7

Will "Watertight Compartments" Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms

Kerri A. Froc

In principle, the Supreme Court of Canada has stated that rights under the Canadian Charter of Rights and Freedoms[1] represent a nonhierarchical "complex of interacting values" that must be interpreted in light of one another.[2] Further, equality in particular has been singled out as a right whose interpretive influence traverses the confines of Section 15; it "applies to and supports all other rights guaranteed by the Charter."[3] One would assume therefore that the more severe, complex, and intractable the oppression suffered – the kind that often manifests in a "cluster" of rights violations – the more likely it is that it will receive judicial recognition. However, the poor track record of women's multiple rights claims at the Supreme Court, claims that arise through a combination of an equality rights violation under Section 15 of the Charter[4] coupled with another civil liberty violation, belies this assumption. Even in the rare multiple rights case that could be considered a "win" for women, it resulted from a truncated analysis that would not assist in preventing future subordination beyond the narrow parameters of the case.[5]

[1] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11 [Hereinafter *Charter*].

[2] *R. v. Lyon*, [1988] 37 C.C.C. (3d) 1, 20 (S.C.C.). *See also R. v. Mills*, [1999] 3 S.C.R. 668, ¶ 21 (citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835); *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, ¶ 39; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710; and *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, ¶ 80 (citing *Dubois v. The Queen*, [1985] 2 S.C.R. 350, 365).

[3] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 185.

[4] Section 15(1) states, "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."

[5] *See, e.g.*, R. *v. Morgentaler*, [1988] 1 S.C.R. 30. The enduring problems with abortion funding resulting from the court's decision to strike down the Criminal Code abortion provisions purely on the basis of Section 7, and refusing to address Section 15, is discussed, for example, in Diana Majury, *The Charter, Equality Rights and Women: Equivocation and Celebration*, 40 OSGOODE HALL L. J. 297 (2002); Beverley Baines, *Abortion Judicial Activism and Constitutional Crossroads*, 53 U. N. B. L. J. 157

The reason for such a fundamen
come, I believe, lies in the "watert
I mean that the courts have constru
discrete, and oppositional, much th
lyzing discrimination claims, maki
Intersectionality theory demonstrate
color to separate out and compartme
to racism and those that relate to se
them to show either that they expe
racialized men, their experiences of
be recognized.[7]

Similarly, in multiple rights cases
of a claimant's experience into one
than viewing it as claimants do – a
arises from complex circumstances c
discrimination and another rights v
that the dominant group ascribes to g
under Section 15, whereas other elen
to those of the dominant social grou
her experiences are considered too
15 completely overwhelms the cons
be considered under the other right
other hand, where women's experie
nant, elements of social identity tha
these non-Section 15 rights. Claima
tional white, male civil rights bearer
challenge, the underlying racialized,
Thus, rights violations are viewed a
from the dominant (and makes an
civil rights claim). It is exceedingly di

(2004); Sanda Rodgers, *Abortion Denied: F*
WHAT'S OUT, HOW WE DECIDE 107, 121 (C
Care and Equality: Is there a Cure? 15 HEA

[6] See Kimberlé Crenshaw, *Demarginalizing*
of Antidiscrimination Doctrine, Feminist Th
Mapping the Margins: Intersectionality, Ide
STAN. L. REV. 1241 (1991) [hereinafter Cren
Harassment, 65 S. CAL. L. REV. 1467 (199
Live Crew, in WORDS THAT WOUND: CRIT
AMENDMENT 111 (Mari Matsuda et al. eds.,

[7] In the words of Crenshaw, "Under this viev
experiences coincide with those of either of t
note 6, at 143 (emphasis added).

The reason for such a fundamental contradiction between philosophy and outcome, I believe, lies in the "watertight compartments" approach to rights. By this, I mean that the courts have constructed rights in multiple rights claims as abstract, discrete, and oppositional, much the same way as it has employed grounds in analyzing discrimination claims, making them resistant to an intersectional analysis.[6] Intersectionality theory demonstrates that discrimination law has required women of color to separate out and compartmentalize the aspects of their experience that relate to racism and those that relate to sexism. Because discrimination law has required them to show either that they experience sexism like white women or racism like racialized men, their experiences of subordination are considered "too aberrant" to be recognized.[7]

Similarly, in multiple rights cases, the focus of the court is on separating elements of a claimant's experience into one (dominantly defined) right or another, rather than viewing it as claimants do – as a singular experience of rights violation that arises from complex circumstances of subordination. Where the claim is based upon discrimination and another rights violation, elements of the claimant's experience that the dominant group ascribes to gender are put into the "discrimination" category under Section 15, whereas other elements of her experience considered comparable to those of the dominant social group are put into the other rights category. Where her experiences are considered too "aberrant" to those of the dominant, Section 15 completely overwhelms the constitutional analysis and there is nothing left to be considered under the other right – it is exclusively "a Section 15 case." On the other hand, where women's experience can be subsumed into that of the dominant, elements of social identity that depart from the "norm" are repressed within these non-Section 15 rights. Claimants have to show that they are "like" the traditional white, male civil rights bearer. Yet in doing so, claimants accept, rather than challenge, the underlying racialized, gendered, classed, heteronormative status quo. Thus, rights violations are viewed as conflicting phenomenon. Either one differs from the dominant (and makes an equality claim) or one does not (and makes a civil rights claim). It is exceedingly difficult for multiple rights claimants to walk this

(2004); Sanda Rodgers, *Abortion Denied: Bearing the Limits of Law, in* JUST MEDICARE: WHAT'S IN, WHAT'S OUT, HOW WE DECIDE 107, 121 (Colleen M. Flood ed., 2006); and Martha Jackman, *Health Care and Equality: Is there a Cure?* 15 HEALTH L. J. 87 at 107–109 (2007).

6 See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139 (1989); *Mapping the Margins: Intersectionality, Identity, Politics, and Violence Against Women of Colour*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*]; *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992); *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew, in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 111 (Mari Matsuda et al. eds., 1993).

7 In the words of Crenshaw, "Under this view, Black women are protected *only to the extent that their experiences coincide with those of either of these two groups.*" Crenshaw, *Mapping the Margins*, *supra* note 6, at 143 (emphasis added).

tightrope and show the court that their experience of inequality is unique to them as women but that their other civil rights violation is analogous to that experienced by the dominant. Often, this results in a court concluding that there has been no rights violation (thereby punishing a claimant who is perceived as "wanting to have it both ways"). Thus, women continue to languish on the horns of the "sameness/difference" dilemma.

Whether the "watertight compartments" approach is applied to rights or grounds, it stems from the same fundamental misunderstanding of subordination as unidimensional and monocausal, rather than composed of intertwined and mutually reinforcing systems of oppression, whose effects are obscured by their synergistic operation. And just as intersectionality theory insisted upon a recognition of the unique oppression experienced by those whose identity is multiply subordinated along the axes of race and sex, my contention is that subordination that implicates multiple rights requires different conceptual tools that recognize its unique nature and that it is more than the sum of its parts. Next, I examine the Canadian Supreme Court case of *Gosselin v. Quebec (Attorney General)*,[8] a constitutional challenge to a provincial "workfare" program as a violation of equality and a Section 7 violation of personal security,[9] to illuminate how the court adopted a "watertight compartments" approach to rights in the case, resulting in a distortion of Louise Gosselin's experience of oppression.[10]

GOSSELIN – DISEMBODIED EQUALITY

Many Canadian theorists have criticized the *Gosselin* decision as representing the *sine qua non* of the decontextualized, classical liberal approach to equality rights.

[8] [2002] 4 S.C.R. 429.

[9] *Charter*, Section 7 states, "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[10] The other Supreme Court cases involving women's multiple rights claims are: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 (finding constitutional the government's decision to fund only "male dominated" indigenous groups in constitutional consultations); *Rodriguez v. British Columbia* (Attorney General), [1993] 3 S.C.R. 519 (Criminal Code proscribing assisted suicide consistent with Section 7; the court found it "preferable" not to make a finding on Section 15 because any violation would be justified under Section 1); *Little Sisters Book and Art Emporium v. Canada* (Minister of Justice), [2000] 2 S.C.R. 1120 (disproportional targeting of lesbian erotica for review and confiscation was contrary to Section 15 but legislation providing discretion to customs officials was consistent with Sections 2(b) and 15); and *Health Services and Support-Facilities Subsector Bargaining Assn., Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (legislation interfering with collective bargaining violated Section 2(d), but the court simply upheld lower courts' finding that discrimination against health care and social services sector did not discriminate against women, despite the fact that they consist of female-dominated professions). In my view, the analyses in these cases demonstrate similar tendencies to those in *Gosselin*, [2002] 4 S.C.R. 429.

This approach exaggerates the s
emmental intent to encourage se
Court of Canada's decision in *L*
seemingly retreated from rigid ac
Yet, it is unlikely that we have s
that the analytic separation of *CH*
role in the outcome in *Gosselin*, a
not addressed.[13]

Gosselin demonstrates the dang
claim without adequately integrat
enables the law to deny that it c
removes poor people's access to th
and Thomas R. Kearns' theory, th
at) threatening violence while den
on bodies subject to the law, appl
tion . . . [but also with respect to] th
her benefits are reduced. . . ."[14] T

Law v. Canada, [1999] 1 S.C.R. 497. F
Women are Themselves to Blame: Choice a
RIGHTS REAL: SECURING SUBSTANTIVE E
& Stephenson eds., 2006); Gwen Brodsk
(2003); Sonia Lawrence, *Harsh, Perhaps*
(2D) 93 (2003).

Following *Law*, the court required claim
ment of human dignity, using four con
prejudice, or vulnerability experienced b
or lack thereof, between the ground or g
capacity, or circumstances of the claima
impugned law on a more disadvantaged pe
interest affected by the impugned law (*Law*
483, the court admitted that "several prob
and the contextual factors into a "*legal tes*
on the broader "perpetuation of disadvan
Law Society of British Columbia, [1989] 1
Band and Nation v. Canada, [2009] 1 S.C
Services), [2009] 2 S.C.R. 181; *Alberta v. H*
repeated the latter test and do not mention t
most recent equality decision, *Withler v. Ca*
the trial judge's analysis of the *Law* context
that it is overruling the *Law* approach, it is
true departure.

Canadian scholars have talked about the p
security of the person interacting in the co
conventions: *see, e.g.*, Gwen Brodsky & Shel
Substantive Equality Speaks to Poverty, 14 C

Austin Sarat & Thomas R. Kearns, *A Journe*
in THE FATE OF LAW 209, 209–10 (Austin Sa

This approach exaggerates the significance of individual choice and "benign" governmental intent to encourage self-sufficiency, and was perpetuated by the Supreme Court of Canada's decision in *Law v. Canada*.[11] Of late, the Supreme Court has seemingly retreated from rigid adherence to the *Law* approach in Section 15 cases.[12] Yet, it is unlikely that we have seen the last of a *Gosselin*-type analysis. I maintain that the analytic separation of *Charter* Section 15 and Section 7 played a significant role in the outcome in *Gosselin*, and will continue to plague multiple rights cases if not addressed.[13]

Gosselin demonstrates the dangers in a multiple rights case of assessing an equality claim without adequately integrating security of the person issues. Such an approach enables the law to deny that it does damage to real bodies and psyches when it removes poor people's access to the necessities of life. Consistent with Austin Sarat and Thomas R. Kearns' theory, the law "seems intent on (and is largely successful at) threatening violence while denying or making invisible the violence it inflicts" on bodies subject to the law, applying not only in cases of "incarceration or execution . . . [but also with respect to] the suffering imposed say, on a welfare mother when her benefits are reduced. . . ."[14] They maintain that the "conditions for successful

[11] *Law v. Canada*, [1999] 1 S.C.R. 497. Representative of the *Gosselin* critiques are Diana Majury, *Women are Themselves to Blame: Choice as a Justification for Unequal Treatment*, *in* MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER, 209, 228 (Faraday, Denike, & Stephenson eds., 2006); Gwen Brodsky, *Autonomy with a Vengeance*, 15 CAN. J. WOMEN & L. 194 (2003); Sonia Lawrence, *Harsh, Perhaps Even Misguided: Developments in Law*, 2002, 20 S.C.L.R. (2D) 93 (2003).

[12] Following *Law*, the court required claimants to prove discrimination by demonstrating an infringement of human dignity, using four contextual factors: (a) Preexisting disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; (b) the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (c) the ameliorative purpose or effects of the impugned law on a more disadvantaged person or group in society; and (d) the nature and scope of the interest affected by the impugned law (*Law*, [1999] 1 S.C.R. 497, ¶ 88). In *R. v. Kapp*, [2008] 2 S.C.R. 483, the court admitted that "several problems" resulted from the calcification of "human dignity" and the contextual factors into a "*legal test*" (*Kapp*, ¶ 21). It therefore refocused the equality analysis on the broader "perpetuation of disadvantage or stereotyping" test for discrimination in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. Subsequent Section 15 decisions (*Ermineskin Band and Nation v. Canada*, [2009] 1 S.C.R. 222; *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567) repeated the latter test and do not mention the four contextual factor in *Law* whatsoever. However, the most recent equality decision, *Withler v. Canada (Attorney)*, 2011 SCC 12, cites with apparent approval the trial judge's analysis of the *Law* contextual factors. Without an express statement from the court that it is overruling the *Law* approach, it is difficult to say whether the current case law represents a true departure.

[13] Canadian scholars have talked about the possibilities of equality and the right to life, liberty, and security of the person interacting in the context of poverty, but relying primarily on international conventions: *see, e.g.*, Gwen Brodsky & Shelagh Day, *Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty*, 14 CAN. J. WOMEN & L. 186 (2002).

[14] Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward Jurisprudence of Violence*, *in* THE FATE OF LAW 209, 209–10 (Austin Sarat & Thomas R. Kearns eds., 1991).

'interpretive violence'"[15] include those where the court is able to position itself as a "mere conduit of constitutional messages. . . . Interpretation and the interpretive act are made invisible by the simple device of refusing to acknowledge any alternative readings."[16] It is further intensified where law's interpretive violence is treated as "exclusively cultural and symbolic, rather than the physical and the bodily," that is, directed exclusively toward decontextualized, philosophical concepts like dignity or autonomy and not toward *real people*.[17] By maintaining a rule-laden "cold separation between law's words and law's deeds,"[18] its violence is obscured, and when it appears, it is visible only as a necessary evil that is done to prevent the greater damage caused by the "cravings and drives of 'human nature.'"[19] Whether this is in the form of capital punishment to keep "the community" safe from criminality,[20] or the denial of welfare to keep the poor from their slothful inclination toward dependency,[21] this justification for law's violence is the same.

Louise Gosselin was a young woman who lived in extreme poverty, in the midst of an economic downturn in Quebec during the 1980s that saw a drastic increase in unemployment among young adults.[22] She was subject to regulations under Quebec's Act Respecting Income Security[23] that drastically reduced monthly welfare amounts paid to those under thirty to $170. The $466 received by those over thirty was deemed by the legislature to be the amount necessary for an adult's basic needs,[24]

[15] *Id.* at 211.

[16] *Id.* at 214.

[17] *Id.* at 221. See also their reference *id.* at 259 that "The question becomes not why there is so much violence or pain or how law might be transformed through the recognition of its lethal character, but, rather, why people put up with a life *in which human dignity is denied in the details of everyday life*. Law is thought to colonize souls so that it can leave bodies intact" (emphasis added). This passage recalls the court's preoccupation with human dignity, separated from bodily integrity, in the *Gosselin* Section 15 analysis.

[18] *Id.* at 211.

[19] *Id.* at 224.

[20] Hegel, for example, regarded criminality as arising from the state of natural will: Angeliki Kontou, *Hegel on Crime, Evil, and Punishment: Reconciliation Between the 'Individual' and the 'Social'*, *in* Evil, Law, and the State: Issues in State Power & Violence 63 (Istar Gozaydin & Jody Lynée Madeira eds., 2006).

[21] The "constitutive violence" against the poor produces the "illegitimate homeless body" from which the "self-regulating bourgeois subject" can separate himself and thereby convince himself of his mastery over his own body: Sherene Razack, *Introduction: When Space Becomes Race*, *in* Race, Space, and the Law: Unmapping a White Settler Society 1, 10–11 (Sherene Razack ed., 2002). These constituted illegitimate bodies of the poor were historically segregated and "trained not to be idle . . . not for the purpose of punishment but for moral regulation." *Id.* (quoting Foucault, *Madness and Civilization*, *in* The Foucault Reader 124, 131 (Paul Rabinow ed., 1984)). Thus, poor regulation creates a vicious circle whereby it produces "illegitimate" poor bodies and obscures this constitutive process by instead implicating the moral failings of the poor, which consequently justifies regulation.

[22] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 6 (McLachlin, C. J. C.).

[23] S.Q. 1988, c.51. The relevant regulations were sections 23 and 29(a), *Regulation Respecting Social Aid*, R.R.Q., c. A-16, r.1.

[24] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 251 (Bastarache, J., dissenting).

and could be achieved by those educational upgrading or on-the- to become registered for a progra to the full amount.[25] Gosselin wa and was periodically employed addictions.[27] However, for most welfare and subject to the lower ra or shelter, much less other neces conditions also negatively affecte As a result of the reductions, man forced to exchange sexual service also experienced an attempted rap and sexual harassment by male b boarding houses.[29] Gosselin com welfare recipients under thirty, a their Section 7 rights and discrim of the Charter.[30]

[25] These factors did not align very often: J., dissenting). As these justices note, th registrants, there were restrictive eligib available for registration. As a result, o their benefits in this fashion. *Id.* ¶ 13 dissenting).

[26] This was acknowledged by McLachlin, failure to maintain her registration in th

[27] Her difficulties with the training progr physical health problems are outlined the full rate from time to time while sh exemption.

[28] Factum of the Intervener, National Ass *available at* www.nawl.ca/ns/en/docume

[29] *Id.* ¶¶ 7–9.

[30] It is possible that the claim was based this was seen as "low hanging fruit" give *of British Columbia*, [1989] 1 S.C.R. 143, enumerated grounds would rarely be fou effects discrimination on the basis of sex ground of social condition would have b the increasing impossibility of proving ad *Dominance: Equality without Substance*, Charter of Rights and Freedoms 95 significant adverse effects sex discriminat Charter, but human rights legislation, an not social, difference: *British Columbia (P* [1999] 3 S.C.R. 3.

and could be achieved by those under thirty only *if*: a "workfare" program for educational upgrading or on-the-job training was available to them, they were able to become registered for a program, and that particular program provided a gross-up to the full amount.[25] Gosselin was able to participate in some of these programs[26] and was periodically employed despite considerable mental health problems and addictions.[27] However, for most of her life as a young adult, she was in receipt of welfare and subject to the lower rate, which rendered her incapable of obtaining food or shelter, much less other necessaries of life. Ironically, living in such straitened conditions also negatively affected her ability to look for and obtain employment.[28] As a result of the reductions, many young women, including Louise Gosselin, were forced to exchange sexual services in return for a place to stay or for food. Gosselin also experienced an attempted rape from a man from whom she was obtaining food, and sexual harassment by male boarders while she was staying in male-dominated boarding houses.[29] Gosselin commenced a class action on behalf of all Quebec welfare recipients under thirty, and claimed that the welfare regulations violated their Section 7 rights and discriminated on the basis of age, contrary to Section 15 of the Charter.[30]

[25] These factors did not align very often: *Gosselin*, *id.* ¶¶ 245–48 (Bastarache, J.) and ¶ 393 (Arbour, J., dissenting). As these justices note, there were only 30,000 places for 75,000 potential under-thirty registrants, there were restrictive eligibility criteria, and there were times when no program was available for registration. As a result, only 11.2 percent of those under thirty were able to increase their benefits in this fashion. *Id.* ¶ 130 (L'Heureux-Dubé, J., dissenting) and ¶ 371 (Arbour, J., dissenting).

[26] This was acknowledged by McLachlin, C. J. C., *id.* ¶ 8, although the Chief Justice attributes her failure to maintain her registration in them to her "personal problems and personality traits."

[27] Her difficulties with the training programs and employment due to her depression, anxiety, and physical health problems are outlined *id.* ¶¶ 164–67 (Bastarache, J., dissenting). She did receive the full rate from time to time while she was registered in the programs or qualified for a medical exemption.

[28] Factum of the Intervener, National Association of Women and the Law, *in Gosselin*, *id.* ¶¶ 4, 11, *available at* www.nawl.ca/ns/en/documents/Pub_Brief_Gosselin01_en.doc.

[29] *Id.* ¶¶ 7–9.

[30] It is possible that the claim was based on age alone (and not in combination with sex) because this was seen as "low hanging fruit" given that the distinction was explicit. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, ¶ 37 (McIntyre, J.) suggested that explicit distinctions on enumerated grounds would rarely be found nondiscriminatory. Further, attempting to prove adverse effects discrimination on the basis of sex under Charter Section 15 or under the Quebec Charter's ground of social condition would have been a risky proposition. Sheila McIntyre has documented the increasing impossibility of proving adverse effect discrimination. Sheila McIntyre, *Deference and Dominance: Equality without Substance*, *in* DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 95 (Sheila McIntyre & Sandra Rodgers eds., 2006). The last significant adverse effects sex discrimination claim accepted by the court was not in relation to the Charter, but human rights legislation, and concerned adverse effects based on women's biological, not social, difference: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

The majority decision, written by C. J. C. McLachlin and two of the four dissenting decisions,[31] accepted Section 15 (particularly the protection against "age discrimination") as the operative right. In denying Gosselin's Section 15 claim, the majority implicitly relied on a conceptualization of equality as a "special right" reserved for "discrete and insular minorities,"[32] who are deemed by the dominant as having been stigmatized *unfairly* by the state. As economic disparity (particularly women's)[33] is treated as a natural source of differential treatment, it receded into the background of the case.[34] To the extent that Gosselin's poverty was considered at all, it was as a signifier of "individual choice and merit."[35] As a result, the majority constructed Gosselin as a liberal, autonomous subject whose self was a bundle of choices and will, rather than as an embodied self existing in particular historic and social relations.[36] Without the grounding in the material that the Section 7

[31] Bastarache and LeBel, J. J. both found that Section 7 did not apply in the circumstances, while Arbour, J. (L'Heureux-Dubé, J. concurring on this point) found a Section 7 violation.

[32] I borrow this concept from Charles Lawrence III, who advances the argument that equality and traditional civil rights are read hierarchically in dominant culture – the latter are included in the "regular" rights of "everyone" and equality is a "special right" for "a minority of different people." Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 474.

[33] This disparity is naturalized as part of what it means to be a woman rather than reflecting patterns of subordination: "[W]omen's poverty and consequent financial dependence on men (whether in marriage, welfare, the workplace or prostitution)... effectively constitutes their social status *as women*, as members of their gender." CATHERINE MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 228 (1989). *See also Falkiner v. Ontario* (Ministry of Community and Social Services) (2002), 212 D.L.R. (4th) 633, 159 O.A.C. 135, 59 O.R. (3d) 481 (C.A.), in which the Ontario Court of Appeal confronts the stereotypical assumption of women's financial dependence on men.

[34] Courts have consistently refused to accept socioeconomic status as an "analogous" ground under Section 15 (explicit grounds not being exclusive under the wording of the right). *See, e.g., Masse v. Ontario* (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20, 35 C.R.R. (2d) 41 (Ont. Div. Ct.), leave to appeal to C.A. denied, [1996] O.J. No. 1526, leave to appeal to S.C.C. denied [1996] S.C.C.A. No. 373; *Dunmore v. Ontario* (Attorney General) (1997), 37 O.R. (3d) 287, 155 D.L.R. (4th) 193 (Gen. Div.), aff'd (1999), 182 D.L.R. (4th) 471, 49 C.C.E.L. (2d) 29 (C.A.), appeal allowed but not on this issue, *Dunmore v. Ontario* (Attorney General), [2001] 3 S.C.R. 1016; *R. v. Banks*, [2005] O.J. No. 98 (Ont. S.C.J.), aff'd, 2007 ONCA 19, leave to appeal denied, [2007] S.C.C.A. No. 139. *See also Guzman v. Canada* (Minister of Citizenship and Immigration), [2006] FCJ No. 1443 (T.D.) (QL), and *Bailey v. Canada*, [2005] FCJ No. 81 (T.D.) (QL) (receipt of social assistance and (low) income level, respectively).

[35] This is how poverty/socioeconomic status is regarded "within a capitalist liberal ideology." Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN'S L. J. 179, 189 (1993).

[36] This disembodied liberal self is inherently masculine: "[T]he power and privilege of the masculine relies precisely on being disembodied, on lacking the contingency of the body in the pursuit of a perspective which is transcendent, objective, and universal... the 'individual' of the modern liberal state is simultaneously disembodied as it is construed *from* a male body." Sara Ahmed, *Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights*, 4 SOCIAL & LEGAL STUD. 55, 56 (1995).

guarantee of "security of the per
exploited, and starving body disappe
law's complicity in the violence don

In the majority decision, McLac
unavoidable imperative driven by ev
of the *Law* test, thereby enabling he
the entire analysis in the purported le
it simply "makes sense to consider
whether the scheme denies huma
legislative purpose before the discr
stage was set for the four contextual
material to "the cultural and the sym

Time and again, while the con
courts to consider material condit
circumstances,[42] the majority in G
evidence of "unfair" stereotyping o
legislature to provide them with edu

[37] Although not restricted to physical integri
violation of security of the person under S
effect on a person's psychological integr
Services) v. G.(J.), [1999] 3 S.C.R. 46, ¶
psychological impairment must have a
Possible Scope of 'Psychological Integrity
presented at the Canadian Bar Associati
Freedoms: Twenty Years Later").

[38] In referring to her body as "sexed," I am
through bodily signifiers but "the discus
arrangements surrounding it." ZILLAH R.

[39] *See* Brodsky, *Autonomy with a Vengeance*
analysis, which places a heavy burden on
purpose within Section 15, and a minima
the problem.

[40] *Gosselin v. Quebec (Attorney General)*, [2
McLachlin, C. J.C. went on to remark
promote the claimant's long-term autonom
position would be less likely to view it as
application of the *Law* test commences a
Test."

[41] Again, this is phrased as an imperative. "
R v. Kapp, [2008] 2 S.C.R. 483 and subseq
the four contextual factors in *Law* is self-e
instead discusses more generally "the larg
(citing *R. v. Turpin*, [1989] 1 S.C.R. 1296,

[42] *Law v. Canada*, [1999] 1 S.C.R. 497, ¶
situation."

[43] *Gosselin v. Quebec* (Attorney General),
that individuals between ages 18 and 30

guarantee of "security of the person" represents,[37] Louise Gosselin's sexed,[38] exploited, and starving body disappears in the Section 15 determination, and with it, law's complicity in the violence done to her body.

In the majority decision, McLachlin framed her approach to Section 15 as an unavoidable imperative driven by evidentiary rules, rationality, and the requirements of the *Law* test, thereby enabling her to obscure the exercise of choice in anchoring the entire analysis in the purported legislative purpose of promoting self-sufficiency:[39] it simply "makes sense to consider what the legislator intended in determining whether the scheme denies human dignity."[40] With the preeminence given to legislative purpose before the discrimination analysis even began in earnest, the stage was set for the four contextual factors from *Law*[41] to be transformed from the material to "the cultural and the symbolic" when the court applied the test.

Time and again, while the contextual factors from *Law* on their face direct courts to consider material conditions of "preexisting disadvantage" and actual circumstances,[42] the majority in *Gosselin* veered into ruminations on the lack of evidence of "unfair" stereotyping of young people[43] and the sage intention of the legislature to provide them with education and skills. Consequently, under the first

[37] Although not restricted to physical integrity, the court has been consistent that in order to constitute a violation of security of the person under Section 7, the state action must have a "serious and profound effect on a person's psychological integrity." *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, ¶ 60. Implicit in this statement is a requirement that the psychological impairment must have a material basis. *See also* Bruce Judah, The Meaning and Possible Scope of 'Psychological Integrity,' *in* S.7 JURISPRUDENCE, 8 (April 2001) (unpublished paper presented at the Canadian Bar Association's Conference, "The Canadian Charter of Rights and Freedoms: Twenty Years Later").

[38] In referring to her body as "sexed," I am speaking about how her body is marked as female not just through bodily signifiers but "the discussion and language that interpret the body and the social arrangements surrounding it." ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 85 (1988).

[39] *See* Brodsky, *Autonomy with a Vengeance*, *supra* note 11, at 207–10 regarding this flaw in the court's analysis, which places a heavy burden on the claimant to show the lack of rationality of the legislative purpose within Section 15, and a minimal requirement on governments to justify their approach to the problem.

[40] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, ¶¶ 19, 26.

McLachlin, C. J.C. went on to remark that "[a]s a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity," *id.* ¶ 27. The application of the *Law* test commences after these statements, under the subheading, "Applying the Test."

[41] Again, this is phrased as an imperative, "we must consider the four factors set out in *Law*," *id.* ¶ 29. *R v. Kapp*, [2008] 2 S.C.R. 483 and subsequent case law put the lie to the contention that recourse to the four contextual factors in *Law* is self-evident or necessary. For instance, in *Ermineskin*, the court instead discusses more generally "the larger social, political, and legal context," *Ermineskin*, *id.* ¶ 193 (citing *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1331).

[42] *Law v. Canada*, [1999] 1 S.C.R. 497, ¶ 70, referring to a claimant's "actual needs" and "actual situation."

[43] *Gosselin v. Quebec* (Attorney General), [2002] 4 S.C.R.429, ¶ 33: "There is no reason to believe that individuals between ages 18 and 30 in Quebec are or were particularly susceptible to negative

factor, preexisting disadvantage, the court made no inquiry into the claimant's lived conditions of oppression.[44] As well, McLachlin seized on the fact that the only ground of discrimination claimed was "age." This allowed her analysis to become even more abstract, excluding any consideration of how Gosselin's experience as a young person was also influenced by poverty, patriarchy, and subordination based on mental disability.[45] By constructing an essentialized class of privileged youth, the Chief Justice was thus able to conclude that "young adults as a class simply do not seem especially vulnerable or undervalued. . . . If anything, people under 30 appear to be advantaged over older people in finding employment."[46]

When the claimant attempted to problematize this essentialist picture of young people by bringing into account the historic disadvantage of welfare recipients to which these *particular* young people were subject, the majority prevented her from doing so. Because this socioeconomic subordination affected under-thirty welfare recipients, and the group of thirty-and-over welfare recipients to which they were being compared, the majority found that it could not be considered at all in the discrimination analysis.[47] This curious "weigh scale" approach to comparators, where subordination on both sides means it can be disregarded, resulted in the majority refusing to consider stereotypes particular to young welfare recipients as lazy and predisposed to welfare dependence,[48] or the particular vulnerability of poor women on welfare to violations of their personal security through male coercion and violence.[49]

Under *Law*'s second contextual factor, correspondence between the distinction and the claimant's actual characteristics and circumstances, the majority turned, yet again, to government purpose and used evidentiary rules to foreclose any attempt by the claimant to challenge the alleged "fit" of the statute in light of its material

preconceptions. No evidence was adduced to this effect, and I am unable to take judicial notice of such a counterintuitive proposition."

44 The emphasis on government intent and stereotype "serve to shift the focus of the analysis from the effect on the claimant to the actions of the government." Lawrence, *supra* note 11, at 103. The most recent distillation of the test for discrimination post-*Kapp* is "does the distinction create a disadvantage by perpetuating prejudice or stereotyping." Unfortunately, this formulation seems only to further entrench the primacy of these concepts.

45 The court described Ms. Gosselin's experience with mental illness in terms of her "psychological problems and drug and alcohol addiction." *Gosselin*, [2002] 4 S.C.R. 429, ¶ 1.

46 *Id.* ¶¶ 33, 34. It is interesting to note here how youth is not "embodied" but defined exclusively in terms of enhanced ability to exert will.

47 *Id.* ¶ 35 ("Ms. Gosselin attempts to shift the focus from age to welfare, arguing that *all* welfare recipients suffer from stereotyping and vulnerability. However, this argument does not assist her claim . . . because the 30-and-over group that Ms. Gosselin asks us to use as a basis of comparison also consists entirely of welfare recipients.").

48 See the evidence cited by Lebel, J., *id.* ¶ 407, regarding the falsity of this stereotype.

49 *See* Holly Johnston, Measuring Violence Against Women. Statistical Trends 2006 36, 36 & 40 (2006) for statistics verifying this risk. *See also* J. E. Mosher, *Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other*, *in* Restructuring Caring Labour: Discourse, State Practice, and Everyday Life 30, 33–34 (S. M. Neysmith ed., 2000).

effects. McLachlin found that, in li
the relevant time, providing young
than "simply handing over a bigger
Because the legislation was intend
affirming. In order to come to this
the distinction between the educat
were not under challenge, and the
benefits to those under thirty who w
assumption that coercion was nec
these programs is thus unchallenge
law's violence in coercing young
acknowledged, obliquely, as "short-
might have predicted, this "pain" is
welfare recipients do not allow the b
them: lack of industry, indolence.
contribute to a vicious circle of in
dismal prospects."[52]

The dissonance between the stark
on the reduced benefit of $170 a mo
iterations of the majority about the
lence of interpretation visible, for a
several paragraphs, attempted to dis
of its decision, citing first judicial
then individualized the effects of t
to participation in inaccessible prog
temic, adverse effect. Instead, the Cl
"personal problems."[54] When reflec
itself, the Chief Justice uses the n
some "fell through the cracks of the

50 *Gosselin*, [2002] 4 S.C.R. 429, ¶¶ 42, 43.

51 *Id.* ¶ 53. This is the only time that the majo

52 *Gosselin*, *id.* ¶ 43. This portion of the ju
ethic" arising from Calvinist religious philo
humanity from their innate sinful, heedless
Religion, 31:3 Business Horizons 8, 10 (19
arose in the 1500s at the very time there
and a high rate of unemployment. He ar
economic problems and instead misconst
human sin, called by one contemporary
Bolstered by religious edict, governments
short, the prevailing values of the time stron
those who would stray 'from the path of rig

53 *Gosselin*, [2002] 4 S.C.R. 429, ¶ 44.

54 *Id.* ¶¶ 47–48.

effects. McLachlin found that, in light of the dismal state of the Quebec economy at the relevant time, providing young people with education and skills training rather than "simply handing over a bigger welfare cheque" reflected "practical wisdom."[50] Because the legislation was intended to encourage self-sufficiency, it was dignity-affirming. In order to come to this conclusion, however, the Chief Justice elided the distinction between the educational and training programs themselves, which were not under challenge, and the coercion exerted by the government in reducing benefits to those under thirty who were not registered in a program. The embedded assumption that coercion was necessary to force young adults to "benefit" from these programs is thus unchallengeable as discriminatory in and of itself. Here, the law's violence in coercing young recipients by denying the necessaries of life is acknowledged, obliquely, as "short-term pain."[51] Nevertheless, as Kearns and Sarat might have predicted, this "pain" is quickly justified as a necessary evil so that young welfare recipients do not allow the baser elements of their human nature to overtake them: lack of industry, indolence, and resulting welfare dependency, which "can contribute to a vicious circle of inability to find work, despair, and increasingly dismal prospects."[52]

The dissonance between the stark reality of welfare recipients struggling to survive on the reduced benefit of $170 a month and the abstract (bordering on philosophic) iterations of the majority about the laudable government purpose makes the violence of interpretation visible, for an instant. Perhaps this is why the majority, for several paragraphs, attempted to distance the court from the material implications of its decision, citing first judicial deference to the legislature as imperative.[53] It then individualized the effects of tying young people's receipt of the full benefit to participation in inaccessible programs because of a lack of evidence of any systemic, adverse effect. Instead, the Chief Justice called these difficulties the result of "personal problems."[54] When reflecting on the involvement of the welfare system itself, the Chief Justice uses the nomenclature of "accident," noting that while some "fell through the cracks of the system," and failed to have their needs met,

[50] *Gosselin*, [2002] 4 S.C.R. 429, ¶¶ 42, 43.

[51] *Id.* ¶ 53. This is the only time that the majority judgment acknowledges the violence of the legislation.

[52] *Gosselin*, *id.* ¶ 43. This portion of the judgment reverberates with echoes of the "Protestant work ethic" arising from Calvinist religious philosophy. This philosophy espoused work as essential to saving humanity from their innate sinful, heedless natures, Paul Bernstein, *The Work Ethic: Economics, Not Religion*, 31:3 Business Horizons 8, 10 (1988). Interestingly, Bernstein points out that this philosophy arose in the 1500s at the very time there was an increase in European population, high inflation, and a high rate of unemployment. He argues that cities were not able to perceive these systemic, economic problems and instead misconstrued the growing numbers of the poor as resulting from human sin, called by one contemporary writer, "that loathsome monster, idleness," Bernstein, *id.* Bolstered by religious edict, governments responded through increasingly punitive measures; "[i]n short, the prevailing values of the time strongly supported the view that forced labor would discourage those who would stray 'from the path of righteous living,'" Bernstein, *id.*

[53] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 44.

[54] *Id.* ¶¶ 47–48.

this "does not permit us to conclude that the program failed to correspond to the claimant's characteristics and circumstances."[55] Because the program was based on "real needs," and because the majority denied that it confined a particular group to "extreme poverty" (given the theoretical possibility of always participating in workfare programs),[56] there was no violation of human dignity.

The next two contextual factors were dealt with in an abbreviated fashion, functioning to again reassert the primacy of legislative intent over lived experience. Under the third factor, ameliorative purpose or effect of the impugned legislation, the majority admitted that while the provision in question was not ameliorative (and therefore this contextual factor was "neutral"), it was appropriate to consider the overall ameliorative purpose of the legislation of reducing welfare dependency for those under thirty. Regarding the last contextual factor, "the nature and scope of the interests affected by the impugned law," the majority again shifted the focus from the impact of the legislation on bodily and psychological integrity to legalistic terminology, finding no "significant adverse impact"[57] but rather only "greater financial anxiety in the short term."[58] Thus, in a world imagined to be unaffected by social power, the methods used by the Quebec government are reconceptualized as an "incentive" rather than a use of force that causes suffering[59] and, particularly for women, further vulnerability to violence and exploitation. The court's preoccupation with legislative purpose entrenches this worldview into judicial pronouncement: the violence obscured by the legislators through euphemisms like "self-sufficiency," "training," and "education" becomes invisible.[60]

Although the separation of Section 15 from Section 7 causes a Section 15 analysis that is preoccupied with stereotype and a disembodied, abstract notion of "dignity," it in turn keeps Section 7 firmly attached to its traditional civil libertarian moorings. In *Gosselin*, this analytic separation has the effect of removing from consideration how substantive access to the Section 7 right by subordinated persons might require material deprivations to be interpreted in their social context. Despite the court's

[55] *Id.* ¶ 54.
[56] *Id.* ¶ 52.
[57] *Id.* ¶ 64.
[58] *Id.*
[59] For a discussion on the use of "metaphysical ideas and expressions" to obscure the fact that "the function of the courts is to determine the use of force," see Sarat & Kearns, *supra* note 14, at 218 (citing Karl Olivecrona, Law as Fact (1939)). They later point out that this, in itself, is a further insult (or, as Canadian constitutionalists might phrase it, injury to dignity) as "their pain recedes further and further from the centre of the law." Sarat & Kearns, *id.* at 246.
[60] Mona Oikawa discussed similar phenomenon in relation to the language used by Canadian legislators to describe the incarceration and displacement of Japanese–Canadians in internment camps – "relocation," "resettlement," and "repatriation." She noted that "the euphemistic language distanced the government and its administrators from the effects of their actions and left a semantic legacy with which we continue to struggle," even to the extent that it affected the ability of survivors to remember the violence. Mona Oikawa, *Cartographies of Violence: Women, Memory and the Subject(s) of the 'Internment,'* in Razack ed., *supra*, note 21, 71 at 88–89.

remaking Louise Gosselin into a
tion cannot be sustained within
too aberrant compared to the tr
jects to merit in-depth considera
her need for "a particular level o
subject.[62] By separating out the s
7 analysis constructs her needs, h
she has already experienced as si
a "defective" liberal self, not a civ

The crux of the majority's rej
characterization of it as seeking t
provide an adequate level of benef
against state intrusions upon bod
as the former because it was inhe
eradicate this vestige of bodily part
disproportionately female,[63] wom
in need of assistance.[64] In law pa
continue to hint at passivity and de
is viewed as an object of disgust.[66]
multiple derogatory references to
worse than death. The palpable ne
between her and the liberal male
which arises "naturally" in women
by the law as alien to the claims of

[61] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 75.
[62] Mosher describes him as a capitalist who
seller in market exchanges. As a respons
has reduced expectations of social provisi
Model Citizen, *in* Poverty: Rights, Soci
et al. eds., 2007).
[63] Statistics Canada, Women in Canada
at 191.
[64] Thérèse Murphy, *Feminism on Flesh*, *in*
[65] *Id.* at 51.
[66] Nussbaum argues that women's bodies (a
used to inscribe the superior status of whit
the body," bodily needs and dependency
Humanity: Disgust, Shame, and the La
and receptivity," "the force of animal na
Nussbaum, *id.* at 109, 112.
[67] *See* the references in *Gosselin*, [2002] 4 S.
socially desirable," *id.* ¶ 7, in terms of "chro
side effects," *id.* ¶ 65. This is coupled with
the most visible signifier of dependency. Sh
problems, and her inability to remain emp
the majority's depiction of Gosselin).

remaking Louise Gosselin into a liberal subject within Section 15, such a construction cannot be sustained within the Section 7 analysis. Her claim is perceived as too aberrant compared to the traditional civil liberty claims made by liberal subjects to merit in-depth consideration under Section 7. She is defined exclusively by her need for "a particular level of social assistance,"[61] anathema to the (neo)liberal subject.[62] By separating out the social context that Section 15 provides, the Section 7 analysis constructs her needs, her dependency on the state, the physical violations she has already experienced as simply personal traits. She is constituted therefore as a "defective" liberal self, not a civil rights holder.

The crux of the majority's rejection of Gosselin's Section 7 claim lies in their characterization of it as seeking to impose a "positive obligation" on government to provide an adequate level of benefits, rather than a traditional "negative rights" claim against state intrusions upon bodily integrity. Gosselin's Section 7 claim was read as the former because it was inherently gendered, despite all the court's efforts to eradicate this vestige of bodily particularity. Not only are the actual bodies of the poor disproportionately female,[63] women's bodies are socially constructed as "naturally" in need of assistance.[64] In law particularly, "representations of the [female] body continue to hint at passivity and dependency."[65] In turn, this feminine dependence is viewed as an object of disgust.[66] This disgust manifests in the *Gosselin* majority's multiple derogatory references to dependency,[67] which is literally viewed as a fate worse than death. The palpable need and dependency of Gosselin made analogies between her and the liberal male subject difficult, if not impossible. Bodily need, which arises "naturally" in women (rather than through state action), is thus viewed by the law as alien to the claims of the traditional, self-sufficient civil rights bearer.

[61] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 75.

[62] Mosher describes him as a capitalist who "maximize[s] his private, rational self-interest as a buyer and seller in market exchanges. As a responsible citizen, he provides for himself and his family, and he has reduced expectations of social provision." Janet Mosher, *Welfare Reform and the Re-Making of the Model Citizen*, *in* POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM 119, 123 (Margot Young et al. eds., 2007).

[63] STATISTICS CANADA, WOMEN IN CANADA 2005 144 (2005). *See also* Brodsky & Day, *supra* note 13, at 191.

[64] Thérèse Murphy, *Feminism on Flesh*, *in* VIII: 1 LAW AND CRITIQUE 37, 49 (1997).

[65] *Id.* at 51.

[66] Nussbaum argues that women's bodies (and "feminized" racial/homosexual male bodies) have been used to inscribe the superior status of white, heterosexual men, by assigning to the former the "dirt of the body," bodily needs and dependency, in essence, mortality. MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 107–15 (2004). It is the feminine association with "need and receptivity," "the force of animal nature, striving to preserve itself" that repulses masculinity, NUSSBAUM, *id.* at 109, 112.

[67] *See* the references in *Gosselin*, [2002] 4 S.C.R. 429, where welfare dependence is referred to as "not socially desirable," *id.* ¶ 7, in terms of "chronic pattern" and "risk," *id.* ¶ 60, and as having "pernicious side effects," *id.* ¶ 65. This is coupled with the disdain displayed toward Louise Gosselin herself as the most visible signifier of dependency. She is defined by the majority in terms of her addictions, her problems, and her inability to remain employed; *see* Majury, *supra* note 11, at 228 (commentary on the majority's depiction of Gosselin).

interest" (i.e., "severe threats to their physical or psychological integrity") this was sufficient to conclude that a legislative distinction on the basis of an enumerated or analogous ground is discriminatory.[73] Her focus on the claimant's whole being rather than abstracted notions of stereotype and dignity has been referred to as the "knit[ting] together" of equality and security of the person.[74]

This approach would be further assisted by the concept of the "lived body," first described by Toril Moi and further elaborated upon by Iris Marion Young.[75] Young used this concept to escape the conceptual bind of the gender/sex dichotomy experienced by feminist theorists in attempting to describe women's oppression. She remarked that utilization of "gender" as a conceptual term has resulted in theory that is too estranged from the materiality of the body, and that the use of "sex" tends to result in women's oppression being described in ways that are overdetermined by biology and lacking social context. This has obvious similarities to the conceptual bind experienced in Section 15/Section 7 claims. Young described the lived body as follows:

> The lived body is a unified idea of a physical body acting and experiencing in a specific sociocultural context; it is a body-in-situation . . . [It] refuses the distinction between nature and culture. . . . The body as lived is always enculturated. . . . Contexts of discourse and interaction position persons in systems of evaluation and expectations that often implicate their embodied beings; the person experiences herself as looked at in certain ways, described in her physical being in certain ways, she experiences the bodily reactions of others to her, and she reacts to them.[76]

In other words, the lived body is concerned with the significance of the body and bodily sensations "in the constitution of subjectivity."[77]

Through the concept of the lived body, a Section 7 and Section 15 analysis would examine the reactions of Gosselin to her body, and how others would react to her body in the midst of her frantic scramble for shelter and food. In such conditions, Gosselin's starved and exploited body cannot be considered by others as inviolate, given her increased vulnerability to male violence and sexual assault. Against the backdrop of the extremely limited opportunities for youth employment in the Quebec economy, women's economic inequality, the disparity of treatment compared with older welfare recipients, and her health obstacles to remaining in workfare programs, she herself is likely to experience the intense bodily sensations of hunger and exposure as an interference with her bodily integrity and as a practice of

[73] *Id.* ¶¶ 134–35.

[74] Gwen Brodsky & Shelagh Day, *Women's Poverty is an Equality Violation*, *in* Faraday, Denike, & Stephenson eds., *supra* note 11, 319 at 328.

[75] Iris Marion Young, *Lived Body vs. Gender: Reflections on Social Structure and Subjectivity*, *in* On Female Body Experience: "Throwing Like a Girl" and Other Essays 12 (2005).

[76] *Id.* at 16–17.

[77] Diana Fuss, Essentially Speaking: Feminism, Nature, and Difference 52 (Routledge 1989).

subordination, rather than as a dignity-enhancing expression of her own autonomy, as the majority argued.

As well, the lived body would also have something to say about whether such a violation was consistent with the principles of fundamental justice, a requirement under Section 7. One element of fundamental justice is that laws must not be arbitrary; there must be a "real connection" between the legislative goal and the limitation of the Section 7 interest, with the test being more stringent where life itself is put at risk.[78] Considering that Gosselin's suffering was related to a government's unproven social experiment to prevent or eradicate perceived dependency, that this experiment was based on a discriminatory belief that dependency is worse than the "cure" of abject poverty and starvation, and the stereotype that an extreme measure like this "cure" was necessary for those "sturdy beggars" under thirty who would not get jobs,[79] the drastic reduction in benefits cannot accord with fundamental justice.[80] Although the majority asserted that a certain degree of arbitrariness in an age-based cutoff is inevitable and does not detract from its legitimacy,[81] the observations of what happens to people who have "fallen through the cracks" would proscribe such a margin of error. Within the concept of "fundamental justice," the concept of the lived body heightens the contrast within the welfare regime between "a bureaucratic pathology and an excessively narrow preoccupation with rules" and "shared humanity and a shared aversion to human suffering" expressed through the basic tenets of our legal system.[82]

A focus on the lived body within Section 15 would also recognize that there cannot be autonomy without a healthy body capable of executing intention. A primary aspect of the analysis would be to consider the impact on the body of living in circumstances of inequality, particularly those circumstances that limit women's choices to preserve their bodily integrity or to resist state coercion. In this light, state intervention to provide adequate food and shelter facilitates autonomy and the ability to exercise rights.[83] Lastly, a focus on the lived body would discourage obsession with legislative intent, requiring instead a focus on the embodied

[78] *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791, ¶¶ 129–30.

[79] *See* Natasha Kim & Tina Piper, *Gosselin v. Quebec: Back to the Poorhouse*, 48(4) McGill L. J. 749, ¶ 26 (2003); and Brodsky & Day, *supra* note 73, at 325 regarding these stereotypes.

[80] Here, I rely on Wilson, J.'s statement in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, that a violation of another right would not accord with fundamental justice under Section 7. It appeared there that Wilson, J. was not maintaining that a claimant need prove a separate Charter violation to rely upon this principle, but rather that the purpose of this other right is violated in tandem with the violation of security of the person. Here, the gendered assumptions embedded in the treatment of "dependency" would meet this requirement.

[81] *Gosselin v. Quebec* (Attorney General), [2002] 4 S.C.R. 429, ¶ 57 (in relation to the Section 15 analysis).

[82] *See* Austin Sarat, . . . *The Law is All Over: Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 Yale J. L. & Hum. 343 (1990), discussing how welfare recipients attempt to confront the web of rules that seek to deny them the basic necessities of life by appealing to the latter principles.

[83] Martha Jackman, *What's Wrong With Social and Economic Rights?*, 11 N.J.C.L. 235, 243 (2000).

claimant within her social context. The concept means taking the body as it is experienced by the claimant herself and the community, as a *whole*, when assessing rights.

CONCLUSION

As *Gosselin* suggests, the strategy of women making multiple rights claims does not necessarily heighten their chances of success under the present Charter analysis. The "watertight compartments" approach to rights has meant that the context of social relations, critical to Section 15, is not permitted to inform the traditional liberal constructs of civil rights, and that noncomparative concepts of subordination within civil rights have not been allowed to reinvigorate Section 15. I have suggested that a concept like "lived body," which integrates Section 7 into Section 15 (and vice versa), permits us to consider how to animate the theory of rights integration. Fundamental to this notion is the understanding that an experience of subordination implicating more than one right is not simply a collection of rights violations, but may result in a rights violation that is unique and requires unique conceptual tools for it to be recognized and redressed.

The Supreme Court jurisprudence of J. L'Heureux-Dubé and J. Wilson provides a glimmer of hope for an integrated analysis. Wilson demonstrated in *R. v. Morgentaler* that traditional civil rights are able to incorporate a gendered perspective, that women's decisions whether to carry a child to term is a matter of liberty.[84] L'Heureux-Dubé, in advocating for an approach to Section 15 that integrated Section 7 in *Gosselin*, relied upon her earlier dissenting judgment in *Egan v. Canada*[85] where she decried "an analysis that is distanced and desensitized from real people's real experiences."[86] She advocated instead starting from the impact of a legislative distinction on a vulnerable group. In considering the severity of this impact, she directly addressed the importance of looking to non-Section 15 rights. She remarked that to understand the discriminatory nature of a distinction a court must consider the "constitutional dimensions" of its impact, namely, whether it "somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society. . . ."[87]

There are signals that the court may be willing to take up these Justices' challenge of interpreting the Charter so that courts recognize rights violations as they are experienced in real life. The current court signaled in *Kapp* its acknowledgment that the form of Section 15 analysis has sometimes been permitted to triumph over substance. Perhaps it was not a coincidence that it signaled the need for a new

[84] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
[85] *Egan v. Canada*, [1995] 2 S.C.R. 513.
[86] *Id.* at 552.
[87] *Id.* at 556.

approach in the same decision that introduced some new risks for equality-seeking groups. Thus, it is now more important than ever that the court reflect on whether the current analytic structure of the Charter truly serves the purpose of preventing the "evil of oppression."[88]

[88] This phrase is used by the Supreme Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 180–81.

Constitutional Ac
Eq

This chapter considers the con
as it has developed in Hong Ko
gender equality.[1] Hong Kong pro
nation of feminist constitutionali
region (SAR) within China, the
developing nation. Hong Kong'
the territory a high degree of au
independence have generally sur
1997.[2] With some exceptions, hu
role as a financial center has boo
Hong Kong's increasingly robust
equality coupled with its growing
potential to set an example within
understanding of the potential – a
for furthering gender equality at th

[1] Substantive equality seeks to tackle struct
based on group membership and is gen
treating like cases alike. SANDRA FREDMA
[2] Zhonghua Renmin Gongheguo Xiangga
Kong Special Administrative Region of the
18, & 85 [hereinafter *Hong Kong Basic La*
[3] Lau argues that one landmark Hong Kon
William Roy v. Secretary of Justice (Leung
advocates, and lawmakers around the worl
American Law in Light of East Asian Deve
[4] The Hong Kong case can also be underst
right to equality in international law and
contributing to this debate include, for exa
Wright, *Feminist Approaches to Internatio*
Shelley Wright, & Hilary Charlesworth, *Fe*

Consequently, the satisfaction of "natural" need is constructed as requiring the court to impose nonjusticiable positive obligations under Section 7.

Could the problems in the case have been solved simply by a Section 15 analysis that was more sensitive to context and social power? Obviously, it does not require an integrated Section 15/Section 7 analysis to broaden Section 15's focus from the promotion of stereotype, and/or impaired societal or self-perception (self-worth or dignity). That Section 15 encompasses more is something that the judges in *Gosselin* recognized,[68] including the Chief Justice herself (in principle).[69] What I am contending is that in circumstances where the law jeopardizes life and health, by separating and arranging Section 15 and Section 7 hierarchically so that Section 15 is the "foreground" right, the equality analysis overemphasizes social construction, stereotype, and legislative purpose, and diminishes the significance of material deprivations.[70] This effect is because a separate Section 15 analysis proceeds on the basis that the claimant does not suffer from the kind of severe deprivations that engage Section 7. In the words of Martha Jackman, claims under other rights, "*presuppose a person who has moved beyond the basic struggle for existence.*"[71]

An integrated approach to rights would challenge this "presupposition" within Section 15 (and other rights) of the claimant's assured survival, and is supported by J. L'Heureux-Dubé's equality analysis in *Gosselin*. In her dissenting decision, she downplayed the role of stereotype, finding that it was "not determinative."[72] Instead, she found that where there was a severe enough harm to a claimant's "fundamental

[68] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 128 (L'Heureux-Dubé, J., dissenting). Bastarache, J. in dissent also gave particular importance to the contextual factor of the severity of the provision's effect.

[69] McLachlin, C. J. C. stated, "I do not suggest that stereotypical thinking must always be present for a finding that s.15 is breached." *Id.* ¶ 70. The more recent Supreme Court Section 15 jurisprudence does, however, risk a heightened emphasis on stereotype, as it directs courts now to consider only "perpetuation of disadvantage or stereotyping" rather than the four contextual factors. *See R. v. Kapp*, [2008] 2 S.C.R. 483 and the other cases discussed at footnote 12.

[70] Robert Leckey identifies the same problem with the majority's *Gosselin* analysis in *Embodied Dignity*, 5:1 O.U.C.L.J. 63 (2005). However, he attributes the lack of attention to material deprivations to the erasure of physical integrity as a component of essential human dignity within the Court's equality analysis. While he acknowledges the objections to dignity as the touchstone for equality, he ultimately relies upon it in advocating for an understanding that "'dignity' is not a purely mental capacity or attribute that judges assume can be enjoyed irrespective of the effect of government action upon individuals' bodies" (at 81–82). Given the serious misgivings of feminists that human dignity as a construct does not permit an interrogation of systemic inequalities (*see, e.g.*, Martha Jackman, "Sommes-nous dignes? L'egalité et l'arrêt Gosselin," 17:1 C.J.W.L. 161 (2005)), the insertion of physical integrity into dignity does not appear to be an adequate solution. This is particularly the case where the body under analysis is not specifically identified as enculturated, as will be discussed later. Further, the problem does not seem to originate in "dignity" per se. Despite the fact that the Court has now retreated from the notion that a violation of human dignity is a discrete element of the discrimination test, the problem with ignoring bodily integrity within s.15 remains in multiple rights cases (see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181).

[71] Martha Jackman, *The Protection of Welfare Rights Under the Charter*, 20 OTTAWA L. REV. 257, 326 (1988) (emphasis added).

[72] *Gosselin*, [2002] 4 S.C.R. 429, ¶ 117.

interest" (i.e., "severe threats to the
sufficient to conclude that a legisla
or analogous ground is discriminato
rather than abstracted notions of ste
"knit[ting] together" of equality and

This approach would be further
first described by Toril Moi and fur
Young used this concept to escape th
experienced by feminist theorists in a
remarked that utilization of "gender
that is too estranged from the materia
to result in women's oppression bein
biology and lacking social context. T
kind experienced in Section 15/Secti
follows:

> The lived body is a unified idea of
> a specific sociocultural context; it
> tinction between nature and cultu
> ated. . . . Contexts of discourse and i
> uation and expectations that often
> experiences herself as looked at in ce
> certain ways, she experiences the bod
> them.[76]

In other words, the lived body is con
bodily sensations "in the constitution

Through the concept of the lived
would examine the reactions of Gosse
to her body in the midst of her frai
conditions, Gosselin's starved and ex
as inviolate, given her increased vuln
Against the backdrop of the extremely
in the Quebec economy, women's ec
compared with older welfare recipien
workfare programs, she herself is likely
hunger and exposure as an interferenc

[73] *Id.* ¶¶ 134–35.

[74] Gwen Brodsky & Shelagh Day, *Women's P*
Stephenson eds., *supra* note 11, 319 at 328.

[75] IRIS MARION Young, *Lived Body vs. Gender:*
FEMALE BODY EXPERIENCE: "THROWING LIK

[76] *Id.* at 16–17.

[77] DIANA FUSS, ESSENTIALLY SPEAKING: FEMINI