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DWORKIN'S SHADOW: EQUALITY RIGHTS AND THE SUPREME COURT OF CANADA'S LOSS OF DIGNITY

Bradley W. MILLER*

Resumen:

Por más de dos décadas la teoría de igualdad de Ronald Dworkin ha ejercido una fuerte influencia sobre la doctrina canadiense de derechos de igualdad. Y a pesar de que a Dworkin no se le ha citado en la Suprema Corte de Justicia de Canadá, en los casos de derechos de igualdad su sombra es perfectamente visible en la forma en que se analiza el derecho a una "igual consideración y respeto" en el caso Andrews de 1989 y el "derecho a una independencia moral" en el caso Law *v* Canadá de 1999.

Este artículo estudia en qué medida la teoría de igualdad de Dworkin ha sido recibida en el derecho canadiense; también se propone discutir los debates entre Dworkin y sus críticos, debates que se generaron cuando Dworkin defendió y modificó, a lo largo de los años, su teoría sobre los derechos y la igualdad. Voy a argumentar que estos debates son invaluables para interpretar la doctrina constitucional canadiense, porque la Suprema Corte no siempre justifica adecuadamente las concepciones, entre otras, de igualdad y dignidad que incorpora al derecho constitucional. Ciertamente, no siempre es evidente si la Corte está consciente o no de que lleva a cabo una elección entre diferentes concepciones, en lugar de interpretar de manera directa un texto constitucional determinado. El

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resultado de estudiar de manera paralela a Dworkin y a la doctrina de derechos de igualdad de la Suprema Corte es la identificación de recursos provenientes del debate académico que pueden ser reconocidos por desarrollar una doctrina constitucional más estable y contundente.

Palabras clave:

Ronald Dworkin, Suprema Corte de Justicia de Canadá, derechos de igualdad, teoría de los derechos.

Abstract:

Ronald Dworkin's theory of equality has exerted a strong gravitational force over Canadian equality rights doctrine for more than two decades. And although Dworkin is never cited in the Supreme Court of Canada's equality rights cases, his shadow is plainly visible in the reception of the right to 'equal concern and respect' in Andrews (1989), and the 'right to moral independence' in Law v Canada (1999).

Although this paper assesses the extent to which Dworkin's theory of equality has been received in Canadian law, it also engages in debates between Dworkin and his critics that developed as Dworkin defended and modified his theory of rights and equality over the years. The debates between Dworkin and his critics are invaluable for interpreting Canadian constitutional jurisprudence, I will argue, because the Supreme Court does not always adequately justify the conceptions of equality, dignity, etc. that it incorporates into constitutional law. Indeed, it is not always evident that the Court is aware that it is choosing among alternative conceptions, rather than straightforwardly interpreting a determinate constitutional text. The payoff from a parallel study of Dworkin and the equality rights doctrine of the Supreme Court is the identification of resources from the academic debate that can be commended for the development of a more sound and stable constitutional doctrine.

Keywords:

Ronald Dworkin, Supreme Court of Canada, Equality Rights, Theory of Rights.

DWORKIN'S SHADOW: EQUALITY RIGHTS

SUMMARY: I. *Introduction.* II. *The Canadian Incorporation of "Equal Concern and Respect".* III. *Dworkin´s Specification and Defence of "Equal Concern and Respect".* IV. *Self-Respect and "Accepting an Argument" in Canada.* V. *A Loss of Dignity.*

I. INTRODUCTION

Ronald Dworkin's theory of equality has exerted a strong gravitational force over Canadian equality rights doctrine for more than two decades. And although Dworkin is never cited in the Supreme Court of Canada's equality rights cases, his shadow is plainly visible.

Dworkin's early political philosophy proceeded from the proposition that all persons have a right to be treated by government with 'equal concern and respect', a proposition which he described as 'fundamental and axiomatic'.[1] Stated at this level of abstraction, the proposition, while perhaps not axiomatic, nevertheless seems uncontroversial. Who would disagree that all persons have equal worth, are equal in dignity, and are equally entitled to just treatment by a state's government and laws? But it is a much more difficult matter to determine what limits need to be placed on government authority in order to manifest 'equal concern and respect' for persons. How such a proposition constrains government depends on the political morality in which it is situated. As JH Schaar argued, '(e)very strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society'.[2] Different theories of political morality will supply different answers to questions such as whether a commitment to equal concern and respect requires, for

[1] Dworkin, R., *Taking Rights Seriously*, London, Duckworth, 1977, p. xv.

[2] Schaar, J. H., "Equality of Opportunity and Beyond", in J. R. Pennock and J. W. Chapman (eds.), *Nomos IX: Equality*, New York, Atherton Press, 1967, p. 228, quoted by McIntyre, J. in *Andrews v The Law Society of British Columbia* [1989] 1 SCR 143, 164.

example, that governments prescind from moral evaluations of some sorts of choices.

Nevertheless, in *Taking Rights Seriously*, Dworkin argues that the uncontroversial moral and legal principle that all individuals are entitled to be treated by government and law with equal concern and respect, necessarily entails the highly controversial political principle that the state, in all its facets, must be *neutral* towards competing conceptions of what makes a good life. Government must not, he argues, 'constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's'.[3] Or as he later expressed it, for the state to treat persons as equals, its 'political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life'.[4] Significantly, Dworkin frequently argues that when a government fails to observe this condition (that is, when it disfavours a person's choice of action because the action is judged to be wrongful or harmful or otherwise unreasonable), it will often (and perhaps usually) be a manifestation of a government's disrespect for those persons who find value in the proscribed actions.

What it means for governments to treat persons with 'equal concern and respect' is also an important question of Canadian constitutional law. When the Supreme Court of Canada first turned to interpreting the anti-discrimination provision of the *Canadian Charter of Rights and Freedoms*, it

[3] 'Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's', R. M. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977, pp. 272-73.

[4] R. M. Dworkin, *A Matter of Principle*, Cambridge, Mass., Harvard University Press, 1985, p. 191. Also, *Taking Rights Seriously* (n 66), pp. 272-78.

described the purpose of s 15(1)[5] as the 'promotion of equality', which:

> … entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings, equally deserving of concern, respect and consideration…[6]

'Equal concern, respect, and consideration' is very close to —and in fact seems synonymous with— Dworkin's signature phrase, and the Court's use of the phrase suggests some affinity with the proposition that government must not discourage or prohibit choices or actions that are motivated by a disfavoured conception of what gives value to life.

This paper is largely concerned with assessing the extent to which Dworkin's theory of equality has been received in Canadian law. But it is also engages in debates between Dworkin and his critics as Dworkin has defended and modified his theory of rights and equality over the years. The debates between Dworkin and his critics are invaluable for interpreting Canadian constitutional jurisprudence, I will argue, because the Supreme Court does not always adequately justify the conceptions of equality, dignity, etc. that it incorporates into constitutional law. Indeed, it is not always evident that the Court is aware that it is choosing among alternative conceptions, rather than straightforwardly interpreting a determinate constitutional text. The payoff from a parallel study of Dworkin and the equality rights doctrine of the Supreme Court is the identification of resources from the academic debate that can be

[5] S. 15(1) provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.

[6] [1989] 1 SCR 143, 171 (MacIntyre, J.).

commended for the development of a more sound and stable constitutional doctrine.

This paper alternates between a chronological exposition and criticism of Dworkin's theory of equality, and an analysis of the reception of these arguments by the Supreme Court of Canada. It begins with the reception of Dworkin's right to equal concern and respect by the Supreme Court in *Andrews* (1989). It then moves to Dworkin's middle-period defence and specification of the right to moral independence, and the parallel reception in *Law v Canada* (1999). Finally, it concludes with a call to the Supreme Court to abandon the autonomy-based conception of equality and dignity that it has relied on to date.

II. The Canadian Incorporation of "Equal Concern and Respect"

Canadian equality rights doctrine began with the *Andrews* decision in 1989[7] and, as mentioned above, it was in this case that the Court first articulated the purpose of s.15(1) in terms of the promotion of a society in which all are recognized by law as being equally deserving of 'concern, respect and consideration'. *Andrews* suffers from an ambiguity that Hart, Finnis and others identified in Dworkin's political philosophy: it is not self-evident what is required by a bare injunction to treat persons with equal concern and respect. Some care is therefore required to determine whether the Court has interpreted equal concern and respect in line with Dworkin, or in some other way. The question is, to what extent has (or can) s.15(1) be interpreted as preventing government and law from disfavouring and/or prohibiting acts on the grounds that they are judged to be wrongful?

At first glance, s. 15(1) of the Charter would not seem to protect choices or actions, such that one's conception of the

[7] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143.

good would simply never be in issue in s. 15(1) adjudication. After all, to make out a claim under s. 15(1), a claimant must establish that a distinction has been drawn between the claimant and others, based on the grounds of discrimination enumerated in s.15(1): race, national and ethnic origin, colour, religion, sex, age and mental and physical disability. While s. 15(1) does not state that the enumerated grounds of discrimination stand exclusively of all others, neither does it use language which lawyers typically use to indicate unambiguously that a list is intended to be open-ended.[8] The task of determining what are suspect grounds of distinction is a matter of construction, and while the Court in *Andrews* interpreted the class of prohibited grounds as an open class, it is not unqualifiedly open. Obviously, s 15(1) cannot be read to prohibit legislatures from drawing any distinction whatsoever between individuals and groups,[9] or else governing would be impossible.[10] In *Andrews*, the Court held that s.15(1) prohibited not only discrimination based on the enumerated grounds, but also on an open-ended class of grounds that are *analogous* to them; grounds which embody 'a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable

[8] *E.g.* '…discrimination on any ground *such as* sex …' Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) Article 14 (italics added); '…and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms…', Constitution Act, 1867, s 91.

[9] 'If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions'. *Andrews* (n 1) 171 (McIntyre, J.).

[10] 'It is, of course, obvious that legislatures may —and to govern effectively— must treat different individuals and groups in different ways'. McIntyre, J., *ibidem*, p. 168.

costs'.[11] Analogous grounds that the Court has posited to date include citizenship, sexual orientation,[12] marital status,[13] and having an aboriginal place of residence.[14]

The reach of the s.15(1), then —and its relevance for constitutionalizing a Dworkinian right to moral independence— depends in large measure on this concept of analogous grounds of discrimination. In particular, it depends on the concept of 'characteristic of personhood' (or personal characteristic). Now if the relevant sense of 'personal characteristic' is to be constrained by similarity to the enumerated grounds of discrimination, then it would seem unlikely that the section could be interpreted in a manner that would protect choices and actions. After all, the enumerated grounds of discrimination relate to characteristics that are either not alterable or not alterable except at great cost. These do not obviously relate to exercises of choice.

Nevertheless, the analogous grounds doctrine as it was later developed by the Court in *Miron v Trudel* (1995) does suggest openness to constructing autonomy-based grounds of discrimination. At issue in *Miron* was whether statutorily prescribed terms of automobile insurance discriminated on the basis of marital status by providing benefits to spouses of married policy holders but not to common-law partners. In considering whether marital status is an analogous ground of discrimination, McLachlin J identified five 'indicators' to be used to assess a proposed analogous ground of discrimination: (1) whether a group defined by the proposed ground had suffered 'historical disadvantage'; (2) whether the group had the status of 'discrete and insular minority'; (3) whether the group was defined by a 'personal characteristic' on which distinctions are drawn instead of on merits and capacities; (4) whether the proposed ground was simi-

[11] *Ibidem*, p. 195.

[12] *Egan v Canada* [1995] 2 SCR 513 (hereafter '*Egan*').

[13] *Miron v Trudel* [1995] 2 SCR 418 (hereafter '*Miron*').

[14] *Corbiére v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203.

lar to an enumerated ground; and (5) whether jurists and legislators in the past had found the ground of distinction in question to be discriminatory.[15]

While McLachlin J found that each of these factors supported the positing of 'marital status' as an analogous ground,[16] the decision nevertheless seems to rest on other grounds. None of the five factors she lists present a strong case for holding marital status to be an analogous ground of discrimination and, in fact, none of them did any real work in her decision to treat marital status as an analogous ground. Instead, her judgment appears to have been driven by what she described as a larger 'unifying principle':

> the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.[17]

[15] *Ibidem*, p. 148.

[16] She found that: (1) there had been some 'historical disadvantage' faced by unmarried partners, in that they have been historically regarded as 'less worthy than a married partner' [152], that (2) marital status is a 'personal, immutable characteristic', but only in an 'attenuated form' (it is immutable in the sense that an individual has *limited control* over the whether he or she is married due to legal, financial, social, and religious constraints, as well as the need for the co-operation of one's partner), (3) that 'marital status' is analogous to 'religion', to the extent that disapproval of unmarried partnerships is based in a religious view of marriage, [154] and (4) that the amount of legislation which does not distinguish between married and unmarried couples suggests 'recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married' and 'fails to accord with current social values or realities'[155]. It should be noted that McLachlin J's analogy to religion was stated summarily and appears in the judgment to be an afterthought. If one were to follow the analogy to its logical conclusion, *any* law or institution which reflects a moral judgment passed into society through religious belief (arguably, most of the Criminal Code), could yield a plausible claim of discrimination by those who dissent.

[17] *Miron v Trudel* [1995] 2 SCR 418, [149].

It is this very abstract 'unifying principle' or 'overarching purpose'[18] of s 15(1) (elsewhere stated in the judgment as 'each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole')[19] that serves as the focal point for McLachlin J's analogising, and *not* similarity to any of the enumerated grounds or any of the other five indicators. In the context of marital status, the 'overarching purpose' is explained by McLachlin J as follows:

> …discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches *the individual's freedom to live life with the mate of one's choice in the fashion of one's choice*. This is a matter of defining importance to individuals.[20]

Recall that McLachlin J's unifying principle required that legislative distinctions be drawn on the basis of the true capacity, worth, and merit of individuals. In *Miron*, the relevant capacity seems to be the capacity to be the type of person who makes decisions of the order of living one's life as one chooses, with the mate of one's choice in the form of relationship which one defines for oneself. Significantly, McLachlin J thus imports into s 15(1) —at least into the methodology of finding analogous grounds of discrimination— protection of autonomy and the exercise of choice which are not on the face of s.15(1) and are consonant with the Dworkinian requirement that government treat persons with equal concern and respect.[21]

[18] *Ibidem* [156].

[19] *Ibidem* [145].

[20] *Ibidem* [151] (italics added).

[21] Other s 15(1) cases in which the Court has held that s 15(1) was breached when a claimant experienced burdens or denial of benefits as a

In addition to the analogous grounds methodology, support for an autonomy-based reading of s.15(1) can also be found in the Court's formulation of the *purpose* of s.15(1). In the landmark decision *Law v Canada* (1999), for example, the unanimous Court held that 'the equality guarantee in s.15(1) is concerned with the realization of personal autonomy and self-determination'.[22] It further developed this theme in *Granovsky v Canada*, where s.15(1) was said to protect 'legitimate aspirations to human self-fulfilment'.[23]

Nevertheless, despite the sweeping statements about the protection of autonomy and self-fulfilment, the Supreme Court has not used s.15(1), to date to invalidate legislation that prohibit the types of actions that Dworkin argues ought not to be governed by law (*e.g.* engaging in obscenity, abortion, euthanasia). *Law*, *Granovsky* and other cases, addressed legislative restrictions on access to social benefits,

result of his or her choices include *Corbiére v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203; (the decision of aboriginal persons not to live on an Indian reserve), *Egan v Canada* [1995] 2 SCR 513 and *M. v H.* [1999] 2 SCR 3 (the decision to co-habit in a same-sex relationship); and *Nova Scotia (AG) v Walsh* [2002] 4 SCR 325 (the decision to co-habit in a common law relationship). But see *R. v Malmo-Levine* [2003] 3 SCR 571 where the choice to engage in recreational marijuana smoking was rejected as a personal characteristic. The inclusion of sexual orientation as an analogous ground of discrimination has blurred the meaning of personal characteristic somewhat. As a ground of discrimination, "sexual orientation" is a phrase which seems capable of bearing more than one meaning, and in particular, is ambiguous between: (1) a person's inner disposition towards (say) homosexual sex, and (2) a person's public acts which are intended to actively promote within society the acceptance and normalisation of (say) a gay or lesbian lifestyle. It remains unclear whether the Court's interpretation of s 15(1) simply prohibits discrimination against gays and lesbians (and others) simply in *being* (*e.g.* in the receipt of government services and benefits as in *Egan* (1995) and *M v H* (1999)), or if it is a broader right which would require government to affirm choices motivated by sexual orientation (*e.g.* as interpreted by the Ontario Court of Appeal in *Halpern v Canada* by extending the common law definition of marriage to include same-sex unions).

[22] *Law* [53].

[23] *Granovsky* [2000] 1 SCR 703, [69].

and neither of the restrictions (one based on age, the other on the duration of one's disability) were related to judgments about disfavoured life choices. The reality is that s.15(1) claims advanced on the grounds that legislation interferes with a claimant's conception of the good life have not typically succeeded. The sole exceptions seem to be distinctions of marital status (as in *Miron* and *Walsh*) and sexual orientation (as in *Egan*[24] and *M. v H.*).[25] But even in these cases, what was at issue was the receipt of recognition and benefits, rather than the criminalization of a chosen way of life.

So while the Court's statements about s.15(1)'s purpose and its analogous grounds methodology both support the proposition that s.15(1) protects a sphere of autonomous decision-making, the Court's practice falls short of confirming this. There is more than one possible explanation for why judicial practice has failed to live up to statement of principle. It is not uncommon for courts to back down when called on to implement what in hindsight looks like incautious dicta. And, as a practical matter, the Court tends to resolve challenges to criminal prohibitions under s.7's protection of liberty, rather than s.15(1)'s protection of equality rights. For present purposes, it is enough to note that while there is much to suggest a Dworkinian reading of 'equal concern and respect', it is an unsettled matter. The Supreme Court has in fact never noted the ambiguity in the injunction to treat persons with equal concern and respect, an ambiguity that did not escape Dworkin's critics.

III. Dworkin's Specification and Defence of "Equal Concern and Respect"

Dworkin's proposition that all persons have the right to equal concern and respect from government seems uncon-

[24] *Egan* [1995] 2 SCR 513.
[25] *M. v H.* [1999] 2 SCR 3.

troversial; government and law exist for the benefit of all persons, and all persons equally.[26] But critics quickly identified an ambiguity in the injunction to treat persons with equal concern and respect. H. L. A. Hart argued, contrary to Dworkin, that the requirement that government treat persons with equal concern and respect does not logically entail one particular theory of political morality.[27] While it is consistent with the "neutral" liberal position advocated by Dworkin —that government must, as far as possible, take a "neutral" stance towards competing conceptions of what makes a good life— it is also consistent with other competing political moralities. It is equally consistent, for example, with the opposite, quasi-Aristotelian position that government is entitled (and required) to foster one uniquely good plan of life. On such a view, government would be denying equal concern and respect to persons if it denied them what it believed to be in their best interests —to be (where persuasion fails) coerced into pursuing the highest good—. It is also consistent with theories of political morality which hold that there is a *range* of valuable life plans and a *range* of valueless life plans, and that a government can be justified (and sometimes required) to act so as to promote the many morally good options and discourage or even prohibit the morally valueless. This latter position is consistent with the perfectionist liberalism of Joseph Raz or William Galston, as well as the natural law theory articulated by John Finnis and Robert George.[28]

[26] A masterful exposition of, and engagement with, Dworkin's concept of rights and equality is provided by Paul Yowell, "A Critical Examination of Dworkin's Theory of Rights", (2007) 52 *American Journal of Jurisprudence* 93.

[27] Hart, H. L. A., "Between Utility and Rights", in (1979) 79 *Columbia Law Review* 828, reprinted in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, pp. 198-222, p. 219 (fn 42).

[28] Raz, J., *Morality of Freedom*, Oxford, Oxford University Press, 1986, pp. 161-62; Galston, W. A., *Liberal Purposes* Cambridge, Cambridge University Press, 1991, pp. 165-237; Finnis, J. M., *Natural Law and Natural*

So the widespread appeal of equal concern and respect does not establish the more controversial right to moral independence. H. L. A. Hart, while appearing sympathetic to Dworkin's commitment to the ideal of government neutrality towards the good, nevertheless objected that Dworkin was mistaken in attempting to derive from the uncontroversial right to equal concern and respect a further right to government neutrality towards 'schemes of values': '(i)t is not clear why the rejection of this ideal [of government neutrality towards the good] and allowing a majority's external preferences denying a liberty is tantamount to an affirmation of the inferior worth of the minority.'[29] That is, there is no reason why it should *necessarily* be the case that denying someone the liberty to do some proscribed action should constitute a denial of that person's equality or worth. A government could well be *wrong* to have denied a person liberty in some situation (*e.g.* owing to a mistaken judgment about the value of or harm caused by that activity), but it need not have been motivated by a denial of that person's equal worth.

Under pressure from Hart, Finnis and others, Dworkin began revising his theory of political equality in his middle-period writings, many of which were collected in *A Matter of Principle* (1985). Two developments in particular are of interest for their influence on Canadian law: (1) the additional requirement of self-respect, and (2) and the re-articulation of (what Finnis has labelled) Dworkin's argument from contempt.[30]

Rights, Oxford, Clarendon Press, 1980, pp. 221-23, and "Legal Enforcement of 'Duties to Oneself': Kant *v* Neo-Kantians", (1987) 87 *Columbia Law Review* 433; George R. P., *Making Men Moral*, Oxford, Clarendon Press, 1993, pp. 189-229.

[29] Hart, H. L. A., "Between Utility and Rights", in (1979) 79 *Columbia Law Review* 828, reprinted in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, 198, pp. 218-19.

[30] See John Finnis, "Universality, Personal and Social Identity, and Law" University of Oxford, Faculty of Law, Legal Studies Research Paper

1. *The Argument from Self-Respect*

Dworkin's argument for government neutrality towards conceptions of the good is not a sceptical one. It is grounded in a political principle which he believes to be true —namely, that everyone is entitled to equal concern and respect—. He clearly rejects the proposition that no way of life is better or worse than any other.[31] The government "neutrality", or anti-perfectionism, that Dworkin recommends is qualified. It is not to be confused with what he calls 'liberalism as neutrality', which says that government must not take sides on moral issues at all. Dworkin's alternative version of liberalism, 'liberalism as equality', is committed to the ideal of state neutrality towards the good life 'only to the degree that equality requires it'.[32]

This is an important qualification and we must ask how much neutrality equality requires of government? When is a government permitted, or prevented, from acting on the basis that some way of life ought to be promoted and some way of life ought to be discouraged or even prohibited? In some of his middle-period essays collected in *A Matter of Principle*, Dworkin answers these questions —and attempts to resolve the ambiguity about what it means to treat someone with equal concern and respect— by adding a requirement that:

> …government must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth.…[N]o self-respecting person who believes that a particular way to

Series Working Paper No 05/2008, February 2008, *http://papers.ssrn.com/Abstract=1094277*, at p. 11.

[31] In particular, see "Do we have a right to pornography?", in Dworkin, R., *A Matter of Principle* (n 67), pp. 335-72; "Objectivity and Truth: You'd Better Believe It" (1996) 25 *Philosophy and Public Affairs* 87-139, and *Sovereign Virtue* (2000), pp. 237-84.

[32] Dworkin, R. M., *A Matter of Principle* (n 67), p. 205.

> live is most valuable for him can accept that this way of life is base or degrading.[33]

On this view, for a government to respect its citizens' 'right to moral independence' (and the right to be treated with equal concern and respect from which it is purportedly derived), it is necessary that citizens be able (as they stand, without any conversion or change of mind) to *accept the arguments* that government makes in favour of its legislation. The examples that Dworkin gives are of atheists not being able to accept the argument that mandatory religion would make a community better, and homosexuals not being able to agree that the 'eradication of homosexuality' would make the community better.[34] On Dworkin's view, any legislation which is motivated by beliefs which would *injure the self-respect* of others violates the right to be treated with equal concern and respect.

With this new requirement, Dworkin has taken the extra step of postulating that disagreeing with a person about the reasonableness of that person's choices or actions threatens that person's sense of self-worth. He requires that governments not adopt any position on a 'way to live' that would injure the self-respect of the hypothetical citizen who defines his well-being in terms of that 'way to live'.

This additional premise is not peculiar to Dworkin,[35] but seems open to question. Why should it be the case that as a matter of political morality, the state has an obligation to accept every self-understanding and every judgment of what makes for a valuable life? Not only is it possible that persons can: (a) be treated with little or no respect and feel as a result a lack of self-respect, and (b) be treated with re-

[33] *Ibidem*, pp. 205-06.

[34] *Idem.*

[35] It should be noted that the centrality of self-respect to duties of well-being is also a feature of Raz's political theory. See Raz, J., *Ethics in the Public Domain* Oxford, Clarendon Press, 1994, pp. 24-26, and "Liberty and Trust", in George, R. P. (ed.), *Natural Law, Liberalism, and Morality* Oxford, Oxford University Press, 1996, pp. 113-29, 122-28.

spect and feel self-respect; it is also possible that they can: (c) be treated with respect, yet unreasonably feel a lack of self-respect, or (d) be treated with little or no respect, yet unreasonably feel self-respect. If 'sense of self-worth' or self-respect is understood as a psychological state, it seems too subjective to be a sound criterion for establishing whether one has been treated with equal concern and respect. Unless one has a pre-existing right to be supported in one's current conception of the good or self-understanding, it is not obvious why the question of whether one has been treated with equal concern and respect should turn on whether one's current conception of the good is compatible with the government's.[36]

We can consider legislation that prohibits any number of practices related to driving: *e.g.* prohibiting the use of handheld mobile phones, setting maximum speed limits on motorways, or setting maximum blood-alcohol levels. Or legislation that requires persons over the age of 75 to take annual driving examinations or prohibiting new drivers from playing music or driving with passengers. A person who is convicted of these or other offences might object to the conviction on the grounds that they did not do anything really wrong; no one, they may object, was ever placed at risk by their behaviour, and the law was unnecessary. The driver might think that even if intoxicated, or operating a mobile phone, or driving at 160 km/h on a straight stretch of relatively unoccupied motorway (or all of the above) he is nevertheless an able driver —one who does not expose himself or others to any real risk of harm—. The driver does not necessarily ever think about the disregarded law, or about the government's motivation in passing it. If caught, however, the driver may feel angry at being punished and forced to bear social stigma for what is believed to be harmless conduct. The driver may continue to disagree with the

[36] George, R. P., *Making Men Moral*, Oxford, Clarendon Press, 1993, pp. 97-98. The examples in the following paragraphs follow the argument developed by George.

legislation and the argument behind it. In such an instance, even though the driver feels aggrieved, the sense of self-worth nevertheless remains intact.

Could the driver *accept* the government's argument that he has posed a danger to others, without abandoning his sense of worth? No —at least not in the short term—. If he comes to accept the argument that impaired driving is selfish and poses a reckless disregard for the safety of others, he will then regret the risks he has taken in the past, and may undertake not to take such risks in the future. If he changes his ways, his feelings of low worth may give way to pride at having reformed his ways. If he becomes convinced that driving while intoxicated puts other people at risk of harm, yet through weakness of will fails to change his ways, he may despise himself for the risks he creates. But does he have a right to a good opinion of himself in such circumstances? As Raz suggests, '(w)e tend to think that every person should possess self-respect. I would prefer to say that every person who earned the right to self-respect should possess it. People can forfeit that right'.[37]

But perhaps the reckless driver is not the best example. Reckless driving is not typically something to which one's sense of self-worth is tied; it is not, in Raz's phrase, an aspect of one's 'core being'. On Raz's formulation, self-respect 'concerns one's ability to accept without alienation one's core being, one's core pursuits and relationships and those aspects of one's character and circumstances that one identifies with most deeply.'[38] A certain kind of pedophile provides a better example.[39] This kind of pedophile believes that there is real value in sexual relationships with young

[37] Raz, J., *Ethics in the Public Domain*, Oxford, Clarendon Press, 1994, p. 26.

[38] *Íd.*

[39] The following fact pattern is taken from out-of-court statements made by the defendant in *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45. See "Child porn defender John Robin Sharpe to defend himself at new trial", *Vancouver Sun* (Canadian Press) (Feb 24, 2001).

boys —not just value to him, but value to the boys as well—.[40] He believes pedophilia to be a positive way of life that should be socially accepted on a par with all other consensual sexual practices and relationships. He certainly does not accept its criminalisation. Criminalisation, he realises, is motivated by a belief that such sexual relationships are predatory, deviant, and gravely immoral. This kind of pedophile cannot possibly accept that judgment. Does the law treat this kind of pedophile with requisite concern and respect? This pedophile would say it does not. And it is no answer *to him* to say that the criminal prohibition is not motivated by any particular animus towards pedophiles (unlike a law, for example, that disqualified convicted pedophiles from receiving state health care benefits), but instead is motivated by the judgment that adult/child sex is a harm and injustice to children. The pedophile does not accept the conclusion that consensual sex with children harms them. To the contrary he believes both that it is beneficial to them and that they also believe it to be beneficial.

On Dworkin's formulation of the requirement of equal concern and respect, government must impose no constraint by virtue of an argument which the pedophile could not accept without abandoning his sense of equal worth. If the criminal prohibition of adult/child sex is motivated by the argument that adult/child sex is harmful and unjust, and the pedophile's sense of self-worth is tied to his core belief that pedophilia is healthy and essential to well-being, then the government, by virtue of Dworkin's principle, would be prohibited from criminalising sexual intercourse between children and adults. The pedophile can thus harness Dworkin's requirement of equal concern and respect,

[40] 'Sharpe, 67, was disappointed [with the Court's decision] but unrepentant… "You know, kids were meant to enjoy sex and to have sex"', quote to John Robin Sharpe, S Bailey 'Supreme Court of Canada upholds most of child porn law as debate rages', *Vancouver Sun* (Vancouver Canada 27 Jan 2001) A1.

unless Dworkin's principle of "accepting an argument" is to be understood as objective —as embodying the standard of the reasonable person—. But then the moral evaluation which Dworkin tried to rule out earlier with his requirement of state neutrality returns in the question of which core pursuits are *reasonable* and which are *harmful*. A determination of whether some activity is harmful to others requires a conception —a moral conception— of what persons' interests are.[41] Moral evaluation of the conduct in question is inevitable, and this evaluation has to go beyond the sole criterion that persons be treated in a manner consistent with their self-acceptance. Even though Dworkin rejects the moral scepticism of what he calls 'liberalism as neutrality', his alternative formulation of 'liberalism as equality' —which is committed to moral neutrality 'only to the degree that equality requires it'—[42] could nevertheless authorise injustice by forbidding legal prohibitions of kinds of practice that involve harming people when harm is rightly assessed. The assessments of harm and reasonableness cannot be neutral even to the degree that Dworkin requires it.

2. *The Argument from Contempt*

While Dworkin acknowledges the conceptual possibility that legislation that condemns an action because of judgments about its harm or wrongness could be motivated by a reason other than the contempt of the law makers for the persons whose actions are thereby restrained, he seems sceptical about the existence of such cases in the wild.[43] He frequently advances the proposition that, in practice, when a legislature condemns an action it is motivated by, and is

[41] On the distinction between harm and morality see Bradley W. Miller, "Morals Laws in an Age of Rights: Hart and Devlin at the Supreme Court of Canada", *American Journal of Jurisprudence* (forthcoming, 2010).

[42] Dworkin, R. M., *A Matter of Principle*, p. 205.

[43] Yowell, pp. 122-24, 134-37.

manifesting contempt for, the actor. Dworkin supposes that persons seek to prohibit vicious conduct, not because the conduct has been judged to be harmful in some way, but simply because it is conduct enjoyed by 'people of bad character'.[44] I suspect that Dworkin here has in mind those governmental judgments that are motivated by what he refers to as judgments of "personal morality". While Dworkin does not provide a definition of "personal morality",[45] he seems to use the phrase to indicate a domain of "private" actions and pursuits that are self-regarding (ie that are victimless).[46] When Dworkin calls an act "private" or a matter of personal morality, or self-regarding, he is not claiming that the act necessarily has no impact on others. Dworkin is

[44] Dworkin, R. M., *A Matter of Principle* (n 67), p. 356-57. See Finnis, "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence", (1985) 71 *Proceedings of the British Academy*, pp. 303-31, 325 (fn 2).

[45] 'Personal morality' seems equivalent to what Dworkin elsewhere describes as 'ethics'. In Dworkin, R. M., *Sovereign Virtue*, Cambridge, Mass., Harvard University Press, 2000, Dworkin distinguishes between 'conventional ethics' (211) and 'morality': 'Throughout this book I distinguish ethics from morality. Ethics, as I use the term, includes convictions about which kinds of lives are good or bad for a person to lead, and morality includes principles about how a person should treat other people' (485 fn 1). The 'old problem' which Dworkin addresses is whether 'conventional ethics should be enforced through the criminal law'. By characterising the problem in this way, Dworkin begs the central questions: Are the matters which are the subject of legal regulation truly victimless? Are the moral judgments that these forms of conduct are corrupt and self-destructive made *as* conventional?

[46] That truly private immoralities should not be the subject of legal prohibition is a proposition which is held in common by other accounts of political morality which do not attempt to justify the conclusion by appealing to the right to moral independence. Instead, they argue that government's jurisdiction is limited to matters which impact on justice and peace within the political community. On this view (one of venerable antiquity), truly private immoralities, because they do not impact on justice and peace, are not within the jurisdiction of government; Finnis, J. M., "Liberalism and Natural Law Theory", (1994) 45 *Mercer LR* 687, 697-98; and *Aquinas: Moral, Political, and Legal Theory*, Oxford, Oxford University Press, 1998, pp. 219-54, especially pp. 232-34.

clear that choices in the sphere of private morality may impact on the "moral environment" and thus make it more difficult for the majority to achieve the type of environment that it may (perhaps correctly) judge to be in the best interests of all.[47]

But Dworkin resists characterising the majority's concern for the moral environment as a concern for justice. Instead, he either characterises it as a Devlinite concern to preserve and promote a common code of morality for the purpose of preserving a common culture (*qua* common), or a concern to force people to live good lives. There is, however, a more compelling option. The legislator or citizen who supports legislation that imposes restrictions on others may be motivated not only by a judgment about what is right or wrong, but also by a judgment about what is necessary to maintain a just political order. It seems more likely that a legislative judgment motivated by a Devlinite desire to maintain the dominance of a particular shared culture based on a shared 'personal morality', independent of the belief that the requirements of that morality truly embody (and/or are supported by) principles of interpersonal justice,[48] would be a peripheral case.

It is not self-evident that the acts that Dworkin believes ought to be protected as a matter of moral independence are, in fact, victimless matters of "personal morality". Many of the Canadian laws which are of the type criticised by Dworkin are not motivated by a concern to uphold "morality" or "decency", but rather are motivated by a concern for interpersonal justice; in particular, those judgments about what assistance the government owes to individuals. In the

[47] Dworkin, R. M., *A Matter of Principle*, p. 350.

[48] Some of the relevant requirements are not themselves principles of justice, since they are self-regarding; but assuming that they are true requirements, they *engage* principles of justice since one who violates them harms himself and we owe at least some people (some uncontroversial examples: children, addicts, the mentally impaired) the duty of justice not to allow them to harm themselves.

Canadian context, laws regulating or prohibiting abortion, assisting acts of suicide, and obscenity that have been subject to constitutional review (to take three examples of conduct which Dworkin has argued ought not to be criminalised because of their private nature) have all been defended by the Crown on the basis that these acts are not private, but have victims whom the government has a duty to protect.[49]

The interpersonal nature of some types of purportedly "private" conduct becomes apparent when one takes into account the state's function in assisting with the education and development of children.[50] If the state has a role in assisting people 'to lead successful and fulfilling lives',[51] and

[49] With respect to abortion: '… [s 251 of the Criminal Code] is aimed at protecting the interests of the unborn child and only lifts the criminal sanction where an abortion is necessary to protect the life or health of the mother.' *R v Morgentaler* [1988] 1 SCR 30, 134 (McIntyre J in dissent); with respect to assisting suicide: 'Indeed, it has been abundantly pointed out that such persons [the terminally ill] are particularly vulnerable as to their life and will to live and great concern has been expressed as to their adequate protection….' *Rodriguez v Canada* [1993] 3 SCR 519, 586 (Sopinka J for the majority); with respect to obscenity: 'This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women' *R v Butler* [1992] 1 SCR 452, 479 (Sopinka J for the majority).

[50] On the state's assisting role in the Canadian context see, for example, *Ross v New Brunswick School District No. 15* [1996] 1 SCR 825 (on the role of the teacher in inculcating virtues of citizenship and acceptance of others), *R v Jones* [1986] 2 SCR 284 (on the supervisory role of the state in education), and *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 (on the supervisory role of the state over health care decisions made for children by their parents).

[51] Raz, J., "Liberty and Trust", in R. P. George (ed.), *Natural Law, Liberalism, and Morality*, Oxford, Oxford University Press, 1996, pp. 113-29, 113. Similarly, Raz states elsewhere '…it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones', Raz, J., *The Morality of Freedom*, Oxford, Clarendon Press Oxford, 1986, p. 133, cited in *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [112] (Gonthier J dissent).

particularly in assisting parents in the function of leading their children to an appreciation of what is truly valuable, then the state's jurisdiction will extend to clearing the environment of some influences which hinder parents in this function. Consider, for example, the justification given by the AG Nova Scotia for the criminalisation of solicitation for the purposes of prostitution: *i.e.* preventing the harm caused to children from 'witnessing adult vices'.[52] That harm is not that children will be lured into prostitution, or grow up to have bad taste, or become "bad people". Rather, the harm is that street solicitation creates an environment where children are at risk of developing an understanding of sexuality in which sexual relationships lack mutuality and dignity. At least some actions of adults which present a corrupting influence on children are, in principle, within the mandate of the state to prohibit, not because it has authority to somehow coerce adults into virtue (expressed by Dworkin as "personal morality", "taste", "decency", or "ethics"), but because of the assistance owed by the state to individuals and families as a matter of justice.[53]

Dworkin is, of course, familiar with the argument that the elimination, or legal regulation, of some opportunities need not have been motivated by contempt for any person. In a reply to Hart, he stated that the restriction of a person's liberty should only be interpreted as a denial of equality 'when the constraint is justified in some way that depends on the fact that others condemn his convictions or values'.[54] But, again, he appears sceptical about the motives which legislators *actually* have when they legislate in areas of moral controversy. For example, he characterised

[52] *Prostitution Reference* [1990] 1 SCR 1123, 1208.

[53] For a more complete exposition of this argument see George, R. P., "Making Children Moral: Pornography, Parents and the Public Interest", in R. P. George, *In Defense of Natural Law*, Oxford, Clarendon Press, 1999, pp. 184-95.

[54] Dworkin, R. M., "A Reply by Ronald Dworkin", in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, Totowa, New Jersey, Rowman and Allanheld, 1983, pp. 286-87, 247.

the decision of governments to regulate pornography as having been motivated by the judgment that certain materials are 'unsuitable to human beings of the best sort',[55] rather than a good-faith effort to prevent injustices believed to flow from pornography. And in his exchange with Catherine MacKinnon, he nakedly asserted that legislators "disguise their repulsion as concern that pornography will cause rape, or silence women, or harm the women who make it".[56]

Even in the case of *truly* paternalistic legislation (not simply those cases misidentified by Dworkin as paternalistic), justifying arguments can be made on the grounds of justice rather than contempt for the individual or the imposition of "morality".[57] This is not only the case for what Dworkin later called 'volitional paternalism' (*i.e.* coercion to help persons achieve what they already want to achieve), but also for what he calls 'critical paternalism' (*i.e.* coercion to help persons achieve what they *should* want).[58] Limiting liberty out of a good faith belief that some people's judgments about what is good are seriously mistaken, and are degrading not only to themselves but also to others who may be induced to follow their example, could be motivated by concern and affirmation of dignity of persons rather than contempt for them.[59] Typically, justifications for the

[55] Dworkin, R. M., *A Matter of Principle*, Cambridge, Mass., Harvard University Press, 1985, p. 354.

[56] *Freedom's Law*, pp. 233-34.

[57] Note that it is not my intention here to set out and defend a thesis about when paternalism is justified, but merely to demonstrate that there are arguments made in favour of paternalism that are not motivated by contempt.

[58] Dworkin, R. M., *Sovereign Virtue*, Cambridge, Mass., Harvard University Press, 2000, pp. 216-17. For a critique of Dworkin's argument, see George, R. P., *Making Men Moral*, Oxford, Clarendon Press, 1993, pp. 102-08.

[59] Finnis, J. M., *Natural Law and Natural Rights*, pp. 221-23; also Finnis J. M., "Legal Enforcement of 'Duties to Oneself': Kant *v.*

criminalisation of drug use are made on this basis. Paternalistic concern, on such a formulation, is not a matter of contempt, but a requirement of justice. Dworkin can argue that such concern is misguided in practice, but the objection in principle —that a rejection of certain 'convictions or values' entails a denial of the equal worth of persons— seems to be mistaken.

To summarize the exchange with Dworkin, the phrase 'equal concern and respect', without any further explanation or qualification, is ambiguous between vastly different theories of political morality which would justify very different sorts of limitations on government action. Given this indeterminacy, the bare injunction to treat persons with equal concern and respect provides no guidance to judges or to legislators wishing to enact constitutionally valid legislation, and certainly no justification (on its own) for a constitutional principle of government neutrality towards competing conceptions of what makes a good life. Dworkin's additional requirement that government not impose any constraint by virtue of an argument that a citizen could not accept, fails because it rests on the unreasonable premise that all persons have an unconditional right to self-respect and a right not to have the basis of that self-respect challenged by the state. Furthermore, it either tacitly requires judgments of reasonableness that it formally rejects, or it mandates a degree of neutrality towards the good which requires government to acquiesce to some forms of injustice.

IV. Self-Respect and "Accepting an Argument" in Canada

Returning to the development of Canadian anti-discrimination law, when the Supreme Court of Canada overhauled its equality rights doctrine in 1999 it adopted (although once again without attribution) some of the features of

Neo-Kantians' (1987) 87 *Columbia Law Review* 433-56; and George, R. P., *Making Men Moral*, Oxford, Clarendon Press, 1993, pp. 95-98.

Dworkin's middle-period work addressed above. The focal point of the doctrinal shift in *Law v Canada*[60] (1999) was the adoption of a rule that claimants were to establish breaches of s 15(1) by reference to violations of their human dignity, which —again echoing Dworkin— was defined in terms of 'feelings of self-respect and self-worth'.[61] Discrimination was said to have occurred:

> when members of the group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.[62]

This change bears at least a superficial similarity to Dworkin's middle period criterion that persons be able to accept an argument without abandoning their sense of self-worth. The similarity to Dworkin is evident, for example, in Iacobucci J's meditation on the meaning of human dignity:

> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. ... (T)he equality guarantee in s. 15(1) is concerned with *the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth.* It is concerned with physical and psychological integrity and empowerment ... Human dignity 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*

[60] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

[61] *Ibidem*, p. 53.

[62] *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, [49], quoting from the dissent of L'Heureux-Dubé J., in *Egan v Canada* [1995] 2 SCR 513, [39].

> *feels* when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[63]

The Court's explanation of what sorts of arguments violate a person's human dignity was in part framed in terms of a claimant's feelings, or psychological reaction, in response to those arguments. To this extent, the test was subjective. It was not, however, radically subjective, such that a claimant's subjective experiences would be sufficient for a finding of discrimination. Instead, the Court held that 'the appropriate perspective is subjective-objective':[64]

> …the relevant point of view is that of the *reasonable person*, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. Although I stress that the inquiry into whether legislation demeans the claimant's dignity must be undertaken from the perspective of the claimant *and from no other perspective*, a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is *supported by an objective assessment of the situation*. All of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.[65]

So the Court must evaluate the *reasonableness* of the claimant's feelings.[66] Subsequently, in *Granovsky v Canada*

[63] *Ibidem*, p. 53 (italics added).

[64] *Law v Canada* [1999] 1 SCR 497, [61].

[65] *Ibidem*, p. 60 (italics added).

[66] '(T)he objective component means that it is not sufficient, in order to ground a s. 15(1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law'. *Ibidem* [59].

(2000), the Court described this objective component as requiring the claimant to show that:

> viewed from the perspective of the hypothetical "reasonable" individual who shares the appellant's attributes and who is dispassionate and fully apprised of the relevant circumstances … his dignity or legitimate aspirations to human self-fulfilment have been engaged.[67]

The underlying logic of *Law*, as developed in *Granovsky*, is that if s 15(1) protects only 'legitimate aspirations to human self-fulfilment', then the Court must be authorised to assess, and discard, *illegitimate* aspirations. But once the Court assesses the reasonableness of the claimant's perspective, using criteria which may be irrelevant to the claimant, it is no longer committed to the perspective actually held by the claimant. As formulated, this subjective-objective component of the test for discrimination was incoherent. It is simply not possible to undertake the investigation into whether legislation demeans a person's dignity both from the 'perspective of the claimant' *and* from a reasonable person standard (*i.e.* a standard informed by the Court's assessment of 'individual needs, capacities [and] merits', 'unfair treatment', and 'the full place of all individuals and groups within Canadian society').[68]

[67] [2000] 1 SCR 703, [69].

[68] Consider the treatment in *Lavoie v. Canada* 2002 SCC 23:

"what is required is a contextualized look at how a non-citizen legitimately feels when confronted by a particular enactment. *Even if the non-citizen knows the preference has nothing to do with her capabilities* — as most reasonable people would — she may still feel "less …worthy of recognition… as a member of Canadian society"; see Law, supra, para. 58 at p. 549. This subjective view must be examined in context, that is, with a view to determining whether a rational foundation exists for the subjective belief".

At issue in *Lavoie v Canada* is whether preferential treatment given to Canadian citizens in careers in the public service, pursuant to the Public Service Employment Act RSC 1985 c P-33 s 16(4)(c), violates s 15(1) of the

Formally, the subjective-objective *Law* test is what Joseph Raz describes as 'semi-objective': one which turns *not only* on how people actually feel but also how it is reasonable for them to feel.[69] Raz's test has two steps: first ascertaining how people feel, and then determining whether it is reasonable or not. But it is difficult to see how the claimant's belief that he or she has been subject to indignity helps to resolve the question of whether or not he or she has, in fact, been subject to indignity. There seems to be no reason why a claimant's perspective on the truth of a moral proposition should be taken as an indicator of its truth, unless the truth of moral propositions varies among persons, a proposition which the Court does not seem to accept.

In practice, the Court never put much, or any, weight on subjective belief and experience in assessing claims about dignity; in the post-*Law* cases (*M v H*[70] (1999), *Corbiére v Canada (Minister of Indian and Northern Affairs)*[71] (1999), *Granovsky v Canada*[72] (2000), *Lovelace v Ontario*[73] (2000), *Lavoie v Canada*[74] (2002), *Gosselin v Québec*[75] (2002), and *Nova Scotia (AG) v Walsh*[76] (2002)), the result was driven by the determination of what a reasonable person would think when confronted with the factual scenario at hand. In *Lavoie v Canada*, for example, where Bastarache J ostensibly applies the subjective branch of the test, it is apparent that it is an *objective* operation, in the sense that the claim-

Charter. A plurality held that preferential treatment of citizens violates s 15(1), but is justified under s 1.

[69] Raz, J, "Liberty and Trust", in George, R. P. (ed.), *Natural Law, Liberalism, and Morality*, Oxford, Oxford University Press, 1996, pp. 113-29, 124.

[70] [1999] 2 SCR 3.

[71] [1999] 2 SCR 203.

[72] 2000 SCC 28, [2000] 1 SCR 703.

[73] 2000 SCC 37, [2000] 1 SCR 950.

[74] 2002 SCC 23.

[75] 2002 SCC 84.

[76] 2002 SCC 83.

ant is required to justify his or her experiences of alleged discrimination using the standard of the reasonable person:

> the subjective inquiry into human dignity requires the claimant to provide a rational foundation for her experience of discrimination in the sense that a reasonable person similarly-situated would share that experience. In this case, the claimants submit that a reasonable person similarly-situated would believe that the reduced opportunity of working in the federal Public Service fails to account for their individual capacities and, moreover, implies they are less loyal and worthy of trust. The existence of a s. 15(1) violation depends on the validity of this submission.[77]

The claimant's perspective provides no additional resources for determining the truth or falsity of a moral proposition such as "this statute interferes with a person's legitimate aspiration to self-fulfilment." The only real work performed by the injunction to take the claimant's perspective into account, was to remind judges to bear in mind all relevant contextual factors which bear on the question of whether a claimant has been treated with equal concern and respect.[78] Ultimately, the Court must decide whether

[77] *Lavoie* (n 138) [47].

[78] The formal commitment to the claimant's perspective did, however, carry some benefit to the Court —the benefit of distancing it from the appearance of "imposing" moral judgments—. It was evident in *Law* that the Court was uncomfortable with the appearance of making moral evaluations and imposing 'community prejudices' in s 15(1) adjudication:

I am aware of the controversy that exists regarding the biases implicit in some applications of the "reasonable person" standard. It is essential to stress that the appropriate perspective is not solely that of a "reasonable person" — *a perspective which could, through misapplication, serve as a vehicle for the imposition of community prejudices*. The appropriate perspective is subjective-objective. Equality analysis under the Charter is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1). *Ibidem*, p. 61 (italics added).

there has been an inaccurate judgment made about the worth of claimants and whether government has failed to treat a person's or group's well-being with the same concern as it gives to others. Feelings of self-worth are not a helpful guide to determining whether someone has, in fact, been treated with equal concern and respect. As Raz points out '(s)ome people are deluded into believing that the government takes their interests fully into consideration, when in fact the government and the law are systematically biased against them. On the other hand, some people feel discriminated against or oppressed when in fact they are not'.[79]

So while the Court persisted in describing the *Law* test as 'subjective-objective', it was applied as though it were an entirely objective, "reasonable person" test. The "subjective-objective" test, as described by the Court, was an inherently unstable device; the subjective component of the test could not do the work that it purported to do, given that persons can be mistaken about whether they have or have not been discriminated against, and that judges must ultimately determine whether a person's self-understanding is reasonable or harmful.

V. A Loss of Dignity

After a decade of struggling with the *Law* test, the Supreme Court of Canada abruptly abandoned the rule that claimants establish an infringement of their dignity.[80] (Ironically, the Court largely abandoned the language of dignity at the same time that Dworkin brought it to the foreground in *Is Democracy Possible Here?*).[81] The Court's rationale was

[79] Raz, J., "Liberty and Trust", in George, R. P. (ed.), *Natural Law, Liberalism, and Morality*, Oxford, Oxford University Press, 1996, pp. 113, 124.

[80] *R. v Kapp* [2008] 2 S.C.R. 483.

[81] Dworkin now articulates the principle of dignity as foundational for human rights. The principles of human dignity comprise two principles: (1) the principle of intrinsic value, which holds that human lives may suc-

that the dignity rule failed to be the 'philosophical enhancement' to s.15(1) analysis that the Court meant it to be. Instead, the test had proven to be 'confusing and difficult to apply', and had 'proven to be an *additional* burden on equality claimants'.[82]

It is too early to be sure as to what precisely the Court abandoned in its s.15(1) apparatus and what remains. It could be that the Court has intended to retain the requirement that governments enact no law that threatens the self-acceptance of persons, and has merely discarded the evidential burden that was placed on the claimant. However, it seems more likely that the 'accepting an argument' apparatus —whether understood as an evidential requirement or a normative one— is no longer. But what of the language of dignity? While the dignity-based rule (or action-norm) was withdrawn, the concept of dignity nevertheless remains in play in s.15(1) interpretation as a goal-norm.[83] That is, it remains the case that s.15(1) is to be interpreted according to its purpose, and the Court has not distanced itself from its statements in *Law* and elsewhere that 'the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom'.

So the conception of dignity adopted by the Court retains a controlling force over the scope of s.15(1) and the limits it exerts on government power. Whether s.15(1) comes to be interpreted as protecting something like a right to moral independence depends, in large measure, on the how the concept of dignity —a concept that appears nowhere in the text of the *Charter*— continues to be interpreted and applied. Given that dignity remains a pivotal concept in Cana-

ceed or fail and that every life has 'intrinsic potential value', and (2) the principle of personal responsibility, that holds that a person has 'special responsibility for realizing success in his own life, a responsibility that includes exercising judgment about what kind of life would be successful for him'. Dworkin, R. M., *Is Democracy Possible Here?*, p. 35.

[82] *Ibidem*, para. 22.

[83] On the distinction between action-norms and goal-norms, see Giovanni Sartor, "Doing Justice to Rights and Values" (forthcoming).

dian equality law, there remains a need for frank discussion about the commitments that the Court is making through its references to dignity.

When the Court in *Kapp* accepted the criticism that dignity is 'an abstract and subjective notion',[84] this is the closest that it has come to admitting that dignity is a contested concept, and that in *Law* and elsewhere, it failed to give a convincing argument of how it is that the conception of dignity that it adopted was an appropriate fit with Canadian law. Although Iacobucci J, in *Law v Canada* recollected the Court's longstanding doctrine that the Charter be interpreted by reference to 'the historical origins of the concepts enshrined',[85] the Court made no such effort to canvass the origins of the concept of dignity. Given that *Law* was the first s 15(1) case in which the Court actually *used* the concept of human dignity, and the first case in which it ventured to articulate what that concept means, one would have expected a careful historical, philosophical, and theological account of the concept, and a justification of the particular conception adopted by the Court. Surprisingly, the Court simply acknowledged that 'there can be different conceptions of what human dignity means' and then offered two propositions: (1) that human dignity 'means that an individual or group feels self-respect and self-worth', and (2) that human dignity is 'concerned with the realization of personal autonomy and self-determination'.[86]

[84] *R. v Kapp*, para. 22.

[85] *Ibidem* [40], citing *R. v Big M Drug Mart Ltd.*[1985] 1 SCR 295, 344 (Dickson J). Beyond just a consideration of 'historical origins', Dickson J also mentioned 'linguistic' and 'philosophic' contexts (p 344) as a guide to interpreting the Charter. In other s 15(1) cases the Court has added 'biological' and 'sociological' contexts (*Weatherall v Canada (Attorney General)* [1993] 2 SCR 872, 877-88) and 'religious traditions' (*Egan v Canada* [1995] 2 SCR 513, [21] (La Forest J)).

[86] *Law v Canada (Minister of Employment and Immigration)* (n 106) [53]. For a rich account of competing conceptions of human dignity, see Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", in (2008) 19 *European Journal of International Law* 655.

The Court's understanding of what it means to respect equality and human dignity, expressed in language which emphasises individual choice and action, and feelings of self-respect, appears to be some distance from the traditional conception of human dignity. Traditionally, 'human dignity' denotes a status possessed by all persons and possessed by them equally, independent of the many inequalities in mental and physical ability.[87] Thus the Universal Declaration of Human Rights (1948), echoing the Roman jurists, declares in its first article that 'all human beings are born free and equal in dignity…'[88] On the traditional understanding, whether someone has been treated with dignity is not determined by measuring feelings of self-worth, but is rather a function of whether a person has received the treatment that he or she is justly due. It is, in this sense, objective. A self-perception of having suffered insult or degradation is neither necessary nor sufficient, on the traditional understanding, to establish that a person's equal human dignity has been disregarded. In this way, the debate over competing conceptions of dignity replays the debate over what is entailed by the requirement that persons be treated with equal concern and respect.

[87] A very different conception of human dignity is on display in *Chamberlain v Surrey School District No. 36*, 2000 BCCA 519, (2000) 191 DLR (4th) 128, [36], (overturned, but not on this point, 2002 SCC 86):

There is little doubt that the idea of the inherent worth and dignity of each individual human person originated in our political history as an insight of Christianity and the democracy of Periclean Athens. It gained ascendancy with the spread of Christianity and the Christian belief that every person is unique and irreplaceable as a child of God. While the association with Christianity deserves acknowledgement, it is not an insight that is exclusive to Christianity. It is shared with other religious traditions and is in that sense religiously inclusive or "pluralist". It is also embraced by those who do not adhere to any religious faith or tradition. For that reason it is properly characterized today as a cultural rather than religious norm. That clearly is the context in which it is formulated by Dickson J. in *Big M*. But it remains a normative or moral proposition.

[88] Universal Declaration of Human Rights (GA Res 217 A (III), UN Doc A/810 (1948)), Art 1.

My fear is that —as was the case with 'equal concern and respect'— the debate over the meaning of dignity simply will not take place in Canada. The Court has never defended the autonomy-based conception of dignity that it adopted, and it has barely acknowledged that it selected this conception from among others. This conception of dignity adopted by the Court —and the nascent autonomy-based reading of s.15(1) that is emerging from it— is not mandated from the text of s. 15(1), but is a product of constitutional construction by the Court. Accordingly, it is necessary that the Court acknowledge and defend these highly controversial acts of constitutional construction, and that government, the academic community, and other persons subject to Canadian law, debate whether this is the Constitution that Canadians enacted or that Canadians want.

The Court's abandonment of the dignity test in *Law* will likely shift the gaze of Canadian constitutional scholars away from the concept of dignity. This is unfortunate, given that the concept remains live in Canadian constitutional law, and that the particular conception of dignity adopted by the Court remains important and controversial.