Equality Rights and the Relevance of Comparator Groups

Sophia Reibetanz Moreau

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INTRODUCTION

It is often said that equality rights are inherently comparative.[1] Justice McIntyre, writing on the Supreme Court of Canada's first equality rights case under the *Canadian Charter of Rights and Freedoms*, stated that 'equality is a comparative concept" and "may only be . . . discerned by comparison with the condition of others in the social and political setting in which the question arises."[2] In its subsequent case law, the Supreme Court has also emphasized the role of comparisons in establishing violations of equality rights. In *Law v. Canada,* the Court defined the first stage in its new test for violations of section 15 as an inherently comparative one, stating that "a court must identify differential treatment as compared to one or more other persons or groups."[3] And the Court suggested that comparisons might also be relevant at subsequent stages of the test, especially at the third and final stage, whose purpose is to assess whether the claimant's treatment amounts, in the circumstances, to discrimination.

In the recent case of *Hodge v. Canada,* however, the Court made the stronger claim that all three stages of the *Law* test *must* be conducted

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[1] See, for instance, K. Simons, "The Logic of Egalitarian Norms" (2000) 80 B.U.L. Rev. 693 at 4 and "Equality as a Comparative Right" (1985) 65.3 B.U.L. Rev. 387 at 389; K. Greenawalt, "How Empty Is the Idea of Equality?" (1983) 83 Colum. L. Rev. 1167; T.M. Scanlon, "The Diversity of Objections to Inequality" (Lindley Lecture, University of Kansas, 22 February 1996).

[2] *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 164.

[3] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497; hereafter *Law*. The test for violations of s.15 outlined in *Law* consists of three stages. First, a court must ascertain that the impugned law imposes differential treatment on the claimant relative to others, either through its form (by explicitly drawing a distinction between the claimant and others) or through its effects (by resulting in greater burdens upon the claimant). Second, the court must assess whether the differential treatment occurred on the basis of an enumerated or analogous ground of discrimination. And finally, the court must inquire whether this differential treatment really does amount to discrimination, in the sense that it denies the claimant's human dignity.

on the basis of a comparison, and moreover, a comparison with the very same comparator group that is invoked at the first stage of the test.[4] The Court emphasized, in Justice Binnie's words, that:

> . . . the selection of the comparator group is not a threshold issue that, once decided, can be put aside. On the contrary, each step in the section 15(1) analysis proceeds "on the basis of a comparison". Indeed in many of the decided cases, the characteristics of the "comparator group" are only developed as the analysis proceeds, especially when considering . . . whether discrimination, as opposed to just a "distinction", has been established.[5]

This approach is, in my view, not only mistaken but dangerous, because it risks overlooking certain very real forms of discrimination. The aim of this paper is to show why. I shall argue that although it is perfectly appropriate to think of a general right to equal treatment as inherently comparative, it is a mistake to think that the kind of anti-discrimination right that the courts have found in section 15 is inherently comparative. We need to distinguish between a general right to equal treatment and the kind of right that our courts currently interpret section 15 as containing, which is a right not to be denied benefits or subjected to burdens in circumstances where this amounts to discrimination.[6] This anti-discrimination right, I shall argue, is not inherently comparative, for not all types of discrimination involve comparative or relational injustices. Some types of discrimination do involve comparative injustices. But others do not. That is to say, sometimes our objection to discrimination is not that some people have been unfairly treated relative to others, but that the treatment these people have received is unfair and demeaning, considered purely in and of itself. If I am right about this, then to insist that our assessment of whether discrimination has occurred must always proceed upon a comparative basis, and to insist that the relevant comparator group must always be the group that has received

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[4] *Hodge v. Canada (Minister of Human Resources Development)* [2004] 3 S.C.R. 357 at para 17.

[5] *Ibid*, at para 17.

[6] For ease of reading, I shall hereafter omit mention of burdens and will simply use the phrase "denial of benefits" to mean both the denial of positive benefits and the imposition of burdens.

the benefit, is to risk blinding ourselves to certain forms of discrimination.

Although the main focus of this paper will be on the relevance or irrelevance of comparisons to assessment of discrimination in the third stage of the *Law* test, I shall also have something to say about when and why comparator groups are relevant to the first stage of the test. I shall argue that, although it may indeed be appropriate in many cases to invoke a comparator group at this first stage of analysis, the reason for doing so is very different from the reason that courts often seem to have in mind.

The paper will therefore discuss the role of comparisons at both the third and first stages of the *Law* test. I shall not discuss the second, "enumerated and analogous grounds" stage, not because the analysis at this stage is indeed comparative, but because it is so obviously *not* comparative that it seems unlikely that courts will ever attempt to use comparisons here. Whether a law denies a claimant a benefit because she possesses a characteristic that is identifiable as an enumerated or analogous ground clearly depends on the law, the way it affected her, and her actual or presumed attributes. It does not depend on the ways in which that law may affect *other* groups. So the suggestion that comparisons are relevant at the second stage of the *Law* test seems to be simply untenable, and not worth further discussion.

By contrast, there is a distinct air of plausibility about the suggestion that discrimination is always and inherently comparative. Why shouldn't we think that the injustice involved in discrimination is always a comparative one, contingent on how others have been treated? Doesn't discrimination consist precisely in an individual or group being treated unfairly and in an undignified manner, in circumstances where others have not been so treated? In what follows, I shall try to explain why this is not always the case.

REJECTING ONE CONCEPTION OF THE RIGHT TO EQUAL TREATMENT

Before turning to my own reasons for thinking that not all forms of discrimination involve comparative wrongs, I think it is worth discussing, and dispensing with, one argument that might be used to

support my position. One might argue, as some scholars have attempted to do, that the only plausible way to understand a right to equal treatment is as a right to the fair and proper application of the distributive rules or criteria that the government has chosen.[7] We can describe such a right as follows:

> *Right to the proper application of the government's criteria:* If the government has chosen to distribute a benefit, and Andre and Maria each meet the government's chosen criteria for receipt of some benefit, then both must be given the benefit.

As this description reveals, this right is not comparative at all. It is of course true that if both Andre and Maria meet the government's criteria, then both must, alike, be given the benefit. But this is not because of any truth about Andre and Maria *relative to* each other. The injustice that is done if Maria is not given the benefit does not depend on whether Andre is given the benefit. It depends only on the fact that Maria fully meets the government's chosen criteria for receiving a benefit, and so should therefore receive it. On this interpretation, then, the right to equal treatment is not comparative because its function is simply to prevent the injustice of the government misapplying its own criteria of distribution in relation to one individual or group, and whether this injustice has occurred does not depend on whether the government has or has not treated others in this way as well.[8]

Hence, one way of contesting the view that the equality rights in section 15 are inherently comparative would be to interpret these rights as rights to the proper application of the government's chosen criteria. However, for obvious reasons, this interpretation does not answer to the purposes of section 15. We look to these equality rights to protect us, not from the injustice of having the government's *chosen* criteria improperly applied to us, but from the injustice of being subjected to the *wrong* criteria – criteria that ignore us, or mischaracterise us, or demean us.

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[7]See, for instance, Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537. For helpful criticisms of this formal approach and a detailed defence of the distinctness of this interpretation of equality from substantive conceptions of equality, see the articles by Simons cited in note 1.

[8] For discussion of a similar non-comparative conception of equality, see Joseph Raz , *The Morality of Freedom* (Oxford: Clarendon Press, 1986) 228. Raz refers to such conceptions as "rhetorical equality," to distinguish them from what he calls "strict egalitarianism" (which I shall discuss at the start of the next section)..

This is the kind of unfairness in distribution that section 15 is concerned with. We must therefore interpret these equality rights in a different way.

DISTINGUISHING OUR ANTI-DISCRIMINATION RIGHT FROM A RIGHT TO EQUAL TREATMENT

One way of interpreting equality rights in a manner that does not reduce them to a mere right to the proper application of the government's chosen criteria is as follows:

> *Right to equal treatment:* If the government has chosen to distribute a benefit, and Maria meets appropriate criteria for receipt of the benefit, then if the government gives the benefit to any person (e.g., Andre), it must also give it to Maria.

This right differs in two crucial respects from the right to the proper application of the government's chosen criteria. Firstly, it appeals, not to the criteria of distribution that the government has in fact chosen, but to "appropriate" criteria, thereby allowing us to substitute alternative criteria for those the government has chosen where the latter seem demeaning or blind to individuals' real needs. But secondly, the mere fact that Maria meets some set of appropriate criteria does not, on this understanding of the right, guarantee her the benefit. This is because the right, so understood, is a genuinely comparative right, a right to *equal* treatment. It simply guarantees Maria equal treatment with others. So it guarantees her the benefit *insofar as* some other person, such as Andre, has also been given it. It follows from this right, then, that if the government chooses to give one person or group the benefit, it must also give it to all others that also meet the appropriate criteria. However, if the government decides not to give anyone the benefit, then no one (including Maria) can object that their right to equal treatment has been violated. They might, of course, have some non-egalitarian reason for objecting to this decision. But they cannot object to it on the grounds that their right to equal treatment has been violated. And that is because this right is concerned solely with a relative injustice: the injustice of being denied a benefit where others, who are no more needy or deserving than oneself, are given it.

Because this is a genuinely comparative right, it follows that if section 15 were interpreted as containing this right, then it *would* be appropriate to require individuals to identify a comparator person or group and to frame their entire objection in terms of a comparison with this person or group. Although, significantly, what would make a particular person appropriate as a comparator would not be the fact that the person was "relevantly similar" to the claimant, but rather the fact that both he and the claimant each *independently* satisfied some set of appropriate criteria for receipt of the benefit.

However, this comparative right is very different from the right that the Supreme Court has found in section 15 of the *Charter*. This is because the Court has read section 15 not as a right to equal treatment, but as a right not to be discriminated against in the distribution of benefits and burdens. In its view, section 15 applies, not to any denial of a benefit to a worthy claimant in circumstances where others have received the benefit, but to *discriminatory* denials. We might describe this different, anti-discrimination right, as follows:

> *Anti-discrimination right:* If the government has chosen to act, and its action affects the distribution of a benefit, then no one can be denied this benefit in a manner that is discriminatory or in circumstances where the denial itself amounts to discrimination.

Unlike the right to equal treatment, this anti-discrimination right does not render a person's entitlement contingent upon some other person's entitlement. It is, of course, necessary for claimants to show that the government has chosen to act and to show that this action has had distributive effects; and a logical way of doing this is to show that some other group has received the benefit in question. Indeed this is, in my view, a helpful way of understanding the function of the first stage of the *Law* test: it asks a claimant such as our hypothetical Maria to show that some group has received the benefit in question, not because the unfairness that she is complaining about is necessarily relative to the way in which that group has been treated, but because she must establish that the government was indeed engaged in an act that had effects on the distribution of benefits, and this is generally a useful way of establishing this. Maria's entitlement is not itself, however, conditional upon the entitlement of any particular comparator group. Provided she can establish in *some* way that the government's action affected the

distribution of this benefit, she is, under the anti-discrimination right, entitled not to be denied this benefit in a discriminatory way. So the first stage of the *Law* test, though helpful, is simply a heuristic device; it is not a hard-and-fast requirement, which all claimants must meet. All that claimants must do, prior to going on to show that the denial of a certain benefit to them amounted to discrimination, is to show that the government chose to act in a certain way, and that this had distributive consequences; for, on this interpretation of section 15, the equality rights within it are concerned with discrimination in the distribution of benefits and burdens.

The above analysis shows that the anti-discrimination right is not comparative in the precise way that the right to equal treatment is. But one might argue that it is indeed ultimately comparative, for discrimination occurs only where the claimant has been treated unfairly in relation to another person or group. I shall try to show, in the next section of the paper, that this is not the case. At least some types of discrimination do *not* involve comparative injustices.

Before I turn to this discussion of the non-comparative nature of some forms of discrimination, however, I should address one objection that might be made to my claims thus far. One might object that my attempt to distinguish our anti-discrimination right from a broad right to equal treatment is artificial, in the sense that even if these two rights are different in their form, they will in fact turn out to be violated in all of the same circumstances. That is because discrimination, one might argue, just consists in someone's being denied a benefit in circumstances where she meets some appropriate criteria for receiving it, and where others who also meet appropriate criteria have been given this benefit. In my view, this line of argument cannot succeed, for at least two reasons.

First, this understanding of discrimination trivializes the kind of injustice that is perpetuated in cases of discrimination (as I hope my subsequent discussion of discrimination will show, in more detail). We think of the injustice of discrimination, not just as a matter of failing to give someone her due, but as failing to give this person her due in a way that mischaracterizes her, or demeans her, or perpetuates oppression. In other words, discrimination is treatment that sends or perpetuates a particularly objectionable sort of message about the claimant and that has

a particularly serious sort of effect on her. A government may fail to give someone her due, or fail to apply appropriate criteria towards one group in the distribution of a benefit, without sending this type of message about them or having this sort of effect on them.

Secondly, however, as I mentioned above, the anti-discrimination right differs from the right to equal treatment in that it does not render an individual's entitlement to a benefit dependent upon any other individual's entitlement. All that it tells us is that if the government has chosen to act in a way that has distributive consequences, it cannot deny the benefit to anyone in a manner that is discriminatory. So it is possible for this right to be violated without any other individual or group being given (or deemed eligible for) the benefit in question.

WHY SOME TYPES OF DISCRIMINATION DO NOT INVOLVE COMPARATIVE INJUSTICES[9]

Let us begin by considering a core instance of discrimination, one that anyone who believes that discrimination is a coherent and recognisable phenomenon would deem discrimination – namely, a case in which someone is denied a benefit on the basis of, or in a manner that seems to reinforce, a *stereotype*. If we could show that, in such cases, the unfairness that the claimant is objecting to does not seem to be comparative, then we would have shown that a central form of discrimination does not involve a comparative injustice.

Suppose, as a hypothetical example, that a government that has been requiring closed-captioning and sign-language interpretation of all parliamentary proceedings decides to eliminate the requirement for closed-captioning, requiring only sign-language interpretation in future. One effect of this measure would of course be to curtail access to these debates for those who are members of the oral deaf community, whose

[9] I shall speak throughout the paper of "types of discrimination" and shall analyse different types separately, rather than trying to offer a single general principle that could explain what discrimination consists in. This approach reflects my view that discrimination is not a unitary phenomenon, reducible to a single type of explanation. On the contrary, I think that the injustices that we group as "discriminatory" are different in their nature and cause, though all can be said loosely to concern treatment that is demeaning and has particularly severe effects. For a defense of this approach to discrimination, see my article "The Wrongs of Unequal Treatment" (2004) 54 UTLJ 291 and my article, "What is Discrimination?" [forthcoming].

preferred means of communication is not sign-language but speech and speech reading. When asked about this, let us suppose that government officials express surprise that not all deaf people prefer to communicate through sign-language. They say that it is surely enough of an accommodation to the deaf community to require sign-language interpretation of parliamentary proceedings, and that if anyone who is deaf wishes to follow parliamentary proceedings, he or she should do so through the language that is most appropriate for deaf persons: sign-language. A member of the oral deaf community now challenges the revocation of the closed-captioning service as discriminatory. What would be the substance of her objection?

It would, I think, be that when the government was considering the impact that its decision would have on deaf people, it ought to have looked at the oral deaf as the people they really are, with the needs and aspirations that they really have, rather than assuming that they were "just like" other deaf people. The government assumed, in a stereotypical fashion, that there is a single, homogenous deaf community and that the members of this homogeneous community are somehow naturally best-fitted for sign-language; when in fact, there is no such homogeneous community and the choice to use or not to use sign-language is a deep personal choice, reflecting a person's core beliefs about who she is and about what is valuable in her life. (Interestingly, for this reason, the government's decision is also deeply demeaning to those who are culturally deaf, as it takes their deep personal choice to use sign-language and treats it as though it is an inevitable fact about them –a fact resulting from a defect in them rather than a fact that reflects their own values and choices). Moreover, the absence of closed-captioning would likely reinforce these stereotypical assumptions about the deaf community, for all that the general public would subsequently see is sign-language interpretation. And this, combined with the more limited access to parliamentary debates which the oral deaf would then have, would further contribute to their social marginalisation and exclusion from politics. So, rather than treating the claimant as who she is, this government action, both in purpose and in effect, assigns her characteristics that she does not possess.

Our hypothetical claimant's objection does not seem at root to be a comparative one. What she is insisting is *not* that she ought to have

been treated exactly like those whose preferred mode of communication is sign-language (nor, for that matter, that she ought to have been treated in exactly the way that hearing persons are treated). Indeed, the very problem with the government's approach in this hypothetical case is that it seems to force her into one or another of these moulds. It forces her to become like one or the other of these other groups. And what she is claiming, on the contrary, is that she ought to be considered for who she is. It seems a mistake, then, to suggest that our inquiry into whether she has been denied the benefit of access to parliamentary debates in a manner that is discriminatory should be treated as a comparative one. In order to determine whether she has been denied access to the parliamentary debates on the basis of a stereotype, we do not need to engage in any comparisons of her with other groups. All that we need to do is focus on the impact that the government's action has upon her, and upon whether the image of her group that appears to underlie the government's action and the image that will be perpetuated by the effects of that action accurately reflect her situation.

One might at this point object that I have mischaracterised the nature of our claimant's objection to discrimination. Her objection, one might argue, is not really that she has not been considered for who she is. It is that she has not been considered for who she is in circumstances where members of other groups – namely, those who prefer to communicate through sign-language, on the one hand, and hearing persons, on the other -- *were* considered for who they are. And this is precisely why her treatment has been so demeaning. Others were treated on the basis of their actual needs and circumstances; but she was not. And so what she is asking for is the same kind of treatment, or the same kind of regard, that they received. If this is the right understanding of the injustice that has occurred here, then it does seem to be comparative in nature.

I doubt, however, that this objection offers us the right understanding of discrimination. To test the objection, imagine this fanciful follow-up to our scenario: one month later, the government cancels the sign-language interpretation of the debates. It announces that those who are clever enough to have learned sign-language are clever enough to learn oral communication, and so it is unnecessary to spend extra tax dollars on sign-language interpretation. Then, the government cancels all sound broadcasting of its debates, stating that it has been appalled by public apathy over the past few months and has realized that

the hearing population is too stupid to understand the content of the debates.

The government in our hypothetical example has now withdrawn the equivalent services from all groups; in doing so, it has stereotyped all groups. It is of course true that some of the stereotypes are more offensive than others, but they are all, I think, still objectionable stereotypes. (If the stereotypes are not, in your view, objectionable in such a way as to constitute discrimination, then just reconfigure the example in light of some stereotypes that are.) So the government has now treated everyone badly, on the basis of stereotypes. But I do not think we would conclude that our first claimant, the member of the oral deaf community, no longer has any objection on the grounds of discrimination. On the contrary, I think we would feel that her objection is just as strong as before. If you agree, then that suggests that you do not in fact think that discrimination is a comparative wrong. You do not think that our claimant's objection is really that she was treated in a demeaning way *when others were not.* Rather, you think her objection was that she was treated in a demeaning way, *and she should not have been.* She should have been shown proper respect. Her objection is not, then, to the relative treatment she has received, in comparison to other groups. It is to the treatment that she has received, considered in and of itself.

One might now object, though, that this follow-up scenario generates the right intuitions only because, in setting it up, I have assumed that there could be a situation in which all groups were stereotyped in a discriminatory way. This is not possible, one might claim, precisely because stereotypes are usually perpetuated by some dominant group that *is* being considered for who they are (e.g., in this case, hearing persons). And discrimination on the basis of stereotypes is always an injustice in relation to the far better treatment that has been given to that group.

I believe, however, that it is this objection, and not my hypothetical scenario, that is making unwarranted assumptions. It may be true that there is usually a dominant group that is not stereotyped whenever there are groups that are. This simply reflects the fact that the stereotype has to come from somewhere: it has to have a cause, and the

cause is usually not, or not initially at any rate, the group that is being stereotyped. But it does not follow from this that the injustice of stereotyping must be conceptualized as an injustice *in relation to* the non-stereotypical treatment received by the other group. And that it is not properly conceptualized as a comparative injustice is shown, I am suggesting, by the fact that if we imagine a case in which a government could "level down" and treat everyone equally badly, we will see that such levelling down does not eliminate the discrimination. It cannot eliminate it, because it is not a comparative injustice.

I have now argued that at least one core type of discrimination does not involve a comparative sort of injustice. It is also arguable that there is another type of discrimination that, similarly, is not comparative. This type of discrimination consists of being denied a particularly fundamental sort of benefit when one is a member of an already disadvantaged or vulnerable group. There is of course disagreement as to whether this really constitutes discrimination, just as there is room for disagreement over the relevant sense of "fundamental" (this could, for instance, mean "necessary for full participation in a society"; or it could mean only "necessary for full political participation"; or perhaps the relevant sense is simply "necessary for survival"). My aim here is not to resolve these difficult questions. Rather, I want to argue that, *if* we view this as a form of discrimination, then we must acknowledge that the injustice involved is not a comparative one.

This type of discrimination is exemplified in the cases of *Gosselin v. Attorney General (Quebec)* and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General).*[10] Louise Gosselin was a welfare recipient in Quebec at a time when provincial regulations set the welfare amount payable to those under 30 at $170, a level that was significantly lower than the amount available to those over 30, and far below what Statistics Canada deemed the poverty level for urban dwellers at that time ($914 per month).[11] Although part of Louise Gosselin's objection was undoubtedly that she was not given the same amount as those over 30, she also seemed to be objecting to the fact that she was not, under that scheme, given enough resources to live on. One way of understanding this component of her objection is as follows. The government had undertaken a welfare scheme. Yet it had not given her

[10] [2002] 4 S.C.R. 429 (hereinafter "Gosselin") and [2004] 1 S.C.R. 76 (hereinafter "Canadian Foundation").

[11] *Gosselin, ibid,* at para 7.

enough to live on. And so it denied her, and all those who were part of the disadvantaged, vulnerable group of persons requiring welfare, a fundamental benefit.[12] So understood, this part of Louise Gosselin's complaint of discrimination is not comparative. And a similar non-comparative injustice was alleged in the *Canadian Foundation* case on behalf of children. This case concerned section 43 of the *Criminal Code*, which excludes from the crime of assault instances in which "reasonable" physical force is used on children for corrective purposes by parents and teachers. Although there are several ways of conceptualizing the nature of the discrimination in this case, Justice Binnie suggested at one point that section 43 was discriminatory because, in the words of Peter Newell: "Children are people, and hitting people is wrong."[13] If we understand the objection to section 43 in this way, then our objection is not that children should be treated exactly like adults, and so because we do not have an exemption for hitting adults, we should not have one for children. Our objection is rather that children should not be hit because, considered in and of themselves, they deserve not to be hit. Or, to flesh it out more fully: children have the intrinsic quality of "being a person" and so they merit protection from intentional physical force. When such a "fundamental benefit" is not given to them, this amounts to discrimination, since they are an extremely vulnerable group.

It follows from these two examples that if we accept that denying a fundamental benefit to a member of a vulnerable or disadvantaged group amounts to discrimination, then we must acknowledge that there is another form of discrimination that is not comparative in nature. Of course, I do not mean to imply that we must accept the antecedent of this condition: many would deny that this amounts to discrimination. But if we do think it amounts to discrimination, we must see it for what it is, rather than trying to fit it into a comparative mould that is not its own.

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[12] Depending on how one understands this form of discrimination, the fundamental benefit might just be the income required to survive, or it might be the participation in society or in political life that is open only to those who have sufficient resources not to have to spend all of their time strategizing about how to survive.

[13] Canadian Foundation, supra note 9 at para 108. Justice Binnie was writing in partial dissent: he held that s.43 does violate s.15 of the *Charter* (though, in his view, it is saved by s.1); whereas the majority held that it does not violate s.15.

WHY WE MUST BE CAUTIOUS EVEN WHEN THE INJUSTICE IS COMPARATIVE

I have now discussed two forms of discrimination –one non-controversial and the other rather more controversial—and have tried to show that the injustices involved in each are non-comparative. I now want to suggest, further, that even in cases where the discrimination that is at issue does seem to be comparative, we need to be cautious about *which* comparisons we engage in. This is so for at least two reasons.

Firstly, the relevant comparator group is not always the group that has received the benefit (i.e., the group that was invoked at the first stage of the *Law* test). Consider a type of discrimination that we have not yet discussed: namely, cases where a claimant or group of claimants is denied a benefit, and this denial of a benefit perpetuates the oppression of this person or group by others. Oppression, however we choose to understand it, is clearly a comparative idea: it always involves an oppressing group and an oppressed group. So if we believe that discrimination can occur in this way, then we will hold that there is at least one form of discrimination in which the injustice is a relational or comparative one.

Recall, for one example of this type of discrimination, the case of *Vriend v. Alberta.*[14] The *Alberta Individual Rights Protection Act*[15] did not, at the time, include "sexual orientation" among the list of prohibited grounds; Delwin Vriend challenged this omission as discriminatory. One way of understanding his objection is as the suggestion that the failure to include this ground perpetuated the oppression of homosexuals, a vulnerable group. If this is right, then the comparison that is relevant in determining whether he suffered from this discrimination is not between homosexuals and the vulnerable groups that *were* protected under the *Act*; it is between homosexuals and the dominant social groups who oppress them. It is true that, in order to assess whether the government had chosen to act in a way that had distributive consequences, we can ask whether there were vulnerable groups that received the benefit of protection under the *Act.* But when we try to determine whether Vriend's own treatment at the hands of the government amounted to discrimination through the perpetuation of oppression, we need to look,

[14] [1998] 1 S.C.R. 493.
[15] R.S.A. 1980, c. I-2.

not to these other vulnerable groups, but to the ways in which the absence of protection for homosexuals under the *Act* contributed to their oppression, and the people and institutions that oppressed them.

A second reason for being cautious in the kind of comparator we look to, when assessing comparative forms of discrimination, concerns the risks inherent in thinking about the relevant comparator always as a comparator *group*. This is unproblematic, if by "group" we mean simply a collection of individuals who happen to share a feature relevant to the case (e.g., they have all received the benefit denied to the claimant, so the claimant can point to them to satisfy the first stage of the *Law* test; or they oppress members of the claimant's group, so the claimant can point to them as part of a demonstration that he has suffered discrimination). But my worry is that by consistently speaking of the relevant comparisons as though they are comparisons with a group, courts may be led to engage in the very kind of stereotyping and essentialising that section 15 is designed to prevent – thereby perpetuating negative images of certain groups, and blinding us to certain forms of discrimination.

I have argued in this paper that some forms of discrimination do not consist in comparative injustices, and hence that it is not always necessary for the claimant to invoke a comparator group in order to demonstrate that she has suffered discrimination. And I have also tried to show, in this last section, that even when the type of discrimination at issue does involve a comparative injustice, we need to be cautious about which groups we invoke, and about how we think about these groups.

So the next time that you encounter a section 15 case, I hope you will begin by asking: What is the nature of the discrimination that is alleged here? Is it really comparative in nature? And if it is, what, really, are the appropriate comparisons to be drawn?