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Harsh, Perhaps Even Misguided: Developments in Law, 2002

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HARSH, PERHAPS EVEN MISGUIDED: DEVELOPMENTS IN LAW, 2002

Sonia Lawrence*

I. INTRODUCTION

Last year, section 15(1) claimants found themselves in the shadow of our Charter's monument to equality. All of the equality claims were rejected in ways that served to expose the disorderly underside of our understanding of equality, providing a glimpse beyond the stirring language and neatly outlined tests. In 2002, push came to shove. Narrow conceptions of equality and institutional competence pushed, and equality claimants were shoved. Liberty and choice pushed out other contenders for the position of "values underlying human dignity," while government motives stole the limelight from the harms experienced by the claimant. Both of these trends appear at odds with past jurisprudence and conventional wisdom about the scope of the section 15(1) protection as interpreted by the Supreme Court.¹

* The author would like to thank Patrick Monahan for the invitation to contribute on this subject, Robert Wai for his careful reading and helpful comments, Lauren Temple for her excellent research assistance, and Bruce Ryder for many fruitful discussions about s. 15(1) in 2002, particularly around *Gosselin*. All errors are of course my own.

¹ "Harsh, perhaps even misguided" refers to *Gosselin v. Quebec (Attorney General)* 2002 SCC 84, at para. 69 *per* McLachlin C.J. (referring to the reasonable welfare recipient's perception of the challenged legislation). The cases considered in this account are *Gosselin, Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 and (to a lesser extent), *Lavoie v. Canada*, [2002] 1 S.C.R. 769 (since Lavoie was discussed in last year's contribution to this publication and indeed was the only s. 15 case discussed last year, I will not cover it extensively here. *Gosselin* challenged a Quebec welfare regulation (since repealed) which granted lower benefits to recipients under 30 unless they participated in education and training programs. Walsh was a challenge to the exclusion of non-married, cohabiting couples from the provisions of the *Nova Scotia Marital Property Act*, R.S.N.S. 1989, c. 275, s. 2(g). The Act defines "spouse" in a limited way:

- (g) "spouse" means either of a man and woman who
 - (i) are married to each other,
 - (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity, or
 - (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year,and for the purposes of an application under this Act includes a widow or widower.

II. LIBERTY, EQUALITY AND DIGNITY

Since the Court has designated human dignity as the touchstone of constitutional equality analysis, the definition of the concept is critically important. Yet of late the court has been applying the idea without explicitly describing either what it encompasses or what it excludes. As a result, the definition of human dignity appears to be straddling one of the fault lines of modern liberalism, expressing allegiance to both liberty and ideas of equality and community.² Without denying the potential importance of the idea of

² See for instance, N. Strossen, "In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future" (1994) 29 Harv. C.R.-C.L.L. Rev. 143. When the article was written, the author was President of the A.C.L.U. She describes her article as a response to the charge that the A.C.L.U. has moved away from civil liberties and has begun to focus on civil rights. At one point, she characterizes part of the critique as postulating a conflict between liberty and equality (at 146). One of the main players in this debate has been the philosopher Ronald Dworkin. See R. Dworkin, Isaac Marks Memorial Lecture: "Do Values Conflict? A Hedgehog's Approach" (2001) 43 Ariz. L. Rev. 251. Dworkin describes the conflict commonly understood to exist between liberty and equality, and sketches two ways in which defining the concepts differently would eliminate the supposed conflict (at 253). However, Dworkin is asking for a philosophical debate on the content of these two values. It is the absence of any position in this debate which (at least in part) constitutes the hole at the centre of our s. 15(1) jurisprudence (at 255). In fact, Dworkin's comments are particularly apt in light of *Gosselin*, and worth quoting at length. At 257, he asks:

Should distribution be sensitive to choice? Many eminent philosophers, including both the utilitarians and John Rawls, would object that choice is often illusory. We don't have as much control over our preferences as I seem to suppose. Many of our tastes are inbred, and someone whose tastes are particularly expensive to satisfy might therefore complain that he has simply had bad genetic luck. In some cases, tastes depend not on genes, but on an environment that is forced on people. Young people in inner-city ghettos sometimes develop work aversion, but that is presumably a consequence of the fact that the work available to them — if any — is unstable, ill-paid, and degrading.

But the importance of choice to equality does not depend on any idea that we choose the tastes or preferences out of which choices are made. Obviously we don't: we may try to inculcate preferences we wish we had, but we do so under the direction of more basic ambitions that we have not chosen to have. The point is rather to recapitulate in politics the role that choice plays in our own, individual critiques of our own lives and of our own responsibility. We want our politics to be continuous with our personal ethics, and we couldn't manage, in directing our own lives, without the crucial ethical distinction between the consequences for which we must take responsibility, because they reflect our choices, and those for which we are not responsible because they reflect brute luck or the decisions of others. I agree that ghetto work-aversion, to the extent that it really does exist, calls for a special discussion. We cannot simply say that people who shun work because they come from a background in which satisfactory work was denied them must take the consequences of that attitude. But we resist that harsh conclusion for only one reason: that the environment that has produced their work aversion is a deeply unjust — because inegalitarian — one. (There are upper-class twits in Britain, where I live part of the time, who ask for special considera-

liberty to an understanding of equality, it is fair to state that the precise contours of the relationship between the two are critical. While equality or equal rights can be described as a form of freedom or liberty,³ liberty is often the rallying cry of those opposed to measures designed to end discrimination or increase equality.⁴ In both *Gosselin* and *Walsh*, the Court suggests: choice = liberty = human dignity = equality. In other words, the liberty in question belongs to those claiming discrimination, rather than those who are engaging in discrimination. Is it enough to appeal to liberty in the context of inequality? Inequality implies unequal distribution of the ability to make certain choices. To take abortion as an example, the “right to choose” will mean different things to different women if abortions are an expensive medical procedure not covered by medical insurance. The liberty in question may be more theoretical than real, at least for some. In addition, the presence of liberty and freedom to choose does not necessarily mean the absence of significant harms.

There are very difficult questions about the relationship between the concepts of choice and liberty and the ideal of equality and non-discrimination. These are questions that the court does not pose, answer, or allude to. In

tion because they were raised to think that ordinary work is beneath them. We have less, if any, sympathy for them.) For now, we owe those who have suffered from injustice in this way special attention: more should be spent on their education, for example, for that reason. But our long-term aim should be to reach a just state in which we have no good reason not to ask people to take the consequences of the choices that, for whatever reason, they freely make. (citations omitted).

For other discussions of the connections between liberty and equality, see R. Langton “Pornography: A Liberal’s Unfinished Business” (1999) 12 Can. J.L. & Jur. 109 (taking issue with Dworkin’s approach in the context of feminist analyses of pornography). In the area of taxation, see M. Kornhauser, “Equality, Liberty, and a Fair Income Tax” (1996) 23 Fordham Urb. L.J. 607, 609 (“... this Article asserts that the American sense of distributive justice and hence taxation rests on the twin foundational principles of America — liberty and equality. These principles have various meanings; under some definitions, liberty and equality are compatible, but most frequently they are in conflict.”). See also D. Roberts, “The Pursuit Of Social And Political Equality: The Priority Paradigm: Private Choices And The Limits Of Equality” (1996) 57 U. Pitt. L. Rev. 363, 64-5 (Roberts begins by recalling that American Constitutional scholar Herbert Wechsler would have upheld school segregation in the late 1950s because of the liberty interest at stake for those White people who found association with Blacks unpleasant or repugnant. She goes on to trace the continuing salience of liberty in the United States Supreme Court’s more recent jurisprudence dismantling affirmative action programs in a number of contexts). See also S. Baer, “Constitutional Equality: Equality, the Jurisprudence of the German Constitutional Court” (1999) 5 Colum. J. Eur. L. 249, 274-5 (Baer argues that liberty from hierarchy ought to be the focus of equality jurisprudence, as opposed to a comparative approach. While she welcomes liberty as a value in the analysis, her use of it would be significantly different to the Supreme Court’s in *Gosselin*).

³ See for instance K. Karst, “Equality as a Central Principle in the First Amendment” (1975) 43 U. Chicago L. Rev. 20, 43-44.

⁴ See Strossen, *supra*, note 2.

addition, the analysis manages to ignore or obscure the history and contemporary practice of subordination and stratification. Instead, it appeals to fundamental values which are left ill-defined. The complicated, long term and deep rooted processes which are the stuff and substance of discrimination are actually replicated in the Court's decision instead of being exposed and prevented.

The move to a dignity-centred equality analysis, long suggested by L'Heureux-Dubé J. but only accepted by the unanimous Court in *Law*,⁵ continues to be difficult to assess. South African commentators, who have had more time to think about the human dignity approach to equality jurisprudence, have been unenthusiastic on at least two levels. First, they have critiqued the concept for its lack of content, with one commentator describing it as "a jurisprudential Legoland — to be used in whatever form and shape is required by the demands of the judicial designer."⁶ Second, they have been concerned by the potential of human dignity to swamp (rather than complement) substantive equality by turning the focus from material/social issues to individual issues.⁷

Gosselin, in particular, displays this tendency to individualize the analysis.⁸ The majority finds significant positive human dignity effects of the heavy economic pressure (coercion?) exerted by the regulation. The challenged welfare program, which required those under 30 to participate in training or education programs if they wished to receive more than \$170 per month in welfare payments, was described as a move towards goals which are the "stuff and substance of essential human dignity": "self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment."⁹

Summing up, the majority held that reasonable welfare recipients under 30 would not have found their human dignity harmed by the program. Indeed,

If anything, [they] would have concluded that the program treated young people as more able...to benefit from training and education, more able to get and retain a job, and more able to adapt to their situations and become fully participating and contributing members of society.¹⁰

⁵ *R. v. Law*, [2002] 1 S.C.R. 227.

⁶ D. Davis, "The Majesty of Legoland Jurisprudence" (1999) 116 S.A.L.J. 398, at 413.

⁷ C. Albertyn and B. Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 S.A.J.H.R. 248, at 257-8 and 272. Canadian observers have developed this same point.

⁸ This may have been heightened by the nature of the claim in *Gosselin* — a class action (with Louise Gosselin as representative plaintiff) for damages in an amount exceeding \$349 million.

⁹ *Gosselin*, *supra*, note 1, at para. 65.

¹⁰ *Id.*, at para. 69.

It is important to recall that the section 15 claim in *Gosselin* was not a claim for “a right to welfare.” It was a relatively straightforward claim for a right to equal access to welfare benefits. The ground of the alleged discrimination was age; those under 30 were subjected to a different regime than those over 30.¹¹ The Court’s analysis utterly ignores the significance of the history of social welfare (and the relationship between the poor and the majority) and the central goal of such programs: distinguishing between the deserving and undeserving poor.¹² Even if the majority disagreed with the premise that the deserving/undeserving distinction is problematic, or that it is a piece of the historical context of this claim, or with the premise that the challenged regulation employed such a distinction, they ought to have brought this concern to the fore. Instead, it is left to be implicitly rejected by the conclusion that the regime was dignity enhancing since it aimed to help participants find jobs and achieve self-sufficiency.¹³

An uncritical “liberty” approach, that does not recognize (even to reject) the possible conflict between liberty and equality, reflects a particular view of section 15. It does not, in my view, support the goal of helping those at the “bottom of the social hierarchy.”¹⁴ The judgment cannot satisfactorily explain

¹¹ The s. 7 claim, in contrast, did raise the question of minimum welfare entitlements.

¹² See generally, M. Katz, *The Undeserving Poor: From the War on Poverty to the War on Welfare* (New York: Pantheon Books, 1989), J. Handler and Y. Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (Newbury Park: Sage Publications, 1991). The distinction between the deserving and undeserving poor is noted in Canadian legal and social policy research. See, for instance, L. Sossin, “Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health & Social Transfer” (1998) 21 *Dalhousie L.J.* 141; D. Majury, “The Charter, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 *Osgoode Hall L.J.* 297-336; M. Little, “No Car, No Radio, No Liquor Permit”: The Moral Regulation of Single Mothers in Ontario, 1920-1997 (Toronto: Oxford University Press, 1998); H. Lessard, “The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring” (2001) 39 *Osgoode Hall L.J.* 717; W. Wiegiers, “The National Child Benefit: Social Inequality Under the New ‘Social Union’” (2001-2002) 33 *Ottawa L. Rev.* 25; *Community Dispatch: An InfoFax of the Halton Social Planning Council and Volunteer Centre*, “The New Canada Child Tax Benefit” December 1998, Vol. 3(2), available online at: <http://www.haltonspcvc.on.ca/dispatch/cd0302.htm> accessed July 29, 2003 describing the Social Planning Council’s position on the Benefit:

We have real concerns regarding the implications of this plan, particularly the segregating of working poor from welfare poor through differential treatment... Benefit serves to reinforce current stereotypes related to the “deserving and undeserving poor.” Stereotyping of the poor is one of the major obstacles to the implementation of real anti-poverty measures. The government’s targeting of “working poor” under this Benefit plan does nothing to eradicate that division in the public eye.

¹³ This problem is also linked to the grounds/harms point which I make below.

¹⁴ See Greschner, *infra*, note 18, at 318:

If, at the end of two decades of equality litigation, we cannot say that equality litigation has made things better for groups at the bottom of the social hierarchy, then we should

how a program which operates to keep some people's benefits at \$170 per month (the majority grants that the reasonable recipient might see it as "harsh, perhaps even misguided")¹⁵ is deemed human dignity promoting and therefore equality promoting? Similarly, in *Walsh*, one of the watchwords of human dignity is "choice." Choice and self-sufficiency are the values serving to justify the legal imposition of hardship on some (though clearly not all) of the unmarried cohabitants unfortunate enough to have their relationships flounder. To more properly support an equality analysis, either the concepts of choice and liberty would themselves have to incorporate equality concerns (for instance, the idea that choice and liberty are harmed in situations of inequality, or that choice and liberty are unequally distributed), or the search for choice and liberty would have to take a backseat to the search for harm.

Concern over the use of choice and liberty to add content to human dignity is not necessarily a condemnation of the human dignity-centred analysis altogether. I agree with those who say it would be *possible* to interpret the string of adjectives, and the broader "human dignity" itself, in ways consistent with a substantive approach to equality.¹⁶ However, the worryingly individualistic notions of liberty, free choice, and self-sufficiency arguably cannot serve as the basis of a substantive and relationally informed equality analysis, as scholars such as Dr. Sheilah Martin have suggested.¹⁷ At present, it does not seem that the Court intends to infuse the idea of human dignity with relational concepts, but rather is content to analyze it at the level of the individual and to measure it by reference to feelings.¹⁸ This diminishes the importance of social structures and historical practices of subordination. Substantive equality is meant to consider the actual context of people's lives, as a whole society. Who has what? Who doesn't? Under a substantive equality analysis, laws which worsen the situation of the already disadvantaged ought to be suspect. Yet the current approach to equality, centred on dignity, produces claimants capable of recognizing "respect" in measures that hurt. The Court may as well have quoted the parent preparing to spank a child who says, "I'm

be suspicious that what claims to be a substantive approach is really formal equality in another guise. If section 15 jurisprudence makes a difference in the lives of the worst-off, we can conclude that the substantive spirit of section 15 is being met.

¹⁵ *Gosselin*, *supra*, note 1, at para. 69 (*per* McLachlin C.J.).

¹⁶ See for instance, Greschner, *infra*, note 18. I have also had opportunity to hear Professor Denise Reaume convincingly make this argument.

¹⁷ S. Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299, at 319-32.

¹⁸ For a very helpful re-imagining of the third stage of *Law*, where human dignity is replaced by a concept of belonging and community, see D. Greschner, "Does *Law* Advance the Cause of Equality?" (2001) 27 Queen's L.J. 299, at 315-16.

doing this because I love you.”¹⁹ Does this make the child feel, in the words of Iacobucci J. from *Law*, “self-respect and self-worth”?²⁰

III. A RETURN TO RELEVANCY

In addition to these trends in the interpretation of human dignity, another key (re)turn in the jurisprudence is the emphasis on government policy intent or motive. The Court seemed unwilling to find against the government where there was some non-malevolent intent or purpose.²¹ This analytic move is generally made during consideration of the “correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant”²² — one of the contextual factors in the *Law* test. Through this factor, the government’s benign purpose is being allowed to serve as an indication that there was no discrimination (as I will explain below, my own view is that direct substantive equality promoting purposes of the measure ought to be considered under the *Law* contextual factor “ameliorative purpose”). A focus on purpose/motive or intent of the government obscures the focus on the group harmed. As such it may erode key facets of Canadian constitutional equality, in particular, adverse effects discrimination analysis.

Although the precise mechanics of the legal analysis are not always explicit, what seems obvious on reading *Gosselin* is that the government’s purpose, as interpreted by the Court, was a significant factor in the failure of the claim.²³ Despite the skepticism of Bastarache J. (“giving too much weight here to what the government says was its objective in designing the scheme would amount to accepting a s. 1 justification before it is required”)²⁴ the majority focused on the requirement of participation in education and training programs, and not the lowered benefits. Thus they argued that:

¹⁹ This is a deliberate reminder that in 2003 the Court will be hearing *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada* (2002), 57 O.R. (3d) 511 (C.A.); leave to appeal to the S.C.C. granted October 17, 2002 (without reasons). Appeal was heard June 6, 2003. [2002] S.C.C.A. 113. The case is a challenge to the *Criminal Code*, R.S.C. 1985 c. C-46, s. 43, which provides parents and teachers with a defence to assault when reasonable force was used by way of correction towards a child.

²⁰ *Law*, *supra*, note 5, at para. 53.

²¹ There are two levels to my critique here. First, (as I have argued above) ascribing a non-discriminatory motive to the government at least in *Gosselin* was potentially incorrect. Second, the government’s intent or motive ought not be determinative in the discrimination analysis.

²² *Law*, *supra*, note 5, at para. 88.

²³ That the majority interpreted the government’s purpose as entirely benign and even helpful is a phenomenon I shall take issue with below.

²⁴ *Gosselin*, 2002 S.C.C. 84, at para. 244 (*per* Bastarache J., dissenting).

[t]he differential regime of welfare payments was tailored to help the burgeoning ranks of unemployed youths obtain the skills and basic education they needed to get permanent jobs.²⁵

Did this correspond to the actual needs, abilities, and circumstances of welfare recipients under 30? According to the majority, yes. The policy:

... reflects the practical wisdom of the old Chinese proverb: “Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime.” This was not a denial of young people’s dignity; it was an affirmation of their potential.²⁶

The purposes of getting recipients under 30 into training programs and eventually enabling them to achieve self-sufficiency are held to demonstrate that a regime which would leave a person like Ms. Gosselin less than \$200 a month to live on is a program which corresponds with her circumstances, needs, and abilities. Most would agree that the law was clearly designed to create an “incentive” for young welfare recipients to enter training programs by ensuring that the alternative was a very low income, even by the minimal standards of social assistance rates. It is the nature of the incentive that is in dispute. The majority felt that this approach was a way to tackle the problem at its root, a strategy based on reality, logic, and common sense.²⁷ As an aside, it should be evident from any consideration of the history and development of anti-discrimination law that the fact that an idea is a matter of common sense, or because it is the subject of proverbs or other forms of conventional wisdom, ought never to be grounds for determining that the idea is not discriminatory — quite the contrary, one would think, since racism and sexism (to name just two forms of discrimination we now recognize as discrimination) were once matters of common sense both in law and in everyday social interaction.²⁸ On the other hand, perhaps the court is serving notice that anti-discrimination doctrine in law

²⁵ *Id.*, at para. 41 (*per* McLachlin C.J.).

²⁶ *Id.*, at para. 42.

²⁷ *Id.*, at para. 44 (*per* McLachlin C.J.).

²⁸ Similar concerns were raised with respect to the analysis in *Law: B. Baines, “Law v. Canada: Formatting Equality”* (2000) 11 Const. Forum Const. 65, at 70:

When it came to applying the ... discrimination inquiry ... Justice Iacobucci began ... by asserting that: “Relatively speaking, adults under the age of forty-five have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada’s discrete and insular minorities.” He might be right or he might be espousing a stereotype, but how to tell?

Baines again takes the Court to task for failing to adequately deal with age discrimination claims at p. 73. Citations omitted. This critical failure of analysis with regard to disadvantage to younger people may come to a head this year in *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada*, *supra*, note 19.

should and will simply track social attitudes of the day and things will not be discriminatory until there is a strong social consensus on the matter. In any case, without evidence that there was no other way to promote training and education, and without evidence that there were jobs in the Quebec market for the thousands of people in Louise Gosselin's position, the majority seems to have decided that the government's intent was benign and moved from there to the conclusion that the program was not discriminatory. The argument, that people were harmed and coerced into accepting the fishing instruction when the government stopped offering a "fish for a day" was completely ignored.

There are two issues here. One is whether or not the government's purpose in *Gosselin* really should have been described as benign, the other is what effect that description should have on the section 15(1) analysis. In my view, the court took the wrong approach on both questions, although here I shall focus on the latter. None of this increases optimism about the *Law* test. Even those commentators who approved of the *Law* test, like Professor Greschner, argued that it needed refinement. In particular, she was concerned that the Court should:

... assess the contextual factors carefully to ensure that the relevancy test, or another formalistic method, does not reappear through the indiscriminate choice of those factors.²⁹

Unfortunately, we seem to have returned to the much critiqued relevancy test from the equality trilogy of 1995.³⁰ In addition, relevancy is being explained through the use of "practical wisdom" and the government is being granted the benefit of the doubt even where it seems to deserve it least. The search for harms is being ignored in the search for innocent motives.

The emphasis on the government's goals and intent, the constant imprecations against stereotypes, and the suggestion in *Law* that the court can reinterpret the claimant's reaction to the situation, all serve to shift the focus of the analysis from the effect on the claimant to the actions of the government. Focusing on government motive rather than result may affect a critical aspect of any substantive approach to equality, the consideration of the backdrop of inequality against which the government acted. This is arguably the dynamic

²⁹ 27 Queen's L.J. 299, at 312.

³⁰ *Egan v. Canada* [1995], 2 S.C.R. 513; *Miron v. Trudel* [1995], 2 S.C.R. 418; and, *Thibaudeau v. Canada* [1995], 2 S.C.R. 627. The relevancy test was set out by Gonthier J. in *Miron*, and relied upon by LaForest J. in *Egan*. Essentially it asked whether the personal characteristic upon which the impugned distinction was made was in some way relevant to the fundamental values underlying the legislation. This test was widely criticized but numerous commentators have noted the resilience of this test. For instance, see Baines, *supra*, note 28, at 67 (describing *Law* as a "re-articulation of the relevancy test in the guise of ... 'contextual factors'").

played out in *Gosselin*, where the government's good intentions (along with the asserted "lack of evidence") are emphasized over the dire situation of those in Louise Gosselin's position, as they faced rising unemployment and meager welfare benefits.

In my view, this almost inevitable result under the new approach is an excellent argument for scaling back the extent to which the motive, purpose, and intent of the government are considered in the section 15(1) test. *Gosselin* plays out many of the concerns of commentators and displays the need for clarification (minimally) and reform (optimally) of the current approach to section 15(1). The motive of the state ought to be considered at section 1, save for those circumstances where substantive equality itself was the motive. The exception arises from the specific interpretive guidance provided by section 15(2). As the Court indicated in *Lovelace v. Ontario*, section 15(2) serves to ensure the failure of section 15(1) challenges to ameliorative programs, programs which aim to further substantive equality by providing benefits to less advantaged groups.³¹ In other situations, where the government's motive is not to deal with situations of substantive inequality, we do not require evidence of a bad motive and therefore should not take account of a good motive. To do so would mistake the fundamental concern of a substantive equality analysis. It would also prioritize discriminatory purpose over discriminatory effect, which would arguably be inconsistent with the interpretation of other Charter sections.

The solution must include a reconsideration of the correspondence branch of the test from *Law*. Consistent with the purpose of equality law, the focus here ought to be on the harms alleged by the claimant, rather than the government's hopes for the program.³² This approach will likely result in an increased number of claims succeeding at section 15(1) only to have the government prevail

³¹ [2000] 1 S.C.R. 950.

³² I think that this would avoid the problem noted by Greschner, *supra*, note 18, at 309, of treating "[t]he goal of substantive equality ... as either a defence to inequality (section 1) or an exception to equality (section 15(2))," although Professor Greschner might disagree. At the very least, I fall into the category of critics whose main fears stem from the history of s. 15(1) interpretation and in particular the Equality Trilogy, as she describes at 306. As for s. 15(2), in my view, it is not an exception to equality. However, the government's attempts to create substantive equality through an ameliorative program can serve as a contextual factor which ought to be considered alongside the harms to others in determining whether equality has been violated.

To the extent that the Supreme Court majority treated *Gosselin* as a case where there was dispute over the existence of harms, my concerns for the future may be exaggerated. Frankly, however, the idea that there could be dispute over the harm of coercing people into a government program by threatening to leave them with only \$170 a month to live on, is disturbing in and of itself. The impact of framing Gosselin's case as a class action for damages may have been to dissuade the majority from accepting that any harm at all had occurred, but this part of the case is quite murky in the judgment.

through the section 1 analysis. In my view this is the more appropriate place to consider such effects. Disputes over the existence of harms must be resolved at section 15(1), but balancing harms against benefits should be done at section 1.

IV. CONTEXT AND GROUNDS

Rethinking the relevance of government motive or intent ought to go further than just asking when motives are positive and when they are irrelevant. We should also look for a link between the question of purpose or intent and the idea of a “grounds based” discrimination analysis. The majority’s identification of the grounds of discrimination, and its conclusion as to the existence of “pre-existing disadvantage” in *Gosselin* served to mask the extreme vulnerability of the group in question instead of assisting in the recognition of particular vulnerabilities. The members of the Court did not agree on whether or not young people were a group facing “pre-existing disadvantage.” For the majority, the matter was disposed of with an analogy:

... a sign on a courthouse door proclaiming “Men Only” evokes an entire history of discrimination against a historically disadvantaged class; a sign on a bar room door that reads “No Minors” fails to similarly offend.³³

The Chief Justice then moved on to say that “young adults as a class simply do not seem vulnerable or undervalued.” Chief Justice McLachlin refers to *Law* to support her contention that “people under 30 appear to be advantaged over older people in finding employment.”³⁴ Yet, the majority also described the impetus for the legislation as “... alarming and growing unemployment among young adults...”³⁵

The analysis does not include any serious analysis of age discrimination, but is totally void of any effort to grapple with the import of welfare receipt. Focused on the alleged ground of discrimination (age), the court refused to recognize that all welfare recipients suffer from stereotyping and vulnerability, which would have bolstered Ms. Gosselin’s case. The court saw the appropriate comparator group as welfare recipients over 30. Thus Ms. Gosselin’s position

³³ *Gosselin*, *supra*, note 24, at para. 32, *per* McLachlin, C.J. It is worth pointing out that the analogy itself changes the context so that the example regarding minors is one “generally accepted.” What if a courthouse had a sign saying “No Minors”? Would we be offended? Regardless, is this the appropriate measure of constitutionality? Furthermore, 18-30 year olds (the age group at issue in *Gosselin*) are not minors. More interesting is the question of why we generally accept one and not the other, along with the question of whether this “general acceptance” is appropriate — the Court does not go into those questions.

³⁴ *Id.*, at para. 34.

³⁵ *Id.*, at para. 6.

as a welfare recipient was irrelevant since she was alleging differential treatment from other welfare recipients, and her position as a youth was rather cavalierly determined to be an advantage rather than a disadvantage. There is no way, in this analysis, to recognize the negative stereotyping of welfare recipients, or the currency of constructs about the deserving and undeserving poor. There is no room for “common sense” to see a link between the perception that work is far easier to come by for young people, and a widespread belief that welfare recipients are lazy, a link that would result in younger welfare recipients facing harsher stereotypes than older ones.³⁶ It is all too easy to use “logic” and “common sense” to recognize certain realities and ignore others; as legal tools for contextual analysis, they are largely unhelpful. In the result, the stereotype that Louise Gosselin tried to illustrate (young welfare recipients are undeserving) is employed against her (young welfare recipients do not need welfare) even as the Court refuses to formally recognize it (there are no stereotypes against youth).

In contrast, Bastarache J.’s approach looked more specifically at the position of young welfare recipients, and found that the “precarious, vulnerable position” of people on welfare (amply borne out by the description of Louise Gosselin’s experiences) was indicative of pre-existing disadvantage linked to human dignity. In a frustrated tone, Bastarache J. demands “If the vulnerability of the appellant’s group as welfare recipients cannot be recognized at this stage, can we really be said to be undertaking a contextual analysis?”³⁷ In the view of the majority, the facts of *Gosselin* were strikingly similar to *Law*. But this comparison ignores the fact that, unlike CPP survivor benefits, welfare assistance is a “last chance” form of social benefit. The comparison is only possible because the majority has refused to accept the fact that welfare receipt is a critical defining characteristic of the group.³⁸

All of this raises some questions about grounds. First, how can we find discrimination in situations where only some of the people identified by the ground of the claim are suffering the disadvantage? This is not only a concern about the fate of claims based on intersectionality (interlocking grounds and

³⁶ See for instance, Factum of the Intervener National Association of Women and the Law (NAWL) in *Gosselin*, at para. 28 (Single young people who are considered “capable of working” and who seek social assistance are particularly vulnerable to negative stereotyping as lazy and irresponsible, and thus suffer loss of self-esteem. Further, in all jurisdictions in Canada this group falls farthest below Statistics Canada’s low-income cut-offs.) Citations omitted. Factum on file with author.

³⁷ *Gosselin*, *supra*, note 24, at para. 238, *per* Bastarache J.

³⁸ I am not indicating agreement with the decision of the Court in *Law*.

mechanisms of discrimination), but also a larger concern about the future of the adverse effects discrimination analysis.³⁹

Admittedly, *Gosselin* may not be the best case from which to draw conclusions, as it is clear that the majority was troubled by the evidence provided. “It may well be,” they concluded, “that some under-30’s fell through the cracks of the system and suffered poverty,” but this is not enough to show that the regime did not correspond to the actual situation of welfare recipients under-30.⁴⁰ It is clear from *Law* that some “falling through the cracks” is allowed without leading to a finding of discrimination.⁴¹ Yet in both *Gosselin* and *Walsh* there is reason to believe that those who fall through would fall because they are particularly vulnerable. That segment of the claimant group who was harmed might have been more vulnerable to that harm *because* of overlapping membership in other disadvantaged groups — in other words, these claims are based on intersectional grounds. For instance, Louise Gosselin had difficulty taking advantage of the training program because of psychiatric illness.⁴² In *Walsh*, the majority uses the language of choice to differentiate between the claimant group (unmarried heterosexual cohabitants) and the comparator (married cohabitants), thus failing to either seek out or recognize the vulnerability that relationships of interdependence entail. By relying on the choice that an individual makes to marry or not to marry, and the fact that equitable remedies may be available, the Court ignores the position of the most vulnerable of the unmarried, those who lack the protection of marriage not from

³⁹ There is very interesting Canadian writing on the subject of intersectionality in equality jurisprudence. See, for instance: N. Duclos, “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 C.J.W.L. 25; N. Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1994) 19 Q.L.J. 1941; D. Reaume, “Of Pigeonholes and Principles: A Reconsideration of Discrimination Law” (2002) 40 Osgoode Hall L.J. 113, at 132-37.

⁴⁰ *Gosselin*, *supra*, note 24, at para. 51, 54, *per* McLachlin C.J. (“Nor is their evidence about the actual income of under-30’s who did not participate; clearly “aid received” is not necessarily equivalent to “total income”.) Ironically, interveners in favour of Louise Gosselin did argue that non-participants under 30 had to resort to dangerous means in order to supplement the \$170/month, as it was not enough to live on. See for instance, Factum of the National Association of Women and the Law (NAWL), at para. 7: “A number of young women on the reduced rate engaged in prostitution, or accepted unwanted sexual advances to try to keep their apartments, to pay monthly expenses, such as heat and electricity, or to buy food.” (on file with author).

⁴¹ See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 105.

⁴² See *Gosselin*, *supra*, note 24, at para. 8, *per* McLachlin C.J. (Louise Gosselin’s mental health and substance abuse problems are described as “personal difficulties”; testimony offered by one social worker is rejected because of the fact that he saw a large number of clients on welfare with serious psychological problems).

choice but through their partner's insistence.⁴³ Given existing inequalities in society, we could speculate that a great many of those who lack the protection of the *Marital Property Act* solely due to their partner's insistence that marriage not take place are women.

In these cases, the intersectional nature of the problem is ignored.⁴⁴ Yet, the lack of perfect correspondence between the needs of claimants and the effects of the law is not perfectly random. It may well correspond to other vulnerabilities. This ought to raise equality concerns. Instead, the harms are defined as unrelated to membership in the group under the ground. In *Walsh*, the experience of those unmarried people who remained unmarried because of their partner's deliberate or passive economic exploitation is unexplored by the majority. In *Gosselin*, the reality of living on \$170 per month is not addressed by the majority, save for the aforementioned skepticism that welfare was the only source of income.

V. DOES DISPARATE IMPACT ANALYSIS HAVE A FUTURE?

These trends creep closer to threatening adverse effects discrimination, the very idea of which is premised on acceptance that there is underlying inequality in society, and that state motive is irrelevant. Since *Andrews*, Canadian constitutional doctrine has recognized that unintentional differentiation may also be discrimination.⁴⁵ All of the section 15(1) challenges from 2002 involved distinctions drawn on the face of a piece of legislation, and they were all argued as such. As I have described the claims in *Gosselin* and *Walsh*, they could be understood to include "adverse impact" effects as well (for the disabled in *Gosselin*, or for women in *Walsh*). I have described how the Court seems more willing to accept evidence of "government intent" as evidence of lack of discrimination, and I have described my concern about the strict approach to

⁴³ See *Walsh*, 2002 S.C.C. 83, at para. 171, *per* L'Heureux-Dubé J., dissenting ("For many, choice is denied them by virtue of the wishes of the other partner. To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation.").

⁴⁴ *Gosselin*, *supra*, note 24, at para. 55, *per* McLachlin C.J.

⁴⁵ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 174-75, *per* McIntyre J.

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 other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

the grounds analysis. These two concerns lead me to conclude that there may be trouble ahead for claims of equality violation through “disparate impact” rather than through reliance on stereotypes. I do not intend to suggest that the majority of the Court is actively at odds with the idea of disparate impact (and/or systemic) discrimination. Instead, I am suggesting that the current interpretation of the *Law* test may create difficulties in establishing such discrimination.

My concern flows from, but is not limited to, the emphasis on the absence of stereotypes on the part of the government which appears throughout the majority judgment in *Gosselin* (despite the fact that the majority tries to downplay the importance of this focus).⁴⁶ Further to this point, although discrimination through disparate impact is also called “adverse effect discrimination,”⁴⁷ the decision in *Gosselin* repeatedly uses the phrase “adverse effect” to describe the effect of legislation on the claimant group.⁴⁸ However, it is clear that Louise Gosselin’s claim was of “direct” discrimination arising out of a distinction drawn on the face of the statute. One possible interpretation of the majority’s choice of language is that the word “effect” is being used in contrast to “purpose,” indicating that the analytic perspective is actually that of the legislature.

VI. LOOKING FORWARD

The upshot of the 2002 cases seems to be a section 15 analysis which moves further and further away from a focus on breaking down existing systems of power and hierarchy. The majority in *Gosselin* refused to look for such a system, relied on common sense to determine that there was no such system, and ignored even the possibility that treating welfare recipients as recalcitrant and lazy is anything less than logical. This kind of approach would have been blind to the historical forms of discrimination we now treat as paradigmatic — racial segregation, in particular, and forms of gender discrimination we now see as egregious but which used to be matters of “common sense.”⁴⁹ It is in this light that I read the line from *Gosselin*: “...a sign on a courthouse door proclaiming ‘Men Only’ evokes an entire history of discrimination against a

⁴⁶ See *Gosselin*, 2002 S.C.C. 84, at para. 70, *per* McLachlin C.J.

I do not suggest that stereotypical thinking must always be present for a finding that s. 15 is breached. However, its absence is a factor to be considered. Justice L’Heureux-Dubé also has this concern: *Gosselin*, *per* L’Heureux-Dubé J., dissenting, at paras. 116-120, 122, 124, and 128.

⁴⁷ See *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3, at para. 47.

⁴⁸ *Gosselin*, *supra*, note 46, at paras. 46, 54.

⁴⁹ Interracial marriage in the U.S. is a particularly useful example.

historically disadvantaged class; a sign on a bar room door that reads ‘No Minors’ fails to similarly offend.”⁵⁰ How can the Court be so sanguine about the latter question? The history of anti-discrimination law suggests greater caution and introspection is necessary, not the “we’ll know it when we see it” attitude of the *Gosselin* majority.

It is probably too much to expect that the Supreme Court will use section 15 to challenge and outlaw existing power hierarchies in Canadian society, but the most recent cases seem to evince a new timidity towards the Court’s use of section 15 — or perhaps it is a new strictness aimed at the equality seekers. Over the next year or so, we ought to have some opportunity for further evaluating the development of section 15. One of the critical factors is likely to be personnel changes at the Supreme Court. We shall have to wait to discover how Deschamps J. will replace the familiar pro-equality voice of L’Heureux-Dubé J. We should also see the departure of Gonthier J., who it is fair to say, has not been overly sympathetic to claims of discrimination.

More easily measured will be the Court’s response to the appeals it will hear in 2003. With *Falkiner* (a successful section 15(1) challenge to Ontario’s “spouse in the house” rule),⁵¹ those members of the Court who stood with the majority in both *Gosselin* and *Walsh* may have an opportunity to clarify their thinking on the meaning of human dignity. The case raises a set of issues which are an interesting mix of *Gosselin* and *Walsh*. All of the claimants are welfare recipients and most are female single parents. Their benefits were reduced according to the rule known as the “spouse in the house” rule, which allows the assumption that a man living with a woman will be providing economic support to that woman. The “human dignity through autonomy” arguments at play in *Gosselin* and the language of “self-sufficiency” ought to resonate differently here. Likewise the statements of the *Walsh* majority about choice ought to operate in favour of the claimants. The “spanking” case, *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada*, will

⁵⁰ *Gosselin*, note 46, at para. 32, per McLachlin C.J.

⁵¹ *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.); leave to appeal granted March 20, 2003, [2003] S.C.C.A. No. 297. Appeal not yet inscribed for hearing. In addition to *Falkiner*, the following s. 15(1) cases may be of interest: Released in 2003: *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3. Judgment reserved: *Martin v. Nova Scotia (Workers Compensation Board)* (2000), 192 D.L.R. (4th) 611 (C.A.), [2001] S.C.C.A. No. 23. Leave granted: *Canadian Foundation for Children, Youth and the Law v. Attorney General in Right of Canada* (2002), 57 O.R. (3d) 511 (C.A.); leave to appeal to the S.C.C. granted October 17, 2002 (without reasons). Appeal heard June 6, 2003, [2002] S.C.C.A. 113. *Hodge v. Canada (Minister of Human Resources Development)* (2002), 214 D.L.R. (4th) 632 (F.C.); leave to appeal granted March 20, 2003, [2002] S.C.C.A. No. 345. *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2002] A.J. No. 694 (C.A.); leave to appeal granted March 20, 2003, [2002] S.C.C.A. No. 318.

ideally force the Court to take a more critical look at the question of age discrimination and the position of youth. At the very least, these two cases ought to prompt more explicit consideration of the proper approach to defining human dignity and the place of concepts like liberty and choice in any definition.

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