PHILOSOPHICAL FOUNDATIONS OF

Discrimination Law

EDITED BY

Deborah Hellman

& Sophia Moreau

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PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW

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Introduction

Deborah Hellman and *Sophia Moreau*

This volume brings together a series of essays addressing how we are to understand and justify laws prohibiting discrimination—both laws that apply in the public sector, providing rights to some form of equal treatment by governments or other public authorities, and laws that apply in the private sector, providing rights to non-discrimination by private organizations in contexts such as the provision of employment, accommodation, and education. Such laws raise many daunting philosophical questions. Indeed, part of what makes this area of law such a difficult one is that there is no initial agreement among scholars as to what the important questions are. One aim of the chapters in this volume is to try to demonstrate that certain questions are worth investigation, and so to help shape our future collective discussions about discrimination law. The other aim, of course, is to defend certain answers to these questions.

This is a relatively young field of inquiry, reflecting the fact that most anti-discrimination laws are relatively new. Although a few countries, such as the U.S., have had longstanding constitutionalized equality rights, it is arguably only since World War II that these constitutional rights have been interpreted in a broad way so as to recognize that all citizens have certain rights to non-discrimination[1]; and it is also only post World War II that most countries have enacted domestic civil rights codes protecting individuals from discrimination in the private sector.[2] It is not surprising, then, that our theorizing about discrimination laws is also at an early stage.

Until recently, scholarship related to discrimination has been of three kinds. First, there has been an abundance of doctrinal work on discrimination law in particular countries. This work explores the ways these laws operate, the history of their enactment, the tensions inherent in them, and the best justifications for them.[3] Such work is doctrinal in that it focuses on actual legislation or legal cases interpreting constitutional provisions and human rights documents and aims to

[1] See *Brown v. Board of Education*, 347 U.S. 483 (1954) (race discrimination); *Craig v. Boren*, 429 U.S. 190 (1976) (sex discrimination); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (disability discrimination).

[2] See e.g. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (U.S.); Canadian Human Rights Act, S.C. 1976–77, c. 30 (passed in 1977); Race Relations Act 1976, c. 74 (U.K.).

[3] For American literature, see e.g. Sam Bagenstos, "The Future of Disability Law", (2004) 114 *Yale L. J.* 1; Charles R. Lawrence III, "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism", (1987) 39 *Stan. L. Rev.* 317; Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, Ct: Yale University Press, 1979); and Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action",

enrich our understanding of it. It still has some normative aims, for it attempts not just to describe the laws as they are but to make the best sense of them that it can, to offer more coherent and more justifiable interpretations of these laws, or to suggest alternative approaches. But its normative aims are relatively modest, and it tends to be local in its focus, applicable only to the legal rules of a particular country.

Second, there is a large body of philosophical writings on the value of equality.[4] This scholarship does not focus on the laws of a particular country; rather, it asks the general question "Why does equality matter, when it does, and what sort of equality matters?" Although this question is clearly relevant to discrimination law, this particular philosophical literature is of limited help to scholars of discrimination law, for a number of reasons. First, the question of why equality as a value does or should matter to us is much broader than the question of what makes discrimination unfair: discrimination, however we understand it, seems to be one kind of unequal treatment, but there are many others, as it is possible to distribute resources unequally without unfairly discriminating. Second, this particular philosophical literature treats the question of why equality matters as an inquiry into which system of general principles for the distribution of resources should guide legislatures in the design of particular policies. But usually, when academics or tribunals are discussing anti-discrimination law, their concern is with the interpretation of just one law or decision, not with the system as a whole; and their concern is not a purely distributive one but seems to involve something else as well, something that makes a particular distribution unfair in the particular way that amounts to discrimination. Furthermore, philosophers have tended to focus on the distribution of goods that can be privately owned, such as income and real property; and they often assume that questions about the just distribution of these goods can be asked independently of questions about the just distribution of social and political power.[5] Although this is often done only for ease of illustration, the result has been that their work often lacks explicit discussion of what matters most to theorists of discrimination law: namely, concerns about the unequal availability of public goods and about the stigmatization or marginalization of certain individuals and groups.

The third main body of work related to discrimination law consists of a number of papers written by philosophers on one narrow issue: affirmative action. Most of these papers stem from the 1970s and were written in response to the development of

(1997) 49 *Stan. L. Rev.* 1111. For Canadian literature, see Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: R. De Boo, 1982), and Peter W. Hogg, *Constitutional Law of Canada* (Scarborough, Ont.: Thomson/Carswell, 2006). For literature on the United Kingdom see Bob Hepple and Erika M. Szyszczak, eds., *Discrimination: The Limits of Law* (London: Mansell, 1992).

[4] See e.g. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1999); Gerald A. Cohen, "On the Currency of Egalitarian Justice", (1989) 99 *Ethics* 906; Richard J. Arneson, "Equality and Equal Opportunity for Welfare", (1989) 56 *Phil. Stud.* 77; Philippe Van Parijs, *Real Freedom for All: What (if anything) Can Justify Capitalism?* (Oxford: Clarendon Press; New York: Oxford University Press, 1995); Amartya Sen, *Inequality Reexamined* (Oxford: Clarendon Press; New York: Russell Sage Foundation; Cambridge, MA: Harvard University Press, 1992); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge MA: Harvard University Press, 2000).

[5] See eg Dworkin, *Sovereign Virtue* (n 5). For a very helpful critique of this approach, see Elizabeth S. Anderson, *What is the Point of Equality?*, (1999) 109 *Ethics* 287.

affirmative action policies at that time.[6] This work is important to scholars working on discrimination law today as it reveals a number of importantly different ways of thinking about discrimination. But since it is so narrowly focused on this one issue, it often does not address the broader general questions to which discrimination law gives rise, or it simply assumes that these questions should take one form rather than another; and although the permissibility of affirmative action is still a significant political issue in the United States, current discussions surrounding it tend to be doctrinal in nature rather than philosophical.

This history, painted admittedly with a very broad brush, clearly omits some important contributions; for there have been some significant larger works theorizing about discrimination.[7] Only recently, however, has the field gained a critical mass of scholars that are engaging in a dialogue with each other. Our volume presents this dialogue through a number of papers that explicitly engage with each other and with the questions that other contributors have raised.

The volume begins with a number of papers that raise certain basic questions about how to understand and justify the particular unfairnesses that discrimination law tries to protect against. For instance, is discrimination best conceived of as a personal wrong, akin to a tort, an unfairness that individuals have a right to be free from? Or is it instead better understood as a sub-optimal distribution of resources, one that we have certain reasons to eliminate but that no one person has a right to be free from? If it is a wrong akin to a tort, what kind of wrong is it—that is, what is it that makes it unfair, and what is the interest that is being protected here? Is it an interest in some kind of liberty, or an interest in not being demeaned, or some other sort of interest? And when discrimination occurs, is the wrong essentially a comparative one or not? If it is not comparative, can we still think of it as an interpretation of the value of equality? The contributions of Denise Réaume, Hanoch Sheinman, Deborah Hellman, Sophia Moreau, and Richard Arneson present these questions and offer some responses to them. Réaume and Sheinman both consider whether discrimination involves a comparative dimension. Hellman and Moreau debate whether the wrong of discrimination is best grounded in the value of equality or instead of liberty, while Arneson argues that a utilitarian account best justifies discrimination law. Together these papers work to frame a set of first-order inquiries into the nature and purpose of discrimination law which we hope will continue to be addressed by the growing body of scholars working in this area.

[6] See e.g. Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., *Equality and Preferential Treatment: A Philosophy & Public Affairs Reader* (Princeton, N.J.: Princeton University Press, 1977) 3; Robert K. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Totowa, N.J.: Rowman and Littlefield, 1980); Alan H. Goldman, *Justice and Reverse Discrimination* (Princeton, N.J.: Princeton University Press, 1979); and John Hart Ely, "The Constitutionality of Reverse Discrimination", (1974) 41 *U. Chi. L. Rev.* 723.

[7] These include, for example, Owen M. Fiss, "Groups and the Equal Protection Clause", (1976) 5 *Phil. & Pub. Affairs* 107; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980); and Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies", (1992) 141 *U. Penn. L. Rev.* 149.

The second section of the volume turns to a number of meta-theoretical questions. Underlying the papers in the first section are a number of assumptions. First, the papers assume that the different discrimination laws of different countries are all, at least when interpreted in their best light, grounded on a single set of moral norms. They also assume that these norms can be interpreted to form a coherent whole; and some assume, in addition, that we can give a unified explanation of these norms, that is, one that appeals to a single underlying value. But one might question whether this is so. One might argue instead that discrimination law is merely a collection of very different rules that have no underlying coherence, and that are either not justifiable or are justified only by appeal to a number of very different considerations. With these questions in mind, George Rutherglen argues against the possibility of a theory of discrimination law and Tarun Khaitan defends the endeavor. Both Patrick Shin and Lawrence Blum challenge, in different ways, the plausibility of attempts to reduce the wrong of discrimination to a single underlying value.

The papers in the last section of the volume all focus on issues in discrimination law that are currently the topic of considerable public political debate. They use these issues to raise general questions about the purpose and the appropriateness of various rules or claims within discrimination law. For example, when courts or commentators object to a law or policy as discriminatory, they often state that it fails to treat people as individuals. How should we understand this objection? Ben Eidelson's essay addresses this issue. David Wasserman asks whether discrimination on the basis of disability is importantly different from race and sex discrimination in a way that warrants different governmental responses. Michael Selmi examines whether the disparate impact theory of discrimination lacks moral justification. And Julie Suk considers quotas and their desirability.

Together the essays in this volume help to define questions and identify points of disagreement which, we hope, will set up further issues for study. They are the product of an ongoing dialogue between their authors. This dialogue began at two conferences on discrimination which we organized in 2011 and 2012; and we feel privileged to have been a part of these discussions and to have watched these papers evolve. It is our hope that this volume will convince other legal academics and philosophers to join in our discussions. For they are discussions that are urgent and necessary. Although many countries now have legal protections against discrimination, the scope of these protections is currently in flux. In Canada, for example, the Supreme Court has moved away from understanding constitutionalized equality rights as rights to dignity, towards a narrower interpretation which identifies wrongful discrimination specifically with exclusions based on stereotyping and prejudice. In the U.S. the Supreme Court is currently reconsidering the constitutionality of affirmative action and considering for the first time whether bans on same-sex marriage violate the Constitutional protections of either liberty or equality. In the U.K., courts are examining the boundary between religious freedom and the rights of gays and lesbians to equal treatment. How courts should decide these issues depends, at least in part, on how we ought to understand the nature and purpose of discrimination law. We can only come to know this through future discussions of the sorts of questions that this volume raises.

PART I

WHAT MAKES DISCRIMINATION WRONG?

1

Dignity, Equality, and Comparison

*Denise Réaume**

I. Introduction

It is a common refrain in anti-discrimination, or equality rights, case law that equality is inherently comparative,[1] and courts sometimes spend a great deal of time determining the appropriate comparator group to whom an equality claimant should be compared. On this, the validity of the claim often hangs.[2] A deeper look at the cases, however, shows that this language often amounts to an oblique way of invoking statutory purpose and the relevance of the criteria used to that purpose. Comparisons between claimants and others are grounded in an account of the purpose in providing a particular benefit and of what criteria for its distribution flow from that judgment. It is by reference to this purpose that X is comparable to Y or not, as the case may be. This makes the values embedded in that purpose the key to a claim's success or failure.

* I am grateful for a chance to discuss these ideas with the participants in the Colloquium on the Philosophical Foundation of Discrimination Law, Part II, held at the University of Maryland Francis King Carey School of Law, 11–12 May 2012 and the members of the Oxford Legal Philosophy Discussion Group, and to Les Green for meticulous feedback on the work in progress.

[1] The Supreme Court of Canada, for example, has very consistently remarked on the comparative nature of equality. See e.g. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 164, *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 56, *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, para. 18. In *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, the Supreme Court shows signs of reconsidering this approach. However, it is unclear how deep the change of view is. The Court has not, for example, changed its mind about equality being a comparative concept; it has merely accepted that some kinds of comparison are wrong. Which ones are to be avoided remain unclear.

[2] This approach has been much criticized. See e.g. Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter", (2003) 48 *McGill L. J.* 627; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15", (2006) 24 *Windsor Y.B. Access. Just.* 111; Sophia Moreau, "Equality Rights and the Relevance of Comparator Groups", (2006) 5 *J. L. & Equality* 81; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences", (2001) 13 *Canadian J. Women & L.* 37; Andrea Wright, "Formulaic Comparison: Stopping the Charter at the Statutory Human Rights Gate", in Fay Faraday, Margaret Denike, and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 409; Margot Young, "Blissed Out: Section 15 at Twenty", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ont: LexisNexis, 2006) 45.

If purpose determines comparability, both purpose and criterion must be open to assessment by the courts, or the comparative analysis is an empty exercise. Legislative objectives implicate principles of distribution based on a range of values. An account of equality rights must provide a basis for assessing these underlying principles by identifying an interest worthy of constitutional protection by virtue of which particular distributions can be declared wrongful. I will argue for understanding this as the interest in treatment with dignity, a position situated within a larger tradition that claims equal moral status for all human beings. Nevertheless, this interpretation shows equality rights not to be predominantly "inherently comparative", indeed not ultimately to be based on the value of equality itself.

The claim that constitutional equality analysis is essentially comparative suggests that the equality clause be treated as a strictly egalitarian entitlement principle, to borrow Joseph Raz's terminology.[3] Such an approach bases any given claim to a benefit or opportunity on the fact of differential treatment between individuals or groups—the claimant's entitlement to whatever she has heretofore been denied is grounded in the fact that others already get it (or more of it). When such a claim is valid, it not only requires a comparison of the claimant to others to establish the difference in shares, it is this difference itself that triggers the entitlement. This tells us that equality itself is the ground of the claim. What matters is that the claimant be treated the same as some others, not that the exclusion of the claimant impairs some other interest or dishonors some other value.

It is understandable why equality claims are often understood this way. After all, they have a "me too" quality:[4] the argument is often put in the form "those people get this, why not me/us too?" That might sound like a claim that *simply* because some others get a particular benefit, the claimant should too. But that interpretation often disguises the true nature of the claim and invites confusion about the role of comparison in these sorts of cases.

A simple test for whether an essentially egalitarian approach to a distributive question is in operation is whether leveling up or leveling down are, other things held constant, regarded as equally attractive solutions to an instance of inequality.[5] Indifference between the two indicates that equality is treated as the sole relevant value in such distributional questions. It matters not how much each recipient gets, only that each gets the same—everyone getting some or no one getting any of the benefit are equally egalitarian outcomes on this view and therefore equally acceptable. But the fact that claimants rarely put their claim this way should be the first clue that equality claims do not usually invoke strict egalitarianism as their foundation.[6] Claimants do not lay claim to a good if and only if others happen to get it, but because it serves some human interest that they share with those others

[3] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 229.

[4] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals", (2001) 80 *Canadian Bar Review* 299. See also Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All", in McIntyre and Rodgers, eds., *Diminishing Returns* (n 2).

[5] Raz, *The Morality of Freedom* (n 3) 234–5.

[6] I want to leave open here the possibility that some claims do involve a form of strict egalitarianism. For present purposes, I need only claim that such claims are relatively rare.

and by virtue of which they think they should share in the benefit at issue. Thus, perhaps counter-intuitively, an equality claim does not directly appeal to equality itself as its foundation, but rather to some other value implicated in the distribution of the benefit in issue.

Whatever the merits of strict egalitarianism as a fundamental theory of distribution—a matter much debated in the literature[7]—judicial talk of the comparative nature of equality rights does not mean to invoke it. Equal rights provisions are not treated as across the board strictly egalitarian entitlement principles. If they were, equality cases would be easy—show a judge that a particular benefit has been provided to one group identified by an enumerated or analogous ground and not another,[8] and inequality has been established (subject, perhaps, to whatever justifying or excusing conditions apply). Providing some account of why we should do things this way might be hard, but adjudicating would be relatively easy. But adjudicating has been anything but easy, and it has been complicated precisely by the courts' attempts to identify the something more—something beyond difference in treatment—that is required to establish a violation of equality rights.[9] If equal rights principles instantiated strict egalitarianism, no such extra ingredient would be necessary. So something else must be going on when courts use comparison to assess equality claims.

The language of comparison in the cases indicates the operation of a background judgment about what a statute's underlying distributive principle is, and whether it is constitutionally permissible. Thus a "test" is needed: what makes a statutory distributive principle unworthy? One thread in the Canadian case law addressed this question by asking whether the distributive criterion used violates dignity. A narrow focus on the criterion gets at some violations of dignity, but leaves some of the deeper issues unexplored. Before judges can evaluate criteria, they must have a sense of what the objective of the legislation is. This is rarely self-evident; often it is a matter of interpretation. As we shall see, however, the typical way that purposes are identified and understood, against which criteria are assessed, is inadequate to do justice to a foundation in dignity. I propose an alternative approach that also

[7] See e.g. Bernard Williams, "The Idea of Equality", Stanley I. Benn, "Egalitarianism and the Equal Consideration of Interests", Gregory Vlastos, "Justice and Equality", all reprinted in Louis P. Pojman and Robert Westmoreland, *Equality: Selected Readings* (New York: Oxford University Press, 1997) 91, 12, 120, Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation; Cambridge, Mass.: Harvard University Press, 1992), Thomas Nagel, "Equality", Derek Parfit, "Equality or Priority", Larry Temkin, "Equality, Priority, and the Levelling Down Objection", all reprinted in Matthew Clayton and Andrew Williams, eds., *The Ideal of Equality* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2002); Timothy Macklem, *Beyond Comparison: Sex and Discrimination* (New York: Cambridge University Press, 2003).

[8] The proviso that the benefit be provided to a group identified by reference to a certain type of ground flows from the enumeration of grounds of discrimination in the *Canadian Charter of Rights and Freedoms*. Where this restriction is absent, the political challenge of strict egalitarianism and the absurdity of it as a legal doctrine is simply more pronounced.

[9] The Supreme Court gradually developed a test by 1999 requiring a claimant to show not only differential treatment connected to a *Charter* ground, but that this treatment was "discriminatory" in the sense that it violated human dignity: *Law v. Canada* (n 1). It has since retreated from a dignity-based approach, but it remains the case that differential treatment must be discriminatory, and this involves an extra hurdle for claimants to establish.

appeals to dignity, but which, I argue, does so in a way that is more productive and more deeply attuned to the broad constitutional role of equality principles.

My argument unfolds against the backdrop of Canadian equality law, where the tendencies I will identify are marked, but where there is also some reference to a dignity-based approach. Nevertheless, I think the general themes explored are widely relevant, though they may express themselves differently in different jurisdictions. One particular feature of Canadian law should be flagged here because it will come up later: the Canadian *Charter* adopts a grounds-based approach. It recognizes a right to equal benefit and protection of the law without discrimination on the basis of a list of grounds, which list can be expanded by analogy.[10] How this approach influences the theory of equality rights is an important issue in its own right, which I cannot develop fully here. Undoubtedly, adopting the grounds-based approach will mean I will not have caught all the places where my argument assumes something that needs argument. I only hope this warning enables readers to make the necessary translations into their own vernacular.

II. Equality's Role in Policing the Distributive Functions of the State

A constitutional equality rights claim challenges the existing distribution of some benefit or burden[11] contained in statutory criteria or flowing from administrative practice. Every distribution has criteria that govern that distribution. These can be and typically are grounded in a range of values: sometimes need is the underlying distributive principle, sometimes protection of a right, sometimes merit or blame, sometimes pursuit of a long-term social goal such as prosperity or environmental well-being. The list goes on. I shall assume that such principles are ultimately grounded in human interests that are judged to be worth protecting or fostering. That judgment is based on the value of "life, liberty, the pursuit of happiness", or any other human goods we wish to add to the list. For example, we all have an interest in security from physical suffering, both because pain is itself bad and because some forms of suffering can curtail one's ability to pursue one's important projects in life, which ability is an independent good. These interests may ground provision of health care based on need or fair access to work opportunities so we can feed and shelter ourselves, and many other concrete goods and benefits besides. Each of these distributive principles is ultimately grounded in the interest in freedom from suffering. That is to say, when these concrete goods are provided, it is because they serve this interest (or one like it).

[10] The Canadian *Charter*, s. 15(1) is as follows: "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."

[11] For the sake of brevity, henceforth I use "benefit" to refer to both benefits and burdens, since relief from a burden can be conceived of as a benefit.

A right to equality can do some work only if the distributive principles the legislature adopts are in some measure justiciable. Even if based on a range of other values, these principles must be justiciable in the name of equality, we might say. The ultimate implication of an equality claim is that a somewhat wider principle of distribution for this particular good is somehow mandated by the equality provision.

The legislature, in specifying the grounds of entitlement that it thinks appropriate, implicitly invokes an understanding of the nature of the benefit being distributed. When legislation is challenged, government elucidates the nature of that benefit by offering a statement of statutory purpose to explain the legislation. The criteria and the purpose are meant to operate as a package: criteria make sense, the government claims, in light of a particular purpose; the way to pursue that purpose is through these criteria. I phrase this idea of connection between criteria and objective deliberately vaguely because, as we shall see, there is more than one type of connection evident in legislation. This connection is what courts are flagging when they speak of the relevance of the criteria used to the state objective.

An equality rights claimant argues that some harm is done or wrong committed[12] by the use of particular criteria or the pursuit of particular ends or some combination of the two, and thus the package must be altered in her favor. That a claimant is implicitly invoking an alternative distributive principle explains why leveling down is rarely the remedy litigants pursue: they ask to be allowed to vote *as well*, not that voting be abolished, or that a pension scheme *include them*, not that it be repealed. It is not the bare fact of differential treatment that grounds the claim, but that the criteria used to distribute the benefit are too narrow. The human interest at stake should be understood in a way that grounds a wider distribution of the good that serves it. To level down would deprive everyone of something all are properly entitled to, and thus exacerbate rather than solve the problem.[13]

The challenge for equality rights law has been articulating the nature of the harm or wrong that one might claim an existing distribution does, and that challenge is exacerbated by the distributive context that is the terrain of equality claims. Much of what government does is to distribute goods: rights, powers, immunities, opportunities, benefits, etc. (and thus also duties, liabilities, burdens, etc.). It does so on the basis of what generically we might call distributive principles, which, once enacted, create legal entitlements. This is what we think democratic government is for—to deliberate about the appropriate distributive principles in different contexts, in light of current circumstances. We elect representatives based on views about just what sorts of distributive principles we want them to put into action. If an equal rights provision enabled claimants to contest any and all of these distributions on the basis of any plausible competing argument about how benefits and burdens should be distributed, the courts would be *comprehensively* substituting

[12] I use these two ways of phrasing the issue interchangeably—human rights provisions can be said to be protecting against certain harms (or protecting certain interests) or prohibiting certain wrongful action.

[13] Sophia Moreau makes a similar argument in "Equality Rights and the Relevance of Comparator Groups" (n 2).

their judgment for that of the legislature. This ratchets up the usual concerns about the propriety of judicial review.

One might therefore say that equality rights provisions are a potentially greater threat to legislative authority than other constitutional rights. An account of them must respond to this concern by defining the nature of the wrong claimed so that it is tolerably plain how the constitutional principle of equality interacts with the legislature's distributive role. That principle gives us something that sits in judgment over other distributive principles as instantiated in legislation. The former itself describes a good of some sort that is to be distributed equally. Distribution of the concrete good at issue is unconstitutional if it violates the distributive principle embedded in the equal rights provision. To the extent that there is a connection between the good embedded within the equality provision and that fostered by the concrete good distributed by the legislation, there will be some overlap between the arguments that support the statute and the arguments a court will have to canvass to assess it.

Absent the articulation of a principle that fulfills this role, the courts are likely to fall in with the legislature's understanding of the nature of the benefit and the appropriate distributive criteria, because otherwise they will see no limits on the redistributing they might be asked to do. They are likely to require the claimant to be virtually identical to the existing beneficiaries in order to succeed. Too different, and the characteristic making one so will be found to be relevant to one's exclusion, or one's similarities to other excluded groups will seem more salient. The need to articulate the nature of the wrong is particularly acute in cases in which the basis for distribution of the benefit in issue is some conception of need. It is not an accident that it is in these cases that the courts' analysis has been especially narrow. Need has an elastic quality that is apt to heighten judicial concerns about the courts' ability to adjudicate claims. Where the criterion of distribution is need, a problem that is always present—giving sound and adequate direction to claimants and courts—is especially acute.

In most of the equality claims that have been successful, the judges have instinctively understood the harm imposed or the wrong done within a fairly narrow range. Exclusion from a benefit motivated by prejudice, for example, is wrongful. So too is exclusion from a benefit based on the operation of stereotypes, even if unconscious.[14] These wrongs have been both recognized as violations of dignity, and as I have argued elsewhere, this is an apt way of describing them.[15] What has fallen by the wayside is an earlier suggestion in the jurisprudence that the nature of the interest affected is relevant to protecting dignity and therefore finding an equality rights violation.[16] The nature of the benefit and the interests it serves are intimately related. To tie an interest to dignity is to treat the benefit that fosters it

[14] *Andrews* (n 1) is an example of a case in which this insight is articulated.

[15] Denise Réaume, "Discrimination and Dignity", (2003) 63 *Louisiana L. Rev.* 645, reprinted in Faraday, Denike, and Stephenson, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (n 2).

[16] This insight was captured by the fourth contextual factor identified in the *Law* test as indicative of a violation of substantive equality. Discrimination cannot be diagnosed without evaluating "…the

as "dignity-constituting".[17] To make good on this suggestion, the benefit at issue under the statute must be assessed in light of and as an instantiation of the abstract goods implicated by the dignity principle. I will return to an analysis of how dignity might fill this role after delving more deeply into the connection between criteria and objective and the task it sets for judges.

III. Relevance, Comparison, and Distribution

That much legislation specifies criteria for distribution of a benefit in pursuit of a particular principle of distribution may explain the prevalence of discussions in the case law of whether a ground is relevant to the statutory purpose. Relevance denotes an assessment of the nature of the connection between criterion and objective. The implicit argument on behalf of the legislation is that because the criterion is relevant to the objective, no harm has been done. Claimants sometimes accept this framing, counter-arguing that the criterion is insufficiently relevant, implying that it is *therefore* wrong. This dynamic stems from an implicit assumption of an exclusively instrumental relationship between the criterion and the objective as the paradigm.

Many equality cases are ones in which the criterion complained of is a proxy for an ulterior quality grounding entitlement. In such cases the ulterior quality or ultimate end is often mutually accepted as appropriate and argument passes on to the question of how effective a means the criterion must be to that end to pass constitutional muster. The government often argues for a relaxed standard—a criterion that is a pretty good proxy should be acceptable. The claimant focuses on the harm use of a proxy does to those who meet the ulterior qualification even though not meeting the express criterion. Apply the ulterior qualification itself, the claimant argues, that way you'll do no harm. If unemployment insurance, for example, is meant to provide income support while someone who is out of work looks for a job, the scheme should provide benefits to those, like this claimant, who are looking for work, rather than assuming that because she is over 65 she has withdrawn from the workforce.[18]

It is common in cases turning on an instrumental connection for the claimant's argument to be put in comparative language, but it is important to see what the point of comparison is. The claimant points out that, apart from the criterion that excludes her, she is comparable to others who are qualified for the benefit. In comparing herself to these people, she is inviting the court to assess her according to

economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question". Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group". *Law v. Canada* (n 1) para. 74, quoting from the judgment of L'Heureux-Dubé J. in *Egan v. Canada*, [1995] 2 S.C.R. 513.

[17] Réaume, "Discrimination and Dignity" (n 15) 686.

[18] *Tétrault-Gaudury v. Canada (ECIC)*, [1991] 2 S.C.R. 22.

those other qualifications, which she concedes to be appropriate. It is those other qualifications that are properly relevant. This reveals that relevance arguments and one kind of comparison are connected, although the essence of the claim is that when the claimant is measured against the proper criteria for the benefit, she meets them. The legislature has the ulterior criteria right, but is wrong to use a particular ground of entitlement. The comparison stands in for an argument about what the proper criteria are—that is, all the existing criteria except the *Charter* ground-related one.

As has often been pointed out, trouble arises when the claimant is somewhat like those who enjoy the benefit, but also obviously somewhat different from them. A woman, for example, may be like other unemployment insurance applicants in being out of but ready and able to return to work, and unlike others in having left a job because she has just given birth. The government will focus on the differences and if the court follows suit, it is in danger of finding that whatever differentiates the claimant is relevant to the scheme so that the exclusionary criteria "correspond to the claimant's actual circumstances" to paraphrase the way the Canadian Supreme Court often expresses this conclusion.[19] This, of course, is the source of Catharine MacKinnon's familiar criticism of the "sameness" approach to equality, the philosophy of treating likes alike.[20] And it is true that equality rights do not do much for people if they require one to be identical to those already eligible for a benefit. Any two distinct people, or groups, necessarily differ in some ways, and if any difference makes a distinction, equality rights are toothless.

This tendency to require close likeness between claimant and existing beneficiaries indicates reliance on a background distributive principle that is taken to be constitutionally acceptable. The implication of that reference point is often negotiated through the language of comparison of one group of people to another, rather than through a direct examination of the purpose and criteria for eligibility themselves. However, comparison to others should be merely an indirect means of assessing the claimant according to the relevant criteria for distribution of the benefit itself. This indirect comparison often obscures this central question and usually results in comparing the claimant to the *legislature's* standard of relevance for purposes of eligibility for the disputed benefit, whatever that standard may be. This amounts to the de facto ratification of the standard without subjecting it to any scrutiny at all.

Discussions of relevance in the cases tend to concentrate too narrowly on defects in the instrumental connection between criteria and objectives. This obscures the dynamic relationship between assessment of criteria and of objective. The dominance of the proxy scenario in the history of discrimination law disguises the fact that not all criteria stand in an instrumental relationship to an objective. Criteria may instead be constitutive of a particular objective. If I spend time commenting on student work in accordance with how much I think the student needs feedback,

[19] *Law v. Canada* (n 1), paras. 69–71.

[20] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

I do not use student need as a proxy for something else; I am not aiming at some other end for which use of the criterion of need is a good means. Rather, I distribute my time and attention based on need because need for feedback is integral to my conception of the enterprise of learning. To challenge my need-based distribution is to challenge the objective itself, or at least my understanding of it. Similarly, to require judges to be citizens[21] does not use citizenship as a proxy for something else that would make one a good judge; it proclaims an enterprise to which citizenship is alleged to be integral.

It is important to remember that the legislature often does not legislate objectives. Legislation often simply specifies distributive criteria for some benefit. The rationale for the use of those criteria—the objective lying behind them—is only implicit. Its content must be constructed through an interpretive process that situates the distribution of the particular benefit in a social and political context. The government will offer one conception of the objective, and will try to make it one that fits the criteria used as tightly as it can. This strategy is designed to give claimants little opportunity to attack the criterion on instrumental grounds. This should be a signal that the equality challenge, in such cases, may be best understood as a challenge to the articulation of the objective offered. The claimant offers a competing understanding of the objective because the one offered by the government is not consistent with treatment with dignity in some way (yet to be described). On the claimant's understanding of the objective, the criterion used is not apt; indeed, it serves *that* objective badly. This takes us back to an assessment of the instrument used, but what drives the argument is the competing account of how best to understand the objective of the legislation. If that is made out, the critique of the criterion follows effortlessly.

To summarize, if the distribution of benefits through legislation consists in the package created by criterion and objective, a challenge to that distribution must aim either at the criterion itself, often done through questioning the sufficiency of its instrumental connection to an agreed upon objective, or at the objective the government offers in support of the use of a specific criterion. In the latter kind of case, the courts are required to decide which understanding of the objective to adopt, and that requires grounding in some principle. If they reject the government's claim of a constitutive relationship between criterion and objective, as they sometimes do,[22] it must be because they think the objective it reflects is unworthy in some way. If they reject the claimant's argument about the best way to understand

[21] In *Andrews* (n 1), this was used as an example of use of a *Charter* ground that would not violate s. 15.

[22] In *Miron v. Trudel*, [1995] 2 S.C.R. 418, for example, the majority rejected the argument that insurance coverage for personal injury arising out of a car accident should be understood as supporting marriage, which would have made sense of the confinement of benefits to the married spouse of the policy-holder. McLachlin J. pointed out the circular nature of that conception of the objective, but circularity is not necessarily a fault if a valid constitutive relationship between criterion and objective is possible. It seems clear from the decision that the majority thought the exclusive support of marriage unworthy as an objective, and so interpreted the objective as the support of intimate relationships of interdependence. According to this understanding of the objection, of course, conditioning eligibility on marriage was a flawed criterion, and was not allowed to stand.

the objective, it must be because they think it is not compelled by the principles underlying the equality provision.

The objective of a statute articulates a benefit that serves some interest. If dignity is to play a role in assessing objectives it must be because it can tell us something about what makes an alleged benefit unworthy or necessary, as the case may be. Only in light of such an assessment is comparison a useful indirect tool to discover whether the claimants have been improperly excluded. As mentioned above, the jurisprudence has occasionally made a gesture toward treating the nature of the interest at stake as relevant to whether dignity is violated. However, little progress has been made in developing the thought. More often, in the cases that most call for that effort, the courts instead use comparison and discussions of relevance to evade this central question, and the result is automatic validation of the legislative scheme. I turn now to illustrate this tendency in two recent cases. This seems to be what happens when the courts lack guidance on how to connect a particular benefit to the abstract value of dignity. Filling that gap will be the task of the last section of the chapter.

IV. Evasive Comparisons

With some regularity, courts assume the validity of the package of statutory criteria and purpose and then defines the group to whom claimants should be compared in such a way as to present claimants as either dissimilar to those who qualify for the benefit or similar to others who are excluded. In effect, this assesses the claimants by reference to the criteria in the statute and finds them wanting rather than subjecting the statute to any meaningful scrutiny.

In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,[23] the failure of the BC government to provide funding for a particular form of behavioral therapy for autism was challenged. The law did not deny coverage for autism treatments per se, but rather provided full coverage only for "core" medical services, defined as those delivered by doctors and hospitals, leaving it to provincial discretion to decide whether to extend funding to non-core treatments. Because of the intensive nature of the behavioral therapy needed by autistic children—amounting to many hours per week—this is treatment not likely to be provided by doctors nor offered in hospitals. The crux of the claimants' argument was that guaranteeing funding only for core services defined this way had an adverse effect on those suffering from mental disabilities that require intensive therapy, such as autism. The province's failure to exercise its discretion to cover behavioral therapy cemented the claimants' exclusion.[24]

[23] [2004] 3 S.C.R. 657.

[24] The combination of federal legislative action and provincial discretionary inaction creates a twist that may well help explain the failure of the claim, but I leave this aside for purposes of the present discussion.

The Court chose to compare the claimants to others seeking funding for non-core treatment "[that] is emergent and only recently becoming recognized as medically required".[25] Since there is no difference between these other disappointed health services seekers and autistic children, the Court concluded it must be because the treatment sought was emergent, not because it is for a mental disability, that funding was not provided. The connection claimed between the detrimental treatment and the *Charter* ground disappears.[26] Refocusing on the emergent nature of treatment allowed the Court to declare: "Funding may be *legitimately* denied or delayed because of uncertainty about a program and administrative difficulties related to its recognition and implementation."[27] Novelty is deemed a relevant, or "legitimate", basis for withholding funding and it displaces the alleged discriminatory basis, however necessary this treatment may be to the health needs of autistic children. Yet whether the *Charter* permits health care to be denied *to the disabled* because the treatment is emergent, or, rather, requires looking past ordinary reasons for denying or delaying coverage to ensure that health funding for disabilities is based more tightly on health-related needs was the very question posed by the claimants. The Court evades it entirely.

The claimants argued that the point of a publicly funded health care system is to ensure that people get medically necessary treatment without having to pay. Rather than enact direct criteria for "medical necessity", the legislation used "services provided by doctors and hospitals" as a kind of proxy, leaving provincial discretion to fill any gaps that might emerge between the definition of "core" services and what turns out to be medically required treatment. The claim is that, in the case of autism, the definition of "core" is a bad proxy for medically necessary treatment. The Court responded by denying that the point of the scheme is to provide for medically necessary treatment. It appealed to the statute's definition of core services to declare: "the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment. All that is conferred is core funding for services provided by medical practitioners, with funding for non-core services left to the Province's discretion."[28] This defines the purpose of the scheme by reference to the statutory exclusions and thus ostentatiously begs the question. The outcome is heralded by the Court's declaration at the outset that "the issue before us is not what the public health system should provide, which is a matter for Parliament and the legislature".[29] This is not so much an argument as a conversation stopper.

In short, having decided at the outset that it would not consider for itself the nature of the benefit or its flip side—the interest in health care—the Court adopted a statutory objective that incorporates the exclusion complained of, and

[25] *Auton* (n 23) para. 55.

[26] *Withler v. Canada* (n 1), purports to correct this tendency of the comparator group analysis; the Court recognizes that comparison for the purposes of demonstrating connection to the *Charter* ground plays a limited role in the overall analysis. However, as I shall show, the suppression of this approach just seems to have diverted the impulse into the Court's relevance analysis.

[27] *Auton* (n 23) para. 55, emphasis added.

[28] *Auton* (n 23) para. 35.

[29] *Auton* (n 23) para. 2.

then concocted a basis for comparison that obscures the claimant's disability-based argument.

Withler v. Canada (Attorney General)[30] provides a second pertinent example. The challenged scheme used age to determine the level of lump sum survivor benefit paid on the death of a spouse. Withler received a much lower supplementary death benefit (SDB) when her husband died than she would have done if he had been under 65.[31] Her equality claim was rejected because age was held to be relevant to the statutory purpose.

The Court accepted the government's claim that for younger spouses the benefit was meant to provide income replacement to help the surviving spouse adjust to her new circumstances. The government argued that older surviving spouses do not need such assistance since the value of the SDB is not reduced until after the deceased has started drawing his retirement pension, a portion of which his surviving spouse succeeds to after the retiree's death. Thus, the government argued, elderly spouses have a continuing source of income; they do not need the full SDB. The reduced amount they do receive is meant not as income replacement but to meet the "costs of last illness and death".[32]

This argument attributed two different purposes to the supplemental death benefit, calibrated to match the different needs of younger and older surviving spouses respectively; based on the income replacement purpose attributed to the full benefit, age becomes a very good proxy for need. However, there is an in-between group that remains unaccounted for. The spouse of someone who retires and dies before 65 is entitled to a survivor pension, just like older survivors, and also the full SDB, just like younger ones. It is hard to see how, if the surviving spouse of an older retiree needs no income support beyond her pension and only a modest and diminishing death benefit, one whose spouse retires and dies early is entitled to a substantial lump sum payment alongside an ongoing pension.

This discrepancy led the claimants to argue for a description of the purpose of the SDB in more abstract terms to cover all recipients. The statute does not explicitly proclaim the purpose; it must be inferred or constructed from its provisions. The objective, they argued, is better understood as assistance for the surviving spouse to adjust financially to being on his or her own. Most surviving spouses need to make some financial adjustment, though the details will vary from person to person. The claimants provided firm proof that the "cost of last illness and death"—the government's own description of the needs of the elderly—rises with every decade that the plan member lives past 65. So, far from the financial needs of elderly surviving spouses declining with age, they actually rise.[33] This makes the elderly survivor

[30] *Withler v. Canada* (n 1).

[31] The SDB available to the spouses of civil servants and military personnel is a lump sum payment calculated as a multiple of the deceased's annual income. The full benefit is payable to those whose spouse dies before age 65. After that the benefit is reduced by 10 per cent per year, leaving a modest residual benefit for those whose spouse dies after age 75. The trigger for reduction of benefit is the age of the deceased spouse rather than the SDB claimant, but the courts did not use this complexity to deny standing to the claimants.

[32] *Withler v. Canada* (n 1) para. 5.

[33] For those whose spouse survives to age 75, the minimum SDB amounted to little more than would pay for an average middle-class funeral. This might lead one to challenge the claim that this has

more like her younger sister; she too may well face financial disruption following the death of her spouse, though not exactly of the same sort. Against the backdrop of this understanding of the purpose of the program, age becomes an irrelevant basis for reducing the SDB.

Rather than deal openly with this conflict about the purpose of the program, the Court steadfastly focused not on what the claimants might have in common with those who do benefit from the scheme, but on how different the claimants were from the age group least like them, repeatedly comparing a surviving spouse not yet entitled to draw her share of her spouse's pension to the claimants who are pensioners. No mention is made of the in-between group who receive both pension and full SDB.[34] And although the Court acknowledged that costs of final illness rise with age, it mysteriously found there to be no evidence that the claimants were unable to meet these final expenses.[35] By refusing to see the claimants' need as a variation on a common theme, the Court could treat them as categorically different from its chosen comparator—a much younger surviving spouse. This approach presupposes a particular basis for comparison. The Court chose to treat need for income replacement as the basis for full entitlement rather than a broader conception of need for assistance in the transition after a spouse's death. In opting for the former, the Court ratified the government's statement of legislative purpose without taking seriously the alternative.

These cases illustrate two things quite familiar to equality lawyers. If it is theoretically and doctrinally possible for courts (and others) to use any difference as a relevant distinction, they may be tempted to do so, especially in politically sensitive cases. Yet without some deeper foundation in an equality principle, the courts (and others) will lack adequate guidance as to the principles they should use to examine underlying legislative objectives in light of equality rights. For cases like these to get a fairer hearing, a firmer foundation must be supplied for settling upon the objective of the statute, which in turn involves an interpretation of the nature of the benefit at stake.

V. The Equality in the Equality Principle

What is needed, then, is a principle of distribution of some benefit that makes the distribution of more concrete benefits in statutes unacceptable. There is one tradition of egalitarian thought that fits this description well enough to use as the basis for the construction of a legal principle of equality. The tradition[36] has articulated such

anything to do with the costs of last illness, and therefore even more seriously undersells the interests of the elderly surviving spouse. As the couple ages, medical and care costs tend to be paid out of savings, leaving the surviving spouse in need in her own last years.

[34] This group is mentioned only to criticize the dissenting member of the Court of Appeal for using such a focused comparison instead of a "full contextual analysis". *Withler v. Canada* (n 1) para. 81.

[35] *Withler v. Canada* (n 1) para. 75.

[36] A short list of its adherents includes: Isaiah Berlin, Bernard Williams, Gregory Vlastos, Harry Frankfurt, Ronald Dworkin, John Rawls, and Jeremy Waldron.

a principle in various ways, but the variants overlap on a core cluster of ideals: all humans have equal moral status, all human beings have inherent value, people are equally entitled to respect, and all are entitled to be treated with dignity. Each formulation is framed in universal terms: "all human beings. . . ." This provides a veneer of equality, but the presence of a universal quantifier is insufficient to signal that equality is the driving force. In this respect, though I count Deborah Hellman[37] within this tradition, for reasons that I hope will become clear, I think she is wrong to treat equality as the ground of her account of the right not to be demeaned.

The "equal moral status" principle, as I will call it for short, is itself a distributive principle. It says that each is entitled to "respect", to "treatment with dignity", to "be counted", or "to be treated as someone who matters". That nebulous, highly abstract, ideal is of universal application. The universal formulation produces an equal entitlement, but equality as a distinct value is no more operative here than in the universal principle that each person is entitled not to be tortured. It is not because some others get respect that I am entitled to it, but because it is owed to all humans, and I am human. Why is it owed to all? We need to know what's so good for people about being respected in order to understand the values at stake, just as we need to know what's so good about being free from torture to understand what grounds the prohibition on torture. This story is likely to be multifaceted and complex, drawing on many facets of what makes a life go well. It is hard to see how "equality" as a distinct value does much of the explaining of the good of respect or dignity.

Hellman is right that saying that "each is entitled to respect" doesn't tell us much.[38] It must be given some content, but it is that content rather than equality itself that tells us how people must be treated. Others in this tradition of thought have taken up that task. Bernard Williams, for example, identifies two aspects of personhood that are bound up with the idea of equal moral status.[39] First, there is a range of basic material needs that humans share. This commonality demands that distribution of certain concrete goods be based on response to need, rather than extraneous considerations. Second, "self-respect"—the desire to identify with and realize purposes of one's own—grounds the claim that "each man is owed the effort of understanding and that in achieving it, each man is to be (as it were) abstracted from certain conspicuous structures of inequality in which we find him".[40] Those structures of inequality include roles and "titles" that value people for their service in the interests of others. Abstracting away from these roles and uses values their occupants from their own point of view on their projects and actions. This form of respect, he argues, is tied to "the notion that men are conscious beings who necessarily have intentions and purposes".[41] Thus exploitation is prohibited, as well as conditions that suppress or destroy consciousness. Likewise, we must also

[37] Deborah Hellman, *When is Discrimination Wrong?* (Cambridge: Harvard University Press, 2008).
[38] Hellman, *When is Discrimination Wrong* (n 37) 47–8.
[39] Williams "The Idea of Equality" (n 7). [40] Williams (n 7) 95. [41] Williams (n 7) 95.

change curable conditions that constrain self-development rather than treating their effects as defects of their victims.

Obviously, there is much more here than an appeal to equality per se. People's self-understanding is important to them as beings who are potentially conscious of their situation and able to reflect on it, and for that reason should be respected in everyone. Common human interests represented by freedom from hunger, disease, etc. speak to a range of values. Because these values are universal, basic needs should be equally met. Gregory Vlastos, another adherent to the principle of equal moral status, even more clearly translates the idea of equal moral value into the twin propositions that one person's well-being is as valuable as another's, and one person's freedom is as valuable as that of another.[42] The former appeals to various material conditions that make a life go well, and the latter appeals to the value of liberty or autonomy. *These* values are to be equally honored or respected in our dealings with all individuals. It is not equality itself that guides the resulting decisions and distributions.

In these invocations of the principle of equal moral status, equality is built into the principle, but only by way of stipulation about the features of personality bound up with the idea of moral status and therefore to be recognized and honored in all individuals, and in that sense, equally. These features implicate values beyond equality itself. Williams and Vlastos are typical within this tradition in identifying a few core values: that self-respect is important, so that people should be supported in a sense of their own worth, that autonomy—the ability to form and execute plans for the running of one's life—is important, and that adequate material conditions are necessary to both. Given that these values provide the content for the principle of equal moral status, there is more to be said about what makes them the right ones. I return to this issue below. The present point is that some values of this sort, that are to be fostered equally, must be present and are ultimately doing the work of deciding whether someone has been treated wrongly.

It seems to me that the common invocation of the value of human dignity in human rights instruments, including anti-discrimination laws, is best understood to be appealing to this tradition.[43] To use the language of dignity, the entitlement the principle expresses is an individual right to be treated with dignity, or to respect for dignity. But, of course, "dignity" is a vague concept, not instantly dictating outcomes in concrete cases. One might say the same thing for the idea of respect, or any of the other variants on the idea of moral status. The task of a theory of discrimination law, or any other area of human rights law, is to sketch the process whereby such abstract concepts are brought down to earth in a sufficiently fine-grained way to help decide cases. Here follows an effort to perform that alchemy with the concept of dignity. I focus on this variation on the theme of the principle of equal moral status not because it is the uniquely right lens through which to develop this tradition, but merely because it has a toe-hold, however precarious, in Canadian law.

[42] Vlastos, "Justice and Equality" (n 7) 128.

[43] Take, for example, the Ontario *Human Rights Code*, R.S.O. 1990 c. H. 19, whose preamble declares it to be "public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law".