In Pursuit of Equality: Bringing Human Dignity to the Forefront of Section 15

by

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ABSTRACT

While it is clear that section 15 of the *Charter of Rights and Freedoms* should be read as prohibiting only of those violations of equality that amount to discrimination, it remains unclear how to determine what it means for a state to treat its citizens as equals, and more specifically, what constitutes discrimination. Thus, the idea of human dignity in section 15 the *Charter* has been, in many ways, groundbreaking in its recognition of the far-reaching impact of unequal treatment. There remains, however much scholarly dissension surrounding the concept’s meaning and use within section 15 equality jurisprudence. As a result, many have argued that the concept suffers from ambiguity and indeterminacy, thus creating an additional burden on equality claimants. This work advances the thesis that the concept of human dignity, understood in the objective sense as autonomy and self-determination, explains the nature and scope of the government’s obligation to show equal concern and respect, and offers us valuable guidance as to why certain types of unequal treatment are unfair and illegitimate. The concept can, I believe, help to delineate how equality is to be conceived, specified and realised under section 15 of the *Charter*. To make my case, I reject and show as flawed the Supreme Court of Canada’s interpretation and use of dignity in section 15(1) jurisprudence. Finally, in an attempt to demonstrate that the concept of dignity is relevant and necessary to an analysis of discrimination, I show that such a concept is in fact grounded in Sophia Moreau’s own illuminating account of the wrongs of unequal treatment.
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I. 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

Section 15(1) of the Charter of Rights and Freedoms guarantees equality, but its precise formulation is restricted to the prohibition of discrimination, on such grounds as race, national or ethnic origin, color, religion, sex, age or mental or physical disability. Thus, it is clear that section 15 should be read as prohibiting only those violations of equality that amount to ‘discrimination’. But how do we determine what it means for a state to treat its citizens as equals and, more specifically, what constitutes discrimination? The idea of discrimination involves a normative assessment that certain instances of unequal treatment are unfair. We might ask then, when unequal treatment is unfair, what makes it so? Likewise, how can we delineate the wrong done to individuals when they are treated unfairly and unequally by the state? These are the sorts of questions that the Supreme Court of Canada has struggled with when interpreting the equality rights of section 15.

These questions have also preoccupied philosophers who have analysed the reasons we have for valuing justice and equality and the different ways we can conceptualize the wrong done to individuals when the state does not treat them as equals. Specifically, philosophers have been concerned with inequalities in the distribution of benefits and burdens in society, with political or social power, and with institutional structures that stigmatize, marginalize, and oppress individuals. The latter question is of

particular relevance to Canadian equality jurisprudence, as the Supreme Court of Canada has construed and employed the protection offered by section 15 of the *Charter* as those forms of unequal treatment that deprive some of a benefit available to others in circumstances where this treatment is unfair. To be sure, no plausible account of equality maintains that what is objectionable about unequal treatment is the mere fact that some individuals end up with more or less than others, but rather that unequal treatment is objectionable when this treatment is said to be *unfair*.

While there has been vigorous philosophical debate about the meaning of equality, until recently there has been little work done in attempting to marry philosophical and jurisprudential fields into a more fully developed and refined account of equality. This project seeks to contribute to current efforts to bridge the gap between the theory and practice of equality. The philosophical literature on equality, I believe, can help shed light on the question: what constitutes discrimination? We can learn from some of the conceptual distinctions that have been drawn in the philosophical literature between the various ways of understanding the wrongs that are done to individuals when the state unfairly treats them unequally and particularly from the philosophical ideal of human dignity.

In what follows, I will argue that the concept of human dignity, as understood in the objective sense as autonomy and self-determination, explains the nature and scope of the government’s obligation to show equal concern and respect, and offers us valuable guidance as to why certain types of unequal treatment are unfair and illegitimate. Indeed, as I will suggest, questions of human dignity are central to questions of equality. As such,

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the concept can, I believe, help delineate how equality is to be conceived, specified, and realised under section 15 of the *Charter*. To substantiate my thesis I will (a) reject and show as flawed, the Supreme Court of Canada’s interpretation and use of dignity; and (b) reject Sophia Moreau’s critique of dignity and show that her account of the wrongs of unequal treatment is in fact grounded in an understanding of dignity. Indeed, without the concept of human dignity, it is not clear that we have any handle on what human interest underlies the right to equality, nor are we likely to do little more than correct glaring deviations from the terms of statutory rules themselves unless we put the interest in dignity at the forefront. The body of the argument of this project is laid out in two chapters. In Chapter II, I outline and criticize the Supreme Court of Canada’s interpretation and use of the concept of human dignity and advance my own account of the ideal, one that I believe escapes the criticisms mounted against it. In Chapter III, I focus in on Sophia Moreau whose recent work attempts to conceptualize the wrongs done to individuals when the state treats them unfairly and unequally. I argue that the concept of dignity is relevant and necessary to an analysis of discrimination by demonstrating that an account of dignity is grounded in Moreau’s own illuminating account of the wrongs of unequal treatment.

But first, it is necessary to set the stage by taking a closer look at section 15(1) of the *Charter*: its purpose, use and context as interpreted by the Supreme Court of Canada.

1.1. Section 15: The Groundwork

Section 15 of the *Charter of Rights and Freedoms* sets out the following:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic
origin, color, religion, sex, age or mental or physical disability.³

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁴

Section 15(1) of the Charter provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is rather concerned with the formulation and application of the law. The promotion of equality under section 15 of the Charter entails the promotion of a society in which all are secure in the knowledge that they are recognized by the law as human beings equally deserving of concern, respect, and consideration. Beyond this, however, the Charter itself provides no guidance as to what it means for the government to treat its citizens as equals, nor what constitutes discrimination in breach of section 15. Thus, with the enactment of the Charter in 1982, the Supreme Court of Canada faced a dilemma. At one extreme was the theory that every distinction drawn in a statute constituted discrimination in breach of section 15. On this theory, the structure of analysis developed in R. v. Oakes⁵ for justification under section 1 (sufficiently important objective, rational connection to that objective, minimum impairment and proportionality) would be the analysis that would be applied to all section 15 challenges. At the other end was the position taken by

³ There exist four equalities under this guarantee; that is, s. 15 provides that every individual is “equal before and under the law and has the right to the equal protection and equal benefit of the law”³.
McLachlin J. who held that the only legislative distinctions that would amount to
discrimination were those that were ‘unreasonable or unfair’. For McLachlin J., section
15 contained its own implicit requirement of justification, and the question whether a
legislative distinction was justified or not would be determined by an assessment of its
reasonableness or unfairness according to standards that the courts would have to develop
within section 15 itself. 6 Both approaches, however, shared the reasonable assumption
that all legislative distinctions are open to review under section 15.

To be clear, section 15 does have significant scope; the listed grounds, though not
exhaustive, point to personal characteristics of individuals that cannot easily be changed
and which have often been the target of prejudice and stereotyping. This has proved to be
a useful and far-reaching approach for specifying what forms of unequal treatment that
are unfair and illegitimate. Moreover, the reference in subsection (2) –the affirmative
action clause—to “disadvantaged individuals or groups” also suggests that the role of
section 15 is not just to prohibit, but correct discrimination. These features of section 15
suggest that the proper role of the equality guarantee is not to eliminate all unfairness
from our laws, but rather to eliminate discrimination based on immutable personal
characteristics.

Andrews v. Law Society of British Columbia was the first section 15 case to reach
the Supreme Court of Canada. It was a challenge to the statutory requirement of the
province of British Columbia that members of the bar had to be citizens of Canada. The
Court held—unanimously—that this requirement was contrary to section 15, and by a
majority that it was not saved by section 1. McIntyre J., writing for the unanimous Court

6 See Hogg, supra note 5, S. 55.6(b) – 55.7.
on the interpretation of section 15, rejected both the view that section 15 condemned all legislative classifications and that section 15 condemned unreasonable or unfair classifications, holding instead that there was a middle ground between the two positions, which was to interpret ‘discrimination’ in section 15 as applying to only the grounds listed in section 15 and analogous grounds. The Court went on to hold that citizenship qualified as an analogous ground of discrimination. *Andrews* made clear that section 15 was a prohibition of discrimination, and that discrimination involved the denial of a benefit or imposition of a burden (i.e. disadvantage) on an individual as a result of an immutable characteristic that was either listed or analogous to those in section 15. The restriction of section 15 to enumerated and analogous grounds is now a permanent feature of the section 15 jurisprudence.

Since *Andrews*, the Supreme Court has worked its way towards an understanding of section 15 based on the concept of human dignity as the underlying interest grounding claims of equality. In *Law v. Canada (Minister of Employment and Immigration)*, the Court added the new restriction: that discrimination involved an impairment of ‘human dignity’. ‘Dignity’ began as an idea about the enumerated grounds given in section 15 and their relationship with one another—the idea being that the enumerated grounds are so tied to one’s person that distinctions based on them affect one’s dignity. Thus, in a sense, dignity was the criterion for the enumeration. This is illustrated in McLachlin J.’s

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8 This position is illustrated in *Miron v. Trudel*, [1995] 2 S.C.R. 418 [*Miron*]. The idea being that enumerated grounds of section 15 are chosen because they have some link to a person’s dignity—that is, to be denied access to some benefit because of ‘stereotypical application of presumed group characteristics’ (specifically those characteristics which define the grounds) is not to be treated with dignity. See also Denise Réaume on this: Réaume, Denise G., *Discrimination and Dignity* (2004). Anti-Discrimination Law, Part of the International Library of Essays in Law and Legal Theory, 2nd Series, Christopher McCrudden, ed., Hampshire: Ashgate Publishing, 2004, reprinted from (2003); *Louisiana Law Review*, Vol. 63, p 16.
description of the purpose of section 15 in *Miron v. Trudel* as “prevent[ing] the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of individual merit, capacity, or circumstances”

This linked the prohibited grounds of discrimination to dignity, suggesting that the grounds listed in section 15 were chosen because of their connection to some stereotype which falsely attributed negative characteristics to members of groups identified by these characteristics and, in turn, violated dignity. This also applied to the analogous grounds: a ground was analogous if and only if it was connected to the dignity of the claimant. The decision in *Egan v. Canada*, for instance, a case deemed a major victory for equality rights, connected dignity to the harm of discrimination on the basis of sexual orientation. Sexual orientation was thus recognized just as fundamental to persons as race or sex.

1.2. The Context of Equality Claims

When discussing the wrongs of unequal treatment under section 15(1), it is necessary to first identify the context in which equality claims are made. Claims under section 15(1) are made in relation to any government action or program that allocates some good or opportunity to a certain individual or group, while denying other individuals or groups the same good or opportunity. Such schemes are necessarily predicated on legislative distinctions, which accord unequal treatment. Most often, it is government distributive schemes or programs that are challenged under section 15(1) (i.e. programs that distribute economic or social benefits of some kind or another). Many

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legislative schemes employ some sort of distinction and therefore engage section 15(1). For instance, government policies will often make legislative distinctions on the basis of personal characteristics or attributes that serve as a qualification for the benefit in question. Likewise, government schemes may treat citizens unequally in less explicit ways, by failing to consider the needs of a certain group or individual.

It is crucial to note, however, that while unequal treatment serves as the basis for section 15(1) claims, it cannot be that all differential or unequal treatment constitutes a violation of the right to equality. As acknowledged by the Court in *Andrews v. Law Society of British Columbia*, claimants must show that differential treatment amounts to *discrimination* in order to be successful under section 15(1). This view that the harm of unequal treatment is more than simply inequality *qua* inequality is also supported by Sophia Moreau who states that:

> [n]o plausible theory of equality maintains that what is objectionable about unequal treatment is the mere fact that some individuals end up with more or less than others. Rather, such theories hold that unequal treatment is objectionable when, and to the extent that, this treatment is unfair.\(^\text{12}\)

With this understanding of equality, the obligation of the government is not to eliminate all types of unequal treatment, but rather to justify those distinctions that come under section 15(1) as fair or legitimate.\(^\text{13}\) For the purposes of this paper, the pertinent question is, then, what makes certain types of treatment unfair or illegitimate? Put another way, what are the harms of unequal treatment, and why are they harmful? Responding to these and related questions will be the focus of the rest of this paper.

\(^{12}\) Moreau, *supra* note 3 at 293.

\(^{13}\) See *R. v. Oakes*, *supra* note 6.
1.3. Conclusion

Thus far we have looked at section 15 as interpreted by the courts and the context in which equality claims have been made. We have seen that section 15 provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. While the Charter itself provides no guidance as to what it means for the government to treat its citizens as equals, nor what constitutes discrimination in breach of section 15, features of section 15, such as the enumerated and analogous grounds, suggest that the proper role of the equality guarantee is not to eliminate all unfairness from our laws, but rather to eliminate discrimination based on immutable personal characteristics. The Supreme Court later worked its way towards an understanding of section 15 based on the concept of human dignity as the underlying interest grounding claims of equality. As we will now see, many have questioned whether the concept of human dignity has the substantive content necessary to ascertain and delineate why certain types of unequal treatment are illegitimate and so I turn now to examine just that. That is, can the concept of human dignity help to conceptualize the wrongs of unequal treatment?
II. Human Dignity and Section 15 of the Charter

Human dignity, while a central value guiding equality rights, has been charged for ambiguity and indeterminacy. In what follows, I will examine the past efforts of the Supreme Court of Canada to develop a substantive conception of equality based on the value of human dignity and argue that the legal test presented in Law v. Canada fails to make good use of the concept and that this has rendered the Court less able to recognise discriminatory instances in which the claimant has suffered a wrong. I will show that the Court has used dignity not in the objective sense but rather as a subjective concept, confining the analysis to the individual, and identifying a person’s dignity with his or her feelings. My aim in this chapter is to defend the thesis that the concept of human dignity, understood objectively as involving autonomy and self-determination, can provide us with meaningful content that explains why certain types of unequal treatment are forms of discrimination and are thereby unfair and illegitimate. Human dignity in its application, I will argue, can help ascertain how equality is to be conceived, specified and realised under section 15 of the Charter.

I will proceed in five sections. Section 1.1 will begin with a brief introduction of human dignity as it has emerged in the legal discourse. Section 1.2, will detail the philosophical foundations of human dignity. Section 1.3 will examine how human dignity has been presented and used in the Courts pre- and post- Law v. Canada. Section 1.4 will highlight the problems with the dignity interest, as used by the Courts. Finally Section 1.5 will explore my own interpretation of human dignity, one that, I argue, escapes the problems plagued by other conceptions.
II.1.1. Dignity and Equality Rights

As we have seen, in Law v. Canada the Supreme Court of Canada issued a unanimous opinion, written by Justice Frank Iacobucci, that provided a new interpretation of section 15 of the Charter. The new consensus was that discrimination in section 15 involved an additional element to a distinction based on a listed or analogous ground—that additional element was an impairment of ‘human dignity’. And though Iacobucci J., did not define human dignity, he did suggest four ‘contextual factors’ that were to facilitate the inquiry. 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.\(^\text{14}\)

There have been many criticisms of the concept of human dignity, but two predominate: first, the concept is vague and contentious—members of the Supreme Court have often disagreed amongst themselves on the question of whether the impugned law impairs the human dignity of the claimant; second, it is burdensome to claimants as it introduces a new element to section 15 thereby establishing yet another barrier to finding a violation of section 15(1).\(^\text{15}\) Indeed, scholarly disagreement about the foundations of human dignity and about its substantive meaning when applied to practical cases attests to the principle’s vagueness and indeterminacy. This ambiguity is only made more problematic when dignity is elevated from its status as a moral value to that of a judicially enforceable legal test, as was established in Law.

\(^\text{14}\) Law, supra note 8, at para 88.
\(^\text{15}\) See page 30 for more on these criticisms.
The court abandoned the use of dignity as a legal test in *R. v. Kapp*[^16], a 2008 Supreme Court case which found that a communal fishing license granted exclusively to Aboriginals did not violate section 15 of the *Charter*. It might be thought, therefore, that the Supreme Court rightly has given up on human dignity as a principle guiding human rights.[^17] However, in this chapter, I will suggest that we can and should retrieve the valuable content inherent in human dignity, though not before we assess what is specifically useful about the concept. While Justice Iacobucci was simply content that “there can be different conceptions of what dignity means,”[^18] without any examination of these different conceptions, I would suggest that, to the contrary, it is crucial that we closely examine the various accounts of dignity to specify a determinate meaning for the term. Thus, I turn first to the philosophical foundations of human dignity to help elucidate the conceptual problems within it and shore up the valuable content, which I believe is useful to a section 15 analysis.

II.1.2. Philosophical Foundations of Human Dignity

Human dignity has been a ubiquitous theoretical justification for human rights in Canada. As a legal value, human dignity is most commonly associated with post-Second World War international legal developments.[^19] As a reaction to the atrocities committed by the Nazis in World War II, the global community united around the belief in the equal

[^18]: *Law*, supra note 8, at para 53.
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 fundamental human value. Human dignity is mentioned in the 1945 United Nations Charter, the preamble of the two 1966 Covenants emanating from the Universal Declaration, and virtually all human-rights declarations, conventions, and international court statutes.

Although the concept does not explicitly appear in the Canadian Constitution, the concept has entered through judicial construction, engulfing Charter decisions and acting as a justificatory rhetorical device. As Justice MacIntyre stated in Kapp, “There can be no doubt that human dignity is an essential value underlying the section 15 equality guarantee. In fact, the protection of all the rights guaranteed by the Charter has as its lodestar the promotion of human dignity”. 20 Certainly, the idea of human dignity is rhetorically compelling. The Court is guided by values and principles essential to a ‘free and democratic society’ and respect for the inherent dignity of the human person is a central value that highlights our commitment to social justice and equality. This is not to say, however, that there is a clear consensus on the idea’s meaning. 21 Ranging from ancient stoicism through Christian theology to Kantian ethics and liberal thought, human dignity emanates from a myriad of intellectual origins. Though all accounts specify dignity as features of humanity, they do so in various ways. In what follows, I outline and briefly examine what I take to be the three most distinct and notable accounts of human dignity.

21 Bateman, supra note 18, p 2.
II.1.2.1. Dignity Grounded in Rights

Dignity as rights-grounding derives from the Kantian tradition, which highlights reason as a central and inimitable human quality. Kant offers us an understanding of autonomy as the possession of practical reason, which gives its possessor the ability to think and decide for herself what to value, what to do, and how to live. The emphasis here is on the intrinsic worth and dignity of all rational beings. To say that we should respect autonomy, or that we should respect people as autonomous beings, is to say that we should take this feature of persons as calling for a response, limiting our behaviour toward them in certain ways, and demanding types of behaviour in others. For Kant, respecting autonomy involves respecting people’s ability to direct their own lives, refraining from interfering with their choices, and from imposing burdens on them that they would not themselves endorse. As autonomous beings we are able to act as ‘self-legislatures’. We are able to subject ourselves, not to the will of others, but rather to the requirements of right reason, which we can discover for ourselves using our own intellect. Thus, respect for autonomy urges us to let people decide for themselves how to lead their lives—to interfere would bespeak a failure to appreciate the value of autonomy and one’s power to generate reasons. On this rights-grounding account, how one uses one’s rights is not central. Rather, dignity is linked to the making of autonomous choices, not to the choices one makes. On the Kantian understanding then, dignity is an unchanging and supreme value that inheres in every human being; that is, in Kant’s words, the idea of a human being’s ‘unconditional and incomparable worth’.

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For Sophia Moreau, however, because this worth is unconditional and thus independent of the individual’s circumstances, or the extent to which she is actually shown respect by others, it follows that one’s dignity cannot be diminished by others’ disregard for it. Hence, even if an individual is discriminated against, this cannot diminish her dignity in the objective sense, as she will always have a claim to concern and respect for her supreme worth. For Moreau, then, the objective conception of dignity, on its own, does not have sufficient content to explain the precise nature of the wrongs that are done to individuals who are not treated with equal concern and respect. That is, because the idea that all human beings simply have ‘unconditional worth’ does not tell us what kinds of treatment fail to show proper consideration for that worth. The abstract ideal of equal concern and respect for dignity, Moreau argues, must therefore be given content by a substantial conception of what kinds of treatment violate human dignity.24

II.1.2.2. Dignity Grounded in Status

Dignity as status-grounding takes a comprehensive look at humanity itself as an inalienable status which all persons possess and which brings obligations. As a result of one’s status as a human being, one has certain duties to oneself and to others. On this account, then, dignity acts as a constraint on an agent’s exercise of freedom—that is to say, one’s freedom is limited by one’s status as a human being. Thomas M.J. Bateman illustrates this nicely, arguing that while prostitution on the rights-grounding account may be consistent with human dignity if it is ‘freely chosen’ (rather than undertaken for survival), on the status-grounding view, it may nevertheless be a violation of one’s duty to humanity since it is a form of degrading one’s person.

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24 We will see this in detail in Chapter 2.
There have also been some efforts to synthesise the status-grounding view with rights-grounding accounts. George Kateb, for example, takes dignity to be an existential value defining what it is to be ‘human’. The ‘human’ on his account includes, ‘developed or distinctive selfhood, autonomy, authenticity, freedom, equality, power for its own sake, virtues for their own sake, perfectionism of character or style of life, honor, glory and fame’. These features thus make up people’s ‘unique capacity to be agents with purposes’. Bateman suggests that while Kateb’s attempt to combine the rights-grounding and status-grounding views is compelling, it still leaves open questions on the limits that status places on rights. That is, are acts of freedom always dignified and can one act in a way to deny one’s own humanity?

Part of the problem, Bateman suggests, is determining what forms of human conduct are substantively caught by the idea of dignity. Actions can have various degrees of harm and so we might ask whether dignity seeks to establish a “floor of conduct below which no deleterious action shall be countenanced; or [whether it reaches for] the ceiling, protecting humans from relatively minor affronts?”

II.1.2.3. Dignity Grounded in Emotion

Finally, dignity grounded in emotion identifies what one feels as the litmus test of dignity. Feelings of indignation, for instance, signal an affront to human dignity. Thus, Bateman argues, ‘by means of an emotional connection with the fate of others, we become aware of the indignity done to them by imagining ourselves in their position and

26 Kateb, supra note 26, at p 38. See also: Bateman, supra note 18, p 3.
27 Bateman, supra note 18, p 4.
then reflecting on our own reaction to that condition.” In historian Lynn Hunt’s words, ‘you know the meaning of human rights because you feel distressed when they are violated’. This account is largely based on the Humean tradition in which, ‘morality is determined by sentiment’. That is, while Kant seeks to ground morality in reason, David Hume, conversely, takes the emotivist position, seeking to preserve passion as taking priority. Hence, according to Hume, reason is and should be a “slave of passions”.

II.1.3. Dignity And The Law Test

Now that we have looked at some of the philosophical underpinnings of human dignity, let us turn to how the concept has been presented and used by the courts. The Supreme Court of Canada in *R. v. Oakes* declared that, when applying section 1 to rights violations, it must be guided by principles essential to a free and democratic society, one of which is ‘respect for the inherent dignity of the human person’. Likewise, Justice McIntyre described the purpose of section 15 in *Andrews v. Law Society* as that which ensures that all individuals ‘are recognized at law as human beings equally deserving of concern, respect and consideration.’ The power of human dignity is such that some have suggested it be the subject of a right *itself*. However, this approach has been rejected by the courts, finding human dignity rather to be the basis for Charter rights such as equality. In *Blencoe v. British Columbia (Human Rights Commission)*, the court held that dignity ‘has never been recognized by this Court as an independent right but rather has been

28 Bateman, *supra note* 18, p 5.
31 *R. v. Oakes*, *supra note* 6, at para 64.
viewed as finding expression in rights, such as equality, privacy or protection from state compulsion.\footnote{Ibid., at para. 77.}

Thus, with the rejection of dignity as a free-standing right and the adoption of the concept as a tool for equality jurisprudence, the courts moved to a new section 15 interpretation in \textit{Law v. Canada}, finding dignity to have the status of a legal rule. That is, the judicial interpretation of ‘discrimination’ under section 15 was as follows:

\begin{enumerate}
\item The challenged law imposes (directly or indirectly) on the claimant a disadvantage (in the form of a burden or withheld benefit) in comparison to other comparable persons;
\item The disadvantage is based on a ground listed in or analogous to a ground listed in s. 15; and
\item \textit{The disadvantage also constitutes an impairment of the human dignity of the claimant.}\footnote{Hogg, supra note 5, at S. 55.8(a).}
\end{enumerate}

Thus, the claimant who persuades the Court of these three elements is entitled to a finding of discrimination, meaning that the impugned law is in breach of section 15.

More than a legal rule, the decision in \textit{Law} held the prevention of the violation of human dignity to be the \textit{purpose} of section 15. \textit{Law} provides a telling statement of this purpose:

\begin{quote}
It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable or less worthy of recognition or value as a human being or as a member of Canadian society.\footnote{Law, supra note 8, at para. 51.}
\end{quote}
In Law, the court considered a claim of age-based discrimination against the federal government for tailoring Canada Pension Plan survivor benefits by age. The impugned legislation dictated that the younger the survivor, the smaller the benefit. Nancy Law, a widow at 30 years of age, failed to meet the requirements for the survivor’s benefit: she had no dependents, was not disabled, and was under the age of 35. The court took the opportunity in Law to re-articulate the section 15 test and consequently created the three-step analysis. First, Ms. Law was to establish that she had received differential treatment, that is, she was to demonstrate that she had been denied a benefit that others received. Second, she was to show that the differential treatment occurred on an enumerated or analogous ground. Finally, she was to demonstrate that this unequal treatment was unfair, or amounted to discrimination – which, according to the Court in Law, involved showing that her dignity was infringed, in the sense that a reasonable person in her position would have been made to feel inferior. For the purpose of this Chapter, my focus will remain on the role of dignity within the Law test. In this regard, Justice Frank Iacobucci declared that 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
Perhaps recognising the lack of clarity in his definition of dignity, Justice Iacobucci sought to supplement the definition with the four “contextual factors”\textsuperscript{38}, which were to provide guidance to the courts in determining whether the claimant’s dignity had been harmed. Again, the 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.\textsuperscript{39} To be sure, Justice Iacobucci did stress that these factors were neither necessary nor exhaustive in determining a violation of human dignity and cautioned against their use as a formal checklist. The connection between the contextual factors and the dignity interest, however, has never been specified and as a result, subsequent cases have done exactly what was advised against\textsuperscript{40}—that is, 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 an overall analysis of the impact of legislation on dignity itself. Consequently, under the term ‘dignity’, the court unanimously dismissed Nancy Law’s case. The court held, and with little evidence, that ‘[r]elatively speaking’, ‘adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada’s discrete and insular minorities’.\textsuperscript{41}

\textsuperscript{37} Law, supra note 8 at para. 53. (Emphasis added)
\textsuperscript{38} Law, supra note 8 at para. 95.
\textsuperscript{39} Law, supra note 8, at para 88.
\textsuperscript{40} Réaume, supra note 9, at p. 17, 25.
\textsuperscript{41} Law, supra note 8, at para 95.

Although the deployment of the idea of dignity in the *Charter* jurisprudence is in many ways ground-breaking in its recognition of the far-reaching impact of unequal treatment, the interpretation of dignity has some significant problems. In particular, the concept of dignity adopted in *Law* is chiefly focused on the emotions-grounding account of dignity, of which we saw earlier—that is, on the subjective feelings of the claimant. Justice Iacobucci’s associates human dignity with feelings of *self-respect* and *self-worth* and with ‘physical and psychological integrity and empowerment’; thus, dignity becomes an evaluation of what the court determines a ‘reasonable claimant’ would legitimately feel when treated in a certain way by the impugned law. Determining an affront on human dignity based on the feelings of the claimant amounts to treating an affront to dignity as an emotion or feeling.42

Rather than reducing harm to dignity as a matter of hurt feelings, I would suggest, along with Denise Réaume, that the dignity interest should be understood as an independent objective harm. To be sure, discrimination will absolutely affect the personal subjective feelings of those adversely affected, but to reduce the section 15(1) *Charter* guarantee to a protection of emotional harm would be a trivial interpretation of the equality rights protected by the *Charter*. It is not the job of section 15(1) of the *Charter* to protect persons from humiliation. As Réaume suggests, “Feelings of worthlessness may be a common symptom of disrespectful treatment and relevant diagnostically, but the evil to be prevented or remedied is the attribution of unworthiness.”43 Moreau adds that the real rationale for using the perspective of the reasonable person is to ensure that the

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43 Ibid.
courts assess not just whether the claimant has come to feel inferior, but whether this feeling is the direct result of unfair treatment. Herein lies the problem, Moreau contends: unfairness is not demonstrated simply by the individual’s feelings but rather must appeal to some other substantive conception of what makes unequal treatment into a wrong against the individual.44

What is more, this emotion-grounded account of dignity acts to reduce the value in dignity to an ‘experiential good,’45 identifying inequality within the individual instead of in the broader coercive social structures of society. Indeed, it is the coercive social structure and the individual relations (and transactions) within the basic structure that have the most profound effects on the individual.46 If section 15’s purpose of providing ‘substantive equality’47 is to have any critical bite, the analysis must be focused towards identifying concrete, objective harm. It must look to unequal social structures of power and their impact on the needs, opportunities, flourishing and overall well-being of individuals in society. Section 15 of the Charter must protect every individual as objectively valuable and equally deserving of “concern, respect and consideration.”48 The purpose is not to protect subjective feelings of empowerment and esteem. An impugned legislation may nonetheless have discriminatory effects regardless of whether the person who is adversely affected feels demeaned or devalued. Similarly, a law or policy may be

44 Moreau, supra note 3, p 320.
45 Ibid.
47 The courts have stated that the purpose of section 15 is not to pursue formal equality, but substantive equality, a concept with has yet to be defined or enumerated by the courts. The courts acknowledgment of “substantive equality” only addresses the fact that treating likes alike can in fact produce inequalities and differential treatment will not always result in inequality.
48 Andrews v. Law Society of British Columbia., supra note 2, at para 34.
in violation of section 15(1) even if, as Réaume writes, “it fails to bring the targets down in their own estimation.”

Again, this is not to deny that objective wrongs will have a negative impact on personal feelings or that discriminatory treatment will generally involve feelings of lesser worth and a diminished sense of self-respect—this most certainly will be true. My argument here, however, is simply that objective wrongs should not be determined on this basis. *Eldridge v. British Columbia*50, a pre-Law decision where legislation that failed to provide sign language interpreters to deaf persons in hospitals was found in violation of section 15(1), demonstrates my argument. Indeed denying an individual an effective voice to comprehend and then make decisions regarding their medical treatment would affect one’s feelings of self-worth and respect. However, rather than focusing on how such treatment affects one’s feelings, the Court directed their attention on the “persistent social and economic disadvantage” faced by the disabled.51 The basis for finding a violation of section 15(1) in this case was that denying this service resulted in deaf persons receiving a lower standard of medical treatment. Thus, *Eldridge* provides a powerful illustration of why it is the objective conceptions of the wrong that must be determinative of the discrimination issues.

Not only are feelings of self-worth and self-respect much too subjective to be meaningfully guarded by the law, but allowing the courts to play the role of the final arbitrator of claimants’ feelings is a risky business for it can imply that what is at issue is sensitivity on the part of the victim, rather than the violation of his or her rights. Even the

49 Réaume, supra note 45, p 162 at para 51.
51 Ibid., at para 56.
business of articulating the question of whether a wrong has been committed as a matter of how the ‘reasonable person’ would *legitimately* feel can, in itself, be a demeaning and humiliating process for the claimant. The conclusion that the reasonable person would not feel an affront on his or her dignity sends a demeaning message that the claimant is not a reasonable person and his or her feelings are illegitimate.\(^5\) Adjusting the focus of the analysis on objective conceptions of the wrong, rather than feelings of self-worth and self-respect, avoids conveying this message.

Parallel to this subjective account of dignity is the ‘reasonable woman standard’—a judicial innovation applicable to workplace sexual harassment litigation, which emerged to assess the validity of sexual harassment claims from the victim’s point of view. The standard, which was devised to benefit women litigants, has been viewed as a legal setback for women and criticized as failing to provide an appropriate gage for ascertaining the contents of such a standard. Kathleen Kenealy argues that as the reasonable women standard scrutinizes the perspective of the victim rather than the circumstances existing in the workplace, it dilutes the impact of sexual harassment claims brought by women plaintiffs. Thus, she argues, the standard has less to do with judicial concern for woman victims of sexual harassment than it does with the reluctance of courts to deal squarely with sexual harassment and to recognize it when it occurs—if sexual harassment were truly a serious problem, then surely it would be recognisable as such by reasonable men. What is more, the standard assumes that members of different groups have differing sensibilities and can only recognise behaviour that is offensive to

\(^5\) Denise G. Réaume makes a similar argument. See Réaume, supra note 9, p 40.
their own group.\textsuperscript{53}

These criticisms, I suggest, can be leveraged against the emotions-grounding account of dignity. Reducing dignity to an evaluation of what the court determines a ‘reasonable claimant’ would legitimately feel when treated in a certain way (1) fails to properly analyse the wrong of the unequal treatment suffered by the claimant; (2) dilutes the impact of the discrimination claim brought by the equality claimant by examining only the claimant’s personal feelings and not the circumstances and context surrounding them; (3) assumes that discrimination can only be recognised as an affront of an individual’s subjective feelings and not through an objective lens, by others unaffected; and (4) puts the onus on the ‘sensitive’ victim to address the problem of abuse, rather than portraying it as an objective problem to be resolved by impartial institutions.

Given the above arguments, I submit that the Supreme Court of Canada has not fully grasped the range of ways in which legislation or policy is capable of violating human dignity. The result is that, rather than conducting a proper analysis of the wrong that is done to individuals when the state treats them unequally, the court has opted for a mechanical checklist of factors to be looked for in any given case without an adequate understanding of why and when they are significant thus making it easy for courts to pick and choose among the factors and deny equality claims without providing clear and satisfactory justifications.

II.1.5. A Way Forward For the Concept of Human Dignity

In \textit{R. v. Kapp}, the Supreme Court of Canada made a clear retreat from the concept of human dignity, projecting it as an abstract and subjective notion that is difficult and

confusing to apply, resulting in an additional burden on equality claimants.  

McLachlin J. wrote for the majority in *Kapp*:

>[A]s critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, can only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way Law has allowed the formalism of some of the Court’s post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike.

Although I believe that this is an accurate criticism of dignity as it had been presented and applied by the courts (pre and post-Law), I do not contend it is necessarily true of the concept of human dignity per se.

The usefulness of the concept of human dignity can be illuminated by distinguishing between human dignity as having two senses: an inward sense and an outward sense. The inward sense of human dignity refers to the idea that all human beings possess supreme value; or, as Kant puts it, that human beings have ‘unconditional and incomparable worth’. The outward element of human dignity, on the other hand, is how that supreme worth is manifested in the external world—in the case of rational agents, that is, the exercise of one’s personal autonomy. This does not merely refer to the *possession* of human dignity, but to *living a life with* dignity, that is, a life with value.

Human dignity in the external, outward sense requires that, as rational agents, we possess

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55 *Kapp, supra note* 17, at para 22.
the ability to act as self-legislatures, but also that we take on freely chosen, objectively worthwhile pursuits. Thus, respect for autonomy urges us to let people decide for themselves how to lead their own conception of the good life; to do so marks an appreciation of the value of personal autonomy and one’s power to generate reasons.

Joseph Raz describes autonomy as a life freely chosen.\textsuperscript{56} Autonomy, for Raz, is the “power to determine which acts to perform and which experiences to have.” It is the power to choose and bring about what one has chosen. More specifically, autonomy can be understood as the formation of one’s self-identity. Moreau similarly describes autonomy as the “power to define and direct [your] life in important ways.”\textsuperscript{57} This includes important life choices, such as the career path one chooses, whether and with whom one decides to marry, and where one chooses to live. She also contends that autonomy includes a person’s ability “to shape his own identity and to determine for himself which groups he belongs to and how these groups are to be characterized in public.”\textsuperscript{58} Reaume expands on this argument, suggesting that a sense of self requires “confidence in one’s identity and the ability to participate in society”.\textsuperscript{59} In elaborating her account of dignity, Reaume stresses the capacity of human beings to develop a conception of the self and to formulate and revise a conception of the good.

In Development As Freedom, Amartya Sen argues for a focus on agency in removing the iniquities that depress the well-being of persons.\textsuperscript{60} So, for instance, if we look at the well-being of women, we can see that this is strongly influenced by variables

\textsuperscript{57} Moreau, \textit{supra note} 3, at 299.
\textsuperscript{58} Ibid.
\textsuperscript{59} Réaume, \textit{supra note} 9, at 675.
such as women’s ability to earn an independent income, to find employment outside of
the home, to have ownership rights, and to have literacy, and be educated participants in
decisions within and outside the family. These variables positively contribute to the
agency of women through independence and empowerment. For Christine Sypnowich,
autonomy is a useful way of articulating the subjective and objective dimensions to
human flourishing, since the autonomous person chooses his or her projects and goals in
the absence of coercion. On her account, an egalitarian society would seek to promote a
variety of sources of human flourishing, ‘to enable individuals autonomously to choose
them and find their autonomy enhanced by such choices’. ⁶¹

I submit that understanding autonomy and self-determination as the outward
dimension of human dignity for rational agents helps to illustrate the nature of the state’s
obligation to show equal concern and respect to all individuals. That is to say, human
dignity can be harmed or vitiated by a failure to respect one’s personal autonomy in such
ways as those described above. Rather than an impairment of one’s respect or self-worth,
the outward dimension of human dignity calls for the ability to live a life with dignity—to
define and direct one’s life in important ways.

To be sure, it is true that the government cannot by itself guarantee self-identity
and self-determination to every individual—this will depend on a host of factors, some of
which will have to do with individuals’ personalities and efforts. However, it does not
follow from this that the government should not be attentive to the ways in which its
treatment of individuals undermines or impairs one’s autonomy and proactive in taking
the appropriate steps to ensure autonomy is fostered. As Reaume states:

⁶¹ Sypnowich, Christine, ‘Equality: From Marxism to Liberalism (and Back Again)’ Political Studies
We may not be able to guarantee that people actually feel the sense of worth to which they are entitled, but we can aspire to a state in which empirical realities strive to match inherent moral entitlements, in which at least it is not state policy that presents the obstacle to people enjoying the subjective sense of self characteristic of those whose dignity is respected.  

On this basis, dignity can explain the nature and scope of the government’s obligation to show equal concern and respect. The right to fairness where there is unequal, differential treatment is not simply an ambiguous right to respect; rather, it is a tangible and coherent right to the exercise of personal autonomy and self-determination. The outward account of human dignity I present here is not to be confused with a formal test used for deciding section 15(1) cases. Rather, its purpose is demonstrated how equality and discrimination can be understood through the lens of human dignity. It is also intended to lay out foundational principles upon which a substantive equality analysis can be achieved.

This account of dignity locates the harm not only in material inequalities but also in the unequal relationships and social structures of oppression and domination in society. It embraces the concepts of stereotyping and prejudice, while focusing on the effects and consequences of such attitudes and behaviours, rather than on the problems associated with holding these attitudes in and of themselves. It subsumes the value of individual agency and self-determination, though not as a matter of what the agent is feeling. Notice too that this account does not consider (and purposefully so) whether the enhancement of dignity and agency is the conceptual purpose or goal of the impugned legislation. Rather, I present 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

62 Réaume, supra note 9, at 676.
63 It is interesting to note that Iacobucci J., identifies ‘the realization of personal autonomy and self-determination’ as the purpose of the equality guarantee in section 15(1). See: Law, supra note 8 at para. 53.
fulfill their potential and live valuable lives. This requires an effects-based contextual approach that is not concerned with personal feelings or the objectives and purpose staggering behind the impugned law.64

To be sure, recognizing autonomous agents requires more than simply recognizing the right to self-determination. That is to say, it does not follow from the fact that one has the freedom to chose, that one in fact has the ability to chose given the circumstances one finds themselves in. Thus, we must take care not to conflate dignity with freedom to make choices, as this would risk the danger of promoting mere equality of opportunity. In Réaume’s words: “the mere fact that some choice is possible and

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64 The courts have a history of emphasizing an impugned legislation or program’s ‘purpose’ to overcome discriminatory effects. Section 15(2) specifically targets this, the underlying rationale being that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, which excluding others. It recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. A purposive approach to s. 15(2) focused on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. One way that this problem manifests is when the Court defines a purpose or objective in narrow terms so as to avoid a finding of discrimination. This occurred in *Law* and was repeated in *Gosselin: See Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84.

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. See *Law, supra note 8*, at para 100. 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 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. Thus, the Court’s focus was on the legislative objective, which locates discrimination in the mind of the actor. 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 claimants 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.

See *Law, supra note 8*, at para 102.

Similarly in *Gosselin*, the majority accepted the legislative objective as promoting long-term self-sufficiency of younger welfare recipients. The criticisms are the same here as in *Law*. The Court 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.
agency is exercised does not necessarily mean that autonomy has been respected.\textsuperscript{65} Though we might say that freedom to choose is an aspect of well-being, well-being per se is also a matter of \textit{actual} achievement. That is, well-being involves not just access to a fulfilling life, or the capacity for such a life, but actually living it.\textsuperscript{66}

To clarify, I am not implying here that the scope of section 15 covers only “persons”, where personhood is defined in the Kantian sense as those who possess the capacity for rational agency. Indeed, section 15 specifies that every “individual” is equal before and under the law\textsuperscript{67} where such individual may be mentally or physically unable to self-legislate as is the case of children and persons of disability. My account of dignity captures this with the inward sense of the term; that is, the idea that \textit{all} human beings possess supreme worth. This supreme, inalienable worth inheres in all individuals even if persons lack the capacity to act autonomously. That is to say, individuals may not have the cognitive or physical capacity to take on objectively worthwhile projects of their choosing, or to create goals and fulfill them. Thus, section 15’s scope is not limited to the application of persons who possesses some designated threshold level of rational autonomy. Exercising productivity, achievement, and choices, for instance, are not essential to personhood. It is certainly implausible to limit section 15 to those who possess the ability to act as self-legislatures. Section 15(1) protects against just this when

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\textsuperscript{65} Réaume, \textit{supra note} 9. \\
\textsuperscript{67} Recall section 15(1) sets out of the following:

\textbf{Every individual} is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

See page 7 of this work for the complete section 15 as laid out in the \textit{Charter}.
\end{flushright}

I am grateful to Will Kymlicka for this insightful comment. Though, unable to fully address this in my thesis, its acknowledgment and admittedly brief discussion has no doubt strengthened my paper.
it lists mental or physical disability as a prohibited ground of discrimination. It would seem implausible to say, then, that the harms associated with the law are intimately linked to autonomy. Indeed, autonomy must be understood in many instances as a disqualifying factor to those who lack the cognitive and/or physical capacity to self-legislate. We might consider a person suffering from Alzheimer’s. Certainly, despite this person’s lack of autonomy and ability to remember or cognize their situation and circumstances, they nonetheless possess unconditional and supreme worth, in the Kantian sense, and ought to be accorded dignity just as any other.

Discrimination and unfair, unequal treatment, however, continue to have a negative impact on one’s self-identity. That is, persons who lack rational autonomy still have a sense of subjectivity, a sense of selfhood, and a subjective experience of the world; and surely this can be vitiated by discriminatory laws. Recall that the outward sense of dignity, as I understand it, is how the supreme worth of human beings is manifested in the external world. We saw that for persons who possess the capacity for rational agency, this is the exercise of one’s personal autonomy. For persons who lack the capacity for rational agency, however, this will be grounded in one’s self-identity and subjective experience of the world. It will be grounded in one’s ability to develop a conception of the self, to participate in society to the best of one’s ability, and to find one’s self enhanced by both. My thesis is therefore two-pronged: all human beings are owed equal concern and respect, and all should be treated with dignity; however, what dignity requires will depend on whether individuals possess rational autonomy or not. Where individuals are rational agents, their dignity will be tied up with respect for their capacity to self-legislate. But where individuals are not able to act as rational agents,
dignity will be tied up with respect for their subjectivity and self-identity, and not their Kantian autonomy. Thus, my account of dignity has two dimensions in the interpretation of section 15. While both appeal to the idea of dignity, dignity is interpreted differently depending on the capacities of the individual. As it is not within the bounds of this paper to discuss the extensive literature written on disability, I will not discuss dignity as it applies to individuals who are not able to act as rational agents, but will instead focus on dignity and its intimate connection to autonomy.

F. Conclusion

In this Chapter, I have rejected and shown as flawed the Supreme Court of Canada’s interpretation and use of the concept of human dignity as a subjective notion reducible to one’s feelings, arguing instead that the dignity interest should be understood as an independent, objective harm. More specifically I have argued that the concept of human dignity, as applied to rational agents and understood in the objective sense as autonomy and self-determination, explains the nature and scope of the government’s obligation to show equal concern and respect, and offers us valuable guidance as to why certain types of unequal treatment are unfair and illegitimate.
III. The Role of Human Dignity in Conceptualizing The Wrongs of Unequal Treatment

I now turn to focus on Sophia Moreau’s recent work on the wrongs of unequal treatment in which she attempts to articulate a more rigorous theoretical underpinning to the current state of equality jurisprudence in Canada and more specifically to clarify the nature of the wrong or wrongs done to individuals when treated unequally. Her illuminating and helpful analysis distinguishes between four substantive conceptions of the wrong of unequal treatment which are as follows: (1) stereotype and prejudice; (2) oppressive power relations; (3) the deprivation of basic goods; and (4) diminishing one’s self-worth. My aim in the chapter is to demonstrate that the concept of human dignity is relevant and necessary to an analysis of discrimination by arguing, contra Moreau, that underlying all four conceptions of the wrong is an ideal of human dignity.

I proceed in three sections. In Section 1.1, I lay out Moreau’s four wrongs of unequal treatment. In Section 1.2, I outline implications of this account and explicate Moreau’s own interpretation of human dignity and her perception of the concept as a tool in section 15 jurisprudence. In Section 1.3, I turn to a careful examination of how the concept of human dignity can help explain why certain types of unequal treatment are unfair and thereby constitute discrimination. My analysis follows Moreau’s substantive conceptions of the wrongs of unequal treatment: stereotyping and prejudice; the perpetuation of oppressive power relations; the denial of basic goods; and diminishing self-worth. In doing so, I demonstrate that Moreau’s identified wrongs of unequal treatment themselves rely heavily on my account of human dignity. That is, underlying all four conceptions of the wrong is the ideal of human dignity.
III.1.1. The Wrongs of Unequal Treatment

I begin here by articulating Moreau’s four substantive conceptions of the wrong of unequal treatment, starting with stereotyping and prejudice.

III.1.1.1. Stereotype and Prejudice

It is widely accepted that a certain denial of a benefit or imposition of a burden wrongs an individual when it is motivated by prejudice or publicly adopted as a stereotype. While prejudice motivates discrimination, stereotype functions both as a motivator and as a public justification, for instance, by rationalising treatment that was based upon prejudice. As stereotyping and prejudice have often been the basis upon which the Supreme Court of Canada has found a violation of 15 of the Charter, Moreau questions what it is exactly about the denial of a benefit on this basis that makes it unfair to the individual. 68 In other words, why does stereotyping and prejudice wrong affronted individuals?

Moreau holds that generally, a stereotype is considered to be

Any generalization or classification that one group of people treats as though it captured an essential feature of certain other individuals, and which this group takes to render unnecessary any individualized consideration of their characteristics or circumstances.69

What seems to lie at the heart of a stereotype, then, is not that it must necessarily carry negative connotations, but rather that it be used as a way of ‘avoiding an individualized investigation into a persons abilities and circumstances’.70 Likewise, it is essential that

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68 The Supreme Court has increasingly found stereotype to be a factor in s. 15 Charter violations. See Gosselin v. Quebec (A.G.), supra note 64 and Nova Scotia (A.G.) v. Walsh, [2002] 4 S.C.R. 325 for some recent cases in which the majorities decision was based upon the determination that the differential treatment was not unfair as, in their perception, their was no stereotyping.

69 Moreau, supra note 3, p 298.

70 Moreau, supra note 3, p 298.
the stereotype has been adopted by one group as a description of another and not derived as a result of the groups own attempt at self-definition.

With these essential features, Moreau notes two reasons why denying an individual a benefit based on a stereotype might amount to a wrong. First, the generalisation that amounts to the stereotype may fail to accurately describe the individual (or group) and doing so denies them a benefit by reason of a consideration that does not apply to them. This denial, then, is arbitrary as it does not correspond to the actual situation of the individual (or group). A second reason why denying an individual a benefit based on a stereotype amounts to a wrong is that one who has been denied a benefit on this basis has been publicly defined by another group’s image of her, rather than being able to present herself and her circumstances as she perceives them. In certain instances this will lessen one’s autonomy as it will limit one’s power to define and direct their lives 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”.

We can note that this will only be the case in certain instances; that is, not every instance of one group’s generalisation of another, in place of using one’s own characterization, will considerably reduce one’s powers of self-direction. Thus, we might see the appeal to enumerated and analogous grounds, which we saw earlier, as an attempt to pinpoint those circumstances in which the individual’s autonomy is indeed diminished.

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71 We can note here that not every arbitrary denial of a benefit amounts to a wrong simply in virtue of its arbitrariness. For instance, section 7 of the Charter protects individuals against arbitrary deprivations of liberty and security interests by requiring that such deprivations be in accordance with ‘principles of fundamental justice’. It does not protect against any arbitrary deprivations of a liberty or security interest, only against certain core interests. Similarly, in the context of s. 15 equality rights, the Court does not treat every arbitrary denial of a benefit on the basis of a stereotype as an instance of unfair treatment. It is rather restricted to one of the grounds (or analogous grounds) of discrimination that is enumerated in the Charter itself. Indeed, mere arbitrariness is not enough—there must be a further factor present that explains why the individual has been wronged.

72 Moreau, supra note 3, p 299.
In Moreau’s words, ‘to mark out the situations in which denial of a benefit on the basis of a stereotype is not only potentially arbitrary, in the sense that it does not correspond to the individual’s actual situation, but also such as to affect the individual’s autonomy and, hence, such as to amount to a wrong against her’\textsuperscript{73}.

Moreau notes that though both the first and the second views of stereotypes may carry negative connotations, they do not do so necessarily. When they do carry such connotations, however, they ‘imply inferiority of the group to whom the generalization does not apply’\textsuperscript{74}. Most often, this inferiority is tied (at least in some respect) to the benefit in question. For instance, it might imply that the group is less deserving, less capable or even simply inferior as human beings. Negative connotations thus enable the stereotype to rationalise the denial of the benefit not only by giving us reason to think that the benefit is not appropriate for the individual, but also by giving us reason to think that the individual is not deserving of the benefit in question.\textsuperscript{75}

Connotations of inferiority are thus not a necessary part of stereotypes but rather a factor that adds an element to the wrong of stereotyping when present. Moreau identifies, several ways in which negative connotations can add to this wrong. In particular, in instances where the negative connotations involve individuals worth as human beings, the individuals will be denied a benefit by reason of an assumption that they are of lesser intrinsic worth: an assumption that the government should not accept. The state has an obligation to treat every individual as having equal intrinsic worth. Moreau suggests that when the state discriminates unjustly, it is showing prejudice, the harm of which involves

\textsuperscript{73} Moreau, supra note 3, p 299.
\textsuperscript{74} Moreau, supra note 3, p 300.
\textsuperscript{75} Moreau, supra note 3, p 300.
more than just a belief in an individual’s inferiority, but also “a malicious desire to use the occasion to cause harm to him”76. Accordingly, there is a further dimension to the wrong, namely, that the state has purposefully set out to harm and in so doing abuses its power.

McIntyre J. had the right idea in Andrews when he viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics. Andrews was decided on the second of these concepts; it was held that the prohibition against non-citizens practicing law was based on a stereotype that non-citizens could not properly discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens an opportunity, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on Equality in Employment (1984), referred to as “attributed rather than actual characteristics”77.

Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous section 15 grounds. In this context, he said:

I would say then that discrimination may be described 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 group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to

76 Moreau, supra note 3, p 302.
77 Andrews, supra note 2, at p 34.
other members of society.\textsuperscript{78}

III.1.1.2. The Perpetuation of Oppressive Power Relations

Another reason to think that a certain denial of a benefit or imposition of a burden wrongs an individual is that it may produce, reinforce or perpetuate oppressive power relations.\textsuperscript{79} Moreau explains that “[i]t may...have the effect of further entrenching or reinforcing power imbalances that are unacceptably large and that leave certain individuals without sufficient social or political influence”\textsuperscript{80}. This need not involve prejudice as oppressive power relations are often the indirect effect of institutional structures—structures that though not purposefully designed to harm individuals nevertheless perpetuate and reinforce the social or political power of certain groups.\textsuperscript{81}

Oppressive power relations, however, do not have to involve stereotyping. Amartya Sen has illustrated that it is sometimes a sign of extreme oppression that the oppressed has come to fit the image that has been defined for them by the dominant group.\textsuperscript{82} Thus, while it is possible that the generalization made of an individual is accurate and that the oppressed have themselves assumed the generalization, this is not to say that the denial of the benefit (to this individual) does not have the effect of perpetuating objectionable forms of domination and oppression. Even in cases where oppression is absent, the denial of the benefit may result not from a generalization, but

\textsuperscript{78} Andrews, \textit{supra note} 2, at p 34.
\textsuperscript{80} Moreau, \textit{supra note} 3, p 304.
\textsuperscript{81} Moreau, \textit{supra note} 3, p 304.

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rather from an omission for instance, a certain policy or legislation with (unforeseen) adverse effects on a particular individual or group.

Iris Young notes that while the traditional use of oppression has been used to signify the exercise of tyranny by a ruling group, its usage today designates the disadvantage and injustice persons suffer as a result of the everyday practices of even well-intentioned liberal societies. Oppression thus refers to the structural phenomena that immobilizes or diminishes a group or individual. That is, oppression not only refers to the tyranny of a ruling group over another, as the situation of the Black South Africans under apartheid, but it also refers to systemic constraints on groups that are not necessarily the result of the intentions of a tyrant. Oppression, in this sense, is structural; it is embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional rules and the collective consequences of following those rules. We can say, then, that in a general sense, all oppressed persons suffer some inhibition of their ability to develop and exercise their capacities and express their needs, thoughts, and feelings.83

III.1.1.3. Denial of Basic Goods

Much of the philosophical discussions on equality have centered on the claim that what is morally relevant is that some people do not have enough basic goods rather than that some unfairly have been given more than others. That is to say, it is the absolute condition of those who are worst off and not the inequalities between those who have more and those who have less.84 Derek Parfit, for instance, draws a distinction between a concern for eliminating inequalities per se and the goal of giving priority to those who are worse off. Parfit questions whether the moral value of equality does not adequately

84 What amounts to basic goods has varied within the philosophical literature.
capture the aim of improving the situation of those who are worse off—and not because it matters that they are worse off than others, but because it matters that, in absolute terms, they are so badly off.  

Can our concern for those who are badly off serve as the basis for a legal complaint about unequal treatment? Moreau suggests that we can treat our concern for the absolute level of the worst off as “a concern that is limited by the need to defer to the government’s choice of whether or not to legislate in a particular area and to provide particular benefits to the public.” Treated in this way, our concern will result in an objection to the character of certain forms of benefits provided by government. Moreau explains that,  

The objection [to the absolute level of the worst off] will be that if the government chooses to make a certain benefit available to the public—for instance, government pensions, unemployment insurance, or a certain level of welfare payment that it deems sufficient for basic survival—then it wrongs individuals if it denies them these benefits and this denial leaves them without access to a relevant basic good.  

This is to say that if the government wishes to legislate over a certain matter and to provide certain benefits, it must do so in a way that does not leave the most disadvantaged groups without access to the relevant basic goods. It may, however, choose not to legislate over these areas leaving those who are badly off with no equality-based objection.  

To see that this is the most plausible way of making sense of the wrong that is alleged by equality claimants, Moreau considers the case of Eldridge v. British
Columbia\textsuperscript{88} which concerned the failure of the British Columbia government to provide funding for sign language interpreters for deaf individuals in their dealings with medical services. The Supreme Court held that this did constitute a violation of the claimants’ section 15(1) equality rights on the grounds that effective communication with one’s medical practitioners is an essential part of medical services, and the British Columbia government had chosen to fund essential medical services. Thus, in this case, denying the benefit to effective communication with one’s medical practitioners left deaf persons lacking a basic good that was relevant to the area in which the government had decided to legislate. We can conclude, then, that the state treated deaf persons unfairly.

Gosselin v. Quebec similarly illustrates Moreau’s way of understanding one of the wrongs of unequal treatment alleged by equality claimants. The case centered on Quebec’s social assistance scheme, which at the time set the base welfare payment for those under the age of thirty at one-third the amount that was payable to those aged thirty and above. The scheme stipulated that those under thirty could receive an amount comparable to that received by those aged thirty and above if and only if they participated in designated work activity or education programs. One aspect of the wrong alleged by Ms. Gosselin pertained to the stereotypes that she viewed as underlying the restrictions on the amount payable to those under thirty, and held that they were based upon an inaccurate view of young persons as better able to find employment than those older, less needy, and as able to rely upon parents for additional support. The second part of her objection was that she was not, under the scheme, given enough to live on: the amount she received left her unable to pay for adequate food, shelter and clothing. Again, we can

\textsuperscript{88} Eldridge v. British Columbia (Attorney General), supra note 51.
understand this aspect of the wrong as based on the harm of being denied access to a
basic good relevant to the area in which the government has chosen to legislate.

III.1.1.4. Diminishing Self-Worth

Diminishing one’s sense of self-worth is a further way of conceptualizing the
wrong of unequal treatment, according to Moreau. This appeals to a subjective
conception of dignity: that is, how the person accorded discriminating treatment feels,
rather than the objective concept of inequality’s effect on ideas of individual worth. With
this conception of the wrong, the individual is made to feel as though she is of lesser or
no worth. Moreau notes, however, that this way of understanding the wrong of unequal
treatment cannot stand independently as a complete explanation of why certain forms of
unequal treatment are objectionable since the mere fact that unequal treatment decreases
the self-respect of those who are denied a benefit is not sufficient in itself to conclude that
treatment unfair. Thomas Scanlon has argued that many legitimate policies that recognise
and reward some individuals for their labour will make others feel that they are of lesser
worth, however this would not be legitimate grounds for thinking that the legislation
wrongs these individuals. So, for instance, we can only deem a person’s feelings of lesser
worth as objectionable, in terms of equality rights, if we have already determined that the
unequal treatment of this person was unfair in light of a conception of the wrong that is
done by the unequal treatment (of which we have discussed).89 Merely feeling that one’s
self-respect has been diminished does not, on its own, warrant the assessment that the
unequal treatment was unfair.

89 Moreau, supra note 3, p 313.
III.1.2. Room for Human Dignity?

Now that we have looked at four different conceptions of what it is to be wronged by unequal treatment, I would like to lay out some of the implications as it relates to section 15(1), equality jurisprudence. We can see the appeal to enumerated and analogous grounds as an attempt to distinguish those circumstances in which the individual’s autonomy is lessened from those in which it is not. As Moreau illustrates, stereotypes that pertain to recognized grounds such as race, gender, and sexual orientation, for instance, seem much more likely to lessen one’s autonomy than would a stereotype such as ‘owners of red cars drive dangerously’ when used as the basis for denying certain individuals reduced auto insurance premiums. We can see this since the stereotype that resulted in the denial of a lower premium to some car owners who do not drive dangerously have not suffered the further and necessary wrong of inhibiting their power to define and direct their lives in important ways.90

What is immediately striking is that the wrongs of stereotyping and prejudice are not fundamentally relational or comparative. That is, the reason that they amount to a wrong is not dependent on a comparison between the situation of those individuals who have been denied the benefit and that of those who have received the benefit. Rather, it is that considered in and of themselves, individuals who have been denied the benefit have been treated in an unacceptable way by the government—they have been denied a benefit in such a way that lessens their autonomy, that may have been arbitrary, that may have involved the unacceptable assumption that they lack intrinsic worth, and that, if motivated by prejudice, amounted to an abuse of government power. To be sure, it is of

90 Moreau, supra note 3, at p. 299-300.
course true that those who are denied a benefit on the basis of a stereotype are denied a benefit that others have received, however, in order to determine whether their treatment by the government was unfair, we do not need to compare the situation of these individuals with that of others.

All four substantive conceptions of the wrong of unequal treatment appeal to distinct kinds of facts about the unequal treatment, or distinct kinds of facts about the effects of this unequal treatment upon the individual. As such, Moreau argues that they cannot be made into one unifying and all-encompassing explanation of these wrongs. This, she argues, simply reflects that our objection to unequal treatment stems from many different considerations and more generally that there exists a myriad of wrongs of unequal treatment. While the concept of human dignity surfaces in many areas of Moreau’s analysis, she maintains that the concept of human dignity, on its own, does not have sufficient content to explain the precise nature of the wrongs that are done to individuals who are not treated with equal concern and respect.

I want to suggest here that Moreau takes this position as her understanding of dignity is limited to the Kantian idea of human beings as possessors of ‘unconditional and incomparable worth’. Indeed, on this interpretation, we must concede that this worth is independent of one’s individual circumstances or the respect shown unto them by others and therefore cannot in fact be diminished by others’ disregard for it. What is more, the mere idea that all human beings have unconditional worth does not tell us what kinds of treatment fail to show proper consideration for that worth. Hence, even if an individual is discriminated against, this cannot diminish her dignity in the objective sense as she will always have a claim to concern and respect for her supreme worth. Thus while
maintaining that dignity *does* explain why certain treatment by the state is impermissible, Moreau contends that, “we cannot derive our conclusions about which forms of treatment these are, and about why exactly they are impermissible, from a single ideal, such as the ideal of concern and respect for dignity.”91 As a result, the abstract ideal of equal concern and respect for the dignity of all must be given content by a substantial conception of what kinds of treatment violate human dignity and the four conceptions of the wrong canvassed above can be seen as an attempt to do just that.

Moreau does concede that this of course does not show that the ideal of dignity is unhelpful, or that it should be abandoned. Conversely, she argues that it provides a useful way of indicating that individuals cannot be treated in certain ways by the state. But, what ways these are, she argues, in almost all cases, must be determined by factors other than the ideal of dignity itself.

While I agree that dignity, as conceived by Moreau, is simply too narrow in identifying the nature of the harms that arise from unequal treatment, I do not agree that the ideal itself is unable to provide us with an explanation of the harms that result from unfair unequal treatment. As I will now demonstrate, when understood as autonomy and self-determination, the content of human dignity, as applied to rational agents, can explain the nature of the harms that arise from unequal treatment and thereby offer valuable guidance as to how the government can and cannot treat people in the context of legislative distinctions. Moreover, I believe that my analysis will show that Moreau herself relies far more heavily on this conception of dignity in her own account of the wrongs of unequal treatment than she herself believes. Therefore, I would argue that this

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91 Moreau, *supra note* 3, at p. 314.
demonstrates that the concept of dignity is in fact relevant and necessary to an analysis of
discrimination.

III.1.3. How Unfair Differential Treatment Can Be Explained as Harmful To

Human Dignity

I have argued for an objective account of human dignity understood as the
exercise of personal autonomy. On this understanding, dignity does not merely refer to
the possession of ‘unconditional and incomparable worth’, but also to living a life with
dignity, a life with value. Human dignity, in this sense, requires that we possess the
ability to act as self-legislatures, but also that we actually take on freely chosen,
objectively worthwhile pursuits. It is recognizing the capacity of human beings to
develop a conception of the self and to formulate and revise a conception of the good. It
is also respecting this capacity for self-legislation, since doing so marks an appreciation
of the value of personal autonomy and one’s creative power to generate reasons.

As I will now show, looking at discrimination and equality through the outward
lens of human dignity would not neglect the various objective conceptions of the wrong:
stereotyping and prejudice, oppressive power relations, access to basic goods, and self-
worth on this account remain important as they violate the principles of human dignity by
denying the affronted individual the right to define and direct his or her own identity and
life in important ways.\footnote{Moreau, supra note 12, at p. 37.} In fact, these objective conceptions of the wrong are grounded
in this account of dignity. I turn now to a careful examination of how the concept can
help explain why certain types of unequal treatment are unfair and thereby constitute
discrimination. My analysis follows Moreau’s substantive conceptions of the wrongs of
unequal treatment: stereotyping and prejudice; the perpetuation of oppressive power relations; the denial of basic goods; and diminishing self-worth. In so doing, I demonstrate that Moreau’s identified wrongs of unequal treatment themselves rely heavily on my account of human dignity.

III.1.3.1. Stereotyping & Prejudice

As we have seen, a certain denial of a benefit or imposition of a burden wrongs an individual when it is motivated by prejudice or publicly adopted as a stereotype. Indeed the legislative use of stereotyping and prejudice has played a central role in several section 15(1) cases decided by the Supreme Court of Canada. In *M. v. H.*, the claimant was ineligible for spousal support under the Ontario Family Law Act because the definition of “spouse” in the Act excluded individuals in same-sex relationships. The Supreme Court found that the definition was constitutionally invalid as it was based on the stereotypical belief that individuals in same-sex relationships were incapable of forming intimate and permanent relationships of economic interdependence. Similarly, in *Little Sisters Art and Book Emporium v. Canada (Minister of Justice)*, the targeting of homosexual erotica by customs officers was found to violate section 15(1) as the Court found that it promoted the stereotypical view that homosexual erotica is more likely to be criminally obscene than heterosexual erotica.

Earlier in the thesis we adopted Moreau’s definition of a stereotype: 

*Any generalization or classification that one group of people treats as though it captured an essential feature of certain other individuals, and which this group takes*

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94 *M. v. H.*, ibid., at para. 3.
95 *M. v. H.*, ibid., at paras 69-70.
97 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, ibid., at paras. 119-25.
to render unnecessary any individualized consideration of their characteristics or circumstances. 98

With this definition we noted two reasons why denying an individual a benefit based on a stereotype amounts to a wrong. First, the generalization that amounts to the stereotype may fail to accurately describe the individual (or group) and doing so denies them a benefit by reason of a consideration that does not apply to them. This denial is an arbitrary one as it does not correspond to the actual situation of the individual (or group). 99 A second reason why denying an individual a benefit based on a stereotype amounts to a wrong is that one who has been denied a benefit on the basis of a stereotype has been publicly defined by another group’s image of her rather than being able to present herself and her circumstances as she perceives them. We can recognise that both harms, in certain instances, will lessen one’s autonomy in the senses described above. In terms of the first harm, when a legislative distinction or state action relies upon an inaccurate characterisation to exclude an individual, the exclusion is arbitrary from her perspective because it is based on a consideration that does not apply to her. Arbitrariness is a harm associated with autonomy—that is, it reflects a lack of consideration by the government of the unique identity and actual situation and circumstances of the claimant thereby undermining the claimant’s self-identity and diminishing her personal autonomy and sense of self. The second harm will also lessen one’s autonomy as it will limit her

98 Moreau, supra note 3, p 298.
99 We can note here that not every arbitrary denial of a benefit amounts to a wrong simply in virtue of its arbitrariness. For instance, section 7 of the Charter protects individuals against arbitrary deprivations of liberty and security interests by requiring that such deprivations be in accordance with ‘principles of fundamental justice’. It does not protect against any arbitrary deprivations of a liberty or security interest, only against certain core interests. Similarly, in the context of s. 15 equality rights, the Court does not treat every arbitrary denial of a benefit on the basis of a stereotype as an instance of unfair treatment. It is rather restricted to one of the grounds (or analogous grounds) of discrimination that is enumerated in the Charter itself. Indeed, mere arbitrariness is not enough—there must be a further factor present that explains why the individual has been wronged.
power to define and direct her life in important ways—to shape her own identity and to determine for herself which groups she belongs to and how these groups are to be characterized in public.

Again, we can note that this will only be the case in *certain instances*; that is, not every instance of one group’s generalization of another, in place of using one’s own characterization, will substantially reduce one’s powers of self-direction; and thus, the autonomy model helps to differentiate between those claims of unfair unequal treatment that are legitimate and those which are not. For example, intellectually disabled adults can have their dignity affronted despite their lack of capacity for autonomy; in such cases, what is at issue is treating them with respect or as possessing intrinsic worth. When the state imposes an arbitrary deprivation on an individual thereby denying a core liberty or interest that is considered necessary for a person’s well-being and flourishing, the state has acted illegitimately. Thus, it is *dignity* exactly that identifies the instances in which this is a wrong of unequal treatment; dignity acts as the determinate of what constitutes a wrong and Moreau herself implicitly concedes this here.

Furthermore, in instances where there is a negative connotation attached to a stereotype, the claim to dignity becomes even more transparent. As Moreau acknowledges, many negative connotations involve an individual’s worth as human beings, and these individuals will have been denied a benefit by reason of an assumption that they are of lesser intrinsic worth. This is an assumption that the government should not have accepted as the state has an obligation to treat every individual with equal concern and respect and, by treating certain individuals as having lesser worth, the government is violating its obligation to its citizens. As I have argued, this obligation to
treat every individual with equal concern and respect is premised on the notion of human dignity. Furthermore, when an individual is denied a benefit and the public justification for this denial appeals to a characteristic that carries connotations of inferiority of any sort, that individual is publicly proclaimed to be inferior. This will not amount to a wrong in all circumstances. If the assumed inferiority is relative to specific abilities or traits, rather than to the individual’s worth as a human being, it may simply be an accurate description of her. But if it is not an accurate description of some specific ability, or if it presents her as being of less than supreme worth as a human being, then its public proclamation will impose limits on what she can do that were not already imposed by her own abilities, and it may also weaken her own sense of what it is possible for her to accomplish.

The same applies to the wrong of prejudice. That is, laws based upon prejudice, in ascribing negative characteristics to those affected, actively deny the inherent worth of those whom they affect thereby diminishing ones self-identity and sense of what it is possible for him or her to achieve.

III.1.3.2. The Perpetuation of Oppressive Power Relations

As we have seen, a certain denial of a benefit or imposition of a burden may wrong an individual by perpetuating oppressive power relations. That is, “[i]t may…have the effect of further entrenching or reinforcing power imbalances that are unacceptably large and that leave certain individuals without sufficient social or political influence”

100 See Anderson, supra note 79; Elizabeth Anderson, Symposium: Reply (22 December 1999), online: Brown Electronic Article Review Service <http://www.brown.edu/Departments/Philosophy/bears/homepage.html>. See also Scheffler, supra note 79.

101 Moreau, supra note 3, p 304.
accurate, given that members of oppressed groups can be socialized to acquire impugned characteristics, and that individual has adopted the generalization for themselves, this is not to say that the denial of the benefit to this individual does not have the effect of perpetuating objectionable forms of domination and oppression. This harm can be seen as an affront to one’s autonomy since if other individuals exert significant control over me, I will indeed be less able to shape my own life in accordance with my personal choices and what I see to be objectively worthwhile.

III.1.3.3. Denial of Basic Goods

We turn now to a common and transparent class of unfair unequal treatment: that is, the denial of a benefit, good, or opportunity. Indeed, this is what most equality claimants seek when making a claim under section 15: they seek the restoration of a significant entitlement, which the government has denied them. When individuals are oppressed by others, certain goods are denied to them, ‘such as the opportunity to participate as equals in public political argument, the opportunity to have equal influence in certain social contexts, and the opportunity to contribute to a genuinely collective self-determination’\(^{102}\). Since we cannot say, however, that any denial of government-provided benefits constitutes a wrong worthy of Charter protection, we might wonder how the concept of human dignity can assist in ascertaining which benefits are legitimate and which are illegitimate.

Recall that Moreau conceives of our concern for the absolute level of the worst off as ‘a concern that is limited by the need to defer to the government’s choice of whether or not to legislate in a particular area and to provide particular benefits to the

\(^{102}\) Moreau, supra note 3, p 305. See also Réaume, supra note 9, p 29.
public. Treated as such, our concern will result in an objection to the way in which the
government acts in the areas it has chosen to legislate in. I submit, however, that this
approach is narrow and the concept of dignity can better assist in the determination of
which government-benefits or goods are legitimately distributed. That is, the denial of
goods that are necessary for an individual to live autonomously—to direct one’s life in
important ways—would constitute a remediable harm under section 15(1) of the Charter.
The denial of goods that are necessary for, or substantially contribute to, one’s control
over one’s body or the development and flourishing of one’s self-identity impairs human
dignity, therefore grounding a claim to redress under the Charter. Benefits such as health
care, physical nourishment, and shelter, for instance, are fundamental, basic goods that
are essential to living a life with dignity. The inequity of basic goods is wrong as this
‘degrades human beings in the sense of robbing them of dignity, self-determination, the
ability to develop their capabilities, and the capacity for choosing among diverse routes to
human flourishing’. To be sure, the scope of section 15 is limited to the formulation
and application of the law; however, where Moreau offers little guidance in this area, my
account of human dignity helps us to ascertain which government-provided benefits and
goods are legitimately distributed and why.

Similar to this point is Reaume’s discussion of “dignity-constituting benefits”. Reaume argues that some distributive benefits and opportunities are so crucial to living a
life with dignity that denying them constitutes a significant harm. Restricting access to
key institutions or significant benefits or opportunities denies individuals control over

103 Moreau, supra note 3, p 309.
104 Sypnowich, supra note 62, p. 338.
105 Réaume, supra note 9, at 686.
106 Réaume, supra note 9, at 688.
how their lives go, and therefore constitutes a profound disregard for human dignity.

Illustrating *Eldridge*, Reaume suggests that the denial of interpreters did more than simply reduce the quality of care received by deaf patients, it denied deaf patients “one of the core rights of personhood”: their bodily autonomy. Reaume’s claim here is that “[t]here are some benefits or opportunities, some institutions or enterprises, which are so important that denying participation in them implies the lesser worth of those excluded.”

Moreau objects that some goods have value in and of themselves, even apart from their instrumental value in promoting individual autonomy. This is particularly illuminating for cases of discrimination for persons who lack the capacity for autonomy. Certainly it seems plausible to hold that, merely in virtue of being deprived of certain goods, the individual has been wronged, quite apart form whether this has also lessened one’s autonomy. Moreau seems right here: there are certainly some goods, which are good in their own right, and not merely instrumental to promoting individual autonomy and self-determination. In the *Protagoras*, Plato maintains that when people condemn pleasure, they do so not because they take pleasure to be bad in itself, but because of the negative consequences they find pleasure to often have. Plato takes the position that pleasure is in fact good in its own right and pain, bad, regardless of the consequences. Others have suggested more comprehensive lists of intrinsic goods. For instance, we might think of life, health, happiness, contentment, truth, knowledge, love, beauty, and friendship as goods that are valuable in and of themselves, apart from the effect they have on one’s autonomy.

107 Réaume, *supra* note 9 at 688.
While I think that this is right, I do not think it to be an objection to my claim that human dignity can help to ascertain which denial of goods are unfair and thus results in discriminatory treatment. I submit that while these goods can be said to be good in their own right, they are likewise good because of their advancement of personal well-being and human flourishing. As Martha Nussbaum argues, there are central human capabilities which provide us with comparative quality of life measurements and which provide us with a focus for the formulation of basic political principles of the sort that can play a role in fundamental constitutional guarantees. In fact, Nussbaum’s capabilities approach begins with a conception of the dignity of human beings and of a life that is worthy of that dignity—a life that has available in it “truly human functioning.”109

Thus, by focusing on what people are actually able to do and to be, the human dignity approach is well positioned to shore up and adequately address inequalities. Of course, certain material resources are good in and of themselves—physical nourishment, adequate shelter, access to healthcare, education, community, culture and personal relationships. However, as Sypnowich recognizes in her account of human flourishing, “Extending our measure of equality to these more intangible goods involves a recognition that it is not simply what keeps the biological self going, but what keeps the self well, that is at the heart of the egalitarian’s concern.”110 Thus, merely having access to basic goods, whether good in their own right or instrumentally good for their promotion of personal autonomy, is not enough. Moreover, Sypnowich argues, “well-being involves not just access to a fulfilling life, but the capability for such a life and, moreover, some

110 Sypnowich, supra note 62, p. 337.
measure of success in the exercise of that capability.”\textsuperscript{111} Similarly, Amartya Sen rejects ‘goods fetishism’ for a more nuanced approach, stressing the relation between goods and capabilities.

III.1.3.4. Diminishing Self-Worth

Recall that for Moreau, diminishing one’s sense of self-worth is a further way of conceptualizing the wrong of unequal treatment. In other words, Moreau here is herself conceding that feeling an affront of one’s dignity can amount to a wrong of unequal treatment. I will spend little time here as this appeals to the subjective conception of dignity of which I discussed and critiqued in Chapter 1. As we saw, under this conception of the wrong, the individual is made to feel as though she is of lesser or no worth. Moreau recognizes, however, as my account does, that this way of understanding the wrong of unequal treatment cannot stand independently as a complete explanation of why certain forms of unequal treatment are objectionable since the mere fact that unequal treatment decreases the dignity of those who are denied a benefit is not sufficient in itself to conclude that treatment unfair.

\textsuperscript{111} Sypnowich, \textit{supra note} 62, at p 340.
III.1.4. Conclusion

In this chapter, I have argued that the concept of human dignity is relevant and necessary to an analysis of discrimination. I have demonstrated this by following Sophia Moreau in identifying and conceptualising the wrongs of unequal treatment—stereotyping and prejudice; the perpetuation of oppressive power relations; the denial of basic goods; and diminishing self-worth—and showing that a concept of human dignity is in fact grounded in such wrongs. While certainly non-exhaustive, all four wrongs of inequality are central to discrimination. I have thus attempted to demonstrate that human dignity, as applied to rational agents, and understood in the objective sense as autonomy and self-determination, can help to delineate how equality is to be conceived, specified and realised under section 15 of the Charter.
IV. Objections

In what follows, I will address an objection that could be raised against my thesis that dignity, understood in the outward sense as autonomy and self-determination, explains the nature and scope of the government’s obligation to show equal concern and respect, and offers us guidance as to why certain types of unequal treatment are unfair and illegitimate. It has been objected that dignity is too vague and imprecise a concept to be of much use in analyzing the wrongs of unequal treatment, a criticism we saw mounted by Moreau. The argument is that dignity is vague to the point of vacuous and, therefore, too easily used to dress up decisions that in fact do little to combat discrimination and reflect nothing more than conservative gut reaction or excessive deference to Parliament. Cases in the past decade might be thought to bear out this criticism.112

I would argue, however, that the concept emerges in fact as a way of clarifying the vagaries of equality. Joseph Raz, for example, is concerned that equality per se, strict equality, has no value.113 Rather, he says, when putative claims about equality are being pursued, often what is at issue is deprivation, and the aim of strict equality – that is the equalization of deprivation – is a perverse goal for political philosophy. Raz argues that egalitarianism if concerned only that people have the same amount of $x$, has no content, since we might ask why $x$ matters. He realises that we require an account of the value of $x$ in order to be concerned with its redistribution and, even once we have this account, it remains unclear why equality per se matters. Indeed, there is something perverse about finding a society with widespread poverty—which is therefore equal—superior to the society with pockets of poverty. Raz is concerned with clarifying our equality

112 See, for example, Gosselin v. Québec (Attorney General), supra note 64.
113 Raz, supra note 57.
discourse—he believes that many principles ostensibly based on a concern for equality are in fact based on something else, and to reduce them to equality principles is to confuse their true meaning. Numerous principles purporting to be principles of equality are in fact principles based on concepts of universality, and this is because “[universal] principles of entitlement generate equality (in some respect) as an incidental by-product since all who have equal qualification under them have an equal right.”114 All of this is to say that equality is better understood as a view that all human beings matter equally. That is, all individuals are entitled to opportunities for the fulfillment and the means for pursuing such opportunities.

Raz uses the term rhetorical egalitarianism to describe arguments which invoke equality in their formulation but are based primarily on ideas of universality.115 Thus, a dignity-based view of equality is an example of rhetorical egalitarianism. That is to say, section 15 claims put forward by reason that the impugned law fails to respect the dignity of the claimant are based on the dignity of all humans and the obligation of the state to recognize and respect that dignity. These claims, then, are based on a failure of the state to respect a universal right; the right to have one’s dignity respected. The significance of that failure is not that it involves unequal treatment, for it would be no solution to deprive everyone equally of their dignity. Rather, the failure to respect a person’s dignity is a failure to accord that person an essential constituent of wellbeing. Dignity, then, helps us

114 Raz, supra note 57, at 228.
115 Raz contrasts rhetorical egalitarianism with what he calls strict egalitarianism, in which the wrong of the treatment lies entirely in the inequality itself. Raz’ example of a strict egalitarian principle is “All Fs who do not have G have a right to G if some Fs have G.” Thus the entitlements of a strict egalitarian principle are not universal entitlements flowing from some inherent quality of those entitled; they are rather entitlements based first on the equality of those who qualify and, second, on some actual fact about something that some have. That is, “[b]eing an F does not qualify one for G. It is the actually existing inequality of distribution which creates the entitlement.” See: Raz, supra note 57, at 225-226.
distinguish between instances where strict equality is appropriate and instances where it is not, as it provides us with a criterion for the relevance of equality. We can consider an illuminating example illustrated by Raz:

A parent who gives medicine to the healthy child and not to the sick one...is treating them unequally. [But] the wrong is the same as where a parent has only one child...to whom he denies the medicine when he is sick. 116

Raz’s example can be extended to many of the situations that fall under section 15. For instance, in Andrews the harm that resulted was the unnecessary requirement of citizenship being applied to the claimant and the effect on his dignity—that is, the effect on his ability to lead his life in the direction chosen—not the inequality of the harm. Raz explains:

Accusing a person of unequal treatment in these and many other contexts is permissible if he behaves wrongly or badly towards some while behaving properly towards others. To accuse him of unequal treatment, however, is not to identify the nature of the wrong: it could be any wrong and it is definitely not the wrong of creating or perpetuating inequalities. As [the medicine example and others] show the same wrong can exist in situations involving no inequality. 117

The section 15 claims based in dignity, then, are clearly examples of this sort of rhetorical egalitarianism since the government, in these cases, is “behaving wrongly” towards the claimants while “behaving properly” towards others. But the wrong lies not in the inequality of the treatment, but rather in the fact that the government is behaving wrongly towards the claimants by not respecting their dignity.

So while the notion of equal concern and respect does not derive its explanatory power from its ability to account for the differences in benefits and burdens, equality is relevant to the ideal. The notion of equality concerned with here does not depend on how

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116 Raz, supra note 57, at 228-229.
117 Raz, supra note 57, at 229.
much a person is given in relation to others, otherwise, every governmental program or scheme that distributes benefits or imposes burdens would run contrary to the equality guarantee, since some individuals will necessarily receive more or less than others. Rather, as I have stated, the appropriate approach to equality is concerned with situations where differential treatment is unfair.

That unfairness is not derived from what or how much individuals are given or denied as a result of the differential treatment, but instead is a consequence of how the state treats the affected individual when making legislative distinctions. Thomas Scanlon illustrates this point well with an example: he argues that while the common desire to help the worst-off in society is often cast in terms of equality, the actual motivating force is humanitarian.\(^{118}\) That is, it is not the magnitude of the gap—or even the existence of the gap—that is objectionable, but that a person’s personal autonomy or selfhood has not been adequately considered or respected, which is unfair.\(^{119}\) Thus, equality must be viewed not as what people are given relative to others, but rather as an entitlement to be treated in a certain way by the state. The human dignity approach, as a form of rhetorical egalitarianism, is able to clarify rather than obscure the precise nature of the wrongs of unequal treatment by focusing not just on strict egalitarianism but on the state’s treatment of persons. Thus, I would argue that the charge of human dignity as hopelessly vague and indeterminate is misguided.

\(^{118}\) Scanlon, T.M., "The Diversity of Objections to Inequality" (presented at the Lindley Lectures, University of Kansas, Harvard, 22 February 1996) at 2.

\(^{119}\) Ibid.
V. Conclusion

In this work I have argued that the concept of human dignity, as applied to rational agents and understood in the outward sense as autonomy and self-determination, can provide us with meaningful content. More specifically, the concept explains why certain types of unequal treatment are unfair and illegitimate and can thereby identify discrimination and disadvantage and protect individuals from the wrongs that are done to persons when the state treats them unequally. To substantiate this thesis, I have shown the Supreme Court of Canada’s conception and use of human dignity as flawed, and explanatorily inadequate, arguing that the Court has used dignity not in the objective sense but rather as a subjective concept, confining the analysis to the individual, and identifying a person’s dignity with only his or her feelings. The crux of my argument lies in my demonstration of dignity as lying at the heart of Sophie Moreau’s identified wrongs of unequal treatment. In so doing, I display the concept of human dignity as relevant and necessary to an analysis of discrimination by arguing that such a concept is in fact grounded in Moreau’s own illuminating account of discrimination. Understanding human dignity in this objective sense, I have argued, facilitates a contextual analysis that captures the objective wrongs of unfair treatment—objective wrongs that the Charter is meant to protect against.

In responding to the criticism that dignity, as a concept used in section 15 equality jurisprudence, is vague and indeterminate, I have shown that the concept emerges in fact as a way of clarifying the vagaries of equality. Surely the aim of strict equality, or the equalization of deprivation is a perverse goal for equality. Rather, equality is better understood as a view that all human beings matter equally and human dignity aims
towards just this: that is, it aims to explain the nature and scope of the government’s obligation to show equal concern and respect.

In arguing for this account of dignity, I hope to have developed and refined an interest, which may better guide and inform a section 15 analysis, but also to assist in formulating appropriate obligations to impose upon the government to better secure and maintain equality. I have shown that the philosophical literature on equality, can help shed light on the question, what constitutes discrimination. In seeking to discover the sorts of harms or deprivations that section 15 seeks to prevent I have found that it is the harm of violating human dignity and it is an understanding of this harm that must drive the recognition of analogous grounds and the recognition of disadvantaging impacts which constitute discrimination.
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