

## EQUALITY RIGHTS: AN ANALYSIS

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*Cet article se veut une analyse de la notion d'égalité, notion d'importance certaine au Canada aujourd'hui et une étude de ses origines légales, historiques et morales. Plus particulièrement, il examine les sortes d'égalité désirables pour diverses fonctions: égalité légale, égalité d'opportunité et égalité de résultat. Il considère les genres de discrimination défendus à la lumière de la jurisprudence récente. Enfin il discute la question de la nature «individuelle» par opposition à la nature «collective» de la notion d'égalité. Il propose une solution «individualiste» qui, bien qu'elle rejette la plupart des cas de discrimination positive (affirmative action) et des droits de groupe en une société démocratique, est quand même favorable à l'Etat-providence et à la justice sociale promulguée par l'Etat.*

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*This article seeks to analyse the notion of equality which is so important in present-day Canada and to consider its legal, historical and moral roots. In particular, it attempts to examine the types of equality desirable for different functions: legal equality, equality of opportunity and equality of results. It considers the forbidden types of discrimination in the light of recent jurisprudence. Finally it debates the issue of the «individual» as opposed to the «collective» nature of equality rights. It proposes an «individualistic» answer which, while it rejects most affirmative action and most forms of group rights in democratic society, is yet favourable to the welfare state and to state-induced social justice.*

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## I. Introduction

There is no question that «equality rights» are a fashionable and an important issue in Canada today<sup>1</sup>. The *Charter*, the traditional Canadian division into groups<sup>2</sup> which compete for funds and attention, the hard times, which exacerbate this competition, the divisive and all-pervasive language question, the sudden revival of feminist ardour all contribute to making the notion of equality both important and controversial. Hardly anyone, except an insignificant fringe of extreme rightists, questions the desirability of some form of equality. Certainly, this writer will not question it. However, careful analysis shows that very often those who are militant egalitarians calling for immediate results, and those whose faith in equality is less activist and more theoretical really mean different things by the very notion. Moreover, the various «equalities» demanded by the numerous and passionate advocates themselves contain contradictions which cannot easily be reconciled. It is therefore desirable to go back to basic philosophical and political questions which are often forgotten in heated debate, to see if equality should be viewed as a goal to be immediately achieved, or more likely an ideal to be perpetually approached but never achieved. Moreover, we should consider the possible definitions of equality and opt between incompatible ones<sup>3</sup>. In particular, Canada will have to face the distinction between group equality and individual equality and decide which we wish to achieve or to approach.

The question is of more than theoretical interest. The courts are already beginning to deal with a vast number of claims arising

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1. Vickers, «Majority Equality Issues of the Eighties» (1983) Can. Hum. Rts Y. B. 47 for a description of what the author terms the «rising temperatures». L. Smith et al, *Righting the Balance Canada's New Equality Rights*, The Canadian Human Rights Reporter Inc., 1986.
  2. As contrasted, say, with the American melting pot.
  3. An analysis not dissimilar to the present, though more oriented towards private law and the justice of transactions is found in Honoré «Social Justice» (1960-62) 8 McGill L.J. 77. The different kinds of equality in that essay are particularly interesting. This essay was somewhat revised in *Essays in Legal Philosophy* Robert Summers «ed.», Berkeley, University of California Press, 1968. The citations in this text are from the McGill L.J. version.

out of the *Canadian Charter's* guarantee of equal rights and out of similar guarantees in other human rights laws. All cannot rationally be maintained. How is one to evaluate these claims and avoid random results dependent merely on the prevailing political winds at any time? While it will never be possible to find a simple and uncontroversial formula, a careful analysis might yield principles which will give at least some weight to the results and will make them generally acceptable. That is why a serious analysis is essential at this time.

## II. Equality as a philosophical ideal

Equality as a serious philosophical ideal dates from the 18th century. It is in that century that we find Rousseau's call for equality in the name of nature and the stirring first words of the Declaration of Independence, drafted by Jefferson. Out of the 18th century came the French Revolution, shaking the very foundations of society in the name of the three-headed ideal - liberty, equality and fraternity.

Of course, calls for equality had been heard before. Although most thinkers, notably Plato and Aristotle, accepted natural inequality of men as a fundamental truth, occasional egalitarian appeals were very popular<sup>4</sup>. Rome had its slave rebellions, its radical politicians and its stoics, the middle ages had their peasant uprisings and attempts to set up ideal societies<sup>5</sup>. We are all taught some of the egalitarian slogans of Wycliffe and of the 1381 English rebellion which was in part inspired by him<sup>6</sup>. In the works of Suarez, a more modern-sounding equality appears, as it does, in very strange form, in the works of Hobbes, a philosopher justly rescued from relative obscurity by our century, at once fascinated and frightened by the implications of his teachings.

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4. One must eschew the temptation to call these «modern». That is anachronistic. In fact, the egalitarians often proceeded from radically different premises than we do. So did Plato and Aristotle. See Plato *The Republic*, Aristotle *Nichomachean ethics* for some of the best examples.
  5. Notably in Tabor under the Hussites and in Germany in 1526. The medieval egalitarians were illustrations of the egalitarian side of Christianity.
  6. Esp. «When Adam delved and Eve spun, who was then the gentleman?»

However, only in the 18th century, did equality become a generally accepted tenet of political philosophy. There can be little doubt that initially, all that was intended was *legal* equality - the abolition of distinctions between castes or classes of persons, of ancient privileges of feudal origin, of irrational tradition that weighed so heavily in the ordinary lives of Europeans. The call for equality could be seen as part and parcel of the rebellion against «natural law» by men like Bentham and Austin, against traditional criminal law by Beccaria and Bentham, against religious absolutes by Voltaire and Diderot and against metaphysical constructs of reality by Hume and Kant. Viewed in that context, Rousseau's political radicalism would have been initially satisfied by an abolition of legal distinctions between men and by a recognition of all men's basic rights<sup>7</sup>. This is basically what the radical governments - those of the United States<sup>8</sup> and, a few years later, France - did.

It is now clear that the partial abolition of legal distinctions did not bring about true equality, as it was supposed to. The reason was a basic difficulty with 18th century political thought. Rousseau had seen the prevailing inequality as the result of society not of man's nature. Therefore, once one abolished the unjust society, liberty and equality would be part of the same coin<sup>9</sup>.

Whether one sees Rousseau as infinitely and somewhat naïvely

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7. T. Paine *The Rights of Man*, Harmondsworth: Penguin, 1969.
  8. But the Americans failed to apply their theory to blacks. Both the United States and France did not realize the full implication of those doctrines for women, although some understanding of this was evident, especially in France. Even when one corrects these glaring anomalies, the abolition of distinctions (i.e. legal equality), stops short of importing an egalitarian ideology into the content of laws which requires active equalizing. Legal equality is what is guaranteed by almost all charters and constitutions (e.g. sec. 15 of the *Canadian Charter*) It clearly does not end the debate.
  9. Clearly, Rousseau did not interpret unjust society around him as a result of inevitable forces of history. In his view, a new movement favouring liberty could create a better world. But Rousseau was aware of the dangers of naiveté. One can see this clearly in his brief comments on the works of Abbé de St. Pierre in *Les Confessions*.

optimistic about man, or as an early proponent of the theory that man is infinitely malleable and can be shaped<sup>10</sup>, one can immediately diagnose this psychological issue as a fundamental weakness of the egalitarian theory of the 18th century. In fact, egalitarian legislation alone failed to solve all the problems. More important, liberty turned out quite pernicious for equality. As Hobbes saw quite clearly, man left to his own devices, tended to strive for an inequality favouring him, rather than for an idealistic, pastoral equality. Reason, which was supposed to limit appetite and keep the newly liberated world on the path of virtue, proved quite unequal to passion as a motive for most men's actions. The philosophers of the 19th century had to deal with the problems created by Rousseau's view of psychology and the contradiction between liberty and equality, which had produced formal freedom but no social justice.

Two significant solutions were proposed. One exemplified by Mill, spawned modern liberalism. It basically chose liberty over equality, maintained individual economic freedom as a basic tenet, but called for some redistribution of the fruits to temper the unequal results of the operation of liberty. Equality was, of course, maintained in the formal legal sense but in no other.

The other position, proposed by Marx, relied on the previous notion of the perfectability of man, but it used recent scientific and economic theories, to attempt to ground it on quasi-scientific principles. Instead of Rousseau's almost naïve faith in the individual «human nature» freed from its chains, Marx tried, to some extent successfully, to discover laws of society and social behaviour independent of the individual. If Marx's economic determinism was correct, it was possible to try to build an egalitarian society by abolishing the economic conditions which necessarily led to inequality and class struggle. Marx's solution then was to sacrifice some of the formal «liberty» in liberty, equality and fraternity in order, to build a society based on equality<sup>11</sup>.

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10. Strauss *Natural Rights and History*, Chicago, University of Chicago Press, 1971 at 252-95.

11. Marx and especially Trotsky were explicit about their belief that the new society would create new freedom by liberating man from what had until now been the inexorable laws of history and necessity. Therefore the temporary sacrifice of formal freedom would create true liberty. See Deutscher *The Age of Permanent Revolution: A. Trotsky Anthology*, Laurel

If Mill was prepared to sacrifice some equality and Marx some formal freedom, neither was prepared to ditch either ideal completely. Mill insisted on redistribution; Marx opposed censorship and spoke of the «costs of administration» falling immediately after his revolution<sup>12</sup>. Presumably, he did not have a powerful state in mind<sup>13</sup>. The writings of both men illustrate the difficulties inherent in reconciling the goals of liberty and equality and the sacrifices one has to make one way or the other.

Both goals and the associated difficulties are still with us. A modern, western attempt to synthesize them is found in John Rawls' *A theory of Justice*. The two basic principles of freedom and equality are postulated, together with a theoretical explanation of when a rational man would accept inequality even unfavourable to him and a liberal bias in favour of liberty as the stronger of the two principles in case of conflict which cannot be resolved. This is not the time to analyse Rawls in detail. Suffice it to say that his is a particular modern western philosophy which is probably not as universal as that of Mill or Marx but which explains usefully many of the goals and aspirations of our society<sup>14</sup>. Rawls provides us with another reminder that the goals of the American and French Revolutions which created the modern world not only have not but cannot be fully realized because of contradictions between liberty and equality. We can no longer blithely favour both and not perceive the «trade offs» that must be made in order to produce a viable result. It is unthinkable for our society to cease restricting economic freedom in order to achieve some equality; equally unthinkable to suppress basic freedoms to prevent anyone from gaining an advanta-

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edition, New York 1964.

12. Marx, *Capital and Other Writings*, The Modern Library New York, 1959 at 4. See also John Stuart Mill *On Liberty* (New York) Library of Liberal Arts, 1956 and Mill «Utilitarianism Liberty: representative government», London, Dent, 1962.
13. Both Mill and Marx would doubtless be shocked to see their modern heirs, neo-liberals and totalitarian Marxists completely write off equality or freedom as the case may be.
14. Unless the Reagan-Thatcher philosophy represents a more permanent mode of thinking than this writer believes or hopes. If it does, the relevance of Rawls, the theorist of the liberal welfare state, declines considerably and he becomes rather a symbol of the post-war epoch than a model of the future.

ge<sup>15</sup>. Nor is it possible to close one's eyes to the inherent and permanent tension between equality and liberty.

Another important problem in the philosophy of equality is to define its subjects. Equality of individuals is a different proposition from the equality of families, tribes, classes, sexes, religions or nations. It is clear that Rousseau, Jefferson, Paine and other 18th century egalitarians were looking at the equality of men, of autonomous and independent individuals and not of any groups. However, the French Revolution spawned not only the modern ideas of social and political justice, but also a new collectivism, called nationalism and, through the romantic movement, a new consciousness of particularism, of ethnic or other special allegiance<sup>16</sup>. Nationalism, by seeking to promote its own, is not by nature egalitarian; however it helps establish groups, rather than individuals as holders of such rights or benefits as remain. The concept of collective rights has become a popular one to invoke in modern times, and Canada has seen a particular growth in its popularity<sup>17</sup>. It is therefore necessary to examine the very concept of collective right to see what it can mean.

While the word «right» has proved difficult to define<sup>18</sup>, its relation to «duty» and the contrast between «right» (where someone must have a duty) and a mere privilege or power where no such duty exists have been described by several writers<sup>19</sup>. This distinction

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15. It is significant to note that Marx fully acknowledged the need for some inequality. See Marx, *supra*, note 12 at 7. The sole exception is that mythical future society after the end of history.
  16. One could trace this development through Fichte, Hegel, Sorel down to our times. In particular, German nationalism from the 1813 rebellion was a fashionable and intellectually influential movement, culminating in fascism.
  17. Largely because Quebec has used it to justify its language legislation.
  18. R.W.M. Dias, *A bibliography of jurisprudence*, 3e ed., Boston, Butterworths, 1979 at 241.
  19. W.N. Hohfeld, *Fundamental Legal Conceptions*, New Haven, Yale University Press, 1964. This writer has already used Hohfeld as a source of basic concepts in administrative law in Grey, «Discretion in Administrative Law» (1979) 17 Osgoode Hall L.J. Use of Hohfeld is not to be viewed as a profession of legal



is a useful one, because it makes clear the importance and imperative nature of rights<sup>20</sup>. If the rights of some are to have any importance, they must be connected to duties upon others to respect them. In public law, rights are most often asserted by individuals against the state or vice versa. This is convenient because both parties can be identified. The beneficiary and the subject are clear and therefore are easily subject to write and to appeal; moreover, violations can be fought not only politically, but through the Courts.

When rights are asserted by collectives this simplicity disappears. The beneficiaries and the subjects cannot be identified, save through unilateral assertion or some other arbitrary process. The justifiability of such claims becomes doubtful and in every case some method of identification of beneficiaries is necessary before litigation can commence<sup>21</sup>.

«Collective rights» theories appear to be particularly unsuitable with respect to equality. Who is to be equal? If all groups, then Spanish will have to be given equal status with English and French in Canada - an obvious absurdity. If one opts instead for each group getting its proper percentage share of goods and services, the result is less absurd but equally undesirable. People can belong to many groups. How is one to divide rationally the goods and services? And why should membership in a group, even a hitherto oppressed one, entitle one to any special share of the advantages our society has to offer? And even apart from these moral questions, the accounting in a system of group equality would be at the same time so complex and so arbitrary as to defeat any meritorious purpose such an idea might have. It is thus far better to promote equality *in spite of* and not *because of* membership in any group.

A distinction must be made between «collective rights» which are meaningless and individual rights, collectively asserted, which are a common phenomenon. In labour relations for instance, workers

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positivism, but rather as the employment of an excellent tool for the achievement of clarity.

20. R.M. Dworkin in *Taking Rights Seriously*, Cambridge, Harvard University Press, 1977. See also H.L.A. Hart *Bentham on Legal Rights* in Oxford essays in Jurisprudence 2nd ed. Oxford 1973.
21. In some cases e.g. women, the identification may seem easy. Even then, complications set in. What of women who refuse to be identified with the group? Are they to be included anyway?

band together to be able to face the greater bargaining strength of the employer, but they are still fighting for individual rights—salaries, vacations, working conditions<sup>22</sup>. «Collective rights» become a problem only when the collectivity asserts rights in addition to or instead of its individual rights, in other words when one sees the whole as greater or different from its parts. If individuals fight to be allowed to keep a linguistic or religious identity in their daily lives, they are collectively fighting for individual rights. However, when they assert a right to prevent members from leaving the group, to restrict non-members in their chosen geographic area, or any other right to group survival or expansion, they are making a fundamentally different and intrinsically dangerous claim. It is that kind of «collective right» which tends to dilute the very notion of right, to turn society into a bargaining session between groups<sup>23</sup>, and to decrease the capacity of the legal system to solve many of the disputes<sup>24</sup>.

In some instances, the collective right/individual right dichotomy may turn out to be a linguistic debate. It makes relatively little difference, whether certain rights are termed «individual, collectively enforced» or collective. In labour relations, the substitution of the word «individual» for the fashionable «collective» will not, in any way, change the value of the social phenomenon of employer/employee relations. It would be a misuse of the notion individual rights, for instance, to support the ultra-conservative position such as that expressed in *Re Lavigne*<sup>25</sup> which would limit the use of

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22. See Book Review «Individual Rights and Collective Action: The legal History of Trade Unions in America» (1986-87) 100-1 Harvard Law. Rev. 672 esp. at 687-88.
  23. Thus making it very dangerous not to belong to any. This is one of the greatest dangers of group bargaining.
  24. Because instead of legal argument we get political bargaining. Courts have a far more pronounced reluctance to judge between groups than between individuals whose equality before them is taken for granted, whether or not it corresponds to a social reality.
  25. *Re Lavigne and Ontario Public Service Employees Union et al.* (1986) 29 D.L.R. 4th 321, (Ont. H.C.). This judgment was overturned by the Ontario Court of Appeal on January 30, 1989 in *Lavigne v. Ontario Public Service Employees Union et al.* While this may not definitely terminate the matter, this writer is confident that in the end, the Court of Appeal's view will

workers' union contributions to narrowly-defined «collective» bargaining issues. Firstly, individual rights can be fostered by indirect action such as participation in political activities as much as by «direct» collective bargaining. Like business, labour has a legitimate interest in the policies of leading parties and may wish to influence them. Corporations are not limited in their spending powers though they, too, administer shareholders' funds. No one has ever challenged the scope of their rights. It is difficult to justify harsher treatment for labour on any but partisan grounds. Secondly, the logic of *Lavigne*<sup>26</sup> ultimately amounts to a challenge of the validity of any taxation aimed at redistribution of wealth. It is not reasonable to attempt to root in basic human rights notions of untrammelled economic liberalism<sup>27</sup>. Liberalism is only one ideology and nothing about it turns it into a form of natural law. Thirdly, everything in law cannot be reduced to fundamental rights<sup>28</sup>. The internal taxation of

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prevail.

26. *Ibid* at first instance.
27. This is what U.S. courts did prior to the New Deal, with highly unfortunate results. One must always avoid the temptation to say that the present social system, if one likes it, is or approaches natural law.
28. See *A.-G. Que. v. Chartrand et al.* (1987) 2 R.J.Q. 1732 esp. at 1736 where a quotation of Gerald Gunther by Vallerand J.A. makes exactly this point. It is also implicit in the following words of the Ontario Court of Appeal in *Lavigne, supra* fn. 25 at 48-49: The Rand formula, as we indicated earlier, has long been recognized as a component of collective bargaining. It must also be recognized that, in expressing financial support for political and social causes, the union is merely doing what trade unions have traditionally done in Canada and in political democracies elsewhere. Whether any restriction ought to be place on the union's use of payments compelled by an agency shop provision, which, as we noted above, was the case up to 1977 with respect to political activities, is in our opinion, not a constitutional matter for the courts. Judicial values ought not to be imposed in determining whether or how far a union expenditure is germane to collective bargaining of a reasonable means of achieving collective bargaining objectives. These are properly matters for the union in the conduct of its own internal affairs. If restrictions are to be imposed, they should be imposed by the legislature which bears the responsibility of striking the delicate and changing balance, in the light of

union members may be liked or disliked, but it is not the violation of fundamental basic rights like the right to liberty and to a minimum standard of living<sup>29</sup>. The error of the first instance *Lavigne*<sup>30</sup> result has nothing to do with the collective or individual status of right, but rather with the definition of what is basic. It may be pointed out that few things bring the *Charter* into disrepute as much as their extension into areas which cannot, in any rational way, be viewed as basic. Then the *Charter* becomes nothing more than another instrument for advancing some particular interest.

One reason for opposing the notion of «collective right» despite the linguistic component of the debate is the persistence with which the advocates of collective rights present their claim. If the difference is linguistic, why insist so much upon it? There is obviously more than language involved and the positions taken by the advocates of collective right lead frequently to the sacrifice of the individual for group autonomy or integrity. It is important because of this to reaffirm the primacy of the individual as holder of rights.

Of course, dogmatic denial of the existence of collective rights is futile. The popularity which the notion enjoys means that some rights are created which answer to the description. The «native rights» clause of the *Charter*<sup>31</sup> is an obvious example. Another example is found in the recent Supreme Court decision of *Greater*

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prevailing circumstances, between employers and trade unions and between trade unions and their members and non-members. The court should not be called upon to monitor and examine every jot and tittle of union expenditure objected to by a non-member, as the judgment in appeal would dictate.

29. In *Public Service Alliance of Canada v. Canada* (1987) 75 N.R. 161. (See also *Reference Re Compulsary Arbitration* (1987) 74 N.R. 99) the Supreme Court refused to recognize a right to strike as fundamental. From this writer's viewpoint the minority provides the more attractive reasoning in the special case but the basic premise that not everything is a basic, unchangeable right cannot be challenged. The *Charter* would be an instrument of political oppression if one could easily constitutionalize the status quo.

30. *Supra*, note 25.

31. Sec. 25 and 35.

*Hull School Board v. A.G. Quebec*<sup>32</sup> where sec. 93 was presented as a collective right of Protestants or Catholics. The same view can be found in or read into other Quebec and Ontario decisions concerning school rights<sup>33</sup>. On the international scale, self-determination of peoples has been turned into a fundamental right which it is impossible to ignore<sup>34</sup>. In Canada, collective rights have been ardently defended as the justification for a very powerful concept of multi-culturalism and for legislation in the field of language. Recently, Professor Magnet has written extensively on the subject<sup>35</sup>. He has criticized the Supreme Court for what he views as its

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32. *Greater Hull School Board v. A-G Quebec* (1984) 2 S.C.R. 575. See also a number of frankly disturbing cases where religious «collective rights» appear to have prevailed over individual freedom and dignity and especially *Caldwell v. Stuart* (1984) 2 S.C.R. 603 and *Eglise Evangélique libre du Québec v. Vermet* J.E. 85-75 (Que. C.A.) See also Carignan, *De la Notion de droit collectif et son application en matière scolaire du Québec*, Centre de Recherche de droit public, U. de Montréal. This article provides much of the inspiration for Chouinard J.'s seeming endorsement of collective rights in *Greater Hull School Board*, *supra*. In general, Prof. Carignan's article is a seminal work, expressing eloquently the view held by many Quebecers that collective rights are important.
33. *Reference Re Education Act of Ontario* (1985) 47 O.R. (2d) 2 esp. at 36-38 (Ont. C.A.). But no full-fledged theory of collective rights is found in the judgment. See also Brossard J.'s decision in *Quebec Association of Protestant School Boards v. A.G. Que* (1985) C.S. 872 invalidating Quebec's planned sweeping reform of school boards.
34. See especially the works of Ian Brownlie and Rosalind Higgins. The problem of «self-determination» as a collective right was brought to this writer's attention by Prof. John Humphrey. Prof. Humphrey elaborated on this in «*The Canadian Charter of Rights and Freedom and International Law*» (1985-86) 50 Sask Law Rev. 13. This writer has serious reservations about self-determination as a basic right. For one thing, one can never objectively define the collectivities «entitled» to it. For another, this «right» ignores the rights of dissent members of these collectivities. See *infra*. fn. 39.
35. Magnet, «The Supreme Court and the *Charter of Rights*» in *The Supreme Court of Canada: proceeding of the October 1985 Conference*, Gerald A. Beaudoin ed., Montréal, Yvon Blais, 1986.

exclusive concern with individual rights. In Quebec, collective rights have long been the justification for state violation of almost any individual rights. An entire issue of the *Revue du Barreau* was devoted to this question at the time when collective rights were particularly fashionable<sup>36</sup>. On the language issue, Quebec has frequently (but, on the whole, unsuccessfully) invoked collective rights<sup>37</sup>. However, these collective rights are all fraught with danger. Firstly, how does one define such terms as Protestants, Catholics or «peoples»<sup>38</sup>? And even if one succeeds in defining these groups, what is their significance<sup>39</sup>? Are there other ones equally worthy of recognition which may have incompatible rights? How do these groups express their will<sup>40</sup>? Most important, how do we react when the rights of individuals whether members or outsiders, conflict with the «rights» of these groups? It is not sufficient to speak of reconciliation or even of weighing and arranging the rights in order of importance, because the individual rights tend to clash irreconcilably with these collective ones and because groups and

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36. (1978) 38 R. du B. at 397 and 44.

37. See A-G. of Quebec's factum in Court of Appeal Supreme Court in *Quebec Ass. of Prot. School board et al. v. A-G. Quebec* where an attempt was made to give priority to collective rights. The government failed before all courts. The cases are reported at (1984) 2 S.C.R. 66, (1983) C.A. 77, (1982) C.S. 673.

38. «Natives» may be an easier category, but even there much doubt lurks under the surface. The traditional use of uncertainty as the means of invalidation in the common law tradition whenever a racial trust was set up is proof of the difficulty.

39. D. Lloyd, *Introduction to Jurisprudence*, 3e ed., London, Stevens, 1972 at 563 we see further arguments against classification of persons into collectivities: «(...) We are thus in the first place, required to accept that collective groups possess some kind of metaphysical personality distinct from the members comprised in the group, a view which recalls the old fallacy that words are names of «things» and that there must be a distinct entity denoted by every word. But, more than this, it is implied that the notion of a «people» is a perfectly definite one that can be applied to specific groups which possess this mysterious collective consciousness. This appears to postulate a degree of unity of thought and action in particular nations, races or the inhabitants of political units, of which there is little evidence in human history».

40. *Caldwell, supra*, note 32.

governments will always try to convince courts to give effect to «collective rights» which they claim to represent and employ their vast resources for this purpose<sup>41</sup>. Unquestionably, «collective rights» can easily become an euphemism for violation of rights.

The religious and school cases can perhaps be explained by McIntyre J.'s words in *Caldwell*<sup>42</sup> at p. 626:

It seems evident to me that the legislature of British Columbia, recognizing the historically acquired position of the denominational school and the desirability of preserving it ... included sect. 22 as a protection for the denominational school (...).

In other words where certain venerable rights are generally accepted and where specific legislative authority for them exists, the «collective rights» may reasonably be permitted to continue. A case presently before the Supreme Court raises this issue with regard to Ontario's wavering desire to fund separate schools<sup>43</sup>. It must be added that, in *Caldwell*<sup>44</sup>, the Court found the beneficiary «group» easy to identify (p. 627) and this may be a factor in rendering the «collective right» palatable. What is dangerous for a free society is not so much the «collective rights» as the claim to «collective rights» by disparate and often dubious groups. Even so, this writer strongly disagrees with *Caldwell*<sup>45</sup> and *Eglise Evangélique libre du Québec*<sup>46</sup>. It is not necessary to have resort to «collective rights» to preserve some religious schools and to fund them, if one is so inclined. One can easily present the matter as one affecting individual rights of ancient standing and historical importance. No one

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41. It is to be noted that the international advocates of self-determination are not necessarily ready to turn electoral democracy into a basic right. No one has suggested that it is. This means the groups must find other, presumably, «collective» and illiberal ways of expressing their will.
  42. *Caldwell, supra*, note 32.
  43. The Court of Appeal judgment is reported as *Reference Re an Act to Amend the Education Act* (1986) 53 O.R. (2d) 513. This writer agrees with the court's conclusion, though he does quibble with some of the language.
  44. *Caldwell, supra*, note 32.
  45. *Ibid.*
  46. *Eglise Evangélique, supra*, note 32.

has yet suggested that charters of rights must destroy all «grand-father clauses».

The fact that the danger is more from the «claim» than from the «right» renders innocuous the undoubted use of collective rights in our private law. If one defines private collective rights<sup>47</sup> as rights belonging to more than one person which cannot be partitioned, then one can meet such rights in many areas of trust law, in condominium law (with respect to the common areas), in bankruptcy law, and, perhaps, wherever joint and several obligations occur<sup>48</sup>. Moreover, while the rights of corporations or of the state can be explained by reference to a fictitious new person in the case of a corporation<sup>49</sup> and of the «person» of the sovereign in the case of the state<sup>50</sup>, it is clear that these legal devices also hide a number of private collective rights, that is, indivisible rights in private law accruing to a number of persons. Such rights are created and circumscribed by statute and their enforcement poses no great difficulty and is usually provided for in the statute. It is clear who may apply to court and under what circumstances; it is true that minority shareholder rights pose their share of jurisprudential difficulties, but that is the case in almost any area of law which is worth discussing. Even where the state asserts *public* law rights (e.g. the right or duty to punish crime), the difficulties associated with claims to collective rights are not normally present<sup>51</sup>. What is essential to

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47. The same analysis could hold for obligations.

48. Although partition is usually possible as between the joint and several debtors or creditors *inter se*.

49. *Salomon v. Salomon* (1897) A.C. 22 (H of L).

50. In *Verrault v. A.G. Quebec* (1977) 1 S.C.R. 41 we find the following lines at p. 47: Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her. In this respect the position of ministers and other officers of the government is fundamentally different from that of municipal employees. In our system municipalities are the creatures of statute, and the *ultra vires* doctrine must accordingly be applied in its full rigor. I make this observation as Mr. Dussault cites in a note appended to the above quoted passage, several cases on municipal or school law.

51. See *Gouriet v. Union of Post Office Workers* (1978) A.C. 435 (H of L).



keep in mind is that such «collective» rights or obligations do not touch the area of «fundamental» rights of the sort protected by charters of rights or the natural law. Corporations, the state or other collective groups (e.g. Condominium associations) may occasionally benefit from the nullity of a law under these charters<sup>52</sup> but they have no fundamental rights as such, unless the distinction between them and their members of employees is blurred in some way<sup>53</sup>. All their rights can be traced to statute as interpreted by courts<sup>54</sup> or can be explained as belonging to their members individually. Few things are more pernicious than the creation of any fundamental or inherent collective rights not strictly defined and limited by law, so that groups could put forward open-ended claims<sup>55</sup>.

The popularity of «collective rights» as a notion in Canada, outside Quebec where this notion is unabashedly employed to violate individual rights, can perhaps be explained by a conceptual error. Many see Canada's «welfare state» with medicare, advanced social security and frequent government intervention as a «collective» foil to the aggressive individualism of the United States. In the *Globe and Mail* May 23, 1987 P. A-3 we see the following comments of Roy Romanow, one of the acknowledged authors of the *Charter*<sup>56</sup>:

The U.S. system is preoccupied with individual rights but it does not necessarily follow that individual rights naturally equal justice... this is especially true in Canada with its unique geography, culture and history... The *Charter's* potential for trumping Canadians' major gains in collective

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52. See *Big M Drug Mart* (1985) 18 D.L.R. (4th) 321 (S.C.C.).
  53. E.g. When the corporate veil is lifted.
  54. With the Crown, a more complex analysis is needed to take into account prerogative powers and, possibly, certain personal powers of the sovereign who may have fundamental rights as a person. On the whole, however, no *fundamental* rights have been accorded to or can be claimed by collectivities.
  55. The difficulties posed in international law by the newfangled right to self-determination are an excellent illustration of the perils of such «rights».
  56. «Charter - Shaper Has Big Doubts About Direction» *The Globe and Mail* (23 mai 1987) at A-3. Mr Romanow's views can be read first-hand in his article «And Justice For Whom» (1986-87) 16 Man. L.J. 102.

rights such as medicare is something «quite different» from what the *Charter's* authors expected...

It is submitted that Mr. Romanow put his finger on a real difference between Canada and the U.S., but one which had nothing to do with collective rights. Medicare and pensions benefit individuals. It is, for instance, preposterous to speak of «collective health» except, if that, as a statistical and totally abstract concept. What is true about Canada is that we lay less stress on the protection of the ancient *individual* rights to property and more to equality of result<sup>57</sup>, for instance with respect to health or education. In other words, the two countries stress different *individual* rights<sup>58</sup>. There is no need to use the language of «collective rights» to explain Canada or, for that matter, any other welfare state.

Where there is a serious assertion of «collective rights», it is usually to prop up a doubtful claim - for instance Quebec's «right» to restrict use of English in the Canadian context or Israeli pretensions to the west Bank in a world context. Indeed, Hitler's theory of «lebensraum» was conceptually nothing more than an assertion of a collective German «right» based on a theory of superiority. «Collective rights» may not always be without any foundation in this obvious way, but they are invariably fraught with danger.

The suggested way of dealing with the entire problem is to give a narrow interpretation to the collective rights, to view them as much as possible as individual rights, collectively pursued, and,

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57. *Ibid* at A-3 for a discussion of this concept.

58. The U.S. is more traditional and conservative. Canada was closer to American values prior to 1945. See Grey, «The Ideology of Administrative Law» (1983) 13 *Man. Law Rev.* 35. In that article at P. 44 this author flatly denied the existence of any legitimate collective rights. Now, he would be more nuanced although he is still quite hostile to the notion. In order not to exaggerate the differences between Canada and the U.S., one must remember that between 1933 and 1980 the U.S. also travelled along the same road as Canada. It is only in recent years that it has rediscovered a pre-1900 form of individualism. So far, much of the U.S. New Deal remains intact despite the ideology and very possibly the philosophical trend will produce few concrete results other than a conservative Supreme Court for a while.

wherever that is not possible, to rank them far behind the basic, individual rights.

The implications for equality are immense. If one concentrates on individual equality, on the equality of men and women and not on the various groups into which they voluntarily or otherwise fragment themselves in our society, much of the modern equality «movement» will seem hopelessly lost and muddled.

We conclude that equality as a philosophical ideal faces two problems - the clash with freedom and the definition of who is to enjoy it<sup>59</sup>. Any consideration of the practical issues cannot ignore these fundamental questions.

### III. Equality as moral absolute

Equality has an unquestionably important role to play as a moral absolute. The idea is that the intrinsic value of every man and his life is the same, whatever his social, intellectual or political status. The basic premise of anti-egalitarians - racists, nationalists, some religious dogmatists, social Darwinists - is that this is not so. According to them, one can ascribe value to a person in accordance with his attributes. Some favour origin or some similar quality and others admire physical strength or, more likely in our times, intelligence defined in some way which is often in relation to wealth. It is an essential aspect of any humanistic egalitarianism to reject any such notion. We have to judge people for many reasons in society - evaluating their economic worth, criminal conduct, the proficiency of their work etc. At least one basic quality, namely, the intrinsic worth of an individual, should be left outside the realm of judgment. That is how one should understand Jefferson's stirring words that «all men are created equal» and the old adage «A man is a man, for all that». Clearly, not all men are equally strong or sharp. Nor are all equally favoured by luck. But in the end, we cannot judge their value - not between the most successful and the marginal, nor between the strong, the beautiful and the clever and those who are

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59. It is possible of course, to repudiate equality altogether and to glory in inequality founded in God's will, in a vision of «nature» or in nationalism. It is not the purpose of this essay to refute such theories, but rather to deal with the difficulties of the concept of equality when its desirability, at least within reasonable bounds, is taken for granted.

unable to cope in the society<sup>60</sup>. Firstly, the subjective value of life to those who have it is equally great. Whatever their endowments, each man equally wants to live. Secondly, no ordained order of attributes (e.g. intelligence, beauty, strength etc.) exists and therefore, any ranking of human worth is fundamentally arbitrary and depends, most often, on the attributes of the judge. Thirdly, even if a valuation were possible, it would be contrary to basic human dignity to carry it out and to create an order of men which would destroy any meaningful notion of freedom or mobility in society. Dignity depends on the recognition by each man of the other's worth; by ranking men we would substitute servility and arrogance for dignity<sup>61</sup>.

Equality as a moral absolute depends not only on counting each man as an equal, but in refusing to aggregate them. Human life is of infinite worth. It is not always right to sacrifice the few for the many. Dostoevski pointed out<sup>62</sup> that if the happiness of mankind depended on the perpetual suffering of one innocent child, it would not be worth achieving. This was a clear reminder of the resistance of the value of men to quantification or measurement.

These statements may seem self-evident, or they may be seen as nothing more than Christianity without theology, but it is important to remember that, in our century, they have been and continue to be hotly contested. Fascist and other corporatist movements, racists of all descriptions and neo-liberals with pseudo-Darwinist ideas about the efficiency of competition have all denied them. Indeed, the basic difference between humanistic liberals<sup>63</sup> and their

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60. The only possibly acceptable judgment is a moral one, between the innocent and the guilty or between good and evil. Even with that type of judgment (which must be made at times) there are considerable difficulties and infinite room for dispute.
61. For Del Vecchio's notion of «absolute value of personality» and «equal freedom of all men» see Del Vecchio *Justice* (Campbell, translator) 1952 and W.G. Friedmann, *Legal Theory*, 5e ed., London, Stevens & Sons, 1967 at 186-89.
62. F.M. Dostoevski, *The Brothers Karamazov*, New York, Harper, 1960.
63. «Humanistic liberal» is not meant as a precise political description. Some of them may be socialist, some are not. The definition proposed is: people dedicated to the pursuit of social justice and political freedoms through democratic political

opponents is the former's acceptance of these premises.

It is hardly necessary to point out that notions of dignity or moral equality are not new. Indeed this approach towards equality predates the others, as the earlier reference to Christianity shows. It would be pedantic to go through all writings where, in a different historical context, such ideas were presented. It may, however, be useful to quote Kant, in whose works moral equality appears as a fundamental principle. In the *Foundations of the Metaphysics of Morals*<sup>64</sup> we read:

The Principle of humanity and of every rational creature as an end in itself is the supreme limiting condition on the freedom of action of each man. It is not borrowed from experience, first because of its universality... and secondly because in experience humanity is not thought of (subjectively) as the end of men... Thus this principle must arise from pure reason.

Even Marxism which is often presented, incorrectly, as opposed to ideological notions of morality, clearly has an element of moral equality at its roots. Its claims to scientific truth do not contradict this, for science, too, must have certain assumptions at the foundation. The humanism in Marx's thought is captured by Garaudy who writes<sup>65</sup>:

Est-ce à dire que Marx a perdu de vue, à cette étape, l'homme comme individu, le travailleur comme personne humaine, avec sa dignité propre? - En aucune façon. «Dans le système capitaliste, écrit Marx (1), toutes les méthodes pour multiplier la puissance du travail collectif s'exécutent aux dépens du travailleur individuel; tous les moyens pour développer la production se transforment en moyens de dominer et d'exploiter le producteur: ils font de lui un homme tronqué, fragmentaire, ou l'appendice d'une machine; ils lui opposent, comme autant de puissances hostiles, les puissances scientifiques de la production».

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methods.

64. I. Kant, *Foundations of the Metaphysics of Morals*, New York, Liberal Arts Press, 1959 at 49.
65. Roger Garaudy, *Perspectives de l'homme*, Presses Universitaires de France, 1969.

Ce serait donc une étrange manière de «lire Le Capital» que d'en éliminer systématiquement comme «retombées idéologiques du discours de Marx», tous les passages où Marx, loin de considérer que l'homme n'est qu'une «marionnette mise en scène par les structures», écrit au contraire son grand ouvrage, précisément pour lutter contre un système qui tend à réduire l'homme concret, individuel, le travailleur, à la condition de simple «support des rapports de production».

L'orientation fondamentalement humaniste de la pensée de Marx n'est pas moins puissante dans Le Capital que dans les Manuscrits de 1844. Elle est même beaucoup plus puissante, car elle ne s'exprime plus dans la dialectique spéculative des rapports entre le travail aliéné et une essence humaine abstraite et éternelle, mais dans la dialectique rigoureuse entre une relation sociale nécessaire et les formes historiques dans lesquelles elle se manifeste.

Moral equality has certain practical consequences. The equal availability to all of medical care, basic necessities, and education is easy to justify on this basis. In other words, the basis of the welfare state exists in this idealistic notion of equality. The social reforms of our century are not simply part of a distribution of the fruits of prosperity; they are an expression of faith in the dignity and ultimate equality of every man. That the issues of life and death, of the right to learn, and the right to a minimum of comfort are largely left out of any market place and any hierarchic arrangement of men is the greatest achievement of egalitarians<sup>66</sup>.

It is, of course, impossible to list or to freeze forever, the type of right which will be shared equally because of the exigencies of moral equality. Certain fundamentals such as life will be constant, others will vary with the period of time and the society. Honoré

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66. It is obvious that this type of notion of moral dignity and equality has other practical applications on such issues as for instance the death sentence. The breadth of this essay does not permit a digression to these topics. As an example, this author can point out that he opposes the death sentence on moral grounds even before beginning to consider such practical issues as defence.

suggested the following guideline<sup>67</sup>.

It is plain that the principles of justice according to desert and justice according to need can and often do conflict. The analysis of these notions does not in itself enable us to say how such conflicts are to be resolved.

Nevertheless there would I think be agreement on a general approach to the resolution of these conflicts. The different advantages which citizens claim and of the deprivation of which they complain may be arranged in an order of importance. Thus life may be regarded as more important than health, health than recreation and so on... The hierarchy of importance will depend, then, partly on the extent which the advantages in question are in fact desired, and partly on the extent which they actually conduce to well-being, that is to a happy and complete existence.

Now the natural solution of the problem that arises when there is a conflict between the principles of justice according to need and justice according to desert will be somewhat as follows: the more important the advantage in question the more weight will be given to the principle of justice according to need.

«Justice according to need» is a variation of the notion of «equality of result» as used in the present essay. Any practical application of such an idea usually has moral equality as its theoretical basis.

One may ask how this moral equality is derived. Like most abstract concepts of this type, it cannot be proved by pure logic or demonstrated mathematically. It is one of the basic building blocks common to man from which most moral ideas are constructed. In addition to its immediate moral applications, moral equality serves as an unseen but understood Platonic form in all egalitarian goals and battles<sup>68</sup>. It is an article of faith<sup>69</sup> in combatting racism, class

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67. Honoré, *supra*, note 3 at 79-80.

68. Perhaps it can be related to the notion of «fraternity» in Rawls's, *A Theory of Justice*, Cambridge, Mass: Belknap Press of Harvard University Press, 1971 at 105-06. See also at 504-12

prejudice and sexual inequality. One can go so far as to say that moral equality by itself may not suffice, but that there are few more dangerous ideas than egalitarianism without moral equality as one of its most important components.

#### IV. Equality as Practical Result

It is now time to consider the type of results which a concentration on equality may produce in society. Firstly, one must see the different types of equality to which one may aspire.

There is the simplest form of equality - legal equality. This has been more or less achieved since the French Revolution. In most countries the law at least purports to apply equally to all men. There are numerous exceptions. Privileges conferred by citizenship, vestiges of noble titles, affirmative action are all examples. However, the fundamental principle is not doubted in many countries<sup>70</sup>.

However, it is also not doubted that legal equality alone is insufficient to achieve a meaningful form of justice. Because human behaviour is not what 18th century optimists hoped it was, or could become, legal equality alone is tantamount to factual inequality. Certain individuals inevitably achieve wealth and power and the theoretical equality either disappears or becomes purely formal<sup>71</sup>. One can even see how legal equality could become a smokescreen to

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where Rawls speaks of equality as an end but puts perhaps too much stress on equality of citizenship and not enough on a certain economic area of desirable equality. See also Rawls, *The Basic Liberties and their Priority in Liberty Equality and the Law* McMurrin ed. 1987.

69. In using the word «faith» the author consciously and unashamedly admits the ideological content of moral equality.
70. The indignation expressed by all countries about South Africa's race relations is proof that at least open racism is almost universally condemned. It is worrisome, however, to see that open racism on the part of developing countries is often condoned by the same persons who most strongly condemn South Africa. Clearly, universal opprobrium cannot be the sole test.
71. Trotsky, *The Revolution Betrayed*, London, 1937 and Djilas, *The New Class*, New York, Praeger, 1957, for a description of this process in a society which in theory makes equality its *raison d'être*.



make certain that more delicate issues were not raised. It therefore follows that, important though legal equality may be, an egalitarian will not be satisfied with it<sup>72</sup> but will ask for more.

Equality of opportunity is often invoked as a practical goal. Indeed, the current neo-liberal views which treat all equality of result as anathema often claim to promote equality of opportunity<sup>73</sup>. One would define such a concept as an equal chance for every person to qualify for unequal rewards of society. Thus success and failure would still exist, as would wealth and poverty; but no barriers would bar or insulate some persons from them.

Equality of opportunity is a laudable and practical objective within certain limits. It can be used as an expression of disapproval for rigid class or ethnic barriers and against rule by clique or caste<sup>74</sup>. However, equality of opportunity, carried to an extreme, clashes with other values in our society, notably with liberty and with the right to a private life. In order to produce true equality of opportunity, one would have to take very strong measures against any form of nepotism or favouritism and, at the very least, would one have to maintain succession and gift duties at a level where no one's opportunities would be truly affected by what his parents gave him<sup>75</sup>. Yet, as anyone who is a parent will confirm, the desire to help one's children is a very profound one and to suppress it would

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72. Of course, he will never accept a state without it. There may be small limitations, but not a repudiation in principle.
73. Such thinking is clearly descended in part from Schumpeter, in part from Hayek. But equality of opportunity has a legitimate role to play as a political ideal. As Honoré aptly said in *supra*, note 3 at 90: «Equality of opportunity is the essence of social justice, because we mostly believe not that all advantages should be equally distributed to all men, but rather that, provided that all men have equal opportunities, distribution should be made according to desert». This, of course, is subject to the reservation of those important things that must be distributed according to need (*Supra*, note 67.).
74. For instance, equality of opportunity prevents barriers based on irrational or unjustifiable distinctions: *Andrews v. Law Society of B.C.* (1986) 4 W.W.R. 242. Upheld by the Supreme Court on February 2, 1989 No. 19955.
75. The neo-liberals' reluctance to allow this betrays the insincerity of their claim about equality of opportunity.

be costly in terms of liberty and also in terms of motivation.

Furthermore, equality of this type is not necessarily conducive to any form of justice. Parents can and often do transmit advantages as important as money - knowledge, emotional stability, diligence. Many believe that they also transmit genetic components of success<sup>76</sup>. If this is so, the race will be equal at the start only in appearance, and equality of opportunity turns out to be limited in the same way as «legal equality».

Like legal equality, equality of opportunity has value as a practical goal, despite its limitations. Although it may not be desirable to use the strong enforcement measures necessary to destroy all advantage, it is both important and possible to create a society in which there are no permanent castes or classes. Indeed, one of the main objections to affirmative action and group equality is that they tend to foster such groups which then perpetuate themselves out of interest.

The instruments towards creating the relative equality of opportunity are numerous - the taxation system, state assistance in higher education to anyone in difficulty, anti-trust laws, regional equalization payments, child bonuses and family allowances. What must be remembered is that the goal is not an achievable, measurable result, but rather a fluid and relative thing. There may be an acceptable result one day and a privileged caste could appear the next. Relative equality of opportunity must be a permanent ideal constantly weighed with other ideals pulling in the opposite direction.

The final equality is that of result. In a pure sense, that can only be advocated by mystics or fanatics; perfect equality does not exist in society. Even the most frightening and the most complete repression would not succeed in destroying inequalities that some would inevitably create in their favour. The need for inequality was accepted by the most egalitarian thinkers and governments<sup>77</sup>. Yet

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76. For a discussion of possible genetic factors see C. Jencks, «Genes and Crime», (1987) *New York Review of Books*, v. 34, no. 2 at 33. See also R.M. Dworkin, *A Matter of Principle*, «Why Liberals Should care about equality», Massachusetts, Harvard University Press, 1985 at 207.

77. Marx, for instance. See *infra*, note 82.

the notion of equality of result is not to be discarded entirely.

It is certainly clear that in the majority of things in a society, equal distribution is impossible. Marx's ideal of taking from each according to ability and giving according to need simply would not work<sup>78</sup>. Yet, there are surely certain things so basic in our type of society that they must be made totally available.

We have already mentioned medical care, education and a minimum of material possessions necessary for comfortable survival as rights which should not depend on a person's resources or previous insurance or on the state of the economy, for realization. Other rights may also belong in this category. A decent minimum of leisure time, state-run protection from violence and dishonesty, old-age assistance are obvious candidates<sup>79</sup>. Equality of result thus has an important, if limited role to play in a modern society. The discussion of equality of result showed that types of equality cannot be studied in the abstract, without asking in what fields the equality is to be sought. There are certain, very fundamental qualities of circumstances in which no one has yet called for equality despite their overwhelming significance for all of us. Beauty, physical strength, intelligence, longevity, are all unequally distributed. Yet to call for equality is unthinkable<sup>80</sup>. It is clear that equality as a practical, social goal<sup>81</sup> must be confined to certain clear areas where the state and legislation are properly involved. Moreover, the creation of equality from one point of view, will almost certainly create inequality from another. For instance, equal pay for equal work inevitably creates unequal results in that those with large families have less to spend. Marx put it as follows<sup>82</sup>:

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78. Save perhaps in conditions of limitless plenty, which is surely what Marx meant. But in such circumstances, men would surely compete for other, non-material privileges, which could not be freely distributed.
79. These rights (imposing *duties* on society or other individuals) are different from mere liberties (e.g. freedom of speech) where others need do nothing but are merely not permitted to hinder use.
80. Galsworthy made this point in his *Modern Comedy* where a working man opposed socialist ideas because, if all were equal, he would never have had as beautiful a wife as he did.
81. As opposed to a moral ideal.
82. Marx, *supra*, note 12 at 6.

But one individual is physically or mentally superior to another and consequently supplies more labor in the same time or can work for a longer time; and in order to serve as a measure, labor must be determined according to its duration or its intensity, otherwise it would cease to be a standard. This *equal* right is an unequal right for unequal labor. It recognizes no class distinctions because everyone is only a worker like everybody else; but it tacitly recognizes the inequality of individual endowment and therefore productive capacity, a natural privilege. *It is therefore a right of inequality in its substance, as is all right.* By its very nature, right can only consist in the application of an equal standard; but the unequal individuals (and they would be different individuals if they were not unequal) can be measured by an equal standard only in so far as they are considered from the same point of view, or are regarded from a *definite* aspect, for example, in the given instance, if they are regarded *only as workers*, no more than that and regardless of anything else. Furthermore, one worker is married, the other is not; one has more children than the other, etc., etc. Hence, with an equal contribution of labor and consequently an equal share of the social consumption fund, one actually gets more than the other, one is richer than the other, etc. In order to avoid all these shortcomings, right would have to be unequal and not equal.

It is therefore our second major task to determine in what matters equality is to be promoted.

It is not particularly enlightening to turn to the language of «rights» as opposed to «privilege». In society, a privilege is always accompanied at least by a *right* to be considered for it. In any case, equality, where it is appropriate, is best viewed as a *right*<sup>83</sup>. It begs

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83. R.M. Dworkin, *supra*, note 20 at 239 puts it as follows: «The fairness... of any admissions program must be tested in the same way. It is justified if it serves a proper policy that respects the *right* of all members of the community to be treated as equals, but not otherwise» (underlining mine). The Supreme Court disapproved of the use of the right/-privilege distinction in adjudicating basic rights in *R. v. Singh* (1985) 1

the question to say that equality is a right to enforce rights. Another criterion must be found for determining which things are properly distributed equally and which type of equality<sup>84</sup> applies to each of these things.

One basis for distinctions could be a utilitarian one. It is possible to argue that a society will be a better one in terms of the happiness of its members if certain things are distributed equally. One could then also draw a utilitarian limit, where the means needed to enforce the equality would end by diminishing happiness below its level without equality.

The utilitarian model is certainly a very useful one and the total effects of any programme should certainly be considered before it is implemented. However, utilitarianism has certain basic limitations and, in the end, does not provide an entirely satisfactory basis for making distinctions.

The first difficulty is that of what Dworkin termed «external preferences»<sup>85</sup>. Suppose it can be demonstrated that a majority is so ecstatic when a minority is disenfranchised that the total happiness rises. Does this make it right? A positive answer seems unacceptable.

Secondly, utilitarianism has never had a measuring system for happiness<sup>86</sup>. How does one distinguish between different types of happiness and different intensities? How is subjective happiness translated into an objective calculus? No easy answers exist to these problems.

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S.C.R. 177 (per Wilson J.). See also *Martineau v. Matsqui Institution* no. 2 (1980) 1 S.C.R. 602 per Dickson J.

84. I.e., legal, opportunity or result.

85. R.M. Dworkin, *supra*, note 20 at 237-38. See also Dostoevski's example of the happiness of mankind at the price of the suffering of an innocent child, *supra* fn 62. Utilitarianism lacks a basis for a satisfying theory of distribution even though it could certainly take desirable distribution into account through a properly calibrated calculus of «greatest good for greatest number». Even so, it would still not, by itself, provide a reasonable resolution to moral or political dilemmas with respect to distribution.

86. Save the very unreliable test of elections and Gallup polls.

It follows that in determining which goods and rights are to be equally distributed, utilitarian considerations must be mixed with moral ones. For instance, the respect for basic rights and liberties cannot depend upon majority will, however great the majority's contentment would be if it had its way<sup>87</sup>. Moreover, the basic ideals for which egalitarians have fought - legal equalities, basic social services and the like - were clearly fashioned more by moral beliefs than utilitarian considerations. In general, one could say that moral considerations have pointed out what to consider for equal distribution and utilitarian ones have helped draw the limits.

Without attempting to create a litmus test which is impossible, because there is considerable disparity between different societies and cultures in what they can and do equalize, one can set out a three-step process for determining which endeavours are the proper field of activity for egalitarians;

- 1) Consider what it would be desirable to distribute equally under the precepts of moral equality in a society such as ours;
- 2) Determine the type of equality desirable;
- 3) Bring in utilitarian considerations to see if the project is feasible without creating greater havoc than benefits.

The first test would eliminate the visionary types of equality (e.g. in beauty, length of life) which are not part of any reasonable moral system. The second and third would bring in the realities of our particular society, and the competing values which must at times prevail over equality on utilitarian grounds.

As a general rule, one can say that an almost universal legal equality will result from such a test. In addition, services provided by the state or public institutions, and most economic benefits of society will emerge as prime candidates for equality or partial redistribution. Things purely private or personal or those not capable of being redistributed without harsh, repressive measure, will normally emerge untouched by the test.

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87. That is why charters of rights are adopted. One of the objections to «collective rights» is that demagogues of the majority could make seemingly attractive appeals to democracy and majority rule for the violation of rights.

The third question about equality as a practical goal is to identify those who will benefit and to specify which types of distinctions can be made and which amount to discrimination.

The first and at the present time, most important function is to decide who will benefit - individuals or groups<sup>88</sup>. This is intimately tied to the second question, that of determining what type of distinctions are illicit, in that this second test will necessarily identify groups. If we say that discrimination on the basis of race is illicit, then we have identified and isolated several groups of persons composing the races. However, we have given no rights to the groups. They have only been reference points, rather like the famous «life in being» in the English rule against perpetuities who does not inherit but serves as a measuring point.

Everyone agrees that some groups must be identified. One cannot simply say that distinctions are to be outlawed because almost all worthwhile statements contain value judgments and distinctions. Should we outlaw all competitions, non-universal social security<sup>89</sup>, school grading systems and such other institutions as discriminatory? Clearly certain criteria for identifying these distinctions which are objectionable must exist because it is impossible to outlaw the vast majority of them.

There is general agreement as to the type of distinctions which should not be made. Almost no one would permit race, religious, ethnic or linguistic<sup>90</sup> discrimination, or discrimination based on sex. In peripheral areas there is some dispute about sexual preference, for instance, or mental handicap<sup>91</sup>. Certain plausible forms of dis-

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88. See *supra* p. for the discussion of the notion of individual and collective rights.

89. E.g. Assistance for the blind.

90. In Canada, the heated nature of language debates has produced some statements that such discrimination is permissible and at times desirable. Fortunately, majority opinion is overwhelmingly opposed to this.

91. Of course, today's peripheral areas may be tomorrow's central areas.

crimination have yet to be attacked<sup>92</sup>. But there is little disagreement substance on the groups<sup>93</sup>.

However, there is considerable disagreement about the reasonable limits of protection against illicit discrimination. For instance, some would argue that the exclusion of women who tend to be smaller than men, from certain physical jobs is reasonable. Others would reply that each individual should be judged on the merits and this writer supports this position. These divergences may not be basic in theory, but they lead to extremely different social results and hide much dispute in political attitudes.

On the one hand are those very reluctant and timid egalitarians who would extend protection only to victims of the most brazen and inexcusable breaches of equality rights. On the other hand are those more open to a broad and generous interpretation of the various charters. A clash between these stands is inevitable.

Two front-lines have appeared so far. The first dealt with the concept of «similarly-situated» persons<sup>94</sup>. Many suggested that equality only operated when the persons compared were «similarly-situated» and not otherwise. In one sense this is a perfectly natural view. When a rational difference between citizen exists, it is preposterous to treat them the same way. Is a forty-year-old entitled to an old-age pension? Or a five-year old to vote?

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92. E.g. Discrimination against landed immigrants as opposed to citizens. Sec. 15 of the Canadian Charter will clearly give rise to some fruitful discussions of appropriate groups because of its open-endedness. See *Andrews v. Law Society B.C.*, supra, note 74.
93. The principle is that discrimination should not occur on the basis of consideration irrelevant to a person's ability or needs to do anything required of him. In practice, one selects those types of discrimination which do occur if unchecked (e.g. racial, religious, sexual discrimination), not ones which are completely imaginary.
94. See *Association des Détaillants en Alimentation du Québec v. Ferme Carnival Inc.* (1986) 3 R.J.Q. 2513 (Gonthier J.) and *Bregman et al. v. A.-G. Canada* (1987) 57 O.R. (2d) 409 (Ont. C.A.) as well as the Ontario Court of Appeal in *Lavigne*, supra, fn. 25.



However, by attempting to set up fine distinctions, one can effectively sabotage equality rights<sup>95</sup>. In the history of jurisprudence, it was almost always possible to distinguish any inconvenient decision because almost no fact patterns are ever totally identical. By attaching great importance to minor differences one could find almost all statutory distinctions not to amount to discrimination<sup>96</sup>. Quebec government argued in this way in most language cases and especially in *Forget v. A.-G. Que*<sup>97</sup>. Although the government succeeded in the case, the Supreme Court was resolute in rejecting a narrow view of «discrimination».

Finally, in *Andrews*<sup>98</sup> The Supreme Court disapproved of the «similarly situated» test, while it made clear that it does not follow that all distinctions are bad in law. At p. 11-12, McIntyre J. (not in dissent on this point) said<sup>99</sup>:

Thus, mere quality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it make distinctions.

A similarly situated test focussing on the equal application of the law to those to whom it has application could lead to results akin to those in *Bliss v. Attorney General of Canada*, (1979) 1 S.C.R. 183. In *Bliss*, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. She claimed that the *Unemployment Insurance Act* violated the equality guarantees of the *Canadian Bill of Rights* because it

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95. See *Bliss v. A.-G. Canada* (1979) 1 S.C.R. 183 as well as the Federal Court of Appeal Judgment in the same case where Pratte J.A. distinguished between discrimination on account of sex and on account of pregnancy.
96. One can see this type of reasoning in *Lavigne*, supra fn. 25, where the Ontario Court of Appeal reached the right conclusions and for the most part for the right reasons. However, the reasoning on equality rights is not as strong as the rest.
97. *Forget v. A.-G. Que.*, (1988) 2 R.C.S. 90.
98. *Andrews*, supra fn. 74.
99. *Ibid* at 11-12 per McIntyre J.

discriminated against her on the basis of her sex. Her claim was dismissed by this Court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the *Act* was that of pregnant persons, and within that class, all persons were treated equally. This case, of course, was decided before the advent of the *Charter*.

I would also agree with the following criticism of the similarly situated test made by Kerans J. A. in *Mahe v. Alta (Gov't)* (1987). 54 Alta. L.R. (2d) 212 at 244:

...the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.

For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.

At p. 9 McIntyre J. had elaborated a more flexible test which, despite its imprecision, will undoubtedly become the basic formulation in Canadian law<sup>100</sup>:

(...) To approach the ideal of full equality before and under the law - and in human affairs an approach is all that can be expected - the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an

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100. *Ibid* at 9.

infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

Some may see in this another transfer of power from legislature to courts<sup>101</sup>. However, even if one were to disapprove of the resulting open-endedness of the test, one would have to prefer it to a mechanical one which might have led to the conclusion that, for instance, Jews and Christians were not «similarly-situated» in Nazi Germany and therefore no discrimination in law has occurred so long as all Jews were equally persecuted<sup>102</sup>.

The battle appears to be more or less terminated. The expression «equally situated» will undoubtedly be replaced by the flexible language of the Supreme Court. The difference may, in large part, be linguistic, but the result must be viewed as a victory for the liberals<sup>103</sup>.

The second, related front, dealt with the narrow or broad interpretation of the accepted categories. An example of a conserva-

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101. The *Charter* has operated to some extent as such a transfer (see *Association of Protestant School Boards*, supra fn. 37 per Deschenes C.J.).

102. This writer, in any case, has no objection to judicial discretion and finds the legislature supremacy argument particularly difficult to follow in view of the existence of the notwithstanding clause.

103. Although conservative judges will undoubtedly be able to adapt *Andrews*, supra fn. 74, to their ends. Moreover, the «similarly-situated» test could, in the hands of judges sensitive to equality appear to be a «liberal» test: See *Hebb v. The Queen*, N.S. Supreme Ct. no. 64419, Feb. 7, 1989 and *R. v. S.S.* (1988) 63 C.R. (3d) 64 (Ont. C.A.). All of this illustrates that social and political attitudes must be studied as much as technical tests in order to measure the efficacy of the *Charter*.

tive victory was found in *Bliss*<sup>104</sup> where it was questioned that discrimination as to pregnancy amounted to discrimination as to gender. Similar arguments (as to sex) were made in *A.-G. Canada v. Robichaud*<sup>105</sup> and as to language in *Forget*<sup>106</sup> and in *Brown Shoes*<sup>107</sup>. In every case the Supreme Court turned down any invitation to interpret the categories of discrimination in a narrow and technical way<sup>108</sup>. Other courts have also been unwilling to allow public authority to escape by drafting seemingly inoffensive statutes with discriminatory effect. Perhaps the best example is *Hayden v. A.-G. Manitoba*<sup>109</sup> in which the Manitoba Court of Appeal struck an offence of being drunk at an Indian reservation although in its terms it applied to everyone<sup>110</sup>.

The conclusion from *Brown Shoes*<sup>111</sup>, *Robichaud*<sup>112</sup>, *Hayden*<sup>113</sup> and *Orphanos*<sup>114</sup> is that what matters is discriminatory effect not discriminatory formulations. This was emphatically reaffirmed in *Andrews*<sup>115</sup> and applied both to the flexible determination of whether discrimination exists which has already been discussed and with respect to sec. 1 derogation. At p. 8, LaForest J. said<sup>116</sup>:

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases

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104. *Bliss*, supra fn. 95.

105. *Brennan v. Canada and Robichaud* (1987) 75 N.R. 303.

106. *Forget*, supra fn. 97.

107. *Chaussures Brown's inc. et al. v. A.-G. Que.* (1989) 90 N.R. 84.

108. It would be difficult to argue for a narrow interpretation given the fact that sec. 15 of the *Charter* explicitly refuses to limit the *Charter* to a few specific categories of grounds.

109. *R. v. Hayden* (1984) 3 D.L.R. 4th 361.

110. See also *Orphanos v. Queen Mary College* (1985) 2 All E.R. 233 for a similar result from the House of Lords.

111. *Brown Shoes*, supra fn. 107.

112. *Robichaud*, supra fn. 105.

113. *Hayden*, supra fn. 109.

114. *Orphanos*, supra fn. 110.

115. *Andrews*, supra fn. 74.

116. *Ibid* at 8 per LaForest J.

have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interest adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

At p. 17, McIntyre J. quoted an earlier decision<sup>117</sup> as follows<sup>118</sup>:

What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In *Ontario Human Rights Commission v. Simpsons-Sears and O'Malley*, (1985) 2 S.C.R. 536 at 551, discrimination (in that case adverse effect discrimination) was described in these terms: «It arises where an employer ...adopts a rule or standard ...which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force». It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.

He concluded as follows at p. 19<sup>119</sup>:

(...) I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the in-

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117. *Ontario Human Rights Commission v. Simpson Sears and O'Malley* (1985) 2 S.C.R. 536.

118. *Andrews*, supra fn. 74 at 17 per McIntyre J.

119. *Ibid* at 19.

dividual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Clearly, on the issue of narrow distinction<sup>120</sup> the *Andrews* case consummated another «liberal» victory.

The conclusions about the classification is that it is not one of the burning issues today. Interpretation may be, but, at least in Canada, the battle is all but over<sup>121</sup>. Quite the opposite is true of the second argument, between group and individual rights. The essence of nationalist and ethnic arguments in Canada, for instance, is that groups have rights. Quebec nationalist have consistently affirmed a «majority» right not only against newcomers but also against recalcitrant members of the majority, in order to prevent assimilation<sup>122</sup>. The same position has been advanced in favour of English and French in New Brunswick and in support of native self-government.

Belief in affirmative action is usually tantamount to belief in group rights, although it is important to distinguish between the belief in group rights as distinct from individual ones, and a belief that «group» results are the best way to measure or to accelerate the recognition of individual rights.

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120. As well as the issue of «intention».

121. Although a number of skirmishes about particular statutes are sure to occur.

122. L. Groulx, *Appel de la Race*, 5th ed, Montréal, Fides, 1956, for a frank statement of this type of view. See also «majority right to rule» arguments in the disputes concerning the confirmation of Mr Justice Bork on the Supreme Court. This was well explained in the *Sunday New York Times*, September 13, 1987. Judge Bork's views may be less offensive than Abbé Groulx's but are equally unacceptable upon reflection.

The latter view depends on an assumption that all groups will tend to have an equitable share of the rewards in the long run unless there is discrimination<sup>123</sup>. The difficulty here is in the assumption. It is true that all people are equal - in the moral sense. To assume that cultural, social and even sexual differences do not exist because of moral equality can only be described as temerarious. This is especially so, in view of the fact that advocates of affirmative action are usually the same people who oppose assimilation of minorities and favour their independent continuation. If cultural differences are to be encouraged, then it is not reasonable to expect affirmative action to be a temporary state until justice has been achieved. As we shall see further on, it is almost impossible to dismantle once it has been set up<sup>124</sup>.

Indeed, it could be argued that the true rationale for affirmative action is an assumption of inequality. If one assumes that members of certain groups are naturally inferior or are less motivated than other citizens and if, instead of drawing the usual racist conclusions that the «better» should be preferred, one wishes to equalize chances of success, then affirmative action recommends itself as the policy of choice. It becomes the obverse side of apartheid, the «benevolent» form of racism as contrasted with the common «malevolent» variety. Of course, no one has ever established any collective inequality nor even criteria on which one could base it. Nothing could be more distasteful or more dangerous, in the long run, than conscious or unconscious acceptance of inequality as a basis for action or even as theoretical view of society. Such an attitude would constitute a violation of the very notion of moral equality. This is not to suggest that proponents of affirmative action advocate such ideas, but only to show that these ideas provide a better rationale for affirmative action.

Against all these collective views is the simple and, it is submitted, healthier view that equality as a practical goal must aim at the individual. There are then no ulterior motives, such as group

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123. If one borrows the economic terminology of short run and long run then one should also consider Keynes' statement «In the long run, we're all dead» Affirmative action amounts to sacrificing «short run» people for theoretical «long run» goals.

124. H. Arendt, *The Origins of Totalitarianism*, New York, Brace and World, 1966, 526 at C. 6 entitled «Race- Thinking before Racism» which explores the perils of group consciousness.

survival or enrichment. There is no difficulty of definition, no injustice towards non-members, no fear of a permanent system of discrimination. In the *Montreal Gazette* of April 13, 1985 Greta Chambers quoted the following words of the Honourable Mr. Justice Jules Deschênes<sup>125</sup>:

It is the cornerstone of our belief in the protection of human rights that rights must be vested in the individual. When it comes to determining rights, it is on the individual as a member of the minority that the emphasis must be put.

It is submitted that this statement is unimpeachable.

Extreme positions always carry with them a certain amount of danger. A total and unconditional refusal to accept *any* affirmative action under all circumstances cannot be completely defended. There are situations where utilitarian arguments must prevail in favour of some sort of reverse discrimination<sup>126</sup>. Two situations come to mind.

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125. Chambers, «Poll is a dubious Gambit», [Montreal] Gazette, (13 avril 1985) at B-3.

126. R.M. Dworkin, *supra*, note 20 at 223 ff. But in this writer's view, Prof. Dworkin carries approval for affirmative action to unjustified lengths. In his recent book of essays *A Matter of Principle*, *supra*, note 76 he returns to the charge with two essays on the *Bakke* case: *Bakke's Case: Are Quotas Unfair?* and *What did Bakke really Decide?* One cannot help concluding that he regards affirmative action as an essential aspect of his vision of a liberal society. The results are, however, anything but liberal. At at 302-03 Dworkin says: «There is, of course, no suggestion in that program that Bakke shares in any collective or individual guilt for racial injustice in the United States; or that he is any less entitled to concern or respect than any black student accepted in the program. He has been disappointed, and he must have the sympathy due that disappointment, just as any other disappointed applicant - even one with much worse test scores who would not have been accepted in any event - must have sympathy. Each is disappointed because places in medical schools are scarce resources and must be used to provide what the more general society must need. It is not Bakke's fault that racial justice is now a special need - but he has no right to prevent the most effective measures of secu-



One is where two populations are on such bad terms that nothing save a quota in jobs will ensure justice. Modern Cyprus is an obvious and sad example. This has little application to Canada or indeed to North America<sup>127</sup>.

Some will argue that there is need for quotas because without them covert resistance to the hiring or admission of minorities will continue, notwithstanding anti-discrimination laws. This is really a variant of the «Cyprus» argument. Undoubtedly, there are many instances where racism, sexism and other forms of prejudice rear their ugly heads, and more instances where a subtle form of «group solidarity» will push an employer or official to prefer a member of his own group to a non-member. Even more numerous will be the subconscious prejudice against those who are very different in culture and dress. For these reasons it is not possible to deny altogether the possibility that affirmative action may be needed from time to time where anti-discrimination laws will encounter serious resistance. However, any realistic assessment of our society will surely conclude that, although private bigotry is rampant, there is little systematic and organized discrimination. Being black, Jewish, female or, for that matter, anglo-saxon or male may occasionally prove disadvantageous, but it is not likely to constitute an insurmountable or even serious barrier to an individual who has succeeded in acquiring the necessary preparation. Anticipated resistance to equality may thus be an acceptable rationale for affirmative action, but only in a very few situations.

A more interesting case is one where it is necessary to break a psychological barrier by admitting or hiring the first few members of an underprivileged group. This gives no rights to the group as such, but it does excuse giving preference to some members of it. The main characteristic of this type of reverse discrimination is its

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ring that justice from being used». This takes all moral considerations out of the allocation of such «scarce resources» and could be used to justify any type of «statism» or even fascism. Obviously, Dworkin intended no such result. However, despite the great respect which this writer holds for Dworkin, he concludes that in this issue, he went much to far, too fast.

127. Although at one time racial prejudice in the United States may have justified some sort of quotas. Today, Cyprus is perhaps the best example.

minimal nature<sup>128</sup>. A few cases can be justified over a very short period of time. Anything more becomes an abuse.

These exceptions make a generally negative attitude towards affirmative action compatible with the latest Supreme Court decision on the subject in *Action Travail des Femmes v. CNR*.<sup>129</sup> The measures approved by the Court were clearly labeled «temporary». They were extended to break a «systemic» discrimination. Mr. Justice Dickson pointed out the great difficulties associated with this type of firmly-rooted discrimination and the need for special measures as the means to overcome them. Some of the language may have been broader than this writer would have desired; nevertheless, the case in no way makes his position untenable.

There may be other, unusual situations where something like this is justified. What is important, however, is to stress the extraordinary character of any «group» advantage, the need not to turn it into an everyday phenomenon, and the exigency of the narrowest interpretation of any «requirement» for it. In all but the most unusual case, the practical goal must be to achieve the relative equality of individuals<sup>130</sup>. Moreover, it can most often be done by

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128. Often, this can be done as a question of individual discretion, without fanfare or the establishment of a formal programme.

129. *Action Travail des Femmes v. CNR* (1987) 1 S.C.R. 1114.

130. It is interesting to consider the narrow scope for affirmative action accepted by Louis Katzner in *Is the Favouring of Women and Blacks in Employment and Educational Opportunities Justified* in Feinberg and Gross ed. *Philosophy of Law* 1975, Although he approves some «reverse discrimination», Katzner imposes four conditions which create very stringent limits. Except for the fact that he does not impose time constraints, his conditions would make affirmative action as exceptional a measure as it would be for this author. The proof is that although he agrees with affirmative action for blacks in the context of American society fifteen years ago, he rejects it for women. This writer could endorse both these judgments, although he would also subject any action in favour of blacks to relatively short time-limits and would also be cautious with the amount and extent of such affirmative action. Despite the growth of affirmative action for women, he is convinced that Katzner was right in rejecting it and considering it unfairly discriminatory. Is it not reasonable to consider women a se-

the exercise of individual discretion not by state policy.

One element of affirmative action that its advocates have understandably failed to stress is the victims that it necessarily creates. Affirmative action deals with the distribution of scarce employment opportunities and educational facilities. Giving to some means taking away from others. Not only does affirmative action take away opportunities from deserving individuals whose merits could, apart from the programme, qualify them and who are naturally tempted by a racist backlash, but they create entire advantaged and disadvantaged classes.

The advantaged are middle class members of the «minority» who do not share the educational handicaps of their group and do not need special programmes but who can use their minority status to get an edge over other competitors. They are the natural winners.

The disadvantaged are the poorest and least educated members of the majority and those who belong to «unfashionable» minorities, for whom no programme exists. Such persons have all the disadvantages of poverty and face an additional and totally unjustified hurdle in any attempt to obtain an equal chance in society.

Affirmative action cannot be said to make the distribution of goods and services more just in principle. It is always promoted with respect to goods and services of which there is a limited quantity and not enough to go around. If that is so, no matter what scheme of distribution is adopted, there will be disappointed aspirants or applicants. If ten percent of a society belongs to a minority, there is nothing more just about a situation where the members of the minority form ten percent of medical graduates, one percent of twenty percent. The amount of human misery and resentment stays the same. Statistically, poverty has increased in the United States since the start of affirmative action. Where one may be tempted to see a particular injustice is in the presence of any a priori barriers for the majority or minority which makes the hopes and dreams of some futile from the start. But usually the barriers can be brought down through anti-discrimination measures coupled with social secu-

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riously disadvantaged group in modern western society. Whatever vestiges of discrimination remain can be successfully eradicated by enforcement of our existing human rights legislation and not by special programmes.

rity to guarantee the standard of living necessary for self-improvement for everyone. Only in exceptional circumstances is it useful to meddle with the result through affirmative action, and risk the inevitable state-created injustice which accompanies such programmes.

The solution is surely to eschew affirmative action programmes except when justified on the very narrow grounds described above and to concentrate time and funds on universal programmes in education, social services and health. It may take a generation for the programme to have full effect, but the policy will at least not compound injustice by creating new distortions. Moreover, a generation for reasonable effect may not be too long, given the fact that twenty years of affirmative action in the United States has not changed the fact the blacks are poorer than whites and that many of them do not see any of the benefits of living in America. The poor blacks are poorer than ever and the black middle class is deriving almost all of the benefits. The Soviet Union's quotas on various nationalities have also failed to bring about equality and have led to massive injustice and bitterness. The indications would therefore be negative not only on the morality but also the efficacy of affirmative action.

#### V. The Politics of Equality

In an electoral democracy, the growth of concern about equality inevitably spawns a political structure. Not only are there research funds and programme administration funds to be distributed and administered, but there is opportunity for those who consider themselves unjustly treated to get some of the benefits they did not have until now. In any country geared towards elections «a squeaky wheel gets the grease». This is all the more likely in Canada, which has two languages from the outset and which encourages pluralism or multi-culturalism, as it is now called<sup>131</sup>.

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131. Nothing here is to be construed as a criticism of bilingualism which this writer considers the essence of Canada. He is less enamoured of multi-culturalism as it presently appears, although the whole question is a complex one which would require far more space than a footnote to resolve. See Canadian Human Rights Foundation, *Multi-culturalism and the Charter: A Legal Perspective*, Toronto, Carswell, 1987. In the preface, this author expresses some of his doubts.

What this means is that «equality» as a goal gives birth to many who have vested interests in it, not of the egalitarian type but rather to acquire as much of the pie as they can for themselves or their group. In hard times, the competition becomes stiffer. Both in good and bad times, however, it is a fact that those who seek and promote «equality» are often more interested in inequality in their favour.

When funds are spent to promote groups through affirmative action, the groups naturally organize themselves into lobbies. Political organization is a natural development whenever people interact with each other. The political structure then has an interest in perpetuating itself. Far from «fading away» when equality is achieved; the groups embark on new battles, which the electoral state is usually unable to oppose.

An analogy can be drawn with marketing boards and quotas. Once quotas are created in any industry, they are difficult to remove because those who received them or their successors consider them as acquired right which at least the successors have normally purchased and paid for<sup>132</sup>.

The groups which promote their interest are most likely to harm those who could be members but refuse or do not conform. The assimilated descendants of immigrants, the non-feminist women, the anti-autonomist natives are most likely to be shut out, if everything is negotiated between corporate entities rather than individuals. This is so, because these people represent an even greater danger to the groups than their declared enemies. If everyone followed them, the groups would be no more. There is therefore nothing sinister or surprising about the group's reaction; however, a liberal state must protect non-conformist citizens by making certain that individuals and not groups are the units among whom benefits of the society are distributed.

The equality lobbies present another danger - that only the powerful or fashionable causes, able to influence politicians will

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132. Marketing boards can, however, have an economic justification in a mixed economy; affirmative action does not; except on the special cases outlined above.

succeed<sup>133</sup>. Yet human rights are supposed to assist the weakest and the most unpopular more than anyone else. In order for the purpose of human rights legislation to be realized, it should be aimed at individuals because then relatively equal bargaining power is possible; especially if the state remains an important referee.

Organized groups perform laudable and worthwhile functions of a cultural and social nature for their members. It would be a violation of freedom of association as well as an outrage to common sense to attack their existence. What is criticized is solely their political role in influencing the distribution of goods and services.

The conclusion is that equalization should always be between individuals and, whenever necessary, the state. Other groups are dangerous participants in the process.

If ever an affirmative action programme is carried out for good or bad reasons, it is essential that its administration never be entrusted to the group benefiting from it. This is both grossly unfair to dissident members but also ensures permanent pressure for the programme's continuity. Any form of group autonomy or «self-government» is suspect<sup>134</sup>.

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133. For instance, the City of Montreal and its union have in the autumn of 1987 agreed upon a programme of reserve discrimination in favour of women. But no such programme has been put in motion for English or «ethnic» Montrealers, who are equally unrepresented. The union would never have agreed because it shares the prevalent view among members of the French majority that no injustice exists or can exist with respect to the English-speaking minority. Yet it is possible that in the uproar following the shooting of a black youth by police in November 1987, a few «ethnic» Montrealers will be added to the police force at least. This is only because the cause has suddenly become fashionable. The justice or injustice of the arguments has relatively little to do with their success. (As an aside one might point out that the ethnic composition of the City of Montreal public service is an almost ideal case for the type of very limited affirmative action intended to break a psychological barrier that this author favours. Because it is an unfashionable cause, nothing is done).

134. There is therefore particular danger when a *majority* group (as in Quebec) decides to do justice to itself.

## VI. Conclusion

It is difficult to come to dogmatic conclusions with respect to equality. Perhaps the most striking feature of the modern, political concept of equality is that its advocates often display considerable rigidity and dogmatism and frequently confuse their special cause with the very notion of equality or social justice<sup>135</sup>. This is why they are so partial to the dangerous notion of «collective right». In fact, equality is a complex set of ideas which at all times requires careful analysis and limitation. The fact that one adopts and should adopt egalitarianism as an attitude must not make one a slave of whatever version of equality is currently fashionable.

The more in vogue a cause may be, the greater the danger that it hides an economic or political injustice behind the facade of equality. For instance affirmative action which is, objectively, an injustice possibly necessary in exceptional cases but which is always to be regretted, has become a positive good in the writings of its supporters, many of whom exhibit a knee-jerk reaction in its favour. It follows that popular causes and powerful lobbies require more ruthless analysis than obscure or weak ones. Just as there are few things more dangerous than liberty without responsibility, there are few dangers as pernicious for a free society as an ideology of equality without a proper understanding of what is possible or what

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135. That is why they frequently view positions taken against collective rights against affirmative action as necessarily connected to conservative or neo-liberal economic or political views. Some conservatives or neo-liberals may take these positions, but this writer hopes that the present essay has demonstrated the absence of any logical connection. Indeed, affirmative action would make more social sense in a conservative analysis than a social-democratic one. If one wishes to cut down substantially on state participation in the economy and on the redistribution of wealth, affirmative action may be the only way in which a professional and entrepreneurial class of the «minority» can be created. If on the other hand one accepts government participation in substantial redistribution, affirmative action appears both clumsy and random as a tool in effecting the redistribution. It is, perhaps, not so surprising that Nixon, rather than Kennedy or Johnson was the President who introduced massive affirmative action.

is morally desirable.