8. PRIVACY'S SECOND HOME
Building a New Home for Privacy Under Section 15 of the Charter

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In Canada, any constitutional "right"[1] to privacy has been housed in section 7[2] or section 8[3] of the Charter of Rights and Freedoms.[4] Located as such, privacy is grounded and protected within the Legal Rights portion of the Charter, the provisions of which set out the rights of people in dealing with the justice system and law enforcement.[5] Although sections 7 and 8 of the Charter guard recognized "zones" of privacy in certain, primarily criminal contexts, the positioning of privacy in the Legal Rights section alone neglects privacy's relevance to other Charter guarantees. This is an impoverished interpretation of what privacy could offer to human rights protections in Canada. Privacy can be viewed as more than simply a legal interest, and finding a home for it, outside of the Legal Rights section of the Charter, opens new possibilities for expanding its constitutional protection and its utility as a tool in advancing other Charter rights.

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1. There is no specific guarantee of or right to privacy enumerated in the Canadian constitution; however, the Supreme Court of Canada has interpreted guarantees in the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11 (Canada), as implicitly including a right to privacy, as will be explored here.

2. Canadian Charter (n. 1) s 7 reads "[e]veryone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."

3. Canadian Charter (n. 1) s 8 guarantees, "[e]veryone has the right to be secure against unreasonable search or seizure."

4. Canadian Charter (n. 1).

5. The Legal Rights section of the Canadian Charter (n.1) encompasses s 7–s 14.

In this paper, I contend that in addition to the protections offered by sections 7 and 8, a constitutional interest in privacy could be housed in the section 15 equality rights provision of the Charter.[6] I argue that privacy could be interpreted as an aspect of the human dignity interest that forms the foundation of section 15, and protected within the existing legal framework for adjudicating equality rights, outlined by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*.[7] The *Law* framework for equality analysis asks, in part, whether an impugned legislative provision harms the human dignity of the claimant and the group to whom the claimant belongs. Understanding privacy as a component of human dignity would allow privacy to find a home outside of the Charter's Legal Rights provisions, breathing new life into constitutional protections for this important value.

The paper begins in Part I with an overview of privacy's legal personae and its current home in the Legal Rights section of the Charter. Part II reviews the concept of human dignity protected by section 15 of the Charter and then locates privacy as an aspect of the dignity interest. Finally, Part III offers two brief case study examples demonstrating the potential of a constitutionally protected privacy interest under section 15 for furthering the human dignity of two equality-seeking groups: women and the (dis)abled community.

I. PRIVACY

Privacy as both a legal and philosophical idea is mutable and highly contested.[8] There are numerous scholarly debates over the definition of privacy[9] and its role as a value in the social and legal fabric of our society. One of the earliest

6. Canadian Charter (n. 1) 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."

7. *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.

8. This paper focuses on the legal approach to privacy in Canadian Common Law, and does not explore the multiple philosophical theories on privacy. For philosophical explorations, see Steven Davis, "Privacy, Rights and Moral Value," *University of Ottawa Law and Technology Journal* 3, no. 1 (2006): 109–131; William Prosser, "Privacy: A Legal Analysis," *California Law Review* 48 (1960): 338–423; Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totowa: Rowman and Littlefield, 1988); and Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4, no. 4 (1975): 295–314, who begins from the observation (at 295) that "the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."

9. The "right to be let alone" is the most prevalent conception of privacy, coined by Samuel D. Warren & Louis D. Brandeis in their influential article, "The Right to Privacy," *Harvard Law Review* 4, no. 1 (1890) 193–220.

and best-known theorists on privacy argued that the concept has been "the subject of . . . vague and confused writing by social scientists,"[10] and legal academics and jurists[11] are similarly perplexed at how to describe, define, and protect privacy. Despite competing visions of the concept and significance of privacy, the Supreme Court of Canada has recognized that "privacy is essential for the well-being of the individual [and] [f]or this reason alone, it is worthy of constitutional protection . . . "[12] In Canadian jurisprudence, privacy has found a constitutional home within sections 7[13] and 8[14] of the Charter, two parts of the Legal Rights portion of that document.

I begin with section 8 because it is here that Canadian courts have had the most opportunities to engage with privacy interests. The Supreme Court has interpreted the section 8 right to be free from unreasonable search and seizure in a broad fashion, describing the purpose of section 8 as the protection of a reasonable expectation of privacy in respect of government action.[15] Section 8 encompasses three general categories of privacy claims: (1) personal privacy (most often concerned with bodily integrity[16]); (2) territorial privacy (including strong protections for the home as "the place where our most intimate and

10. Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 7.

11. In the Supreme Court of Canada's most recent pronouncement on privacy in *R. v Tessling* [2004] 3 S.C.R. 432 at 25, Binnie J. characterized privacy as a "protean concept," and noted the difficulties inherent in balancing privacy with countervailing considerations like safety, security, and the suppression of crime.

12. *R. v Dyment* [1988] 2 S.C.R. 417 at 17. The strong privacy-protective language in *Dyment* reflects the egregious nature of the privacy violation in that case. While treating Dyment following a motor vehicle accident, a doctor collected a blood sample for medical purposes without Dyment's knowledge or consent and then turned the blood sample over to a police officer, though the officer had not requested a blood sample and had no search warrant. Following analysis of the sample, Dyment was convicted of impaired driving. At issue was whether the police officer's taking of the sample amounted to an unreasonable seizure for the purposes of section 8 of the Canadian Charter (n. 3). The Supreme Court found that an unreasonable seizure had taken place, and that Dyment's spatial, physical, and informational privacy interests had been violated, stating at 38, "[t]he Charter breach . . . was a very serious one . . . The sense of privacy transcends the physical. The dignity of the human being is . . . seriously violated when use is made of bodily substances taken by others for medical purposes in a manner that does not respect that limitation."

13. Canadian Charter s 7 (n. 2).

14. Canadian Charter s 8 (n. 3).

15. See *Dyment*, 426 (n. 12). The limits of a "reasonable expectation of privacy" are contentious and subject to considerable judicial interpretation in any section 8 case. See *Tessling* (n. 11). See also Ian Kerr & Jena McGill, "Emanations, Snoop Dogs and Reasonable Expectations of Privacy," *Criminal Law Quarterly* 52, no. 3 (2007): 392–432.

16. See *R. v Golden* [2001] 3 S.C.R. 679 at 90–92; *R. v Stillman* [1997] 1 S.C.R. 607; and *Dyment*, 431–32 (n. 12).

private activities are most likely to take place"[17]); and (3) informational privacy ("how much information about ourselves and activities we are entitled to shield from the curious eyes of the State"[18]). Claims to each of these kinds of privacy first require a claimant to establish the existence of a reasonable expectation of privacy[19] in order to trigger the application of section 8, because the "guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation [of privacy]."[20] The privacy protections that section 8 offers are therefore available to claimants in a limited number of circumstances, and are of primary significance in the criminal law context.

Although section 8 is the major source of privacy protections under the Charter, the Supreme Court has also recognized privacy interests within the section 7 guarantees of liberty and security of the person. The Court generally uses section 7 to describe a residual right to privacy, apart from the more specific categories protected by section 8,[21] and often looks to section 7 to protect "decisional privacy" or an individual's ability to make fundamental decisions free from state scrutiny.[22] Specifically, the Court has found that the liberty guarantee, " . . . properly construed, grants the individual a degree of autonomy

17. *Tessling*, 22 (n. 11). See also *R. v Silveira* [1995] 2 S.C.R. 297 at 144 where Cory J. states, "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house.'"

18. *R. v B. (S.A.)* [2003] 2 S.C.R. 678.

19. A reasonable expectation of privacy is established using the two part "totality of the circumstances" test, first described by the Supreme Court in *R. v Edwards* [1996] 1 S.C.R. 128, which focuses on the existence of (1) a subjective expectation of privacy; and (2) the objective reasonableness of that expectation. The latter half of the test includes a consideration of contextual factors including the place where the alleged search or seizure occurred and whether the information obtained exposed core biographical or intimate details of an individual's life. The Supreme Court has noted that the "objectively reasonable" aspect of the section 8 analysis is particularly troublesome, describing it in *Tessling*, 43 (n. 11) as "a major battleground in many of the section 8 cases."

20. *Hunter v Southam* [1984] 2 S.C.R. 145 at 159 (emphasis in original).

21. See *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 S.C.R. 425 at 178, where the Supreme Court held that "section 7 may, in certain contexts, provide residual protection to the interests protected by specific provisions of the Charter." Similarly, in *Re: B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 at 28 the Court explained, "[s]ections 8 to 14 of the Charter address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice and, as such, violations of s.7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person. It would be incongruous to interpret s.7 more narrowly than the rights in ss. 8 to 14."

22. See *R. v O'Connor* [1995] 4 S.C.R. 411 at 487, where L'Heureux-Dubé J. concludes that the right to privacy is a significant aspect of the right to liberty in a free and democratic society; and *R. v Beare* [1988] 2 S.C.R. 387 at 58 where LaForest J. for the Court voices "considerable sympathy" for the proposition that "section 7 includes a right to privacy such as that inhering in the guarantee against unreasonable searches and seizures in s. 8 of the *Charter*."

in making decisions of fundamental personal importance,"[23] and security of the person has been similarly interpreted as including a right to privacy with respect to one's physical body, its well-being, and decisions about one's body.[24] The Supreme Court has further suggested that the principles of fundamental justice, the cornerstone of the Charter's Legal Rights guarantees, include a right to privacy.[25]

Despite these well-established (though still controversial) protections for privacy in the Charter, the interpretive framework and availability of sections 7 and 8 are narrowly circumscribed. There are two main constraints, one internal to these two sections and the other a structural limitation of the Charter. Internally, the Supreme Court has developed fairly rigid "tests" that a claimant must satisfy in order to access sections 7 and 8. Before a privacy-related claim can succeed under section 7 or 8 of the Charter, an applicant must establish that a breach of section 7 is contrary to a principle of fundamental justice, or, in the case of section 8, that a reasonable expectation of privacy exists with regard to the subject matter of a search or seizure, and that the search or seizure in question was unreasonable.

Structurally, situating privacy within the Legal Rights section of the Charter entails inherent restrictions on the nature and scope of privacy interests protected. In *Gosselin v. Quebec (Attorney General)*,[26] a majority of the Supreme Court of Canada affirmed that the guarantees under the Legal Rights section of the Charter are triggered by state action involving the administration of justice. This means that the Legal Rights guarantees are usually triggered in the criminal law context, though they may also apply in administrative contexts,

23. In her concurring decision in *R. v Morgentaler* [1988] 1 S.C.R. 30 at 299, Wilson J. concluded that "the right to liberty contained in section 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives."

24. See the dissenting opinion of McLachlin J. (as she then was) in *Rodriguez v British Columbia (Attorney-General)* [1993] 3 S.C.R. 519 at 91, arguing that the right to security of the person under section 7 of the Charter protects "the dignity and privacy of individuals with respect to decisions concerning their own body." The majority in *Rodriguez* concurred with McLachlin J.'s conclusion that by interfering with an individual's ability to make autonomous choices about his or her own bodily treatment, the prohibition on assisted suicide violated the right to security of the person under section 7.

25. See *Winnipeg Child and Family Services v K.L.W.* [2000] 2 S.C.R. 519 at 96, where the Court reiterated the value of privacy, stating: "[t]his Court has suggested . . . . that the principles of fundamental justice include a right to privacy given its great value to society . . . In particular, this Court has recognized that it may be necessary, in certain contexts, to balance one individual's right to privacy against another individual's competing rights and interests . . . The privacy interest underlies and informs the content of this right [security of the person]."

26. *Gosselin v Quebec (Attorney-General)* [2002] 4 S.C.R. 429.

as was the case in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,[27] involving a challenge to child protection processes.

Although *Gosselin* left open the question of whether an adjudicative context is strictly required for the Legal Rights guarantees to apply, the majority of the Supreme Court insisted that it was appropriate to restrict the applicability of the Legal Rights protections to the administration of justice.[28] On the facts of *Gosselin*, this meant the section 7 guarantee to life, liberty, and security of the person was useless in challenging an inadequate welfare regime. If privacy as a legal value is located only in sections 7 and 8 of the Charter, the nature of the interests protected is unavoidably limited. This is, in my view, an incomplete and inadequate vision of a constitutional privacy interest, and of unnecessarily limited utility for the protection of this important value.

II. BUILDING ANOTHER HOME FOR PRIVACY: SECTION 15 OF THE CHARTER

My basis for advocating a home for privacy interests in section 15 of the Charter rests on my understanding of the concept of human dignity. Human dignity is a fundamental constitutional value underlying almost every right protected under the Charter.[29] It has found special protection as the touchstone of the section 15 equality guarantee. The leading Supreme Court of Canada pronouncement on section 15, *Law v. Canada (Minister of Employment and Immigration)*,[30] makes human dignity the fundamental inquiry in cases of discrimination, with the Court defining the purpose of section 15 in the following manner:

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and

27. *New Brunswick (Minister of Health and Community Services) v G.(J.)* [1999] 3 S.C.R. 46. See also *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307 at 45, where the Supreme Court acknowledged that section 7 has some applicability outside of the legal rights or criminal context, stating, "[t]here is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context. Section 7 can extend beyond the sphere of criminal law, at least where there is state action which directly engages the justice system and its administration."

28. It is notable that in her dissenting opinion in *Gosselin*, 305 (n. 26), Arbour J. took a different and radical approach to section 7, interpreting the guarantees broadly and without the limitations imposed by its location in the Legal Rights section of the Charter. She left the Supreme Court soon after the *Gosselin* decision and her views on section 7 have not gained further traction at the Court to date.

29. See *Morgentaler*, 288 (n. 23), where Wilson J. states, "[t]he idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter." See also *Blencoe*, 76–77 (n. 27).

30. *Law* (n. 7).

> to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[31]

Connections between privacy and human dignity have long been acknowledged and explored by theorists,[32] and the Supreme Court of Canada has declared, "a fair legal system requires respect at all times for the complainant's personal dignity, and in particular his or her right to privacy, equality, and security of the person."[33] It seems natural, then, that privacy should find a home outside of the Legal Rights portion of the Charter, within human dignity as it is understood and protected under section 15.

I anticipate two practical and legal benefits to interpreting section 15 to include a privacy interest. First, protecting privacy as part of the Charter's equality guarantee will provide new opportunities for the advancement of privacy-related claims that do not fall within the boundaries of Legal Rights. A claimant whose privacy interests have been violated in situations that do not trigger the application of section 7 or 8, could have an avenue under section 15 to bring forward the claim, expanding the Charter's range of privacy protections. Second, understanding privacy as an equality issue could present more expansive possibilities for safeguarding a range of different kinds of privacy interests, over and above those protected under section 7 or 8.[34] Whatever the content of

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31. *Law*, 59 (n. 7).

32. A number of philosophers have connected privacy to human dignity, and explained the relationship between the two as harmonious and even symbiotic in nature. See Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," *New York University Law Review* 39, no. 6 (1964): 962–1007; Jeffrey H. Reiman, "Privacy, Intimacy and Personhood," *Philosophy and Public Affairs* 6, no. 1 (1978): 26–44; Helen Nissenbaum, "Privacy as Contextual Integrity," *Washington Law Review* 79, no. 1 (2004): 119–158; David Matheson, "Dignity and Selective Self-Presentation," *Lessons from the Identity Trail* eds. Ian Kerr, Carole Lucock, & Valerie Steeves (New York: OUP, 2009), Chapter 18.

33. *O'Connor*, 154 (n. 22).

34. It is beyond the scope of this chapter to theorize on what the precise content of privacy is, could, or should be; however, as noted previously, section 8 has been interpreted by Canadian courts as protecting three specific "classes" of privacy interests: personal, territorial, and informational, and the residual interest embodied in section 7 is often interpreted as a decisional privacy interest. This is not an exhaustive list of privacy-related interests that deserve protection. A number of theorists have argued persuasively that a robust understanding of privacy includes more than simply protecting individuals from government interference, and may include recognition of values such as solitude and anonymity, and features such as positive obligations on the state to provide the conditions necessary for true private choice to be exercised. Although these and other privacy interests do not fall strictly within the boundaries of section 7 or 8, it is possible that understanding privacy through a lens of equality could provide a forum for such arguments to be made. See Allen, *Uneasy Access*, (n. 8); Linda McClain, "Reconstructive Tasks for a Liberal Feminist Conception of Privacy," *William and Mary Law Review* 40, no. 3

privacy is understood to include, there is general agreement in law and society that privacy is worth protecting, as a requirement both of "inviolate personality"[35] and human dignity.[36] Expanding the possibilities for protecting privacy by including it within the ambit of the section 15 equality guarantee recognizes the foundational role that privacy plays in society and its contribution to ensuring equal respect for the dignity of all persons.[37]

In imagining a new home for privacy within section 15, I begin by briefly outlining the relevant interpretive framework for assessing claims of unequal treatment under the Charter: the *Law* test. In *Law*,[38] the Supreme Court of Canada outlined three broad inquiries to be made when assessing a claim under section 15:

(1) Does the law, program, or activity impose differential treatment between the claimant and the applicable comparator group,[39] creating a distinction between the groups in purpose or effect?
(2) Is the differential treatment based on enumerated or analogous grounds?[40]

(1999): 759–794; Dorothy Roberts, "Punishing Drug Addicts who Have Babies: Women of Colour, Equality, and the Right of Privacy," *Harvard Law Review* 104, no. 7 (1991): 1419–1482.

35. Warren & Brandeis, "The Right to Privacy," 194 (n. 9).

36. See Bloustein, "Privacy as an Aspect of Human Dignity," (n. 32).

37. While I define here two distinct benefits of a section 15 privacy interest, I acknowledge that they will inevitably overlap and intersect in any number of ways.

38. *Law* (n. 7).

39. The choice of comparator groups is integral to any equality claim. The Supreme Court has held, in cases including *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203, that the comparator group must possess all the characteristics of the claimant except for the personal characteristic at issue. The Court has further held, in cases including *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 S.C.R. 357, that a court may reject a claimant's choice of comparator group, and that choosing a comparator group deemed "incorrect" by the court may cause an equality claim to fail. See *Auton (Guardian ad litem of) v British Columbia (Attorney-General)* [2004] 3 S.C.R. 657. The comparator group model has received a great deal of criticism. See Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15," *The Windsor Yearbook of Access to Justice* 24, no.1 (2006): 111–142; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?" in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, eds. Sheila McIntyre & Sanda Rodgers (Toronto: LexisNexis Butterworths, 2006), 135.

40. The concept of enumerated and analogous grounds originated in *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143. There are nine enumerated grounds stated in the Canadian Charter's section 15 provision (n.6), and to date the Supreme Court has recognized analogous grounds including sexual orientation (see *Egan v Canada* [1995]

(3) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration? For discrimination to be established under the final step of the *Law* framework, it must be shown that the burden or denial of a benefit harms an individual's human dignity.[41]

I propose that it is within the dignity analysis of the *Law* framework that privacy interests could be recognized and protected, though I acknowledge that the dignity step of the section 15 test has proven arguably problematic.[42] The concept of dignity has been accused of being "vague to the point of vacuous and, therefore [it] . . . can be used as an empty place-holder for other less presentable reasons for finding or refusing to find a violation of equality."[43] Indeed, although there is considerable judicial and academic consensus on the importance of human dignity as a measure of equality, there is considerably *less* agreement about the nature or content of the dignity interest itself. The Supreme Court has made human dignity the central feature of equality analyses, but has yet to offer any defining characteristics to make the concept more concrete, intelligible,

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2 S.C.R. 513), off-reserve Aboriginal status (see *Corbiere* (n. 39)), and marital status (see *Miron v Trudel* [1995] 2 S.C.R. 418).

41. *Law* (n. 7). The Supreme Court in *Law* set out a nonexhaustive list of four contextual factors to be considered in determining whether a claimant's dignity has been infringed: (1) preexisting disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; (2) 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; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature and scope of the interest affected by the impugned law.

42. Criticisms leveled against the dignity aspect of section 15 include the fact that the concept is too imprecise to ground equality jurisprudence. I am included amongst those who have concerns about using human dignity as the central focus of section 15. For elaboration of my position on this issue see Daphne Gilbert, "Time to Regroup: New Opportunities for the Supreme Court and Section 15 of the *Charter*," *McGill Law Journal* 48, no. 4 (2003): 627–649; and Daphne Gilbert, "Substance without Form: The Impact of Anonymity on Equality-Seeking Groups," *University of Ottawa Law and Technology Journal* 3, no. 1 (2006): 225–247. See also Sophia Moreau, "The Wrongs of Unequal Treatment," in *Making Equality Rights Real: Securing Substantive Equality Under the Charter*, eds. Fay Faraday, Margaret Denike, & M. Kate Stephenson (Toronto: Irwin Law, 2006), 31 at 34–35.

43. Denise G. Réaume, "Discrimination and Dignity," in *Making Equality Rights Real: Securing Substantive Equality Under the Charter*, eds. Fay Faraday, Margaret Denike, & M. Kate Stephenson (Toronto: Irwin Law, 2006), 124.

or identifiable. In *Law*, Iacobucci J. for a unanimous Supreme Court attempts to define human dignity for the purposes of a section 15 analysis stating,

> There can be different conceptions of what human dignity means . . . [T]he equality guarantee in s.15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.[44]

The way that human dignity is currently framed in law offers section 15 claimants and Canadian judges few, if any, guidelines as to its content, and dignity's amorphous nature has caused difficulties for equality claimants in a number of post-*Law* decisions.[45] Despite its ambiguity, human dignity remains, for the time being, the fundamental consideration in assessing equality claims under the Charter. A number of legal commentators continue to theorize on ways to work within the confines of the *Law* framework, arguing that human dignity can be rehabilitated to provide important contours to equality analyses under section 15.[46] I take a similar approach here, and work with the *Law* framework to contend that the ongoing project of defining and interpreting the section 15 dignity interest should include recognition of, and protection for, privacy interests.

Legal scholar Denise Réaume has developed a defense of human dignity that offers a useful departure point for incorporating privacy into the section 15 concept of dignity.[47] The core of Réaume's defense is that dignity protects agency and self-determination and a recognition that humans are choosers and planners, "beings with projects and dreams who make commitments and attachments and at least partly measure their own sense of worth according to

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44. *Law*, 53 (n. 7).

45. See *Gosselin* (n. 26) and *Auton* (n. 39).

46. See Moreau, "The Wrongs of Unequal Treatment," 35 (n. 42), who proposes that a model of the kinds of treatment that violate human dignity is necessary in order to give "[t]he abstract ideal of equal concern and respect for dignity of all . . . content by a substantial conception of what kinds of treatment violate human dignity."

47. Though she defends human dignity, Réaume, "Discrimination and Dignity," 124 (n. 43), acknowledges that the process of giving dignity some meaningful content "stands as perhaps the most significant challenge facing the Court in the coming years."

their ability to exercise their capacities and realize their dreams."[48] Réaume's description of dignity's contribution to equality analysis includes many of the same ideas that underlie the legally dominant conception of privacy under section 7 of the Charter,[49] evidencing the relatedness of the two concepts. The value of privacy in the human dignity context is that it is an enabling tool for persons to be self-determining individuals, which, according to Réaume, is one of, if not *the* goal that human dignity seeks to further and protect under section 15. Although privacy and dignity may remain conceptually imprecise, accepting Réaume's defense of dignity illustrates that both concepts are directed toward the same, or similar goals—the valuing of individual persons through respect for their autonomy—and that privacy and dignity intersect in ways that may offer guidance in interpreting each of them individually.

Commentators have noted a similar connection between human dignity and the nebulous value of liberty arguing,

> [a] fully fleshed out concept of dignity should help explain a range of, if not all of, the human rights typically entrenched in constitutions, just as the value of liberty does. Different rights will reflect different aspects or dimensions of the concept . . . [W]e need to be looking for the dimensions of dignity that help with the work of s.15 in particular.[50]

A comparable relationship exists between dignity and privacy, and in this way my argument here dovetails with that of Réaume. Like liberty and dignity, privacy can be considered a meta-concept that may support increasingly sophisticated and layered interpretations of other concepts that inform Charter values. Privacy may be a companion tool to dignity, furthering the "work" done by section 15[51] and contributing to the realization of equality through human dignity.[52] If dignity is concerned with the promotion or safeguarding of

48. Réaume, "Discrimination and Dignity," 144 (n. 43).

49. See Part I, above.

50. Réaume, "Discrimination and Dignity," 109 (n. 43). Wilson J. made a similar connection in *Morgentaler*, 289 (n. 23), stating " . . . an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state."

51. According to the Supreme Court in *Law*, 51 (n. 7), the "work" of the section 15 equality guarantee is aimed at preventing the "violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudices, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

52. The Supreme Court has acknowledged the contribution of privacy to the realization of human dignity in cases including *Dyment*, 27 (n. 12), where the Court stated, "the use of a person's body without his consent to obtain information about him, invades an area of privacy essential to the maintenance of his human dignity."

the conditions necessary for the realization of full personhood, privacy is the tool that may, in some instances, help to accomplish this end. I turn now to examine briefly two contexts where section 15-based privacy protections could contribute to the furtherance of human dignity for equality-seeking groups.

III. CASE STUDIES: EMPLOYING PRIVACY UNDER SECTION 15

I have outlined two broad benefits of situating and protecting privacy interests within human dignity under section 15.[53] This model, used both as a new avenue for privacy claims that do not fall within the spectrum of Legal Rights, and as the basis for protecting new kinds of privacy beyond those recognized under sections 7 and 8, presents possibilities for equality-seeking groups to argue for the privacy they require to realize their human dignity. I foresee at least two possible ways in which these privacy-related arguments under section 15 could be used by equality-seeking groups. The first argument is that equality-seeking groups must have equal access to privacy,[54] understood here as the right to be left alone, to lead one's life and make decisions free from scrutiny or interference by the state. The argument favoring privacy presumes a context within which privacy is desirable and must be protected in order for human dignity to be realized. In *Falkiner v. Ontario (Ministry of Community and Social Services*),[55] the Ontario Court of Appeal implicitly recognized this argument in its section 15 analysis of a social assistance regime that presumed that once persons of the opposite sex began living together, they were "spouses" and their eligibility for social assistance was less than that of a single person. The Court noted that single people not on social assistance were free to have "try-on" relationships without suffering any adverse financial consequences, whereas those on social assistance were penalized as a result.[56] Although it did not use the language of privacy, in my view, the Court accepted the idea that the claimants should have the privacy to define their relationships as they

53. See page 8 of this chapter.

54. Equality-seeking groups are generally afforded less privacy and are subject to greater levels of surveillance than those occupying more privileged positions in society. For instance, individuals are often required to divulge a great deal of personal information in order to access social support services, as is required by the United States' Department of Housing and Urban Development's Homeless Management Information Strategies, which tracks homeless persons and the services they access by collecting names, Social Security Numbers, dates of birth, race, gender, health status information including HIV status, and income information. See Electronic Privacy Information Centre, *Poverty and Privacy*, http://www.epic.org/privacy/poverty/.

55. *Falkiner v Ontario (Ministry of Community and Social Services*) [2002] 59 O.R. (3d) 481.

56. *Falkiner*, 73 (n. 55).

deemed fit, without being subject to state-imposed labels and the resulting financial consequences.

Although it is true that government nonintervention may be a necessary condition for individuals to realize dignity, merely shielding a sphere of decision-making from the reach of government may be insufficient to ensure meaningful privacy for everyone in all contexts. The second privacy-related argument under section 15 begins from the premise that the privacy an equality-seeking group may appear to enjoy is often a consequence of neglect; in other words, being "let alone" by government does not categorically translate to a meaningful state of privacy for everyone. Simply removing the state from the equation of choice leaves a claimant with only the abstract freedom to choose, which "is of meager value without meaningful options from which to choose and the ability to effectuate one's choice."[57] Human dignity may demand that positive steps be taken in order for an equality claimant to access privacy and enjoy its benefits.[58] This second argument shifts the focus of the privacy construct away from state nonintervention toward an affirmative guarantee of the resources necessary to make privacy meaningful in the particular context of an equality-claimant's life.[59]

These two arguments evidence the dual nature of privacy—a dual nature that may be uniquely accommodated within a section 15-based understanding of privacy. Interpreting privacy within the section 15 pursuit of human dignity illustrates that for dignity to be realized, privacy may take on a different meaning or character in different circumstances. Infringements to human dignity may require a remedy with either a negative or a positive approach to privacy, in accordance with the demands of a particular case. I outline here two examples where equality-seeking groups could utilize a privacy interest under section 15

57. Roberts, "Punishing Drug Addicts," 1478 (n. 34).

58. The "positive obligations" notion of privacy acknowledges that privacy must be understood within the broader societal context within which it is employed. Feminist critiques of conventional privacy doctrine have noted that in the context of our patriarchal society, privacy does not benefit men and women equally. See Anita Allen, "Coercing Privacy," *William and Mary Law Review* 40, no. 3 (1999): 723–757, where she notes that "[t]o the extent that the government is infused with patriarchal, heterosexual ideals, men's and women's privacy rights are likely to reflect patriarchal, heterosexual ideals of a [privacy]."

59. Current privacy jurisprudence under sections 7 and 8 is overwhelmingly based on an understanding of privacy as a negative right—the ability to live one's life free from state intrusion—and the assumption that this kind of privacy is accessible and desirable for all. See *Tessling*, (n. 11). Canadian courts have given little, if any, formal acknowledgment to the fact that in some instances, privacy may do more harm than good, or that some individuals may not be able to access the conditions necessary to truly exercise private choice.

to further their human dignity: (1) access to abortion services for women; and (2) (dis)ability rights.

A. Abortion Access

Abortion was decriminalized in *R. v Morgentaler*[60] on the basis that the procedural requirements imposed by the Criminal Code[61] to access a legal abortion violated women's security of the person interest under section 7 of the Charter. Although privacy was not explicitly relied upon by the Supreme Court in *Morgentaler*,[62] privacy-related language featured prominently in many of the judgments, particularly that of Wilson J. She emphasized the importance of protecting private decisions affecting the physical body, including choices about health care, sexuality, and procreation, from unwanted intrusions, and stressed the importance of such decisions to personal autonomy and maintaining a sense of control over one's body. All of these ideas speak to the concept of human dignity, and implicitly recognize the importance of privacy in a woman's decision to abort a pregnancy. Section 15 provides a new avenue for privacy-based claims similar to those implicitly acknowledged in *Morgentaler*, to protect a woman's private decision to abort. Understanding the role that privacy plays as an aspect of human dignity in the context of abortion accepts that reproductive control is "essential to women's full personhood and participation in all spheres of life,"[63] and that dignity demands decisions about procreation be "let alone," free from state scrutiny or control.

Section 15 may present a new avenue to argue for a woman's right to make private choices regarding reproduction; however, the existing constitutional framework around access to health care services raises a separate but equally fundamental issue. The risk of construing abortion as a wholly private matter is

60. *Morgentaler* (n. 23). *Morgentaler* did not bestow a right of access to abortion upon Canadian women, but simply decriminalized the procedure. The narrow boundaries of the *Morgentaler* decision continue to circumscribe women's access to abortion services across Canada. See Sanda Rodgers, "Misconceived: Equality and Reproductive Autonomy in the Supreme Court of Canada," in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, eds. Sheila McIntyre & Sanda Rodgers (Toronto: LexisNexis Butterworths, 2006), 271.

61. Criminal Code, RSC 2005 c C-8 (Canada) s 252 (now s 287). Section 252, the therapeutic abortion provision, stated that a woman could only access an abortion legally if it was performed in a hospital with the approval of a 3-doctor committee that must certify that continuing the pregnancy would endanger the life or health of the mother.

62. In *Morgentaler* (n. 23), three judgments concurring in the result were written by Dickson C.J., Beetz J., and Wilson J. A dissent was entered by McIntyre J.

63. Rhonda Copelon, "Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom," *New York University Review of Law and Social Change* 18, no. 1 (1990–1991): 15–50 at 49.

that the state is under no obligation to provide access to abortion services.[64] Section 15 must also act as a platform for arguing that women's dignity requires that they *not* be "let alone" when it comes to the provision of abortion services. It is "society's responsibility both to protect choice and to provide the material and social conditions that render choice a meaningful right rather than a mere privilege."[65] Privacy under section 15 in the reproductive rights context must therefore include arguments for both the negative proscription against government coercion, as well as the imposition of a positive duty on governments to facilitate the process and actualization of choice by providing the conditions necessary for all women to enjoy and exercise privacy in furtherance of their human dignity.

B. (Dis)ability Rights

Despite antidiscrimination laws and legal guarantees for (dis)abled persons in Canada, "it remains a crucial task to argue vigorously for policies that insure the full measure of equal dignity to people with all forms of disability."[66] Understanding the role of privacy in achieving human dignity is a critical part of this project, particularly in light of the fact that the Supreme Court has offered little insight into what aspects of human dignity are most pertinent to an equality-based (dis)ability rights claim.[67] Section 15 offers a new avenue for (dis)ability claimants to advance privacy-related claims that do not arise in the Legal Rights context, and also offers possibilities for arguments in favor of recognizing the unique privacy-related needs that (dis)abled persons may require in order to realize their full measure of dignity and equality.

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64. For example, in New Brunswick, access to abortion services is limited by the province's Medical Services Payment RSNB 1973 c M-7 (New Brunswick), NB. Reg. 1984–84–20, Sched. 2(a.1), which deems abortion services ineligible for public funding except when " . . . performed by a specialist in the field of obstetrics and gynecology in a hospital facility . . . and two medical practitioners certify in writing that the abortion was medically required." This means that New Brunswick women must meet procedural requirements to access an abortion at one of only two hospitals in the province providing the service, or must pay out-of-pocket for an abortion in a clinic setting. These are serious limits to abortion access.

65. Copelon, "Losing the Negative Right," 16 (n. 63).

66. Eva Feder Kittay, "Equality, Dignity and Disability," *Perspectives on Equality: The Second Seamus Heaney Lectures*, eds. Mary Ann Lyons & Fionnuala Waldron (Dublin: The Liffey Press, 2005), 95 at 99.

67. In *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 S.C.R. 703 at 33, the Court articulated what is to date its most progressive vision of what section 15 might offer to (dis)ability claimants, but see *Auton* (n. 39), where the Court appeared to move backwards by accepting the government's position that its decision on what treatments to fund could not be judicially challenged.

One location where the privacy interests of (dis)abled persons are routinely violated is in interactions with the medical community. (Dis)ability theorists[68] have argued that the clinical encounter is fraught for individuals with (dis)abilities, that there is a strong disconnect between the law's promise of protection for confidentiality and the actual experience of (dis)abled persons,[69] and that insufficient respect for the bodily privacy of a (dis)abled individual amounts to an insult to human dignity.[70] Employing section 15 to protect privacy in this context focuses on issues of self-determination, autonomy, bodily integrity, and free choice, all of which speak to the concept of human dignity underlying the Charter's equality guarantee.

In addition, using section 15 to protect the privacy of (dis)abled individuals may open doors for new arguments regarding the nature of the privacy interests at stake. For instance, physically (dis)abled individuals may not enjoy the benefits of privacy-related values such as solitude, seclusion, or anonymity[71] to the same degree as non(dis)abled persons as a result of the fact that they may require a higher degree of assistance in going about their everyday lives.[72] Accepting under section 15 that a range of privacy-related values over and above the right to be "let alone" can be critical to the realization of human dignity, claimants could argue for the constitutional protection of a spectrum of different privacy interests of unique importance for the realization of their dignity and therefore essential to equality.

CONCLUSION

I have argued here that privacy can be fundamental to the realization of human dignity and must therefore be understood as an aspect of equality

68. Including Catherine Frazee, Joan Gilmour, & Roxanne Mykitiuk, "Now You See Her, Now You Don't: How Law Shapes Disabled Women's Experience of Exposure, Surveillance, and Assessment in the Clinical Encounter," in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, eds. Dianne Pothier & Richard Devlin (Vancouver: University of British Columbia Press, 2006), 223.

69. Despite the fact that privacy's traditional constitutional home in section 8 of the Charter ostensibly maintains the privacy of one's health information, the privacy interests of the disabled community are routinely violated, as noted by Frazee, Gilmour, & Mykitiuk, "Now You See Her," 234 (n. 68).

70. Feder Kittay, "Equality," 96 (n. 66).

71. Allen, *Uneasy Access* (n. 8), terms these values "paradigmatic" privacy concepts, and explores their importance to women, arguing that a robust understanding of privacy must include acknowledgment and protection of these ideals.

72. Frazee, Gilmour, & Mykitiuk, "Now You See Her," 234 (n. 68), note the ways in which the privacy of (dis)abled women may be compromised by others out of a paternalistic desire to do "what is best."

under section 15 of the Charter. Equality is an ideal to which all individuals are entitled and a reality to which governments and societies should aspire; it is difficult to imagine denying an individual's right to privacy when it is framed as an aspect of equality. Conceptualizing privacy under section 15, therefore, presents an important "higher level" of protection, complementing the safeguards currently offered by sections 7 and 8. Building a home for privacy interests in section 15 expands the spectrum of constitutional privacy protections and acknowledges the importance of privacy in our individual lives and society as a whole.