

## EMBODIED DIGNITY

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### A INTRODUCTION

A curious development is afoot regarding Canada's constitutional equality guarantee. Section 15 of the Canadian Charter of Rights and Freedoms (the Charter) guarantees equality under the law and 'equal benefit of the law'.<sup>1</sup> This last phrase has been seen as securing substantive equality, that is, equivalence of outcome from government programmes. Substantive equality requires taking differences seriously and responding to them sensitively. It is concerned with the effects of government action on a claimant group. The contrasting conception is formal equality, which demands only that laws be facially neutral. Formal equality's target is *animus* or discriminatory intent on the part of the legislature towards a particular group. The judges of the Supreme Court of Canada have declared unanimously, in *Law v Canada (Minister of Employment and Immigration)*<sup>2</sup> and repeatedly since, that the essential interest underlying section 15's guarantee of substantive equality is human dignity.

Early on, the Supreme Court of Canada also recognized that distinctions are necessary for the operation of government. Thus, not all distinctions are discriminatory in the constitutional sense.<sup>3</sup> The court has held that only those distinctions that diminish human dignity will run afoul of section 15. Under the test in *Law*, once (a) a substantive distinction is found in a law or government action, and once (b) that distinction is identified as depending upon a prohibited ground, the inquiry turns to whether (c) a reasonable person in the circumstances of the claimant would find his essential human dignity to have been violated. The judges characterize this last inquiry as taking a subjective-objective standpoint. The court has identified several 'contextual factors' that influence a finding that section 15 has been infringed, which will be noted below. In its section 1, the Charter

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<sup>1</sup> Pt I of the Constitution Act 1982, sch B to the Canada Act 1982 (UK) c 11 s 15(1) reads: '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.'

<sup>2</sup> [1999] 1 SCR 497, (1999) 170 DLR (4th) 1.

<sup>3</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, (1989) 56 DLR (4th) 1.

provides that the rights it enunciates, section 15 included, are subject to those reasonable limits that are demonstrably justifiable in a free and democratic society.

To this point, Canada has been regarded in some circles as ‘at the vanguard of constitutional equality jurisprudence’.<sup>4</sup> South African judges, notably, have referred to Canadian jurisprudence in construing their equality guarantee. It would not be startling for British judges to do likewise as they grapple, within a common law tradition, with the Human Rights Act 1998 (UK).<sup>5</sup> Objectionable developments in Canadian equality jurisprudence are thus arguably a matter of more than domestic importance.

Everyone has assumed that substantive equality imposes a higher standard than formal equality. In other words, some measures that are facially neutral, and would thus pass a test of formal equality, may fail to deliver equal benefit under the substantive equality standard. For example, it is formally but not substantively equal to deny pregnancy leave to both men and women.<sup>6</sup> The recent development I mentioned at the outset is that the court has deployed the notion of human dignity (the value associated with substantive equality) to exonerate legislative distinctions that impose material disadvantage on a group characterized by a prohibited ground and that would fail even a more minimal, formal equality standard. In *Law*, a unanimous court defined human dignity as ‘concerned with *physical* and psychological integrity and empowerment’.<sup>7</sup> But in the cases I shall discuss, psychological integrity is effacing physical integrity and emerging as the sole defining component of essential human dignity. I contend that the Supreme Court of Canada is making human dignity a quality too abstract and intellectual, drifting away from an integrated notion that includes both mental and bodily integrity. The result is that the court will overlook physical disadvantage to the claimant group where it identifies a way in which the law benefits the group’s psychological dignity. My argument is that, contrary to the approach in a couple of recent cases, judges hearing an equality claim must take into account the bodily effects of the impugned measure. I do not argue that the mere presence of detrimental bodily effects entails a conclusion of discrimination, but the analysis cannot be complete where such effects are not considered and assessed in light of the context and all relevant factors.

My argument proceeds in three parts. Part B sets out more fully what I detect to be the emergent problem. I trace the absence of attention to physical integrity in two recent cases in which equality claims failed. *Canadian Foundation for Children, Youth and the Law v Canada (A-G)*<sup>8</sup> addressed an attack against the exemption in the

<sup>4</sup> E Grabham ‘*Law v Canada: New Directions for Equality Under the Canadian Charter?*’ (2002) 22 OJLS 641, 641.

<sup>5</sup> L. Weinrib ‘Constitutional Conceptions and Constitutional Comparativism’ in VC Jackson and M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (Praeger Westport 2002) 3, 23–29.

<sup>6</sup> *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219, (1989) 59 DLR (4th) 321.

<sup>7</sup> *Law* (n 2) [53] (emphasis added).

<sup>8</sup> [2004] 1 SCR 76, (2004) 234 DLR (4th) 257.

criminal law of assault for the discipline of children. *Gosselin v Quebec (A-G)*<sup>9</sup> treated a challenge to a workfare scheme that differentiated eligibility for benefits on the basis of age. Part C articulates my proposal that judgments of equality must take into account the bodily impact of governmental action on the claimants. It discusses ways of getting at that impact, particularly in the difficult case of children, and sets out some constraints upon my proposal. Part D then applies my proposal, reviewing the decided cases and conjecturing the impact it might have made. My conclusion reflects more broadly on the role of dignity in adjudicating equality claims.

## B DIGNITY ABSTRACTED

The Supreme Court of Canada called, in *Law*, for a contextual, particularistic assessment in each equality case using a subjective-objective approach to determine whether human dignity has been diminished. The court identified contextual factors that aid a judge in determining whether a particular distinction amounts to discrimination—that is, whether it offends human dignity. The factors are (a) historical disadvantage on the part of the claimant group, (b) an ameliorative purpose on the part of the government towards some other group, (c) the correspondence between the impugned measure and the actual circumstances and capacities of the complainant, and (d) the nature and scope of the affected interest. In its analysis, the Supreme Court typically devotes a paragraph or more to each factor, identifying salient facts and assessing their significance for the complainant's dignity. The problem preoccupying me here is the court's construction, despite its exercise of ostensibly particularistic and contextual judgment, of an abstract, disembodied sense of dignity.

My point of departure is *Canadian Foundation*. In that case, a children's advocacy group contested the constitutionality of section 43 of the Criminal Code,<sup>10</sup> which provides: 'Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.' A majority of the Supreme Court of Canada upheld the provision, rejecting the two major contentions. The first was that section 43 deprived children of security of the person contrary to principles of fundamental justice (section 7 of the Charter). The Crown had wisely conceded that the provision adversely affects children's security of the person, but the majority determined that in doing so section 43 satisfies 'fundamental justice'. Addressing the argument that the text was unconstitutionally vague, McLachlin CJC, for a majority of six, detected 'a number of implicit limitations' that, conjoined with

<sup>9</sup> [2002] 4 SCR 429, (2002) 221 DLR (4th) 257.

<sup>10</sup> RSC 1985 c C-46.

expert consensus, aided her in construing the text and demonstrating its specificity.<sup>11</sup> She departs in two respects from the text's most obvious meaning. First, she reads 'child' as excluding those under two and over twelve. Second, while the text addresses schoolteachers and parents together, the Chief Justice distinguishes sharply between them: she concludes that teachers may reasonably use force to remove a pupil from a classroom but may not inflict corporal punishment.<sup>12</sup> This interpretation has the retroactive effect of showing many cases to have been wrongly decided. The second claim was that section 43 discriminated on the basis of age (prohibited under section 15 of the Charter). The majority concluded that the reasonable correction exemption does not violate children's equality rights. Three judges dissented. Arbour J found a violation of section 7 of the Charter on the basis of vagueness, refusing to follow the majority in sweeping aside cases in which acquittals were granted for the infliction of serious force against children. Binnie and Deschamps JJ each found a breach of the equality right.

The majority reasons in *Canadian Foundation* are vulnerable to attack on several fronts, and indeed the dissenting judges highlighted a number of crucial points. They noted that in the interpretive exercise just described, the majority deviated from the canons of constitutional adjudication by narrowing the impugned provision in the process of assessing its constitutionality.<sup>13</sup> 'Reading down' legislation is more appropriately a remedy subsequent to recognition of an unjustifiable Charter breach. The dissenting judges also pointed out convincingly that the majority introduced into the section 15 analysis a number of considerations that, in keeping with the internal architecture of the Charter, belong more appropriately in the justification under section 1.<sup>14</sup> This matter is not purely aesthetic: at the section 15 stage, the burden is the claimant's; once a breach of section 15 is established, the discussion shifts to section 1 and the government, with its superior resources, takes up the burden of proof. Arbour J also observed that the majority exaggerated the risks of parental arrest if the statutory defence were to be struck down. As the court's leading criminal specialist, she opined that, contrary to the majority's alarmist suggestion, the general prohibition against assault would not sanction a parent for placing her unwilling child in a chair for a 'time-out'.<sup>15</sup> Despite the breadth of the potential critiques, my argument is relatively narrow.

In *Canadian Foundation*, the majority departed from its own practice developed in *Law* by giving the contextual factors short shrift. The majority in the later case concedes in a single short paragraph, as if to be done with it quickly, that three of the four factors are met. 'Children are a highly vulnerable group', writes the Chief

<sup>11</sup> *Canadian Foundation* (n 8) [29].

<sup>12</sup> *ibid* [40]. cf *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) [48] in which the South African judges were able to address the constitutionality of corporal punishment in schools while sidestepping the question of such correction in the home because the challenged legislation was the South African Schools Act 84 of 1996 s 10.

<sup>13</sup> *ibid* [81].

<sup>14</sup> *ibid* [74].

<sup>15</sup> *ibid* [205]–[207].

Justice laconically. ‘The nature of the interest affected—physical integrity—is profound.’<sup>16</sup> She proceeds to explain (here is the crux of her analysis) how the challenged exception in the criminal law of assault in fact *erves* children’s best interests and dignity by protecting the integrity of their family units. Of course, the only family units the integrity of which would be threatened are those in which corrective physical force is applied to an extent that surpasses the criminal law’s *de minimis* exception. The dissent of Deschamps J makes a telling point: in her view, the fact that the accused in such cases is the very person charged with the control and trusteeship of the child means that a deprivation of legal protection exacerbates children’s already vulnerable position.<sup>17</sup> In other words, those vulnerable persons assaulted by their caregivers are precisely those whom the law should seek to protect. The way that children are vulnerable surely includes a substantial physical component (both vulnerability to attack and inability to supply their own necessities). Yet, significantly, the physical dimension of children—their bodies—drops substantially away in the majority’s analysis. Normally, if the nature of the interest affected were profound, the judge would take very seriously the possibility that a finding of discrimination should follow. The judge would undertake to weigh the profound affected interest against the other factors. But here the majority does not, for instance, note that protection of physical integrity animates the criminal law’s general prohibition against assault, nor that it constitutes a basic principle of tort law. The court fails to follow its own prior and more adequately balanced vision of equality. I admit that it is difficult to prescribe, in abstract terms, a correct procedure for ‘weighing’ multiple factors or to specify a minimum length of discussion; factors can be unquantifiable or incomparable, and the metaphor of weight quickly runs out.<sup>18</sup> But it is surely inadequate to rhyme off three significant factors indicative of one outcome and then to declare, with little connecting process of reasoning and justification, that a single factor pointing the other way trumps.

The second case that indicates the Supreme Court of Canada’s effacement of physical integrity from dignity pertains to a workfare programme. In *Gosselin*, a welfare recipient contested a provincial law in Quebec that differentiated between two classes of benefit recipients on the basis of age. The law made two-thirds of the entitlement for persons under 30 contingent on participation in government training or work-experience programmes. By contrast, the scheme maintained unconditionally the full benefit for persons 30 and over. Although the trial record was spotty, some evidence indicated that it was impossible for a young person to be continuously enrolled in programmes and thus continuously eligible for the

<sup>16</sup> *ibid* [56]. By contrast, Sachs J provides a much richer discussion of the impact of corporal punishment on children’s dignity and emotional and physical integrity in *Christian Education* (n 12) [43]–[50].

<sup>17</sup> *ibid* [226].

<sup>18</sup> *eg* in administrative law, conceptual difficulties with the idea of weighing infect review of the substantive reasonableness of exercises of discretion. *Canadian Union of Public Employees v Ontario (Minister of Labour)* [2003] 1 SCR 539, (2003) 226 DLR (4<sup>th</sup>) 193 [25], [176]; D Herling ‘Weight in Discretionary Decision Making’ (1999) 19 OJLS 583.

standard benefit. It was uncontested that the lower benefit fell far short of the government's own declared survival threshold. The majority declared itself to be following the court's contextual approach, but failed to scrutinize the regime's physical impact upon the claimant. The striking point for the majority (again, it was McLachlin CJC writing) was the legislature's benign intention in encouraging young people to acquire training. The reasonable person in the claimant's circumstances would take this intent into account. It was significant for the Chief Justice that she detected no negative stereotypes underlying the law. On this basis, the majority found that the scheme did not infringe the claimant's dignity, but by affirming her potential, it enlarged it.<sup>19</sup> In my view, the mental comfort deriving from the absence of negative stereotyping cannot be assumed to compensate for physical discomfort. In the majority's avoidance of the inevitable physical sequelae of extreme poverty, I detect the same tendency as in *Canadian Foundation* to treat dignity as solely a psychological quality. The most the majority does is to express 'sympathy' towards the appellant, an emotion provoked rather abstractly by Ms Gosselin's 'economic circumstances',<sup>20</sup> not the probable inscription of those circumstances on her body. The majority does not consider the predictable consequences in terms, say, of malnutrition and illness of subsisting on \$170 per month. The record, as I noted, could have been fuller. It is significant, though, that the Chief Justice was prepared to take judicial notice of the increased difficulty persons 30 and over may encounter in finding employment,<sup>21</sup> but not of the effects of living in extreme poverty. The Chief Justice's economic discourse, one common in the welfare context, contrasts with the 'prosaic and potentially painful reality' of embodied beings' capacity to suffer.<sup>22</sup> A considerable body of literature deals with the questions raised by *Gosselin* regarding the justiciability of positive obligations, the institutional capacity of courts to intervene in legislative allocation of resources, and rights in their socio-economic context,<sup>23</sup> but to my knowledge no one has focused on the majority's occlusion of specifically physical detriment.

These judgments' neglect of the physical impact entailed by the impugned laws is significant in two respects, for their claimants and for future cases. First, gaps in the reasoning process under section 15 of the Charter may have altered the outcome. Without taking into account the challenged law's detrimental effect on the claimant's body, a majority of the court will now find that an equality claim founders on the basis that, contrary to the claim, the law actually *affirms* the claimant's human dignity. By virtue of the omission of physical effects, the majority's reasoning is incomplete. I suggest that the majority's incomplete and

<sup>19</sup> *Gosselin* (n 9) [42], [65].

<sup>20</sup> *ibid* [19].

<sup>21</sup> *ibid* [60].

<sup>22</sup> H Dean 'Introduction: Towards an Embodied Account of Welfare' in K Ellis and H Dean (eds) *Social Policy and the Body: Transitions in Corporeal Discourse* (Macmillan London 2000) xi, xxiv.

<sup>23</sup> eg A Gibbon 'Social Rights, Money Matters and Institutional Capacity' (2002–2003) 14 *National J of Constitutional L* 353; N Kim and T Piper '*Gosselin v. Quebec*: Back to the Poorhouse ...' (2003) 48 *McGill LJ* 749.

abstracted approach, if followed in future, has the potential to undermine substantive equality. After all, substantive equality has often concerned itself with material accommodations and the reconfigurations of institutional practices necessary to provide equal or equivalent benefit under the law to persons in response to the particularities of their bodies. This was the case, for example, where sign-language interpreters were held to be constitutionally mandated for deaf persons accessing medical services.<sup>24</sup> But the necessary assessments and determinations cannot be made if claimants' bodies dissolve away. Indeed, what seems to be happening in *Canadian Foundation* and *Gosselin* is that the majority finds that a beneficent intent vis-à-vis the claimant group renders it unnecessary to grapple with actual material disadvantage. Put another way, the majority is treating as disjunctive alternatives the elements of physical and psychological integrity that it earlier associated with human dignity: the presence of one is enough.

The caveat arises that at this point I do not presume the cases to have been wrongly decided. In both cases, the majority found that section 15 was not breached, that is, that there was no infringement of dignity. Recall, however, that under the Charter, it is possible for a government to defend a statutory limit on a right as justified by democratic considerations.<sup>25</sup> A preferable possibility in the cases might have been to find that section 15 was breached and then to give the government the opportunity to adduce evidence in defence of its law. A finding of a breach puts the government on the defensive and has important effects for public discourse. It requires the government to show that the beneficial effects of the law outweigh the discriminatory effects. It also prompts the government to articulate its understanding of a group's dignity interest. By contrast, a finding of no breach, particularly in light of the *Law* test's perspective of the reasonable person in the claimant's shoes, silences the claimants by declaring them unreasonable.<sup>26</sup> My quarrel for the moment is with a putatively 'contextual' approach to section 15 that, while assessing the impact on a claimant's dignity, does not meaningfully take note of real physical impact.

Second, the failure to consider physical impact significantly detracts from the judgments' ability convincingly to justify the outcome to the claimants. The majority's approach gives the sense that the judges do not grasp the claimants' reality. These judgments do not give the claimants a sense that they have been respectfully, attentively and actively heard. The judgments do not adequately constitute a social world in which there is space for the claimants.<sup>27</sup> Where equality

<sup>24</sup> *Eldridge v British Columbia (A-G)* [1997] 3 SCR 624, (1997) 151 DLR (4th) 577.

<sup>25</sup> For analysis of the effect of s 1 in structuring relations between legislatures and courts, see K Roach 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80 Canadian Bar Rev 481.

<sup>26</sup> M Moran 'The Reasonable Person and the Law of Equality' in SA Tierney (ed) *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice* (Ashgate Aldershot forthcoming).

<sup>27</sup> JB White *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press Chicago 1990) ch 8.

claimants are involved, the need for judicial rhetoric to constitute such a social world is particularly pressing: the minority groups that raise equality claims are precisely those who are not heard in democratic fora and whose weight in the market may be trivial. It is, rather, the procedure of adjudication that permits them to speak to society's institutions of power and to make their voices heard. It is therefore incumbent upon judges to perform their role in the adjudicative process by attentively listening to these parties.

Before proceeding, let me briefly situate my argument in relation to contemporary scholarship on constitutional equality. Some scholars have argued that reliance on dignity potentially occludes material disadvantage.<sup>28</sup> My focus on the importance of bodily integrity in human dignity develops one aspect of that broader argument. I bracket, for the moment, broader debates over the unsuitability of dignity as the central concept for interpreting an antidiscrimination provision.<sup>29</sup> Finally, while some commentators will likely contend, on the basis of recent judgments, that the Supreme Court of Canada is retreating generally in its willingness to vindicate equality claims,<sup>30</sup> I do not pursue that hypothesis but adhere closely to the disappearance of the body.

### C RECOVERING THE BODY

My enterprise of restoring the bodily dimensions to Canadian equality analysis begins with an essay by Jennifer Nedelsky.<sup>31</sup> This essay inscribes itself in a line of feminist theory calling for a rethinking of the role of the body, with all its difference and particularity. Nedelsky connects conundrums arising in the work of feminists theorizing difference to the work of neurologist Antonio Damasio. In contrast to prevailing jurisprudential conceptions of judgment as requiring objectivity and detachment, he explores how both the body and emotion are essential to reason and judgment.<sup>32</sup> Nedelsky argues that judges should seek to develop

<sup>28</sup> eg Grabham (n 4); C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African J on Human Rights* 248.

<sup>29</sup> eg CD Bredt and AM Dodek 'Breaking the Law's Grip on Equality: A New Paradigm for Section 15' (2003) 20 *Supreme Court L Rev* (2d) 33; A Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 *South African J on Human Rights* 221.

<sup>30</sup> eg *Nova Scotia (A-G) v Walsh* [2002] 4 SCR 325, (2002) 221 DLR (4th) 1; *Newfoundland (Treasury Board) v N.A.P.E.* [2004] 3 SCR 381, (2004) 244 DLR (4th) 294; *Auton (Guardian ad litem of) v British Columbia (A-G)* [2004] 3 SCR 657, (2004) 245 DLR (4th) 1.

<sup>31</sup> J Nedelsky 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill LJ* 91.

<sup>32</sup> AR Damasio *Descartes' Error: Emotion, Reason, and the Human Brain* (Putnam New York 1994). For work by Damasio subsequent to Nedelsky's essay, see AR Damasio *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* (Harcourt New York 1999); AR Damasio *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* (Harcourt New York 2003). See also MC Nussbaum *Upheavals of Thought: The Intelligence of Emotions* (CUP Cambridge 2001) 37–49; D Evans and P Cruse (eds) *Emotion, Evolution, and Rationality* (OUP Oxford 2004).

their physical and emotional responses, incorporating them into their judgments. In the part of her essay important for my purposes, Nedelsky reflects on formal equality for the embodied object of judgment. She contends that judging equality claims requires two steps. The first consists of a purely formal conception of equality or formal claim of equal moral worth, one not grounded in any empirical claims.<sup>33</sup> (I should clarify that this Kantian formal claim, one to which every person is automatically entitled, is unrelated to the conception of formal equality as identical treatment.) This non-empirical claim addresses the worry that a measure of worth based on empirical proof of cognitive ability could unacceptably exclude children or developmentally-challenged adults. A similar sense that the first step must be a rule of equality, rather than reasoning directly from the body, appears in Drucilla Cornell's articulation of the right to abortion as prescribed by an equal right to minimum conditions of individuation. In short, Cornell contends that providing women the same conditions of individuation or self-determination that men enjoy entails the right to abortion. Cornell warns that without such a formal right to equality, an emphasis on the body can reduce a woman to the maternal function.<sup>34</sup> Second, prescribes Nedelsky, the judge turns from the formal axiom to the concrete, 'to the context of our embodied selves with all their overwhelming multiplicity'.<sup>35</sup> This approach seems compatible with the Canadian setting, where a universal rule of equality is realized through a contextual analysis. Under *Law*, Nedelsky's concern for the body can perhaps be realized through careful examination of three of the contextual factors: historical disadvantage, correspondence between the contested measure and the claimant's actual circumstances and capacities, and the nature of the interest affected.

I want to adopt Nedelsky's prescription for a formal principle of equal moral worth coupled with an examination of the embodied context. While this prescription is intuitively appealing, it is somewhat vague as to precisely how, as judging praxis, 'one tries to work out the concrete meaning of equality in any given context'.<sup>36</sup> Nedelsky's essay advances the conviction that judging cannot focus solely on the mind. Rather, good judgment takes the body into account, both in terms of the judge's affective responses and the concrete particularities of the embodied object of judgment. For Nedelsky, features of the bodies of those being judged—their sex, age and mental and physical abilities—integrally affect their identities and ways of viewing the world.<sup>37</sup>

What I want to add in fleshing out Nedelsky's prescription is one specific and, I suggest, crucial step. The judging subject must charge herself to think through, articulate and, where providing reasons, write out in some detail, the impact—

<sup>33</sup> Nedelsky (n 31) 115.

<sup>34</sup> D Cornell *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge New York 1995) 64–68.

<sup>35</sup> Nedelsky (n 31) 115 (footnote omitted).

<sup>36</sup> *ibid* 116.

<sup>37</sup> *ibid* 103.

past and future—of the impugned law or conduct on the claimant’s body. Bodily effects are epistemically rich, the body being a ‘crucial source of knowledge’.<sup>38</sup> In *Canadian Foundation*, for example, how does the child’s body experience the governmental action at issue? In other words, how does such conduct figure on the body? Such an inquiry can, as suggested a moment ago, find a place within three of the contextual factors in *Law*: historical disadvantage, the relation between the law and the claimant’s actual circumstances and capacities, and the nature of the interest. The inquiry is most clearly already implicit within the examination in Canadian constitutional equality cases as to how ‘severe and localized’ the consequences of the impugned action are upon the affected group.<sup>39</sup> The result of this inquiry should then link back to the principle that dignity demands bodily integrity as a necessary (though insufficient) component. The challenge for the judge is how to reconcile the bodily effects with other relevant factors. A physical impact inconsistent with bodily integrity should signal strongly to the judge the possibility of discrimination. Where significant bodily impact is present, the analysis must take it into account and justify it in the larger picture in order to conclude that dignity is not abridged. It is not that a particular conclusion will follow as a matter of deduction. But if judges emphasize mental states of psychological integrity to the detriment of bodily effects, dignity as a regulative concept for equality will fail to live up to its promise. Until dignity is reconceived as corporeally figured, the risk remains acute that those least able to speak for themselves will realize the equality guarantee’s promise in only a truncated way. Bodily effect warrants judges’ specific attention. How, though, can judges uncover and analyze this bodily impact so as to render dignity corporeal?

I do not wish to imply that the body’s epistemological status is unproblematic.<sup>40</sup> Judging (and other) adults do not have unmediated access to the physical experiences of children and the way government action is corporeally figured upon them or other disadvantaged persons.<sup>41</sup> It is a problem, as in medicine, that young children are unable satisfactorily to articulate feelings about their bodies. Moreover, children’s experiences are not transparent to judges, as suggested by Iris Young’s work on difference. She argues that there are substantial constraints on the ability of one person to transcend his particular characteristics and social location so as to imagine the situation of another. Even when people share significant characteristics such as race and class, age is an impediment to fully understanding the

<sup>38</sup> J. Nedelsky ‘Meditations on Embodied Autonomy’ (1995) 2 *Graven Images* 159, 162.

<sup>39</sup> *Law* (n 2) [74].

<sup>40</sup> K. Bumiller ‘Body Images: How Does the Body Matter in the Legal Imagination?’ in B.G. Garth and A. Sarat (eds) *How Does Law Matter?* (Northwestern University Press Evanston 1998) 145, 145; Nedelsky (n 38) 165; J. Butler *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge New York 1993); V. Vasterling ‘Butler’s Sophisticated Constructivism: A Critical Assessment’ (1999) 14(3) *Hypatia* 17.

<sup>41</sup> L. Berlant ‘The Subject of True Feeling: Pain, Privacy, and Politics’ in W. Brown and J. Halley (eds) *Left Legalism/Left Critique* (Duke University Press Durham 2002) 105, 122–23.

other.<sup>42</sup> Moreover, it is problematic to suggest that it is possible accurately to imagine and grasp a child's perspective regarding his body on the rationale that every judging adult was once himself a child. The weakness in this argument is that the childhood memories of adults who judge are mediated through their experience of adulthood, altering their views. Many judging adults are likelier to view childhood through the lens of their much more recent experience as parents. Caution is thus warranted in assessing the view that '[m]ost adults do remember what it was like to be a child and, therefore, they could apply a reasonable child standard in assessing a s. 15 claim brought by a young person.'<sup>43</sup> Young's arguments underscore the difficulties in transparently apprehending the views of another regarding the impact of state action upon his body. They also highlight difficulties with the point of view taken by the Chief Justice for the majority in *Canadian Foundation*. Confronting the problem of locating a workable perspective, the Chief Justice concluded that '[t]he best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs.'<sup>44</sup> It is difficult for such a reasonable person to apprehend the child's views.

Nonetheless, it may be possible to structure listening practices that would open adults' ears to hearing the voices of children regarding their own bodily effects in these circumstances. A little theoretical background is in order. Seyla Benhabib has developed a communicative ethics that recognizes difference and particularity. More specifically, she identifies moral respect with a reversibility and symmetry of perspectives.<sup>45</sup> This idea of moral respect requires individuals mentally to reverse positions with others. Critical to her project is the encouragement and cultivation of a public ethos of democratic participation. In the civic practices and associations of a society, she argues, individuals face each other as public agents in a political space. Differences can be bridged by cultivating qualities of civic friendship and solidarity.<sup>46</sup> It is immediately apparent, however, that children (and, for that matter, most persons, such as Louise Gosselin, living in extreme poverty) are unable to function fully within the organs of civil society so as to make others aware of their perspectives. Iris Young proposes a somewhat different ideal, one more promising in this setting. She advances an ideal of *asymmetrical* reciprocity.<sup>47</sup> She submits that without actually reversing perspectives or fully identifying with

<sup>42</sup> eg IM Young 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought' in R Beiner and J Nedelsky (eds) *Judgment, Imagination, and Politics: Themes from Kant and Arendt* (Rowman and Littlefield Lanham 2001) 205.

<sup>43</sup> S Anand 'Reasonable Chastisement: A Critique of the Supreme Court's Decision in the "Spanking" Case' (2004) 41 Alberta L Rev 871, 877.

<sup>44</sup> *Canadian Foundation* (n 8) [53].

<sup>45</sup> S Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Routledge New York 1992) 30–31.

<sup>46</sup> *ibid* 140; S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press Princeton 2002) 133–46.

<sup>47</sup> Young (n 42) 208.

each other, people can understand each other across their differences through dialogue. She argues that dialogue can be enhanced by a stance of wonder towards the other and an emphasis on questions as signals of moral respect. Drawing on Habermas's work on communicability, Young stakes her hopes on real dialogue, presuming communicability despite cultural and linguistic differences and the cognitive distinctness that goes inextricably with them. Moreover, the asymmetry of her model takes into account power differentials and other inequalities.

My suggestion is that the spirit of Young's asymmetrical relating could be adopted to conceive of procedures that would position a child as intermediary between a younger child and the listening adult. In the interests of plurality, the conversation could include other children the same ages with different views. The adult would never 'understand' the child in the sense that the child understands herself, but careful listening and drawing of analogies might disclose at least some dimension of the child's own experience and her expression of it. Such a procedure is admittedly demanding and marks a departure from contemporary judicial and institutional practices, and it may be necessary to settle for something decidedly less optimal. But where the difficulties of judging the actual or even imaginary views of children are so substantial, it becomes necessary to resort to imperfect methods. The essential point is to provide bodily content to the notion of dignity as applied to children and others whose voices are not otherwise heard.<sup>48</sup>

Even where such direct means of listening to children are not practicable, there must be ways for judges to place emphasis on the children's (and other claimants') corporeal experiences. The effects of governmental action upon the body may be (imperfectly) accessible when a person's own subjective assessment of human dignity is either incommunicable or non-existent. Often there will be legally admissible social science evidence as to the impact of the impugned measure upon the bodies of the claimant group. Such evidence is not transparent and cannot be infallibly decoded. There is a risk of paternalism and of error in attempting to interpret it. But the risk of assessing the dignity of others without attention to bodily effect is borne out in the cases under discussion; bodily impact is crucial to a complete sense of the impact of government action on a claimant's dignity. In any case, the psychological impact of government action is not transparent either, an observation underlying much of the criticism more generally of the emphasis on

<sup>48</sup> I am grateful for Jim Tully's help on this point. Carol Gilligan's work on listening practices may gesture helpfully in the right direction: C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press Cambridge, Massachusetts 1982). On the practical means of creating structures to facilitate listening to children, see GB Melton 'Parents and Children: Legal Reforms to Facilitate Children's Participation' in AB Smith and others (eds) *Advocating for Children: International Perspectives on Children's Rights* (University of Otago Press Dunedin 2000) 141. Note that in *Christian Education* (n 12) [53], Sachs J regrets the absence of a curator representing the interests of the children. He distinguishes between speaking on behalf of children and speaking in their name: 'A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.'

dignity. A focus on evidence of bodily impact may assist a judge charged with the theoretically and practically problematic task of assessing feelings of indignity, particularly a child's. The step I am proposing will open up space in the adjudicative process to acknowledge the judges' affective response to physical consequences.

The point is not of course, as I hinted earlier, that severe bodily impact will automatically dictate an infringement of dignity. The contextual, comprehensive assessment of dignity will necessarily include other dimensions. My proposed inquiry into bodily effect should not replace other (also imperfect) attempts to get at the non-physical dimensions of the dignity of the person being judged. Consequently, even in the presence of bodily impact, other factors may prevail in appropriately characterizing the action as consistent with dignity. That is, there may be cases where, ultimately, cultural, religious or other considerations outweigh physical effects. Consider a challenge under section 15 of the Charter to the criminal law which protects female infants from religiously motivated circumcision but not male infants. Adjudication of such a challenge would need to consider the impact of the law upon the body, but also the value of cultural and religious membership in which the contested practice is embedded. A further complication arises once one acknowledges that the Jewish male claimant would presumably make different assessments as to the impact of circumcision upon his dignity as an infant (physical pain) and later as an adult (appreciation of community membership). Does the *Law* test's reasonable person in the claimant's shoes permit assessment of perspectives that alter through time? Such prospective evaluation depends on one's view of what kind of adult a particular child will or might become. It will acknowledge only with difficulty that the self develops in and through time and in relation to a community, and as a consequence of decisions taken for that child.<sup>49</sup> Clearly a full life intertwines bodily and other issues, so I do not suggest that pain and dignity are incompatible *tout court*. For example, the experiences of many persons with disabilities testify to the coexistence of atrocious pain with human dignity, as does the discipline of dance. But recall that the focus here is pain causally linked to governmental action and dignity as a regulative concept for such action. (To the objection that governments cause neither the intrafamilial corporal punishment at issue in *Canadian Foundation* nor the economic privation in *Gosselin*, the reply is that equality analysis focuses upon the particular impugned provision. Without the disciplinary exception in section 43 of the Criminal Code, the general criminal law would prohibit all corporal punishment. Absent the impugned clause making a benefit for welfare recipients under 30 conditional, those recipients would have been entitled unconditionally to the full benefit.)

<sup>49</sup> DW Archard *Children, Family and the State* (Ashgate Aldershot 2003) 50–53. In *Christian Education* (n 12) [15], Sachs J notes that it is to be expected that a child would have 'ambivalent emotions' when a religious tradition in which he is a believer has customs which impose what outsiders would regard as violence.

A further point calls for clarification. My proposed focus on corporeal effects is largely a particularized, contextual exercise. It does, however, presuppose a privileged position on the part of the claimants in relation to consequential universal standards. The vast majority of judges would respond differently to evidence of human rather than to animal suffering, presumably on the basis that animals are not a priori entitled to the same moral consideration as humans. Any contemporary conception of the 'human' is culturally produced, parochial, and contingent, subject to ethical and critical contestation and rethinking.<sup>50</sup> It is important to acknowledge that the extent to which attention to bodily impact could alter judgment depends upon prior demarcations of privilege. I turn now to speculate on how this method might apply.

#### D APPLYING EMBODIED DIGNITY

In *Canadian Foundation*, a constraint on the majority judges requiring them specifically to examine and articulate the impact of impugned governmental action on the bodies of the children would have altered the content and perhaps outcome of the majority's reasons.

Recall that the majority construed section 43 of the Criminal Code differently from past practice and thus overruled many cases as wrongly decided. By eliminating upfront as wrongly decided the most egregious cases, the majority spared from analysis many of the cases that model the correction exemption in action. The Supreme Court has previously considered whether it can uphold as constitutionally valid a law that, though unobjectionable on its face, has proven in administrative practice to inflict harm on a protected group. It held, regrettably in my view, that it can.<sup>51</sup> But surely there is a distinction between administrative officials' implementation of a law and judges' interpretation of one. While legal texts may have no intrinsic meaning, the meaning acquired over time through successive judicial interpretations should not be lightly set aside. There are thus two objections. The first operates at a general level and has to do with the understanding of the respective responsibilities of the courts and of the legislature. Where a provision has proven in practice, as applied by judges, to infringe the dignity of the claimants, the claimants should be entitled to a finding that their equality right has been infringed and to a constitutional remedy. The most obvious remedy would have been to declare the law invalid. The second objection touches much more closely my argument about dignity. In this particular case, the effect of overruling

<sup>50</sup> J Butler *Undoing Gender* (Routledge New York 2004) Introduction, ch 1; AI Davidson *The Emergence of Sexuality: Historical Epistemology and the Foundation of Concepts* (Harvard University Press Cambridge, Massachusetts 2001) ch 4, 93, 124; J Butler *Excitable Speech: A Politics of the Performative* (Routledge New York 1997) 89–92.

<sup>51</sup> Cf the majority and dissent in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120, (2000) 193 DLR (4th) 193.

the most egregious old cases was to preempt an examination within the equality analysis of the worst cases imposing bodily harm. This exclusion is especially peculiar since the court's own *Law* analysis calls for examination of a law's *effect*, which is surely how it has operated in the past. The cases noted by Arbour J adduce clear evidence of section 43's past bodily inscriptions, including swollen lips, red marks and welts, and enduring bruises. Had these cases been retained, they would have provided significant bodily evidence for the judges to interpret. Indeed, had the full gamut of decided cases been considered collectively, the court might have reached a different conclusion as to the law's effect on children's dignity. By sweeping aside these cases as wrongly decided, the court clears the field for its abstract exercise of judicially pronouncing on how the reasonable person ought to feel.

The step I propose would have precluded the Chief Justice from conceding in four short sentences that three of the *Law* analysis's four contextual factors were met. My proposal would have prodded the majority to acknowledge that section 43 has functioned as a defence in cases where children have sustained significant physical harm. Such acknowledgement would have complicated the majority's project of demonstrating that section 43, viewed contextually, actually secures children's interests. McLachlin CJC writes that children need a 'stable and secure family and school setting', that section 43 is 'sensitive to children's need for a safe environment', and that introducing the criminal law into children's families and educational environments in circumstances of minimal force would harm them more than help them.<sup>52</sup> Note the rhetorical strategy in speaking of 'introducing' the criminal law into children's families: it is more accurate to state that the contested measure, section 43, effectively withdraws the criminal law by carving out an exception. The criminal law of assault is otherwise of general application. Although they are never developed satisfactorily in the judgment, there are intriguing hints here at a relational understanding of the constitutive value of relationships and of the necessary role that protection of a child's relationships with parents and caregivers must play in enhancing a child's dignity.<sup>53</sup> But because little attention is paid to the physical effects of the reasonable correction exception, the majority fails to engage deeply enough with the particularity of children. It is also the case that the impact of relationships on the quality of life is especially notable for persons with disabilities;<sup>54</sup> but society, doubtless including the majority judges, would swiftly reject a zone free from the criminal law to promote the flourishing of relationships between caregivers and adult disabled persons. What, then, is the basis for the distinction drawn between children and adults?

<sup>52</sup> *Canadian Foundation* (n 8) [58]–[59].

<sup>53</sup> J Nedelsky 'Reconceiving Rights as Relationship' (1993) 1 *Rev of Constitutional Studies* 1; M Minow and ML Shanley 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11(1) *Hypatia* 4.

<sup>54</sup> M Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press Ithaca 1990) 347 n 121.

Why is it acceptable to violate the physical integrity of one class in the interests of promoting relationships, but not in the case of the other class? The answer cannot be merely that children's relationships and home environments matter to them. An assessment of the bodily impact of the law would have prompted the majority to undertake this analysis more fully. If the majority could not justify such a distinction—could not have justified the physical impact in light of other interests—it might have reached another outcome, thus indicating the potential substantive bite to my proposal. At the very least, it would have provided a more compelling, fully reasoned judgment, one more faithful to the standard of substantive equality. My suspicion, however—to return to an evaluative question I bracketed earlier—is that, to the extent that there are persuasive reasons for upholding section 43 of the Criminal Code, they belong as justifications, under section 1 of the Charter, of the reasonableness of a limit on children's equality rights. Avoidance of the crudeness of the criminal law as a regulatory instrument and of the costs of intruding into homes are (arguably) benefits of section 43 that should have come into the cost-benefit exercise of justification. They are not, in my view, reasons why permitting the assault of children in limited circumstances dignifies them, the question at the section 15 stage. To this extent, then, I submit that the majority's conclusion as to section 15 of the Charter is incorrect. Developed fully, in a contextually sensitive way, alert to children's bodies, the interest of bodily integrity would have emerged as the most important factor and, in this case, would have yielded a conclusion of a Charter breach.

Furthermore, the extent to which the judges did or did not pose themselves my proposed query aids in explaining the split in the welfare case discussed above, *Gosselin*. Recall that the Chief Justice, for a bare majority, upheld the scheme as not infringing the appellant's human dignity, and indeed, as affirming it. The abstracted economic discourse deployed by the majority in *Gosselin* signals a conception of the claimant as a rational economic actor functioning in the marketplace, rather than as a three-dimensional person with an under-nourished body.<sup>55</sup> The approach I propose is already reflected in the dissenting reasons, which are notable for their attention to the physical effects of the one-third benefit entitlement on the appellant and her peers. L'Heureux-Dubé J's references are the sharpest: 'In 1987, the monthly cost of proper nourishment was \$152. The guaranteed monthly payment to young adults was \$170. I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.'<sup>56</sup> She proceeds to render more concrete the *Law* test's perspective of the reasonable person in the circumstances of the claimant: 'The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet.'<sup>57</sup>

<sup>55</sup> White (n 27) 64–65.

<sup>56</sup> *Gosselin* (n 9) [130].

<sup>57</sup> *ibid* [132].

L'Heureux-Dubé J's situated reasonable person is very much an embodied agent, not an abstract locus of psychological integrity and a purely cerebral sense of dignity. Bastarache J, in his dissent, is less explicit but equally sensitive to the scheme's effects on the embodied subject, writing that 'what made the appellant's experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one.'<sup>58</sup> Perhaps the members of the majority would have permitted themselves a different reaction had their judging method prompted them to acknowledge explicitly the regime's effects upon the body of the appellant, in its difference and vulnerable particularity. It is my view that serious attention to the corporeal consequences of cutting the welfare entitlement yields the conclusion that the contested program did infringe the complainant's human dignity and thus violated section 15 of the Charter. Contrary to the majority's assertion, a reasonable welfare claimant in extreme poverty would likely not appreciate that the program in question worked 'towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment'.<sup>59</sup>

Is the consideration of bodily effects that I propose a substantive or a procedural change to the recent trend in the Canadian court's equality jurisprudence? This sort of question arises since I have suggested that both examples were wrongly decided. Indeed, it arises whenever steps are advanced to guide or constrain the judging process. It is triggered, for example, by Hannah Arendt's argument that, in exercising political judgment, one must take into account the perspectives of those for whom a judgment will claim validity, imagining oneself in their circumstances and imagining the judgments they would make.<sup>60</sup> The same question is raised by the stipulation in the Supreme Court's *Law* test that the judge assume the perspective of a reasonable person in the complainant's shoes. On one level, characterization as a substantive constraint seems appropriate, since the Supreme Court of Canada, in its own leading case on equality, defined dignity as concerned with physical integrity. But on another level, my caveat that the presence of bodily impact of a challenged law is not per se determinative implies a merely procedural change, one which, like procedural fairness in administrative law (say the right to a hearing), may or may not alter the outcome. In any case, on a procedural level, if the court paid more attention to physical effects, counsel would doubtless respond by adducing more relevant evidence at trial.

It is here that a sceptical mind may object that in both cases the majority judges were fully conscious of the negative corporeal impact of the laws in question, but

<sup>58</sup> *ibid* [256].

<sup>59</sup> *ibid* [65].

<sup>60</sup> H Arendt *Between Past and Future: Eight Exercises in Political Thought* (enlarged edn Viking New York 1968) 197; J Nedelsky 'Judgment, Diversity, and Relational Autonomy' in R Beiner and J Nedelsky (eds) *Judgment, Imagination, and Politics: Themes from Kant and Arendt* (Rowman and Littlefield Lanham 2001) 103, 106–9.

chose, as a strategic matter, to downplay or overlook that impact. Perhaps the majority judges had decided, prior to undertaking the *Law* analysis, that for one policy reason or another—reluctance to interfere with regulation of family life (*Canadian Foundation*) or resource allocation (*Gosselin*)—it was undesirable to find a breach of equality. The answer to these suppositions has been gestured at in the administrative law setting respecting the duty to give reasons. In that context, a persuasive argument has been made that the bright line between substance and process blurs because a duty to provide reasons forecloses certain outcomes that cannot reasonably be articulated; the field of possible outcomes contracts.<sup>61</sup> In the constitutional equality setting, it is probable that the bodily impact of some government action is sufficiently severe that, identified and discussed at some length, it would be difficult, as a practical matter, to square it with the governing idea of physical and psychological integrity as dignity. This is arguably the case in *Canadian Foundation* and *Gosselin*. A requirement that, in equality cases, judges render explicit their understanding of the relationship between specific physical impact and the more abstract ideal of dignity would preclude a pro-forma exercise of quickly noting the importance of physical integrity but drawing nothing normative from it. The result would be either to generate more satisfying justifications for a finding of no breach or to effect a substantive change by eliminating certain outcomes. Even if the court had policy reasons in mind for finding that equality was not infringed, it might well have found itself unable to justify deciding on those reasons had it held itself to a notion of dignity which included physical integrity.

Is my approach emphasizing bodily effects germane to cases pertaining to life, liberty and security of the person under section 7 of the Charter? The question is a natural one, since in *Canadian Foundation* and *Gosselin*, claims were formulated under both section 15 and section 7. While space precludes any sustained examination here, the explicit inclusion of ‘security of the person’ in section 7 appears to have succeeded in ensuring that bodily impact is considered in its interpretation.<sup>62</sup> By contrast, it is protection of psychological integrity that has had to be added by judicial interpretation.<sup>63</sup> The Supreme Court has also addressed the relationship of dignity to section 7. In a judgment denying that lengthy investigative proceedings by a human rights commission violated the defendant’s security of the person (psychological integrity), the majority clarified that dignity is better understood ‘not as an autonomous Charter right, but rather, as an underlying value’.<sup>64</sup> The

<sup>61</sup> D Dyzenhaus and E Fox-Decent ‘Rethinking the Process/Substance Distinction: *Baker v Canada*’ (2001) 51 U of Toronto LJ 193, 236–38; DJ Galligan ‘Judicial Review and the Textbook Writers’ (1982) 2 OJLS 257, 274.

<sup>62</sup> eg *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, (2002) 208 DLR (4th) 1 [51], citing E Scarry *The Body in Pain: The Making and Unmaking of the World* (OUP Oxford 1985) in a discussion of torture.

<sup>63</sup> *R v Morgentaler* [1988] 1 SCR 30, 173, (1988) 44 DLR (4th) 385; *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46, (1999) 177 DLR (4th) 124 [59]–[60].

<sup>64</sup> *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, (2000) 190 DLR (4th) 513 [78].

fear was that recognizing dignity too robustly in a section 7 case might overshoot the intended purpose of the right. In other words, I think the majority sensed that dignity might be abridged in cases where a complainant had not been deprived of life, liberty or security of the person. The section 15 cases I have discussed here indicate, however, that the restriction of dignity under section 7 may have another consequence: it may prevent ‘dignity’ from curing cases where physical security of the person is diminished but the court perceives that, psychologically, dignity remains intact. Dignity, it seems, may amplify a right in some circumstances, and narrow one in others. Further research remains to be done in the section 7 context on the relationship between bodily and psychological integrity.

## E CONCLUSION

Before closing I wish to address a strategic objection to my argument, namely, that it is undesirable, for political reasons linked to the pursuit of justice, to emphasize the body. While feminists have frequently called for an embodied politics and justice, countermanding cautions emerge. Lauren Berlant, for example, warns against the pernicious tendency to regard the reparation of pain or its absence as indicative of happiness or justice.<sup>65</sup> In the constitutional equality setting, I acknowledge Berlant’s cautions. Recent Canadian practice is, however, so distant from any overprivileging of the body that they have little purchase. It has been appropriate and progressive to sanction, under section 15 of the Charter, violations of formal equality that have exclusionary symbolic and communicative effects. For example, the Supreme Court held recently that it was discriminatory on the basis of sex for vital statistics legislation to permit, as a general rule, a child’s mother to exclude a child’s willing father from the birth registration forms.<sup>66</sup> But sensitivity to the detrimental non-physical messages communicated by discriminatory laws should not permit the body as a site of discrimination to vanish. The contextual approach to judging equality now takes into account the views of other members of society and, at times, of the legislature; that context must surely include the claimant’s body. Otherwise, Canadian equality jurisprudence focuses on psychological dignity at the expense of attention to physical effects—perhaps a reflection of a putatively ‘infallible vision of a neutral and rational subject’.<sup>67</sup> The solution is not a determinant rule that the presence of physical detriment flowing from government action entails a finding of discrimination, but rather, a commitment to balancing bodily and other interests. Put another way, the idea must be that ‘dignity’ is not

<sup>65</sup> Berlant (n 41) 127–28.

<sup>66</sup> *Trociuk v British Columbia (A-G)* [2003] 1 SCR 835, (2003) 226 DLR (4th) 1. See also *Halpern v Canada (A-G)* (2003) 65 OR (3d) 161, (2003) 225 DLR (4th) 529 (CA).

<sup>67</sup> Bumiller (n 40) 152.

a purely mental capacity or attribute that judges assume can be enjoyed irrespective of the effect of government action upon individuals' bodies.<sup>68</sup>

In Canadian equality jurisprudence, there is a discernible retreat from judicial efforts to secure redistribution in favour of recognition, to borrow a dichotomy developed by Nancy Fraser.<sup>69</sup> Such a retreat may be cast as deference, consistent with the separation of powers, to the expertise of the legislative and executive branches at allocating resources. The court recently deferred, for example, to a governmental determination that a fiscal crisis had justified denying female public-service employees the compensation owed to them under its own pay equity scheme.<sup>70</sup> (The court accepted the government's justification for limiting the equality right under section 1 of the Charter.) Sustained attention to the corporeal effects of contested laws can potentially preserve, in a modest way, a toehold on the terrain of redistribution. Indeed, while I have focused on bodily impact, there are connections worth exploring further between such impact and redistribution, effects-based discrimination, and substantive equality generally. Put another way, the majority of the Supreme Court's diminishing commitment to protecting physical integrity may well be emblematic of a weakening nerve in vindicating these related concepts. Conversely, there are likely links between the majority's emphasis on psychological integrity and increasing attention to recognition, a hunt for discriminatory *animus* (such as stereotyping), and formal equality. In this respect, my argument, though narrow, has broader implications.

It is late to pose the question, but in *Canadian Foundation*, is the impact of section 43 of the Criminal Code on children's essential human dignity even the correct inquiry, however one goes about answering it? The Supreme Court of Canada's *Law* analysis applies somewhat clumsily in the circumstances of *Canadian Foundation*. For some readers, infringement of dignity likely fails to capture what is wrong with assaulting babies or with carving out an exception in the criminal law to shield such practice.<sup>71</sup> Certainly section 43's opponents are more likely to frame their argument in terms of safety, security or other basic goods than infringement of dignity; they probably regard the potential physical and psychological harm to children as far outweighing any potential insult.<sup>72</sup> 'Safety' and 'security of the

<sup>68</sup> Someone suggested to me that my proposal preserves a Cartesian mind/body divide. On the contrary, the attempt to reinvigorate the Supreme Court's definition of human dignity as concerning bodily and psychological integrity advances an integrated conception of body and mind. Indeed, it is the approach taken by the majority in the cases discussed here that most instates the dualist position by holding that psychological integrity is enhanced without reference to one's physical state.

<sup>69</sup> N Fraser *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge New York 1997) ch 1.

<sup>70</sup> *Newfoundland (Treasury Board)* (n 30). See also J Fudge 'The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts' in T Campbell KD Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (OUP Oxford 2001) 335, 340–50.

<sup>71</sup> Of course, s 43 has now been interpreted so as to exclude hitting children under two as unreasonable. My point is that doctrinal constraints dictated that the litigation proceed within the dignity framework.

<sup>72</sup> eg SR Moreau 'The Wrongs of Unequal Treatment' (2004) 54 U of Toronto LJ 291, 307–12; DG Réaume 'Discrimination and Dignity' (2003) 63 Louisiana L Rev 645, 688–94.

person' are related to dignity but nonetheless distinct. Accordingly, dignity should not be the sole concept under which to judge actions upon the body and perhaps equality claims more generally.

The hunch that subjective dignity is the wrong touchstone in *Canadian Foundation* locates itself within a growing body of scholarship critical more broadly of *Law's* consecration of dignity as equality's signal preoccupation. Perhaps part of the trouble is that section 15 of the Charter, and presumably the equality guarantees in other similar instruments, seek to remedy more than one type of wrong. Some wrongs, communicative and symbolic, are appropriately regarded as insulting and a diminution of dignity. More material deprivations may warrant qualification otherwise.<sup>73</sup> It is ironic that reliance upon dignity in equality adjudication can penalize the claimant who maintains self-respect in the face of governmentally imposed material disadvantage; the court's approach can provide an incentive for the claimant to maximize his sense of debasement or his contention that a sense of debasement is reasonable.<sup>74</sup> Perhaps dignity, as the touchstone for substantive equality, is not thoroughly doomed from the outset. The cases I have discussed at length intimate, however, that dignity's venerable pedigree in philosophical and political discourses—as an attribute of subjects marked by universality, objectivity, neutrality and uniformity—exerts a weighty influence.<sup>75</sup> Yet the will to configure dignity towards an ideal of substantive equality, one rooted in particular differences, is manifested in the Supreme Court of Canada's definition of dignity as concerned with both physical and psychological integrity. Given the court's repeated commitment to a dignity-based approach and the improbability of a volte-face so shortly after *Law*, perhaps the best that can be hoped for is to hold the judges, more rigorously than they have done in recent decisions, to their own articulation of an embodied dignity.

<sup>73</sup> eg Moreau (n 72) 297–313 identifies four kinds of wrong targeted by the equality guarantee: unequal treatment based upon prejudice or stereotyping; unequal treatment that perpetuates oppressive power relations; unequal treatment that leaves some individuals without access to basic goods; and unequal treatment that diminishes individuals' feelings of self-worth. The second and third are the more obviously material ones.

<sup>74</sup> Compare the stronger contention that the human rights methodology of the majority in *Gosselin*, by dismissing the claims of those whose response to different treatment is unreasonable, introduces an element of fault or blame into the constitutional analysis: J Cameron 'Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*' (2003) 20 *Supreme Court L Rev* (2d) 65, 78.

<sup>75</sup> eg M Young 'Why Rights Now? Law and Desperation' (paper presented at the Feminism and Law Workshop Series, University of Toronto, 29 October 2004).

