principles define our obligations and responsibilities to other people. The state is allowed to force its citizens by law to live according to decisions regarding moral principles, in the interest of justice, but it is not allowed to dictate ethical convictions in the same way. According to Dworkin, the state is forbidden to try to persuade people to live according to ethical convictions by force of law.\[^{135}\]

Dworkin’s theory of equality is based on these two principles. Any distribution of resources is not equal if it conflicts with the two principles of human dignity. His theory of equality provides a guide for the distribution of resources premised on three fundamental principles. The first is the egalitarian principle: “government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each.”\[^{136}\] Equal “concern” is objectively understood. It is a matter of showing equal concern, and not a matter of whether individuals feel they are showed equal concern or whether the legislature intended to show equal concern. The second fundamental principle is that people are responsible, and should be held responsible, for the consequences of their own choices and actions.\[^{137}\] This is a necessary consequence of the principle of personal responsibility. The principle of responsibility would mean nothing if

\[^{135}\] Ibid. at 21.

\[^{136}\] Sovereign Virtue, supra note 1 at page 128.

\[^{137}\] Ibid. at 89.
people were not held accountable for the consequences of the decisions they make in their lives, both negative and positive. If circumstances do not reflect individual choices, such choices are meaningless and this negates the right to define and pursue a life of one’s choosing. The third principle is the other side of the second: people are not to be held responsible for the consequences of their unchosen circumstances.¹³⁸ A person who suffers from illness or disability or whose circumstances in life are affected by their race, gender or social position, should not suffer consequences that flow from these unchosen distinctions. Dworkin describes the theory of equality of resources as “ambition-sensitive” but “endowment-insensitive.”¹³⁹ Individual circumstances should reflect people’s ambitions and choices about the course of their lives, but not unchosen personal characteristics.

The theory of human dignity articulated above is compatible with the structure and values of Canadian society. In Canada people are able, and expected, to manage their own success by virtue of employment and education. People are free to choose lucrative careers and are promised the economic benefits that flow from such choices. However, we also acknowledge that (a) equality means creating a climate in which all people are given the opportunity to realize the same levels of success and (b) that there are barriers for certain members of society to enjoying such opportunities.¹⁴⁰ Thus, substantive equality imposes a positive duty on the state to “rectify and prevent discrimination”¹⁴¹ by

¹³⁸ Ibid.
¹³⁹ Ibid.
¹⁴¹ Eldridge, supra note 48, at para 54.
adopting policies aimed at helping individuals and groups to overcome barriers and to create, so far as possible, an equal playing field for everyone.

The fundamental principles that can be taken from Dworkin and used to guide an understanding of s. 15 are the following:

1. Every member of society has equal intrinsic value, and this value is objectively important to all other members of society, including the state. This value is not tied to any personal characteristics about the individual, but simply relates to the potential of every life to be successful.

2. Every member of society has the right and responsibility to define the potential value of his or her life and to determine how to realize that potential. The state may not influence such decisions by force of law and must ensure that the ability to make such decisions is a practical reality and not just an abstract right.

3. The state has an obligation to ensure that inequalities in society only reflect the consequences of freely chosen decisions and do not reflect differences in unchosen characteristics of individuals and groups.

4. The state must show equal concern for the lives of all members of society.

5) Human Dignity and Objective Wrongs under Section 15

The theory of human dignity presented here does not purport to provide a formula or test for deciding s. 15(1) cases. It is meant to demonstrate how equality and discrimination could be understood through the concept of human dignity. It is also intended to provide foundational principles according to which the protection of substantive equality can be achieved. The reasonable claimant test from Law distorted the concept of human dignity by locating the harm of discrimination in the individuals and groups affected and in the intentions and objectives of the legislature. The concept of dignity presented here locates the harm in material realities and the relationships and structures in society. It
encompasses the concepts of stereotyping and prejudice, but focuses on the outward impact of such attitudes and not on the problems associated with holding these attitudes per say. It contains the value of individual autonomy and self-determination, but not as a matter of whether the individual feels empowered or whether autonomy is the abstract goal of the legislation. Rather, this paper presents a notion of human dignity that is respected when members of society enjoy circumstances that allow them to make meaningful choices about their lives in order to fulfill their potential. This requires an outward looking contextual approach that is not concerned with the personal feelings, whether real or hypothetical, of the claimant or the objectives and intentions behind the challenged law.

Legislative distinctions are discriminatory when they display unequal concern for the potential success of individuals and/or groups. Distinctions are discriminatory when they deny people the opportunity and ability to make meaningful choices about how to define and achieve personal success. Impact and effects must determine whether a law or policy is discriminatory in the substantive sense. If the distinction causes disadvantage that is tied to personal attributes (classified under enumerated or analogous grounds) and not to freely made decisions then it will be discriminatory. The court must look at the overall context of the claim (which does not include the legislative objectives) in order to determine whether the social reality reflects inequality between individuals and groups that flow from unchosen circumstances and traits. A government has a duty to work to fix such inequalities under the duty to show equal concern to all members of society.
A) Autonomy and Circumstances

Respect for individual autonomy is an essential element of human dignity and equality. This was first recognized in Law and post-Law Supreme Court has repeatedly defined the interests of dignity and equality with reference to the value of individual autonomy.\textsuperscript{142} However, the right to autonomy and self-determination in equality cases has special characteristics. Recognizing the value of individual autonomy requires more than simply recognizing the right to self-determination – the fact that a choice is possible does not mean that the ability to make such choices is a reality. Autonomy in the context of equality cannot be construed as strictly synonymous with freedom to make choices. If Charter analysis conflates these two ideas, the Courts run the risk of promoting equal freedom rather than equal concern. Showing equal concern requires consideration of whether the legislative distinctions in question impose burdens or disadvantages so significant, that they deny individuals and groups the ability to exercise their autonomy in a meaningful way; or, in other words, “the mere fact that some choice is possible and agency is exercised does not necessarily mean that autonomy has been respected.”\textsuperscript{143}

This was recognized by the dissenting judgments in Nova Scotia v. Walsh. In this case, the claimant’s case was dismissed because the majority of the Court held that excluding unmarried cohabitating couples from the Nova Scotia Matrimonial Property Act respected the dignity of those excluded in that it respected their autonomy in choosing not to get married. Justice Bastarache stated that “[a] decision not to marry should be

\textsuperscript{142} Law, supra note 3 at para 53; Walsh, supra note 86; Gosselin, supra note 70; Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9, [2009] 1 S.C.R. 222. 
\textsuperscript{143} Réaume, supra note 42, at 170.
respected because it also stems from a conscious choice of the parties.”¹⁴⁴ Justice L’Heureux-Dubé took issue with this conclusion, arguing instead that unmarried cohabitation is rarely the result of considered autonomous choice made by the parties.¹⁴⁵ The reality is that the choice of one partner whether to marry or not is often dictated by the wishes of the other partner and, as a result, one partner “preserves his or her autonomy at the expense of the other.”¹⁴⁶ The majority decision in Walsh failed to respect the dignity of the claimant group by failing to recognize that “for many, choice is not an option.”¹⁴⁷

Consider this case in light of the two principles of human dignity espoused in this paper. When asking if the legislative distinction protects the autonomy (personal responsibility) of the claimant, the Court would ask if this distinction respects the equal value of the claimant in terms of potential, and whether the distinction creates a situation whereby there will be barriers to the claimant’s ability to realize this potential. Does the distinction dictate how the claimant should shape her life choices in order to realize her potential value? The answer is clearly yes. The impugned legislation denies recognition of the worth of unmarried cohabitant’s contribution to a shared life. It denies cohabiting couples valuable protection of the individual contributions of each party to the shared life at the dissolution of a relationship, despite the fact that the legislature has clearly recognized the importance of this protection in the context of married couples. The reason that these provisions exist for married couples is in order to protect spouses from falling into

¹⁴⁴ Walsh, supra note 86 at para 55.
¹⁴⁵ Ibid. at para 151-153.
¹⁴⁶ Ibid. at para 152.
¹⁴⁷ Ibid. at para 157.
poverty at the end of a marriage and to acknowledge the contributions of both to the marriage.\textsuperscript{148} The legislation arose from concern over the fact that at the end of marriages women were left in very dire situations. Statistics showed that divorced women were often left without assets and without marketable skills or experience. Such an existence is an obvious denial of the potential value of these women’s lives. It denies them the right to choose to fulfill their potential in a domestic setting. The value of such a life course is recognized by the legislature in enacting protections like those in the Matrimonial Property Act, thereby making the ability to choose such a life a reality. However, excluding unmarried cohabitants from the same protection denies them the same kind of choice.

The dignity interest of protecting autonomy in this concrete sense raises issues of what essential benefits and opportunities should be provided by the state. The Women’s Court of Canada decision of Law v. Canada points out that “[s]ome goods, institutions and opportunities are so important to agency and its exercise that their denial fundamentally undermines autonomy.”\textsuperscript{149} Certain benefits, like housing, education, health care, physical security and opportunity for employment are “dignity-constituting” benefits because of their relationship to autonomy; these are “preconditions for the pursuit of most other projects and plans.”\textsuperscript{150} As such, the denial of fundamental benefits, such as those denied to Mrs. Law and Ms. Gosselin, can have such an impact on the dignity interest of autonomy that the denial of benefits constitutes discrimination.

\textsuperscript{148} Ibid. at para 106-114.
\textsuperscript{149} Réaume, supra note 42, at 168.
\textsuperscript{150} Ibid. at 168.
Substantive equality can also impose positive obligations on the legislature to provide fundamental benefits in order to avoid discrimination. The Supreme Court recognized that s. 15(1) can impose an obligation to act in *Vriend v. Alberta*¹⁵¹ and *Eldridge*.¹⁵² This element of the s. 15(1) guarantee is significant to the objective understanding of dignity and equality presented in this paper. By acknowledging that substantive discrimination requires positive action on the part of the government and legislatures, the Court is accepting Dworkin’s criticism of the laissez-faire attitude towards equality rights, that the state cannot justify laws that have discriminatory impacts with a “hands-off” defense.¹⁵³ Justice L’Heureux-Dubé expressed this idea clearly in her dissenting decision in *Gosselin*, when she suggested that a violation of s. 15 can be the result of the legislature’s failure “to turn to the particular needs and abilities of individuals or groups so as to provide equal benefit under the law.”¹⁵⁴ However, the rule articulated in *Vriend* and *Eldridge* only partially addresses the concern over legislative voids expressed by both Dworking and Justice L’Heureux-Dubé. As it stands, the positive duty of the government to act under s. 15(1) only arises once the government has decided to legislate in a particular area; there is no positive duty to provide essential benefits that the government has not chosen to provide.¹⁵⁵

¹⁵² *Eldridge*, supra note 48.
¹⁵⁴ *Gosselin*, supra note 70 at para 120.
¹⁵⁵ It has been suggested however that going forward equality seeking groups should try to advance cases based on positive social equality claims, without any reference to under-inclusive laws, benefits or programs. This claim would be based on the argument that the government has not taken the necessary steps to ensure the social rights of groups guaranteed by section 15(1). Consider these cases within the larger frame of systemic
In applying the concept of dignity espoused by this paper to the s. 15(1) analysis, we must be careful not to conflate the notion of “dignity as autonomy” with the notion of “autonomy as aspiration”. Just because the stated objective of a legislative distinction is to promote the autonomy and self-sufficiency of a group does not mean that the dignity of that group is respected. Though a laudable goal, the policy or program must ensure that the circumstances of the targeted group are such that they can actually realize the goal of autonomy. In Gosselin, the majority of the Court held that providing a lower monthly amount of welfare to recipients under 30 was not discriminatory on account of the fact that the objective of the distinction was to promote the autonomy and self-sufficiency of this younger group.\textsuperscript{156} The majority of the Court was able to reason that the distinction upheld the right to personal autonomy and self-determination by ignoring the circumstances created by the benefits scheme. Chief Justice McLachlin described Louise Gosselin in the following way:

[S]he has led a complicated life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work … but work would wear her down or cause her stress, and she would quit.\textsuperscript{157}

This description focuses on features about Ms. Gosselin herself that were held to be the cause of her difficult life. It does not recognize the systemic consequences of living

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\textsuperscript{156} Gosselin, supra note 70.

\textsuperscript{157} Ibid. at para 1.
below the minimum level of subsistence as playing a role in this dire life. The Chief Justice referred to Ms Gosselin’s inability to participate in the government programs as being due to “personal problems”. The inference is that the result of having to live on substantially lower benefits was a result of *choice* on the part of Ms. Gosselin. The legislature was not to blame, as the welfare scheme was designed to respect autonomy and the negative consequences are attributed to the individual rather than the system. The language of autonomy served as Ms. Gosselin’s downfall; it was uncritically accepted that the objective of the distinction was to promote autonomy and so the majority of the Court did not consider whether the distinction actually limited autonomy. However, living in conditions of poverty and desperation severely limit the ability to exercise the right to self-determination. The choices available to other members of society are not equally open to someone who is struggling to survive. This case is an excellent example of the perils of equating dignity with autonomy in isolation from the context in which individual autonomy is exercised. Even if we accept the legislative distinction between present autonomy and long-term autonomy, the Court is not at liberty to ignore the actual impact of serving one goal at the cost of the other. As was discussed in earlier sections, the impact of ignoring immediate needs can have a significant long-term impact of the lives of those adversely affected, thereby undermining the long-term goals of the distinction.

Another aspect of *Gosselin* that is troubling in light of the foregoing analysis of human dignity is that the legislative distinction (whether benevolently justified or not) exposed many young people to abject poverty and deprivation. On a broad consensus level, most people agree that living in extreme poverty constitutes a threat to human dignity. To then allow the government to use the threat of this indignity as an incentive is troubling. We should not accept the *unrealized* end of enhanced self-sufficiency and employability of young people to justify exposing people to poverty and deprivation. The aspirational end of long-term self-sufficiency cannot justify discriminatory treatment which, in reality, has a significant adverse impact on the majority of those affected.

**B) Outward Consequences of Prejudice and Stereotyping**

The Court in *Kapp* refocused the s. 15(1) analysis around the twin concepts of perpetuating prejudice and stereotyping. A return to defining discrimination in terms of human dignity would not abandon the concepts of prejudice and stereotyping. Stereotyping violates the principles of human dignity because it denies the person stereotyped the right to define his own identity in accordance with the principle of personal responsibility:

> [I]t will limit his power to define and direct his life in important ways – 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.\(^{160}\)

Moreover, stereotyping classifies groups and individuals according to generalized assumptions; it does not accord them equal concern for particular circumstances and attributes which are not in line with the stereotype. Prejudice likewise violates the

\(^{160}\) Moreau, *supra* note 44, at 37.
principles of human dignity because it treats individuals and groups as less worthy of concern.

Despite human dignity’s recognition of the concerns associated with stereotyping and prejudice, attitudes of prejudice and stereotyping are not truly within the purview of harms the Charter is concerned with preventing. Rather, s. 15(1) is intended to prevent prejudice and stereotyping because it is concerned with protecting individuals from the consequences that often flow from these attitudes. If attitudes of prejudice and stereotyping had no objective or outward consequences, there would be no reason to combat them. Prejudice and stereotyping do send the message that the victim of such attitudes is less worthy of respect and concern but there is also an outward effect of such a message: if an individual feels a lowered sense of worth then there is a real possibility that this will have an impact on her ability to define and realize her potential. She will thus be less likely to go after certain career paths or educational goals and will resign herself to the position in society that the stereotypes and prejudices in question lead her to believe are her proper place. Justice Abella identified this phenomenon in regards to systemic discrimination. Systemic discrimination refers to the continued exclusion of a particular group from an area of society. Justice Abella recognized that the real world consequences of systemic discrimination, which leads to diminished potential or a failure to actualize potential, reinforces the belief that certain individuals or groups do not belong as a result of “natural” forces. Negative stereotypes and prejudices are a “public proclamation” of lesser worth which will “impose limits on what she can do that were not

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already imposed by her own abilities, and it may also weaken her own sense of what it is possible for her to accomplish.”

Consider how this could manifest in the case of the claimant in *Nova Scotia v. Walsh*. One of the reasons that the majority dismissed the claim in this case was that there were other legal avenues available to unmarried cohabitants at the dissolution of the relationship that could provide the type of protection that the *Matrimonial Property Act* provided for married persons. However, excluding unmarried persons from the protection of the *Act* sends the message that such relationships are not deserving of these protections. It sends the message that if the couple is not married, there is no assumption of equal contribution to the relationship as there is within a marriage. Sending this message can foster this belief within unmarried cohabitants themselves making it less likely that they will pursue the other avenues available because they do not think that they are deserving or entitled.

What section 15(1) is attempting to combat are the negative consequences that flow from shaping laws and policies on prejudicial and stereotypical attitudes and the consequences that flow from law and policies that create or perpetuate prejudice and stereotypes. This is important to highlight in order to keep the focus of section 15(1) from slipping back to an analysis of intentions and feelings. Negative consequences that flow from stereotypes

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163 *Walsh, supra* note 86 at para 58-61 and 168.  
164 *Ibid.* at para 46
and prejudice do not show equal concern for the lives of those affected because such consequences are not related to actual individual needs and circumstances.

**Comment on Contextual Approach**

The human dignity analysis of equality presented here must take a contextual approach to section 15(1) cases. Such an approach has been consistently endorsed by the Supreme Court starting from *Andrews* right through to the most recent decision on section 15(1) in *Withler v. Canada*. A word of caution is merited: a contextual approach does not mean assessing the claimant’s cases in light of the legislative purpose. Too often courts equate a contextual analysis with an analysis that takes into account the rationale behind the law in question and the stated objectives of the legislature. Such a “contextual” assessment does not turn on the actual effects of the distinction being challenged. This paper questions whether legislative objectives should even enter the framework of a section 15(1) analysis, but, so long as they do, the courts must be careful to scrutinize the stated objective and to ensure that a benevolent intention does not overpower the other relevant considerations. Consideration of legislative intentions must be, at most, a secondary consideration under section 15(1). We must not forget the fact that even if a distinction is found to violate section 15(1), the state still has the opportunity to advance arguments about the benevolent objective of the distinction to satisfy a justification under section 1. A judgment that contains phrases such as “the section 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate,” should be regarded as suspect.

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Guidance as to the proper type of contextual approach required can be drawn from Justice L’Heureux-Dubé’s judgments in Gosselin and Walsh. She makes use of the available social science evidence relevant to the facts of the case in order to get a fuller understanding of the context in which the claim arises. Although the Court has repeatedly asserted that establishing discrimination and accepting a legislative objective does not require evidence of the facts asserted, this should not be taken to mean that evidence, when available, should not be considered. A truly contextual approach will make use of all the information available that is relevant to the issue before the court. It is only by examining the social, political, and economic realities of the claim before the court that judges are actually able to realize and appreciate the effects of the impugned law or policy. Judicial notice and logical reasoning can only go so far – to get a full picture of any discrimination claim, the court must engage in a thorough examination of the situation and how it impacts not just the claimant, but society as a whole.

7) Conclusion

Section 15(1) of the Charter is committed to substantive equality. This is an incredibly complex concept that cannot be reduced to an enumerated list of types of conduct that offend it. In the same way, human dignity cannot be reduced to an enumerated list of factors or actions that offend it. The courts any many academics have established lists of conduct, or “wrongs”, of discrimination. While these are undoubtedly helpful in understanding the concept of equality, none of these lists can provide an exhaustive description of what section 15 is about. The concept of human dignity is invaluable to the
analysis of section 15(1) because it allows us to proceed without a complete list of factors or types of conduct that are prohibited under the Charter. Understanding the nature of the interest of equal human dignity enables a contextual analysis of discrimination that captures the objective evil the Charter is in place to prevent. The fact that the concept of human dignity does not have a concrete and finite content is not its downfall, but rather its true value:

The idea of human dignity sets a revolutionary task for human beings and human societies. It is still for us to discover, or invent, the social arrangements and understandings that adequately live up to the idea of human dignity.\footnote{Wood, Allen, “Human Dignity, Right and the Realm of Ends” (2008), Acta Juridica 47, at 51.}

The task of protecting fundamental human rights is not a simple or straightforward one, and equality rights are perhaps the most difficult of all. Justice Iacobucci described section 15 of the Charter as “the most conceptually difficult provision.”\footnote{Law, supra note 3, at para 2.} The reason for these conceptually difficulties are that there is not yet a concrete body of right and wrong answers in human rights law. Society is in the process of building such a body of theory and in doing so it must appeal to universal moral concepts, which are, by definition, sufficiently abstract to be universal. Human dignity is one such concept and it is invaluable to human rights in general, and to equality rights specifically. The difficulty with human dignity being abstract and ambiguous is not unique to dignity, “it is common to all of the large and general concepts involved in the interpretation of human rights.”\footnote{Carozza, Paolo G., “Human Dignity and Judicial Interpretation of Human Rights: A Reply” (2008) 19(5) E.J.I.L. 931, at 931.}
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