

## WHAT ARE REASONABLE LIMITS TO EQUALITY RIGHTS?

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*The fundamental problem in interpreting the scope of equality rights under the Charter of Rights and Freedoms is to determine whether section 15(1) confers a general right of likes to be treated alike (the principle of formal equality), a right limited only to the extent necessary to achieve overriding political goals; or whether section 15(1) and section 1 combine to protect the rights of persons to equal respect (the principle of juridical equality). The latter view is preferable for the following reasons. First, the principle of formal equality is a norm not for discrete laws but only for a system of laws and yet it is only discrete laws that are at issue in constitutional adjudication. Second, there is in principle no right to formal equality, since this norm can countenance the universal denial of substantive rights of respect and is redundant as a justification for their general recognition. Third, the right of persons to equal respect is at once a natural law criterion of legal validity and a condition of democratic self-rule. Hence the limitation of equality rights to rights of equal respect reconciles (as the alternative view cannot) substantive judicial review with democracy. This interpretation of the scope of equality rights supports the application of rationality analysis as the single appropriate standard of equality review under section 1.*

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*Le problème fondamental que pose l'interprétation de la portée des droits à l'égalité en vertu de la Charte des droits et libertés est de décider si l'article 15(1) donne le droit aux personnes semblables d'être traitées de façon semblable, ce qui est le principe d'égalité de forme, principe qui n'est limité que par la nécessité d'atteindre des buts politiques d'importance primordiale, ou si les articles 15(1) et 1 se complètent l'un l'autre et assurent ainsi à tous le droit au même respect, ce qui est le principe d'égalité juridique. C'est la dernière de ces interprétations qui est préférable et ce pour plusieurs raisons. En premier lieu, le principe d'égalité de forme est une norme qui ne s'applique pas aux lois séparément mais à tout un système de droit alors que les jugements constitutionnels ne concernent que des lois prises séparément. En second lieu, le droit à l'égalité de forme n'existe pas puisque cette norme peut permettre l'interdiction universelle des droits réels au respect et elle est superflue si elle n'est que la justification du fait qu'ils sont reconnus de tous. En troisième lieu, le droit des personnes au même respect est en même temps un critère, en droit naturel, de sa validité en droit et une condition de l'indépendance démocratique. Limiter les droits à l'égalité au droit de tous au même respect réconcilie donc la démocratie et la*

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*décision judiciaire sur le contenu, ce que ne peut faire l'autre point de vue. L'interprétation que l'on doit faire de la portée des droits à l'égalité doit aller dans le sens de l'application de l'analyse rationnelle qui est la seule norme appropriée aux décisions judiciaires sur l'égalité en vertu de l'article 1.*

### Introduction

The equality guarantees of the Canadian Constitution, set out in section 15 of the Charter of Rights and Freedoms,<sup>1</sup> differ from those of the American in that they are expressly subject to reasonable limits. At first sight, the separation of the limitation section (section 1)<sup>2</sup> from those guaranteeing rights and freedoms seems to invite a balancing of individualistic right-claims against collective goals and a definition of the scope of rights in terms of the general welfare. On this reading of section 1, the Charter requires the state to maximize the sum of the benefits of collective goods and individual rights, permitting restrictions of the latter only to the extent necessary to achieve more beneficial results for others. Although superficially plausible, this utilitarian construction of reasonable limits encounters two sorts of difficulties.

One of these concerns the notorious inability of utilitarianism to render an account of fundamental rights that preserves the inviolability of the individual person.<sup>3</sup> For utilitarianism all rights are a creation of positive rules approved by the greatest happiness principle. The rights that some philosophers call moral or natural rights are distinguished not in kind from ordinary rights conferred by law but only by the weight they bear in assessments of the costs and benefits of legal rules.<sup>4</sup> Since these rights are justified only by their tendency to maximize aggregate welfare, they are defenceless against this standard. Thus the denial to a few of the right freely to move about, to acquire and dispose of property, can be justified by the greater sum of gratifications produced in those who bene-

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<sup>1</sup> Constitution Act, 1982, Part 1. Section 15 reads:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>2</sup> Section 1 reads:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>3</sup> See D. Lyons, *Utility and Rights*, in J. Waldron (ed.), *Theories of Rights* (1984), pp. 110-136.

<sup>4</sup> J.S. Mill, *Utilitarianism*, in M. Lerner (ed.), *The Essential Works of John Stuart Mill* (1961), pp. 238 ff.

fit from such an arrangement. There exists for utilitarianism, therefore, no special class of interests justifying a demand that any limitation be in the name of the principle underlying them and so be capable of preserving undiminished the individual good in the realization of collective ends. It would seem that the Charter's restriction of reasonable limits to those justifiable in a "free" (as well as democratic) society precludes any interpretation that would so subject persons to the external and particularistic rule of others.

The second problem faced by a utilitarian interpretation of reasonable limits has to do with the phenomenon of entrenchment itself. If the scope of individual rights depends on the outcome of a calculus balancing the utility of rights against that of competing social goals, it seems both illogical and (from a utilitarian standpoint) ethically retrograde to have transferred the power of striking the balance from legislatures to the courts. Since utilitarianism regards parliamentary democracy as itself justified by its capacity faithfully to reflect and to aggregate individual preferences,<sup>5</sup> the entrenchment of the Charter must appear from its standpoint as the entrenchment of the class interests of the judiciary. It would be odd, however, to adopt as a theory of the Charter one so fundamentally inimical to it in the first place.<sup>6</sup> Were the courts to do so, they would be faced with an absurd dilemma: either to apply independently the utilitarian calculus, in which case they run a grave risk of producing counter-utilitarian results; or to interpret section 1 as requiring deference to validly enacted majoritarian outcomes, in which case they nullify the entrenchment of the Charter.

Accordingly, if sections 1 and 15 must interact in the way utilitarianism says they must, then the Charter is an unintelligible document. Not only would it fail to protect individuals against majoritarian domination, but it would give judges a power that is illegitimate by the very standard they would be called upon to apply. I want, therefore, to propose an alternative understanding of the limits of equality rights, one that saves the notion of rights on the one hand and gives democratic credentials to judicial review on the other. This understanding will depend on a theory of equality rights that discloses their inherent or conceptual limits, that therefore preserves in limitation their integrity as rights, while at the same time excluding from consideration by courts matters properly reserved for the legislative process. It will, moreover, confirm "rationality analysis" as the single appropriate standard of equality review under section 1.<sup>7</sup> By rationality analysis I mean the application of a test under which legislative

<sup>5</sup> James Mill, *An Essay on Government* (1937), pp. 33-42.

<sup>6</sup> See D.A. Schmeiser, *The Case Against Entrenchment of a Canadian Bill of Rights* (1973), 1 *Dalhousie L.J.* 15.

<sup>7</sup> Whatever rights emerge from the analysis as guaranteed by the interaction of ss.

generalizations that treat relevantly like persons differently (or relevantly different persons alike) are valid if reasonably related to a purpose that is not itself discriminatory in an invidious sense. In defending this unitary standard of review, I mean to take issue with two competing versions of rationality analysis as well as with an approach that would vary the standard of review according to the nature of the classification adopted by the legislature. The type of rationality review I will *not* defend is one that applies a simple instrumental test of rationality, demanding that a classification bear a reasonable relation to a legislative purpose but without examining in the light of equality rights the legitimacy of the purpose itself.<sup>8</sup> Few words need be spent in criticizing this approach, for its shortcomings are obvious and well understood.<sup>9</sup> One need only point out that classifications are always instrumentally justified by the purpose of harming the class, so that this test merely demands that, if the legislature wishes to oppress a minority, it must do so effectively or not at all.

In the United States, rationality review has moved from this purely instrumental focus to one that scrutinizes the constitutional validity of legislative purposes.<sup>10</sup> The purpose must be "legitimate" in terms of the Fourteenth Amendment. It must be a genuinely public purpose, not one aimed at the detriment of a group.<sup>11</sup> Nevertheless, the rationality review of American jurisprudence is not precisely the type for which I shall argue. In the United States, rationality review has become associated with doctrines that are only contingently related to it and that embody a degree of deference to the legislature in excess of that demanded by any plausible theory of the Constitution. Specifically, the legitimate state purpose which the impugned classification must serve need not have been actually contemplated by the legislature, but may be any hypothetical purpose of which the court might conceive, or even any purpose which the state's

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15(1) and 1 will, by virtue of s. 28, be guaranteed equally to male and female persons, and this equality of reasonably limited rights will not be subject to further limitation by s. 1.

<sup>8</sup> This was the gist of the "valid federal objective test" developed by the Supreme Court of Canada under the Canadian Bill of Rights, R.S.C. 1970, App. III; see *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, (1973), 38 D.L.R. (3d) 481; *R. v. Burnshine*, [1975] 1 S.C.R. 693, (1974), 44 D.L.R. (3d) 584; *Prata v. M.M.I.*, [1976] 1 S.C.R. 376, (1975), 52 D.L.R. (3d) 383; *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, (1978), 92 D.L.R. (3d) 417. However, the strictly instrumentalist version of rationality review was rejected by McIntyre J. in *MacKay v. The Queen*, [1980] 2 S.C.R. 370, (1980), 114 D.L.R. (3d) 393.

<sup>9</sup> See J. Tussman and J. tenBroek, *The Equal Protection of the Laws* (1949), 37 Calif. L. Rev. 341.

<sup>10</sup> See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Vance v. Bradley*, 440 U.S. 93 (1979); *Zobel v. Williams*, 457 U.S. 55 (1982). See also Note, *Legislative Purpose, Rationality and Equal Protection* (1972), 82 Yale L.J. 123.

<sup>11</sup> For an interesting unitary theory of American constitutional law on this basis see C.R. Sunstein, *Naked Preferences and the Constitution* (1984), 84 Col. L. Rev. 1689.

lawyers might concoct *ex post facto*.<sup>12</sup> Further, there is no requirement that the factual assumptions underlying the classification be valid or even probably valid. Rather, it is enough that they are assumptions a reasonable legislature could make, and the onus is on the challenger to prove the contrary.<sup>13</sup> Finally, an impermissible purpose is taken to be identical with an impermissible motive, so that American rationality review takes the one-sided form of an intent- (as opposed to an impact-) oriented brand of judicial scrutiny.<sup>14</sup> This approach forgets that the character of a legislative purpose as public or particularistic is determined not solely by the consciousness of legislators (though an invidious intent concludes the matter) but also by the objective import of the legislation. A law that subordinates a class of persons to the exclusive good of another cannot be justified by public-spirited motives, because the invidious impact of such a law precisely fragments the *res publica*, and so objectively transforms the public reasons in the mind of the legislator into rationalizations of narrow self-interest. Accordingly, in contrast to that of the American Supreme Court, the rationality test defended here requires, first, that legislative classifications be demonstrably related to the legislative purpose, and second, that they be free of any actual intent or tendency to degrade or depersonalize the members of the class.

There is a further aspect of American equal protection jurisprudence which the theory offered here will reject. Traditionally that jurisprudence has distinguished between legislative classifications based on neutral and those based on suspect criteria. A suspect classification is one that discriminates on the basis of a characteristic determined by birth and historically associated with (in Stone J.'s words) "prejudice against discrete and insular minorities".<sup>15</sup> To neutral criteria the Supreme Court has applied rationality review, which will uphold a classification even though it fails to treat alike all those who are identical in the respect made relevant by the purpose of the law. To suspect classifications, on the other hand, it has applied strict scrutiny, under which such classifications are invalid unless tightly connected with the avowed aim of the statute and necessitated by some compelling state interest. The weight of this onus is such that strict scrutiny inevitably spells doom for any classification based on

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<sup>12</sup> See *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947); *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

<sup>13</sup> *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Vance v. Bradley*, *supra*, footnote 10.

<sup>14</sup> See *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); T. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication* (1977), 52 N.Y. Univ. L. Rev.; G. Binion, *Intent and Equal Protection: A Reconsideration*, [1983] *The Supreme Court Review* 397.

<sup>15</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at pp. 152-153, n. 4.

race or national origin. The only case in which the state has been held to have satisfied the onus was *Korematsu v. United States*,<sup>16</sup> where the court ruled that military necessities in the wake of Pearl Harbour justified the removal from the west coast of all persons of Japanese ancestry. Moreover, strict scrutiny is also applied to laws that, regardless of the basis of classification, burden interests considered fundamental because implicitly protected by the Constitution. On this branch of the doctrine, the Supreme Court has invalidated laws that penalize inter-state travel, enjoin the sterilization of habitual criminals, burden the right to vote, and interfere with access to the courts.<sup>17</sup>

In the past decade or so, a third standard of review has been developed by the American Supreme Court in connection with classifications based on gender. First explicitly articulated in *Craig v. Boren*,<sup>18</sup> this standard seeks a middle ground between the inevitably fatal compelling interest test of validity and the more deferential rational basis test. A sex-based classification is reasonable, according to this standard, only if it is necessary to the attainment of "important governmental objectives" and if it is "substantially related" to those objectives.<sup>19</sup> Two tests are specified here. First, the value of the state's objective in employing the classification must, in the opinion of the court, outweigh the value of treating like persons alike; second, the criterion of gender must be closely correlated with the trait that is the real object of the legislation. The first test virtually assures the invalidity of sex-based classifications whose only justification is administrative convenience, while saving those employed by special legislation designed to remedy the effects of past discrimination against women.<sup>20</sup> The second test invalidates gender stereotypes suggesting blindness to counterexamples rather than a calculated decision to ignore them.<sup>21</sup>

It will be the argument of this article that multiple standards of review are an incoherent refinement that should not be adopted in Canada; that, while they may be explicable in terms of the historically toothless rationality review of American jurisprudence, they have no objective support in theory. Properly conceived, rationality review is (I shall argue) a sufficient test of the legitimacy of classifications and therefore appropri-

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<sup>16</sup> 323 U.S. 214 (1944).

<sup>17</sup> Inter-state travel: *Shapiro v. Thompson*, 394 U.S. 618 (1969); sterilization of habitual criminals: *Skinner v. Oklahoma*, 316 U.S. 535 (1942); right to vote: *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); access to the courts: *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>18</sup> 429 U.S. 190 (1976).

<sup>19</sup> *Ibid.*, at p. 197.

<sup>20</sup> *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974).

<sup>21</sup> See J.H. Ely, *Democracy and Distrust* (1980), p. 157 ff.

ately applied irrespective of whether the criterion of classification is a neutral one or one that is explicitly named in section 15. Any balancing test, we shall see, is relevant not to the legitimacy of the law but to its wisdom. Since, moreover, rationality review tests the validity of classifications only by their democratic legitimacy, it will emerge as the only test that reconciles substantive judicial review with democratic principles of sovereignty. Finally, because it alone eschews the balancing of rights against extrinsic social goals, rationality review will present itself as the only test consistent with the notion of a fundamental right to the equal protection of the laws.

### I. *The Case of Bailey v. M.N.R.*

The analysis proposed here will be served by consideration of a concrete case. In *Bailey et al. v. M.N.R.*,<sup>22</sup> two provisions of the Income Tax Act<sup>23</sup> were challenged before the Canadian Human Rights Tribunal for allegedly discriminating on grounds prohibited by the Canadian Human Rights Act.<sup>24</sup> Section 109(1)(a) of the Income Tax Act provides for a "married status" deduction from income for purposes of tax assessment. The complainant, who had supported a common-law spouse during the relevant period, was disallowed her claim to a deduction on the ground that she was not "married" to the person whom she had supported. Both she and her common-law spouse filed complaints with the Canadian Human Rights Commission, alleging that section 109(1)(a) adversely discriminated against them on the basis of marital status, a ground of discrimination explicitly prohibited by section 3 of the Human Rights Act.

The second provision challenged in the case was section 63. This allows a deduction for child-care expenses to both men and women, but imposes more stringent eligibility requirements on men. Whereas women are entitled to those deductions unconditionally, men must be either unmarried or separated from their wives pursuant to a written agreement or a court order. The complainants, both informally separated from their wives and having custody of children, alleged a breach of the Human Rights Act, section 3 of which prohibits discrimination in the provision of services on the basis of sex.

I shall disregard for present purposes the issue as to whether the Human Rights Act applies to federal statutes as well as to private acts of discrimination. It is enough to point out that the Tribunal held that it did.<sup>25</sup> The only issue that concerns us is whether the provisions chal-

<sup>22</sup> (1980), 1 C.H.R.R. D/193.

<sup>23</sup> S.C. 1970-71-72, c. 63.

<sup>24</sup> S.C. 1976-77, c. 33.

<sup>25</sup> It is not clear what was gained by this, however, as the Tribunal also held that the remedies prescribed by the Human Rights Act do not apply to statutory discrimination; see *Bailey v. M.N.R.*, *supra*, footnote 22, at p. D/224.

lenged in *Bailey* are now vulnerable to attack under the Charter. Although the *Bailey* case was decided under the Human Rights Act, the Tribunal's reasoning is nevertheless relevant to this issue, inasmuch as it explicitly measured the challenged provisions in light of a hypothetical constitutional standard.

The Tribunal had no difficulty in concluding that there was factual discrimination on the basis of marital status and sex in section 109(1)(a) and section 63 respectively. The question was whether this factual discrimination constituted discrimination in law. Given the existing jurisprudence on the equality guarantees of the Canadian Bill of Rights,<sup>26</sup> the Tribunal saw its task as twofold. First, it had to determine whether the impugned provisions had been enacted for a valid federal purpose; and second, it had to decide whether the classifications based on marital status and sex were rationally ordered to the attainment of that end. The interpretation it placed on these tests is noteworthy. It denied, first of all, that a valid federal purpose could be "equated with any legislative reason whatsoever so long as there is a constitutional basis for legislation".<sup>27</sup> The standard, in other words, for the validity of the state's purpose was not only the constitutional allocation of powers but also the statutory guarantee of equality rights. On the other hand, the test of rationality was interpreted by the Tribunal as a subjective one. A legislative classification satisfies this test if it was based on criteria "perceived by Parliament as relevant to its purpose".<sup>28</sup> The Tribunal explained this formulation of the reasonableness test by reference to the need for judicial restraint in striking down legislation pursuant to a statutory as opposed to a constitutional jurisdiction.<sup>29</sup>

By adopting a subjective test of reasonableness, the Tribunal permitted itself a two-dimensional analysis. For it could now officially defer to the judgment of Parliament while at the same time measuring the challenged provisions in the light of a hypothetical objective standard. It could thus indicate both the impact on the provisions of the existing statutory guarantee of equality as well as the probable impact of a constitutionally entrenched guarantee. The hypothetical objective standard applied by the Tribunal was the American one of intermediate review. It found that the statute used married status as a surrogate for dependency in order conveniently to distinguish between stable and ephemeral relationships and thereby to minimize tax avoidance and the resultant loss of revenue. It reasoned that this end could be accomplished in less discriminatory fashion and without much additional cost by allowing a deduction for a

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<sup>26</sup> *Supra*, footnote 8.

<sup>27</sup> *Supra*, footnote 22, at p. D/219.

<sup>28</sup> *Ibid.*, at p. D/219.

<sup>29</sup> Citing *Curr v. The Queen*, [1972] S.C.R. 889, (1972), 26 D.L.R. (3d) 603.



dependant whose principal residence during the entire taxation year was the home of the taxpayer. Given the importance of providing every income-earner with a minimum amount of untaxed income to support himself and his dependants, the Tribunal denied that administrative convenience could, objectively speaking, be a sufficient basis for the reasonableness of an underinclusive approach. Applying the standard of intermediate review, it concluded that the classification by marital status of paragraph 109(1)(a) was unreasonable. Since, however, that classification had been deemed by Parliament to be reasonable, it was not inconsistent with the Human Rights Act.

The same dualistic analysis was applied to section 63. The Tribunal found that the purpose of child-care deductions was to facilitate the entry of women into the labour force. Nevertheless, it held that section 63 is not an affirmative action provision in the strict sense, since it makes men eligible for deductions in certain situations. The real purpose of the statute's differential treatment of men and women, the Tribunal held, was to limit the loss of tax revenue by ensuring that child-care expenses of married couples were deducted from the wife's income, which is usually the lower one. Since, however, this goal could be easily achieved by a provision directly requiring the deduction to be taken by the spouse with the lower income, the sex-based classification was, in the Tribunal's view, objectively unreasonable. Nevertheless, it was held not to contravene the Human Rights Act because Parliament evidently thought it was reasonable.

What if the challenged provisions had been held to have violated the Human Rights Act? Could the Tribunal have used its cease and desist powers to declare the offending provisions inoperative? At this point the Tribunal came face to face with the bizarre dilemma confronting any court which holds that underinclusive classifications can be illegal even in the absence of invidious discrimination. If the court invalidates the provision, the benefits of countless needy persons are obliterated even though they are not substantively objectionable; if it orders equal treatment for the entire needy class, it affirmatively amends the legislation, something only Parliament can do. The Tribunal's understandably evasive solution was to disclaim any power to do either. "The bottom line", it concluded, "is that any actual relief for the Complainants must come through legislative change, whether or not they were successful before this Tribunal".<sup>30</sup>

A few preliminary observations may be offered here. Although the Tribunal stated that its decision in favour of the challenged provisions was relative to its jurisdiction under a statutory guarantee of equality, the reason it advanced for refusing to declare illegal statutes inoperative (concern for existing rights) have no such limited force. They would

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<sup>30</sup> *Supra*, footnote 22, at p. D/224.

apply as well under a constitutional as under a statutory mandate for judicial review. For whenever a court invalidates legislation pursuant to a constitutional jurisdiction, it wipes out existing rights. The reason a court may cancel rights conferred by Parliament is that, objectively speaking, they never were rights, but were merely unjust privileges acquired through an arbitrary exercise of power. Now, if the Tribunal believed the challenged provisions to be illegally discriminatory measured by a constitutionally entrenched right to equality, why did it display such a solicitous regard for the rights conferred by them? Perhaps it was because it understood that the problem with these provisions was not that they represented illegitimate exercises of power but that they were imperfect means of achieving a legitimate end and hence provisions not for the courts to invalidate but (as the Tribunal decided) for Parliament to amend. But if this is so, what becomes of the Tribunal's assertion that, objectively speaking, the provisions constituted discrimination in law?

This brings us to the crucial point. The Tribunal's finding that section 109(1)(a) and section 63 of the Income Tax Act were consistent with the Human Rights Act was based on a subjective test of the reasonableness of legislative classifications, one that deferred unreservedly to the opinion of Parliament. This test was applied not because the Tribunal thought it was the true one but because of a perceived lack of authority to strike down legislation absent a compelling interest. The Tribunal believed that, measured by an objective standard of reasonableness, the challenged provisions offended the principle of equality before the law and should (presumably) be invalidated by a court with the constitutional mandate to do so. With this conclusion I shall respectfully disagree. I shall try to show that these provisions are, from an objective point of view, not illegitimate and thus no more subject to curial invalidation under a constitutionally entrenched right to equality than under a purely statutory one.

## II. *Some Distinctions*

The equality rights to which human beings lay claim are either negative rights of juridical equality or positive rights of economic equality. These two kinds of rights are in one sense radically distinct and in another sense intimately connected. On the one hand, juridical equality is so far from entailing equality rights with respect to holdings or opportunities that it presupposes the inequality of individuals in respect of these goods. This is so because the juridical equality of human beings is conceived as a reflex from whatever can possibly distinguish them in their natural or social circumstances.<sup>31</sup> Juridically equal individuals are equal in personality, in the formal capacity for self-activity, a capacity that is intellectually grasped precisely by abstraction from all contingent attributes in respect

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<sup>31</sup> See on this point Hegel, *Philosophy of Right* (trans. Knox, 1967), paras. 5, 49.

of which human beings may differ. Thus understood, the juridical equality of persons is really a tautology (though not an uninteresting one), since personality so conceived is the idea of identity itself.<sup>32</sup> The attribute in respect of which individuals are said to be alike is one in which they are analytically alike, for personality is precisely the repulsion of all differences.

Because it is silent regarding the justice of concrete inequalities in holdings or chances, juridical equality has always seemed to critics of liberal individualism a rather poor conception of equality, one indifferent to the circumstances affecting the real enjoyment of formally equal rights of free self-activity. This criticism grasps the inner bond between rights of juridical equality and rights of economic equality. My right as an abstract person to act in accordance with freely chosen goals means little to me as a determinate individual if circumstances reduce me to dependence on the projects of another. The inadequacy of juridical equality as a comprehensive standard of right is just the inadequacy of abstract (that is, non-individuated) personality as a stable foundation for the worth of the determinate individual. Indeed, it is because rights of juridical equality cannot guarantee everything that respect for *this* person entails that liberal states are obligated *qua* "states" to equalize chances for the fulfilment of the capacity for free self-activity and, as part of this endeavour, to assure equality in the means of subsistence. However, from the existence of a moral right to more equality than is guaranteed by juridical equality it does not follow that the distinction between juridical and economic equality is politically irrelevant, or in particular that it need not be reflected in institutional differentiation. It does not follow, in other words, that courts should enforce rights of economic equality along with rights of juridical equality and that section 15 should be interpreted as now empowering them to do so.

While it might seem obvious that courts ought not to be able to command the satisfaction of economic rights *de novo*, it is worthwhile reminding ourselves why this is so, particularly in view of the strand of American equal protection jurisprudence that would use courts to protect claims to basic necessities and to mandate real equality of opportunity in the distribution of preferred positions.<sup>33</sup> The reasons for reflecting institu-

<sup>32</sup> *Ibid.*, para. 49.

<sup>33</sup> See *Shapiro v. Thompson*, *supra*, footnote 17; *Plyler v. Doe*, 457 U.S. 202 (1982); F.I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment* (1969), 83 Harv. L. Rev. 7; Note, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence* (1984), 132 U. of Penn. L. Rev. 1547; C.E. Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection* (1983), 131 U. of Penn. L. Rev. 933; O.M. Fiss, *Groups and the Equal Protection Clause* (1976), 5 Philosophy and Public Affairs 107. The Burger Court has refused to develop the theme of enforcing the state's affirmative duties through the Fourteenth Amendment; see *Dandridge v. Williams*, 397 U.S. 471 (1970); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

tionally the difference between economic and juridical equality have to do with elementary considerations of competence on the one hand and of democratic legitimacy on the other. Since the satisfaction of economic rights requires a diversion of scarce resources from competing social uses, it is always subject to the possibility of rendering the disadvantaged class worse off on the whole than it would be with a lower level of benefits. It must be plain that neither the estimation of these effects nor the determination of the point of maximum welfare is an inquiry to which adjudicative procedures can usefully contribute. Secondly, the same duty of respect for the determinate person that underlies rights of concrete freedom also generates the idea that laws are authoritative only when enacted through procedures enlisting the participation and assent of those who are subject to them. One difference between juridical and economic equality is that the former is an apodictic truth that can only be negatively dishonoured, whereas the latter is a factual condition that must be affirmatively brought into being. Since economic equality is a product of law, respect for the individual demands that it be produced by lawmakers who are chosen by and accountable to him. Accordingly, whether or not there is a moral right to state intervention to promote equality of chances or of basic welfare, it is certain that the Charter does not confer court-enforceable rights to such intervention in the absence of government action which violates juridical equality. Moreover, I shall attempt to show that the provision by the state of benefits to some but not all similarly needy persons does not itself violate juridical equality unless the unequal treatment manifests an intent or tendency to stigmatize or otherwise to deny the equal moral worth of those excluded.

Given that the equality rights protected by the Charter are rights of juridical equality, we have to determine the meaning of these rights. There are at least two senses of juridical equality, one richer and more interesting than the other. In its thin but not unimportant sense, juridical equality is satisfied if officials enforce rules impartially against all those to whom they apply, blind to differences that are irrelevant from the standpoint of the policy or principle of the rule. So understood, however, the right to juridical equality simply states the formal condition of the rule of law.<sup>34</sup> To say that everyone ought to be equal before the law is to say that the laws should be laws. Accordingly, the right envisaged here is most accurately expressed not as a right to equality (which is also satisfied by universal lawlessness) but as a right inherent in personality to be subject to laws rather than to the particularistic will of men.

Here we encounter for the first time the necessity of distinguishing the underlying, substantive meaning of equality rights from the formal

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<sup>34</sup> See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), pp. 187 ff.; *Attorney General of Canada v. Lavell*, *supra*, footnote 8.

meaning of equality.<sup>35</sup> Substantively, the right to equality before the law is a right to objective and impartial law application, one that defines the legitimate scope of official discretion *vis-à-vis* the subject. It is a right, at bottom, to equality in relation to officials; one which denies any natural subordination of one human being to the particular will of another. I call this the substantive meaning of equality rights, because the right is to equality of a specific content, namely, to an equality of respect owed to autonomous agents. Formally, on the other hand, the right-claim to equality is a claim to a horizontal and comparative equality among subjects, abstractly demanding that like cases be treated alike. This sense of equality is formal in that it fails to specify any treatment to which human beings have an equal claim, and is therefore hospitable to any. In a moment I shall argue that there is no right to equality in this formal sense. For now it is enough to indicate one consequence of the distinction between the substantive and comparative senses of equality. A claim of right to comparative equality renders problematic all exercises of discretion in the enforcement of rules, necessitating an appeal to social expediency as an external and hence destructive limitation of the right. By contrast, a substantive right to impartial rule application precludes only those exercises of official discretion that cannot be demonstrably justified by authentic public purposes. It is a right, therefore, not to like treatment of likes but to structured and public-spirited decision-making.

Once the right to equality before the law is understood in this way, the true character of its limitations becomes apparent. Conventionally it has been thought that the norm of equality before the law is deficient because, applying to the enforcement rather than to the content of the law, it is satisfied by a law which, however unjustly discriminatory in purpose, is applied impartially to all those whom it is intended to harm. This turns out to be not strictly correct. Inasmuch as the norm of impartial application envisages an equality of status as between ruler and ruled, it cannot unambiguously countenance legislation that subordinates some to the uses of others. It would be more correct to speak of an internal tension within the norm—a tension between its implicit content and the content-neutral form in which the latter is self-contradictorily encased. The problem with the norm of equality before the law, then, is that it is not yet sufficiently emancipated from the formal meaning of equality. Its problem is that, while inherently affirming the equal *dignity* of persons, it cannot condemn the like *evil* treatment of likes.

Whereas the first sense of juridical equality stated the formal condition of the rule of law, the second sense states its substantive condition. When we distinguish the rule of law from that of men, we have in mind a

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<sup>35</sup> See R.E. Flathman, *Equality and Generalization, A Formal Analysis* (1967), 9 *Nomos: Equality* 38; P. Westen, *The Empty Idea of Equality* (1982), 95 *Harv. L. Rev.* 537; K. Greenawalt, *How Empty is the Idea of Equality?* (1983), 83 *Col. L. Rev.* 1167.

contrast between the universality of law and the partiality or self-preference of human beings. The condition, however, of the substantive universality of law is the mutual recognition of rational beings as ends, or as persons worthy of respect. It is of this sense of "equality before the law" that Hegel remarked that it is at once a "great truth" and a tautology.<sup>36</sup> It is a great truth because the rule of law is finally attained when the law is impartial in content as well as in execution, or when it is a possible expression of the common will of citizens who treat themselves as ends. It is a tautology because the equality of persons as persons is itself the idea of law. The ground of the possibility of substantively universal laws is the unity of rational beings in personality.

Let us call the first sense of juridical equality "equality before the law" and the second sense "equality under the law". Both types of juridical equality can be reduced to a single principle cast in terms of the ancient formula that likes should be treated alike.<sup>37</sup> The demand that everyone be equal before and under the law is a demand that all beings who are alike in respect of personality be ruled only by laws, or in other words, be respected as self-governing agents. The principle that likes should be treated alike is thus the formal and generic principle of equality, of which the right to juridical equality is a substantive instance. And there are, of course, as many other substantive instances of the form as there are criteria of relevant likenesses. Now the fundamental problem in the interpretation of section 15(1) is to determine whether this section guarantees a general right of likes to be treated alike, in which case section 1 requires that any limitation be necessary to the achievement of overriding political goals; or whether sections 15 and 1 combine to protect rights of juridical equality only.

Some preliminary light may be shed on this question by a consideration of the differences between juridical equality and all other instances of the formal principle. We have seen that the respect in which human beings are said to be juridically alike is one arrived at by abstraction from all empirical attributes in respect of which they might possibly differ. What is left is the transcendent idea of identity itself. By contrast, the likeness made relevant by all other instances of the formal principle is a likeness in respect of some concrete attribute—for example, widowhood, pregnancy, poverty—in respect of which persons may also be dissimilar. This difference entails another. Because the juridical identity of persons is identity itself, this identity merits equal treatment not of any sort but equal recognition of dignity, understood as the attribute of things raised above those that may be otherwise than they are. That is, the attribute in respect of which human individuals are necessarily alike is the basis for a right to a substantive and indivisible good, namely, respect. Since, how-

<sup>36</sup> *Philosophy of Mind* (trans. Miller, 1971), para. 539.

<sup>37</sup> See Aristotle, *Politics*, 1280a-1281a.

ever, contingent attributes cannot ground natural rights, the equal treatment of likes demanded by all other instances of the formal principle is nonspecific equal treatment. So, for example, the formal principle of equality is satisfied whether all cohabiting couples are granted tax deductions or none are. Furthermore, the good with respect to which contingent likes must be treated alike is some divisible good, one that is not necessarily denied completely if it is denied at all. A widower, for example, is not necessarily denied the means of subsistence simply because he is denied benefits under a widows' pension scheme. He may be provided for to a comparable degree by other programmes. By contrast, a woman whom the law denies because of her gender the capacity to give effective consent will not be comforted by the knowledge that she is entitled to hold property. Since respect is indivisible, she is denied it as long as the single offending law stands. Nor are her "equality rights" indifferently satisfied by acknowledging her capacity to consent and denying it to all. The right of the person is not to equality but to respect. When, therefore, a court invalidates such a law in the name of juridical equality, it does not provide one among several possible affirmative remedies; rather it nullifies a law that inherently violates the substantive criterion of law and whose nullification is thus rigidly determined. When, however, a court strikes down in the name of formal equality the married status deduction, it chooses one remedy from among others equally eligible from the standpoint of formal equality and from which it is barred merely for institutional reasons.

Now from these differences there follows the one that is most interesting for our present purposes. The juridical equality of persons, understood as the idea of law, states the condition of the justice (lawness) of isolated laws, whereas all other instances of the formal principle state the condition of the rationality of a distributive system. The inquiry as to whether any individual is treated differently in respect of a divisible good from all other similarly situated persons logically transcends the investigation of any particular law, implicating the totality of laws distributing that good. Moreover, even if discriminatory treatment by one law is not compensated for by others, the fact that the formal principle is indifferent as between abolishing or amending the discriminatory law and enacting compensatory ones demonstrates that the formal principle, as one yielding comparative rather than substantive rights, is generally a norm for a distributive pattern. The sole exception is juridical equality, which alone is a norm for discrete laws. Since, however, constitutional adjudication is by nature confined to the evaluation of particular governmental acts, it would seem that the norm of juridical equality, which alone prescribes for such acts, is the only equality norm whose application is consistent with the nature and competence of a court. Were section 15(1) interpreted as conferring a firm right of likes to be treated alike, the courts would be forced to apply to the review of a single law a norm that can be violated

only by a system of laws.<sup>38</sup> They would therefore have to assess the rationality of the political distribution of benefits and burdens, possessing neither the expertise for this task nor the requisite powers of affirmative reform. And, lacking those powers, they would have to "invalidate" laws by a principle that is indeterminate with respect to their particular validity. The rendering inoperative of laws by a principle that cannot determine this result seems to capture the meaning of a legislative repeal.

Let me draw some further distinctions. The principle that likes should be treated alike implies a distinction between discrimination that is rational and discrimination that is irrational. It thus already implies an intrinsic limit to the right to be treated equally. It is rational and permissible to treat different persons differently; it is irrational and at least *prima facie* impermissible to treat like persons differently.<sup>39</sup> The question upon which we must focus, therefore, is whether *all* irrational discrimination by the state violates a constitutional right.

Irrational discrimination may be either invidious or non-invidious. It is invidious if it denies an individual rights that are *a priori* entailed by respect for personality (for example, the right to vote, to speak, to believe), if it imposes unequal restrictions on the liberty of some for the exclusive benefit of others, or if it distributes benefits and burdens unequally with an intent to exploit the disadvantaged group or on grounds which appeal to the outcome of past exploitation. In all these cases, the relevant similarity ignored by the law is the personhood of the individual, an attribute that in the one case entitles him to the equal enjoyment of certain so-called fundamental rights, and that in the others entitles him to be free from subjection to any rule that treats him as a means to someone else's good.<sup>40</sup>

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<sup>38</sup> Consider, for example, the widower excluded from the widows' pension scheme. Suppose he complains of discrimination based on gender because he, as it happens, was financially dependent on his deceased spouse. Suppose further that the following facts are established. If the complainant is over 65, he will receive an old-age pension equal, let us say, to the widows' pension. Otherwise he will be eligible for social assistance based on some calculation of average need to an amount somewhat less than that received by widows under their pension scheme. For needy widowers under 65, therefore, equality with similarly situated widows is achieved by doing any one of the following: (i) enacting a widowers' supplement to the social assistance program, (ii) enacting a widowers' pension, (iii) abolishing the widows' pension, (iv) amending the widows' pension so as to make it applicable to anyone who was dependent on his or her spouse before the latter's death. For widowers over 65, equality with their female counterparts is achieved either by (i) granting them a widowers' pension, (ii) withdrawing the old-age pension from widows over 65, (iii) abolishing the widows' pension, or (iv) amending the widows' pension so as to make it apply in gender-neutral fashion. It is impossible to say which of the various welfare programs is violating the principle that likes should be treated alike, because this principle applies only to the interconnection of all of them.

<sup>39</sup> See S.I. Benn and R.S. Peters, *The Principles of Political Thought* (1959), pp. 124-128.

<sup>40</sup> The unequal restriction of liberty violates John Rawls' first principle of justice and is invidious irrespective of intent, because it objectively subordinates the restricted class



Irrational discrimination of the non-invidious type arises most often as an incident to rational discrimination in the law. When laws confer benefits unequally in order to remedy or compensate for *de facto* inequalities, they often distribute not on the basis of individualized assessments of eligibility but on the basis of general criteria that correlate with the need which the law seeks to satisfy. Section 109(1)(a) of the Income Tax Act, for example, uses marriage as a shorthand way of measuring the need for deductions for the support of adult dependants. It does so because a more individualized approach would be administratively more costly, cumbersome and intrusive. I shall call classifications based on such criteria surrogate classifications, because they are not directly relevant to the purpose of the law but are merely connected with some other variable that is directly relevant.

Now, if the surrogate classification is underinclusive with respect to a benefit (or overinclusive with respect to a burden), that is, contains fewer (or more) than all those similarly situated with respect to the purpose of the law, the irrationally excluded (or included) individual may claim that he has been discriminated against in a way that violates his constitutional right. It is important to grasp the essential difference between the basis of this complaint and that of one who complains of invidious discrimination. A law may deny an individual the right to hold property because she is a woman, or it may deny a father child-care deductions that are granted mothers even though he has sole custody of children. Both laws discriminate on the basis of gender. In the former case, the individual will complain that the law has considered her in the light of an irrelevant particular attribute rather than on the basis of her generic human personality, which basis is alone relevant to the distribution of property rights. In the latter case, however, the individual will complain that he has been considered in the light of irrelevant *general* categories rather than on the more pertinent basis of his individual circumstances. Thus the first challenger alleges the violation of a substantive right to equal respect as a person, whereas the second can invoke (assuming no intent to injure) only the formal principle that likes should be treated alike.

The latter principle, however, is clearly not a standard of just treatment.<sup>41</sup> Suppose the state had decreed that all single mothers be sterilized. Any-

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to the ends of the class whose liberty is not similarly burdened. It is tempting to apply Rawls' second principle to the unequal distribution of social and economic advantages, if only to avoid the necessity of inquiring into legislative intent. The failure of a discriminatory law to maximize the welfare of the representative person in the excluded class could serve as an objective test of the legitimacy of the law. This will not work, however, because Rawls' second principle is a norm for the "basic structure of society" and not for any single law. It is therefore, as he himself says, a norm whose vindication is a task for the political process; see *A Theory of Justice* (1971), pp. 372-373.

<sup>41</sup> See Flathman, *loc. cit.*, footnote 35, at pp. 50-51; Westen, *loc. cit.*, footnote 35, at pp. 545-546; J. Feinberg, *Social Philosophy* (1973), p. 312.

one claiming a right of likes to be treated alike must argue that an independent wrong has been committed against the mothers by failing to sterilize similarly situated fathers.<sup>42</sup> This position is absurd, however, because it leads to a self-contradictory conflict of rights. The remedy for the additional "wrong" done to the mothers is to infringe a substantive right of the fathers, while the protection of the fathers' right infringes that of the mothers'. There is thus at least one right that must be subjugated to the other. Any attempt to dissolve the conflict by reducing both rights to some such common metric as utility also dissolves the force of the rights. Of course, the tension between equality and substantive rights is avoided by arguing that no one ought forcibly to be sterilized, but this conclusion in no way derives from the principle that likes should be treated alike; rather, it is independently supported by each person's substantive right of respect, so that the injunction to treat likes alike is either immoral or morally redundant. Nor will it help to call the right to the like treatment of likes a *prima facie* right, one which will be overruled by stronger substantive rights of respect.<sup>43</sup> For either the reasons justifying the equality claim are different from those which justify overruling it in particular situations, or they are the same. If they are different, the conflict of rights is simply transferred to a higher plane of generality, and the right-claim to equality is refuted by the ascendancy of the reasons supporting the substantive right.<sup>44</sup> If the reasons are the same, then these reasons will define the inner scope of the right to like treatment and leave the original abstract claim with no intrinsic justification. Presently I shall argue that it is the rule of law (in both its formal and substantive senses) that defines the scope of the right of equals to equal treatment.

The abstract right-claim to like treatment of likes is incoherent in yet another respect. Since it pursues equality as an end in itself without regard to substantive rights of respect, it can regard with equanimity the levelling of the distinction between persons and things, a distinction without which the claim of right is itself unintelligible. It can, as in our previous example, admit the indefinite extension of wrongdoing in order to ensure that all relevantly similar individuals are treated wrongly alike. Lest it be thought that this argument works only for unjust detriments imposed by law, consider again the married status deduction in *Bailey*. If there is a right of common-law spouses to be treated like legally married ones for the purposes of this provision, this right will countenance the denial to legally married spouses of their substantive right to a basic income for subsistence. The right to subsistence is perfectly intelligible as an embodiment of the worth of determinate personhood. A right to a

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<sup>42</sup> Greenawalt takes this position; *loc. cit.*, footnote 35, at p. 1173.

<sup>43</sup> See R.B. Brandt, *Ethical Theory* (1959), pp. 41 ff.; W.D. Ross, *The Right and the Good* (1939), p. 20.

<sup>44</sup> See G. Vlastos, *Justice and Equality*, in Waldron, *op. cit.*, footnote 3, pp. 48-49.

substantively neutral equality, however, one that is indifferent as between an equality of dignity and an equality of baseness, is perfectly unintelligible, except on the theory that envy is a morally relevant and constitutionally privileged desire.

The foregoing examples illustrate the ethical indeterminacy of the formal principle of equality. They show that the statement "likes should be treated alike" is false and a principle of injustice to the extent that it demands a levelling of similarly situated persons to a condition where none are accorded substantive rights of respect. Conversely, they show that the statement is true only to the extent that the treatment accorded some relevantly similar individuals is substantively right by some independent standard of just treatment. And then it is true not because of any intrinsic moral force of its own, but because the treatment is independently right for each relevantly similar individual. But this means that the problem with the child-care and marital status deductions in *Bailey* is not that they fail to treat likes alike, but that they fail to confer benefits on deserving fathers and common-law couples respectively. The court, therefore, cannot coherently attack the deductions without implicitly invoking a substantive right of those excluded to benefits, which is to enforce positive rights of economic equality rather than negative rights of juridical equality. The contradictions latent in this attack are revealed at the stage of remedies. For if it be conceded that the court cannot wield section 15 to enforce rights of subsistence *de novo*, whence comes it by a power affirmatively to order that the state satisfy these rights perfectly if it wishes to satisfy them at all? Alternatively, whence comes it by a power to cancel benefits it implicitly concedes are due as a matter of right?

One might anticipate two possible objections to these arguments. First, one could dispute the claim that the formal principle of equality is without independent moral force and hence not a principle whose violation necessarily infringes any right. From its failure to provide a sufficient standard of justice, we may be told, one cannot infer that it has no moral significance whatsoever. Might it not be a guide to just treatment in circumstances where substantive duties are silent or in doubt? Kent Greenawalt has urged this view, the force of which he tries to convey by the following examples.<sup>45</sup> Imagine a judge who must sentence identical twins convicted of jointly committing a burglary, but who does not know whether probation or imprisonment is the appropriate sentence. Even if he thought the circumstances ideal for a penological experiment, he would undoubtedly consider himself barred from releasing one on probation and incarcerating the other. Further, suppose a teacher in a school whose minimum passing grade is sixty has mistakenly and irrevocably passed six students who achieved grades of fifty-nine. If on realizing his mistake he is still inclined

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<sup>45</sup> *Loc. cit.*, footnote 35, at pp. 1171, 1173.

to pass the seventh fifty-nine, it must be by virtue of the formal principle of equality, since substantively the student deserves to fail.

One can acknowledge a value in like treatment in these situations, without, however, conceding that the value inheres in treating likes alike. In both situations there is a way of accounting for the duty of equal treatment which reveals it as a special case of the substantive duty of respect. The judge is not permitted to conduct penological experiments on prisoners because this behaviour would fall outside the conceptual limits of punishment and hence outside the legal ambit of his discretion. Since punishment presupposes desert, and since the two prisoners are *ex hypothesi* equal in desert, they must be sentenced identically if the sentencing is to be punishment. Otherwise they are subject not to the law but to the judge or to whoever will benefit from the experiment. In other words, the gravitational force towards like treatment is exerted not by a requirement of horizontal equality between the prisoners but by the rule of law, or by a duty on officials of rational discretion under a substantively universal standard.<sup>46</sup> And the proof of this contention is that the criterion of horizontal equality becomes hospitable to different sentences as soon as one postulates that data-gathering is a valid goal of sentencing. For in that case, the equality of the prisoners' desert is not their sole relevant likeness.<sup>47</sup> Similarly, if the seventh student is failed according to the rule, the moral basis of his complaint cannot be the bare fact that he has been treated unequally *vis-à-vis* those similarly situated, since the others have also been treated unequally with respect to him. Rather the basis of his complaint is that the pattern of the teacher's decisions is so irrational as to justify a strong suspicion of partiality against him. The pull towards like treatment is thus explained by the requirement that discretion be demonstrably as well as inherently rational. If the student could be completely persuaded that the discrepancy was due to innocent error and that the correct rule dictates that he fail, his complaint would immediately have been transformed from one of unfairness to one of bad luck.

This account of the moral force of comparative equality also explains the undoubted presumption in favour of treating likes alike.<sup>48</sup> If a law or administrative decision violates this principle, the result is an appearance of irrationality in the design or enforcement of the law. This irrationality kindles a suspicion that the individuals treated inconsistently have been

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<sup>46</sup> R. Dworkin, *Taking Rights Seriously* (1977), p. 227: ". . . the right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances".

<sup>47</sup> P. Westen, *To Lure the Tarantula from its Hole: A Response* (1983), 83 Col. L. Rev. 1186, at pp. 1195-1196.

<sup>48</sup> See I. Berlin, *Equality* (1955-56), 56 *Proceedings of the Aristotelian Society* 301, at pp. 304-305.

disadvantaged from the particularistic motives of officials. The suspicion may be allayed, however, by showing that what initially appeared as an irrational exercise of authority is in fact rational when viewed from a more comprehensive perspective on legislative goals, which may include the achievement of public purposes in a piecemeal manner or in the most cost-effective way. This is, of course, why the American Supreme Court's test of equal protection is centrally a test of the rationality of discretion. Were there (as Greenawalt contends) a deep-seated moral inclination towards comparative equality for its own sake, the ease with which this value regularly succumbs to considerations of administrative convenience would be puzzling to say the least. If, however, the right is to rational discretion under a universal law, this phenomenon becomes transparent. It merely reflects the truth that the formal principle of equality has moral force only to the extent that it embodies the deeper principle of the rule of law, and that outside this principle the sole inclination supporting it is envy.

The second response to the thesis that the mere failure to treat likes alike violates no right of the person is in the nature of a demurrer. Thus far our arguments have merely shown that if section 15(1) confers a conceptually complete right of likes to be treated alike (limited only to the extent necessary to achieve more important political goals), then the courts have been empowered to judge what is probably unjusticiable and to perform functions inconsistent with their traditional subordination to the legislature. Specifically, they have been empowered to judge the equity of distributive systems, to repeal just benefits conferred by the legislature, to enforce rights of economic equality, and to weigh "rights" against political objectives. The rejoinder to these arguments is that, however upsetting these consequences might be to conservative notions of constitutional propriety, they are precisely the effect of the entrenchment of equality rights and, in particular, of the right to the "equal protection" and "equal benefit" of the law. That the entrenchment of these rights should mean an expansion in the political power of the judiciary is, after all, hardly surprising.

A response to this manoeuvre must take the form of a coherent theory of equality rights under the Charter, one that is equally supported by the words of the document, but which harmonizes judicial review of legislation with democratic government. This theory will show that the distinction between invidious and non-invidious discrimination is crucial to the interpretation of section 15 as limited by section 1; that only discrimination of the invidious type ultimately violates the constitutional right to equality; and that, since this type (and no other) is caught by rationality review, there is no justification for regarding discrimination on enumerated grounds as either *per se* illegal or as attracting a special standard of judicial scrutiny.

### III. *A Theory of Equality Rights*

Implicit in the discussion thus far has been a distinction between laws violative of equal treatment that are properly subject to judicial invalidation and those for which the only remedy should be legislative amendment. This distinction rests on a theory of judicial review that should now be made explicit.

Judicial law-making is problematic at any time, but no more so than when it involves sitting in judgment on the declared will of a duly elected and sovereign legislature. Of course one form of judicial review is easily reconciled with parliamentary supremacy. When a court in a federal system declares legislation *ultra vires* the enacting body, it is acting in a manner consistent with democratic principle, for it is then simply allocating functions among legislatures that share plenitude of power. It does not by virtue of this form of review deny plenitude of power, for if authority to pass a particular law does not rest with one level of government, then it rests with the other. However, when a court strikes down legislation as being repugnant to constitutionally protected rights and freedoms, it declares that there are certain acts that are beyond the authority of any parliamentary majority. How is this kind of review possible in a democratic polity?

The problem can be restated in the following terms. It seems that judicial review (in the sense just spoken of) can be justified only on a theory of natural law. Such a theory provides a standard for distinguishing acts of the legislature that have obligatory force from those which are mere assertions of naked power and so devoid of binding authority. Only if this distinction exists objectively or by nature is the judicial invalidation of legislative acts comprehensible in a democracy. It would not make sense for mass-based legislatures to grant judges the power to oversee the wisdom of legislation, to ensure that laws truly maximized the general welfare, for a non-accountable and non-representative judiciary is not better, and is arguably much worse, constituted for this purpose than themselves. Accordingly, in the absence of a natural law foundation for judicial review, the only comprehensible role for the court under the Charter would be to supervise the process as distinct from the outcomes of representative democracy.<sup>49</sup> Its mandate would be to safeguard the integrity of the electoral system, to prevent restraints on free debate, and to take under its wing those whose interests are perennially isolated from the ebb and flow of legislative majorities. And yet a theory of judicial review that restricted its function in this way fits awkwardly with the rights and freedoms typically protected by the constitutions of liberal democracies. It would take strenuous efforts to explain in terms of the requisites of democratic decision-making the right to worship freely, to travel freely, to be secure against unreasonable search and seizure, or to

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<sup>49</sup> This is, of course, Ely's thesis; see *op. cit.*, footnote 21.

retain and instruct counsel on arrest. No doubt some remote connection between these rights and the democratic process could be manufactured, but we would suspect, I think, that a better theory of fundamental rights existed. And if we set aside utilitarianism as incapable of making sense of judicial review, the only alternative is natural law.

The difficulty, however, is that natural law theory does not co-exist comfortably with democratic theory. To the extent that political democracy is justified as the form of government most conducive to the maximization of the net aggregate utility of society, it is antithetical to any theory of natural law, for the latter asserts what utilitarianism denies, namely, the natural or objective foundation of moral distinctions. But utilitarianism is really only one expression of a general orientation of modern philosophy to what might be called the primacy of human subjectivity. This is an orientation that, simply put, views the human understanding as the ultimate source of order in both the natural and social worlds, rejecting all externally imposed ordering principles whether given by tradition or by revelation. It is this belief in the immanence of authoritative universals that seems to form the common substrate of the variants of modern democracy, which thus appears incompatible with any deference to a moral law said to be rooted in the nature of things.

It would seem, then, that judicial review can be justified only if the natural law theory it presupposes can somehow be reconciled with democratic assumptions about the moral autonomy of the human subject. If there exists an objective standard of legal validity that is compatible with democracy, then judicial invalidation of legislative acts will be legitimate insofar as these acts are inherently illegitimate judged by that standard. And this standard will allow us to determine whether there is any difference in point of constitutional legitimacy between irrational discrimination that involves the domination of some by others and irrational discrimination that results from underinclusive classification.

Fortunately, we need not elaborate such a theory *de novo*. The seminal attempt to reconcile natural law limitations on political rule with democratic government is the stream of political theory beginning with Rousseau and ending with Hegel.<sup>50</sup> A consideration of this theory is needed in interpreting constitutional guarantees of equality, for, as the foundation of the original Declaration of the Rights of Man and of the Citizen, Rousseau's thought is the embryo from which has unfolded all modern human rights legislation. Lest the choice of this tradition seem arbitrary, however, a few comments are needed on the use of philosophic texts in constitutional interpretation.

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<sup>50</sup> See Rousseau, *The Social Contract* (trans. Cole, 1968); Kant, *The Metaphysical Elements of Justice* (trans. Ladd, 1965); Hegel, *op. cit.*, footnote 31.

The argument against such a reference runs, I think, as follows. Moral and political philosophy is the quest for knowledge concerning the nature of the good and of the right. Inasmuch as any account of such notions must commence from an indemonstrable premise or starting-point, no account can authenticate itself as the true one. Consequently, there is no basis independent of one's tastes for choosing one philosophic text over another as a guide to constitutional interpretation.<sup>51</sup> The use of such texts by judges and legal scholars is thus incompatible with the rule of law.

The flaw in this argument is that it blurs the distinction between the philosophic and judicial enterprises. That philosophy has not or cannot become science is no argument against its relevance in constitutional interpretation, for the judge is engaged in a quest not for knowledge but for the spirit of the laws.<sup>52</sup> Thus the basis for choosing one philosophic text over another is not its agreement with one's opinion about right but rather its organic connection with the political morality embedded in the Constitution. That there exists such a nexus between the clearest thought of an age and the shape of its institutions is no doubt itself a philosophic premise, one that affirms the same connection between thought and deed at the level of the species as exists at the level of individual action. However, this connection can be persuasively argued in a manner to which judges are accustomed. Just as a theory of an area of private law commends itself to a judge if it integrates and explains doctrine in a way that preserves the pre-theoretic understanding of the law, so too a theory of constitutional morality. Now, the two central precepts of our constitutional morality would seem to be that the people's representatives are legally sovereign and that there are rights and liberties of the individual which they cannot legally infringe. The best theory of the Constitution is one which harmonizes these two doctrines in a way that preserves the full integrity of both.

According to Rousseau, political authority is alone distinguishable from arbitrary force if the individual, in being subject to it, remains as free as he was in the state of nature.<sup>53</sup> This is possible only if, as he says, each individual "puts his person and all his power under the supreme direction of the general will. . .".<sup>54</sup> The general will is not identical with the majority will, because it is never simply a contingent coalition of self-regarding interests. Rather the general will is the public or impartial will of each individual, the will that wills only what all persons acting

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<sup>51</sup> Ely, *op. cit.*, footnote 21, pp. 58-59.

<sup>52</sup> See M.E. Gold, *Equality Before the Law in the Supreme Court of Canada: A Case Study* (1980), 18 Osgoode Hall L.J. 336, at p. 359.

<sup>53</sup> Rousseau, *op. cit.*, footnote 50, p. 12.

<sup>54</sup> *Ibid.*, p. 13.



rationally would will for themselves.<sup>55</sup> But what is the necessary object of every rational will?

In the *Discourse on the Origin of Inequality*,<sup>56</sup> Rousseau tells us that there are two qualities that distinguish human beings from the brutes: freedom of the will and self-perfectibility. The first allows the human individual to transcend the sphere of natural determinism, to choose either to submit to or resist the promptings of instinct. The second is a power, both in the individual and in the species, infinitely to unfold the potentialities inherent in his spiritual freedom. These faculties are on the one hand responsible for man's fall from his natural good, which is the self-sufficiency and equality he enjoyed in his primitive state. They are the faculties that generated desires beyond man's natural needs and capacities, which thus forced individuals into dependence on each other's will, into competition and warfare, and ultimately into subjection to despotic authority as a condition of peace. On the other hand, they are also the faculties that make possible the recovery of man's original autonomy on the higher ground of civil society. This is so because the freedom of the will is the basis of a principle of justice which, being united with self-interest, is capable of being spontaneously legislated by each individual to himself. That principle is civil liberty, by which Rousseau means natural liberty so circumscribed as to be compatible with the equal real freedom of all.<sup>57</sup>

The object of the general will, then, is the legal conditions for the equality of concrete freedom.<sup>58</sup> In subjection to this will, the individual remains as free as before, because he is subject only to the dictates of his own reason, and because he incurs no obligation of forbearance toward others without acquiring reciprocal rights against them. Moreover, since the sovereignty of the general will is the condition of legitimate rule, it follows that positive laws are valid only if they are possible expressions of the general will, that is, only if they embody the principle of equality of freedom. Acts that non-reciprocally burden some for the greater liberty of others are not binding on the individual because they are by definition not acts of the sovereign. They are expressions of a particular rather than of a general will.

<sup>55</sup> Cf. Kant, *Foundations of the Metaphysics of Morals* (trans. Beck, 1959), pp. 49 ff.; Rawls' thesis can be viewed as the application of the theory of the general will to the design of the basic institutions of society; see *op. cit.*, footnote 40, pp. 17-22.

<sup>56</sup> Rousseau, *Discourse on the Origin of Inequality* (trans. Roger D. and Judith R. Masters, 1964), pp. 113-115.

<sup>57</sup> The Social Contract, *op. cit.*, footnote 50, p. 16.

<sup>58</sup> By concrete freedom is meant freedom protected by law against both wrongful interferences and social or natural contingencies; see Hegel, *Philosophy of History* (trans. Sibree, 1956), pp. 447-448; *Philosophy of Right*, *op. cit.*, footnote 31, para. 230.

Two points are here especially noteworthy. First, the concept of the general will allows Rousseau to reconcile the notion of popular sovereignty with that of natural law limitations on rule. On the one hand, the general will is supreme, beyond all restrictions that it may impose on itself, and subject to none from outside.<sup>59</sup> On the other hand, it cannot act otherwise than as a general will. It is limited, in other words, by its own concept, so that any act which burdens the liberty of some for the exclusive good of others is by definition not its act and hence by definition invalid. Thus, the sovereign, as Rousseau says, "is always what it should be",<sup>60</sup> not in the positivist sense that its arbitrary will is the source of right, but in the sense that it necessarily acts in conformity with its essence. Clearly, this is a concept of popular sovereignty that makes room for, and defines the scope of, judicial review, the function of which becomes not to limit the general will (it needs no limitation) but to guard it from usurpation. It follows, of course, that once the judiciary oversteps this function, it becomes itself the usurper.

Secondly, it is because the sole legitimate sovereign is the general will that equality before and under the law is an *a priori* right of the individual. Were the individual to incur an obligation of forbearance toward others without acquiring a reciprocal right against them, he would be subject to a rule which he could not rationally legislate to himself, which could not therefore be the expression of a general will, and which could thus possess no authoritative force. "The undertakings", writes Rousseau, "which bind us to the social body are obligatory only because they are mutual, and their nature is such that in fulfilling them we cannot work for others without working for ourselves".<sup>61</sup>

We can see, however, that Rousseau's standard of legal validity places an extremely heavy, perhaps impossible onus on the legislator. According to Rousseau, that law is alone valid which the individual, acting rationally, would impose on himself. The rational individual will assent to restrictions on his liberty only insofar as others are equally restricted. This test of legal validity lays down the sensible requirement that all tort and criminal laws apply to everyone equally; but literally and consistently applied, it would render illegitimate not only special criminal legislation but *all* special legislation by the positive state. Indeed, Rousseau explicitly points out that "the general will, to be really such, must be general in its object as well as in its essence; that it must both come from all and apply to all; and that it loses its natural rectitude when it is directed to some particular and determinate object. . .".<sup>62</sup> It would seem that, in

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<sup>59</sup> The Social Contract, *op. cit.*, footnote 50, p. 14.

<sup>60</sup> *Ibid.*, p. 15.

<sup>61</sup> *Ibid.*, p. 24.

<sup>62</sup> *Ibid.*, p. 25. Cf. p. 26: ". . . the social compact sets up among the citizens an

making equality of freedom the basis of right, Rousseau has at once authorized the positive state and condemned it in advance to illegitimacy.

It was on this point that Rousseau was criticized by Hegel. In the *Philosophy of Right*,<sup>63</sup> Hegel praises Rousseau for having discovered in the will a principle by which the common good could be liberated from the ends of appetite and right thus distinguished from the outcomes determined by inequalities of power and fortune. However, while accepting the proposition that the general will is the foundation of valid law, Hegel argues that Rousseau's conception of the general will is too abstract. Reflexively conceived in opposition to the selfish will of the empirical individual, Rousseau's general will is forced to repel from itself the very determinateness that is necessarily incident to its realization. So abstracted from reality, however, the general will is self-contradictory, for it is once again partial in relation to a world ostensibly indifferent to it. To become adequate to its essence, the general will must actualize itself or make itself authoritative in the world as the true end of the polity. But, argues Hegel, the actualization of the general will (that is, of the equal right to concrete freedom) of necessity implicates a particular will, or a will whose object is not capable of being *a priori* legislated by each individual for himself. This is so because first, the realization of concrete freedom necessitates different laws for different classes of persons, and second, because there is intrinsic to this process of realization a discretionary component in the choice among possible means to the achievement of the end.<sup>64</sup> At some point the weighing of the relative merits of various schemes must cease and a decision be made. This decision will no doubt be partly determined by the general will insofar as the scheme chosen will be one of several possible means to the realization of an egalitarian policy. But the decision as to which of the possibilities to select cannot be determined by this concept, for the latter is a test of principles that would be universally and necessarily self-legislated, whereas the decision involves a calculus of costs and benefits, one whose outcome is relative to contingent circumstances and necessarily more favourable to some than to others. Now because this particularity is essential to the effective reality of the general will, it is not something opposed to or outside the latter, but is rather a constituent element of a whole of which the will in its abstract generality is itself but a part.<sup>65</sup> Accordingly, the particular will considered as necessarily entailed by the realization of the general will and as united

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equality of such a kind that they all bind themselves to observe the same conditions and should therefore all enjoy the same rights".

<sup>63</sup> *Op. cit.*, footnote 31, para. 258.

<sup>64</sup> Hegel, *Philosophy of History*, *op. cit.*, footnote 58, p. 448; *Phenomenology of Mind* (trans. Baillie, 1967), pp. 602 ff.; *Philosophy of Right*, *op. cit.*, footnote 31, paras. 213-214.

<sup>65</sup> *Philosophy of Right*, *ibid.*, paras. 6-7.

with the latter in essence must be distinguished from the particular will considered as a will whose aim is particular. The former preserves the integrity of the whole and is thus in no sense illegitimate (though it may err); the latter fragments the whole and has no binding force.

It is clear that a law which unilaterally restricts the liberty of some for the exclusive good of others or which confers benefits and burdens unequally with an intent to exploit or injure the disadvantaged group is an expression of a particular will in the latter sense. It is an instance of discrimination that is not incidental to the realization of the general will but that shatters this will in its concept. A criminal law applying exclusively to Indians,<sup>66</sup> or a law that exclusively disallows Indians from administering the estate of a deceased spouse,<sup>67</sup> or a qualification for welfare benefits designed specifically to withhold public support from an unpopular group<sup>68</sup> are examples of discrimination of this sort. On the other hand, a law whose object is to remedy *de facto* inequalities and which for cost reasons accomplishes this end imperfectly by failing to treat equally all those similarly situated with respect to the purpose of the law is an expression of a particular will in the first sense. As a possible means to the realization of the general will, such a law is also a possible expression of the latter and is thus valid for purposes of equal protection. No doubt a classification based more directly on need would produce a more rational result in terms of the aims of the statute. However, such considerations, together with those relating to the administrative and social costs of more individuation are relevant to the efficiency of the law, and because questions of efficiency are not susceptible of determination by the general will, they are, from the standpoint of legitimacy, indifferent. Hence they are properly entertained by legislatures rather than by courts. Moreover, if it is true that a classification is politically legitimate if rationally related to an egalitarian purpose, then rationality review is a sufficient guarantee of the legitimacy of classifications. For this test perfectly expresses the principle that, to be authoritative, a will whose object is restricted must be ordered to the general will as means to end.

#### IV. *Enumerated Grounds and Rationality Review*

It can make no difference to the foregoing analysis whether the basis of a classification is a neutral criterion or one that is historically associated with invidious discrimination. The argument that classifications based on such considerations as race or colour constitute unique types that are either *per se* illegal or that require a special standard of review might take

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<sup>66</sup> *R. v. Drybones*, [1970] S.C.R. 282, (1969), 9 D.L.R. (3d) 473.

<sup>67</sup> *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, (1975), 52 D.L.R. (3d) 548.

<sup>68</sup> *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973).

the following forms. On the one hand, one might argue that such classifications are *per se* invidious because never relevant to a legitimate state purpose.<sup>69</sup> Alternatively, it has been suggested that these criteria identify groups that have been systematically excluded from the political bargaining creative of majority coalitions and so justify a strong suspicion of invidious intent whenever found in the legislative product of these coalitions.<sup>70</sup> On this theory, the heightened scrutiny tests of "substantial fit" and of compelling or important state objectives serve merely as indices of legislative intent by which the court may test its suspicions without embarking on a futile direct inquiry into motive. Finally, one could argue that classifications based on suspect criteria require heightened scrutiny because, even while relevant to legitimate state objectives, they may incorporate stereotypes reflecting historical domination, thereby reinforcing and perpetuating this history.<sup>71</sup>

The first argument need not detain us. The criteria of race and national origin are obviously relevant to policies aimed at remedying past injustices against racial and ethnic minorities, or at combatting race-specific diseases. Gender is relevant to policies designed to benefit widows or pregnant women. True, the constitutional immunity afforded ameliorative measures that employ these criteria might leave open an argument that classifications based on enumerated grounds are *per se* illegal unless protected by section 15(2). However, the inclusion of age and disability among the enumerated criteria should scuttle any theory that these grounds are relevant to legitimate objectives *only* when the objectives are ameliorative.<sup>72</sup>

But what of the argument that heightened scrutiny of "suspect classifications" is necessary in order to avoid reliance on a direct investigation of legislative motive?<sup>73</sup> Notice, first of all, that this argument accepts the thesis that only invidious discrimination is unconstitutional. It insists, however, that in the case of suspect or sensitive criteria, heightened scrutiny is needed in order to dislodge the court's suspicion of invidious

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<sup>69</sup> See Stevens J.'s dissenting judgment in *Micheal M. v. Superior Court of Sonoma*, 101 S. Ct. 1200 (1981), at p. 1218, n. 4.

<sup>70</sup> See Ely, *op. cit.*, footnote 21, pp. 145-148.

<sup>71</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>72</sup> See W.S. Tarnopolsky, *The Equality Rights*, in W.S. Tarnopolsky and G.A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), p. 422.

<sup>73</sup> The motivation theory of heightened scrutiny is probably inaccurate as a descriptive theory of American equal protection jurisprudence. The application of different tests for "suspect" and for "sensitive" classifications indicates fairly decisively that the American Supreme Court is really engaged in a utilitarian balancing of political values. This orientation is explicit in Marshall J.'s call for a "sliding-scale" approach that would vary the tests according to the importance of the interest affected. See *San Antonio Ind. School District v. Rodriguez*, *supra*, footnote 33.

intent, given that this suspicion will also extend to any reasons with which the law is publicly justified. Thus, if the classification is only loosely connected with the avowed legislative purpose, if that purpose is unimportant, or if a more individuated inquiry is easily achieved, the suspicion of ulterior motive is treated as confirmed.

As a means of screening invidious discrimination, however, heightened scrutiny is actually inferior to rationality review. For in the first place, motivation analysis is not always necessary to identify invidious discrimination. The dichotomy between an impact or outcome model of equal protection on the one hand and an intent or process model on the other dissolves as soon as one focuses on domination as the vitiating element, as well as on the factors that permit a conclusion that a single law intrinsically manifests this relation.<sup>74</sup> Thus rationality review will dictate an intent analysis in cases where an impact test of domination makes relevant systemic facts of a legal order and is indeterminate with respect to the fairness of any particular one. Such cases will typically involve statutes that distribute economic benefits and burdens, for in these cases any impact test (such as Rawls' second principle<sup>75</sup>) for the exploitation of the disadvantaged group requires a judgment about the total distribution of social and economic advantages and, because of the divisibility of the good, is ultimately a test of the totality alone. In general, then, the measure of the substantive universality of any single distributive law will be the legislature's motive, or what can be inferred about motive from the needless disadvantaging of an historically disempowered group.<sup>76</sup> However, this will not be true in the exceptional cases in which the distributive system is necessarily corrupted by the operation of a single law. For example, the distribution of educational opportunities is so decisive for the social distribution of opportunities in general that any factual discrimination in the conferring of educational benefits that affects life-chances may fairly be said to be invidious regardless of motive. Thus in *Brown v. Board of Education*,<sup>77</sup> the American Supreme Court quite rightly focused on the deleterious effects on blacks of "separate but equal" educational facilities. Similarly, an impact test is appropriate where public service recruitment laws distribute positions on the basis of criteria (for example, veteran status) that, while relevant to

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<sup>74</sup> The Supreme Court of Canada has rejected the intent-impact dichotomy, at least as it applies to freedom of religion; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321.

<sup>75</sup> *Op. cit.*, footnote 40, pp. 60-90.

<sup>76</sup> An intent should be considered illicit, however, not only when officials demean the members of a class but also where there is official sanction of private prejudice. See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

<sup>77</sup> 347 U.S. 483 (1954).

some legitimate state purpose, are unrelated to the requirements of the position.<sup>78</sup> In this context, the use of such criteria conclusively violates the systemic principle of careers open to talents, which principle measures the impartiality of the social distribution of preferred positions. Nor will a motivation analysis be necessary in the reverse situation—that is, where a single law, neutral on its face, derives its significance from its connection with a broader pattern of social domination. Thus a statute requiring parents to give children the surname of the father is invidious by impact alone, because it instantiates a pattern of male domination in a way that is not simply contingent on the absence of compensating benefits elsewhere.<sup>79</sup> Finally, the discriminatory impact of laws that restrict liberty unequally is likewise sufficient to condemn them as invidious. Such laws are always and *per se* destructive of the general will, because they create inequality in respect not of any particular good, but of the capacity to pursue any good whatever. Hence they one-sidedly subordinate the burdened group to the ends of the unburdened regardless of motive.

Whereas, therefore, rationality review (properly conceived) will in all these cases simply invalidate on the basis of discriminatory impact, heightened scrutiny will apply the tests of fit and importance. This, it turns out, is not to saddle these laws with an extra burden of justification but rather to grant them the possibility of a reprieve. It is to uphold invidious discrimination if the individual's right to respect is sufficiently overbalanced by the majority's interest in invading it. Furthermore, if legislative motive is really the point of heightened scrutiny, it is illogical to uphold a classification that meets the tests of fit and importance in the face of overwhelming evidence from all other circumstances of corrupt motivation. Understood as a proxy for motivation analysis, therefore, heightened scrutiny logically collapses into a special case of rationality review, one in which looseness of fit, triviality of avowed purpose, or the easy availability of a less discriminatory alternative are conclusive (but not exclusive) evidence of invidious intent against welfare laws that classify to the detriment of historically dominated groups.

<sup>78</sup> Such laws may, however, be saved by the s. 15(2) exemption for affirmative action programs.

<sup>79</sup> *Re Pål and Registrar General, Vital Statistics Act*, unreported, Dec. 9, 1985, O'Brien J. (Ont. H.C.). Contrast this child-naming statute with one that distributes jobs on the basis of neutral criteria but so as to disfavour a group (let us say women) already systemically disadvantaged in economic terms. Both statutes are neutral on their face but are part of an unjust system. The former is invidious by impact alone, whereas the latter is not invidious unless the motive is. The difference is that the child-naming statute embodies, or is constituted in its meaning by, the pattern of male domination, whereas the job statute is only a contingent cause of the unjust distribution. The distribution could be made fair without touching the job statute (e.g. by remedying the causes of the group's general failure to qualify), and once this was done, the statute would not even be *prima facie* objectionable. However, disrespect for women would persist as long as the child-naming law persisted; no reforms elsewhere will cure it.

We have finally to deal with the argument that classifications based on enumerated grounds often incorporate in their justification invidious stereotypes, thereby reinforcing the effects of past domination. An American case in point is *Stanton v. Stanton*.<sup>80</sup> There a Utah statute established different ages of majority for males and females. As a result of this difference, female children were entitled to parental support until age eighteen, while males were so entitled until age twenty-one. The state justified the law by reference to the fact "that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; . . . and that females tend to marry earlier than males".<sup>81</sup> The court rejected this argument and, applying rationality review, held that the gender classification was wholly irrelevant to the purpose of the statute. Now it surely cannot be irrelevant to a policy of ensuring support for children that males and females have, as a matter of fact, periods of dependence on parents that differ in duration. The problem with the law is not that it employs irrational means but that it tends to perpetuate, by withdrawing compulsory parental support for girls earlier than for boys (thus inducing girls to marry or work rather than pursue higher education), the very social inequality to which its rationale appeals.<sup>82</sup> It is a mistake, however, to think that this problem escapes the grasp of rationality review. The fact that the state justifies the classification by facts contingent on past domination has the effect of building the discriminatory impact of the legislation into its purpose. We cannot say that this impact is an incidental result of an otherwise legitimate state goal if it is taken for granted as a conscious premise of the legislation. The classification thus fails rationality review, not because it is irrelevant, but because it furthers a discriminatory end.

Related to the problem of surrogate classifications that incorporate in their justification invidious stereotypes, is that of facially rational criteria that affect with disproportionate severity historically disadvantaged persons. A statute may, for example, prescribe qualifications for entry into the police or civil service that are directly relevant to its purpose but that, for historical reasons, cannot be met by most members of a racial group. Unless an invidious motive figured in the enactment of such a law, rationality review will uphold it.<sup>83</sup> Now it might be argued that this result is anomalous given our previous conclusions about legislative stereo-

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<sup>80</sup> 421 U.S. 7 (1975).

<sup>81</sup> *Ibid.*, at p. 14.

<sup>82</sup> This seems to have been the real ground of the court's decision; see *ibid.*, at p. 15, per Blackman J.: "To distinguish between [males and females] on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she can hardly be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed".

<sup>83</sup> As in, for example, *Washington v. Davis*, 426 U.S. 229 (1976). See also *Village of Arlington Heights v. Metropolitan Housing Corp.*, *supra*, footnote 14.



types, and that only heightened scrutiny will set matters aright.<sup>84</sup> For although the criteria employed are directly relevant on their face, they have in reality become contaminated by prohibited ones owing to the cultural deprivation suffered by economically disadvantaged groups. Were these statutes to use racial criteria as a surrogate for educational attainment, they would surely be bad as incorporating invidious stereotypes. Why should the result be different merely because direct criteria are used, given that these criteria also incorporate the results of history and have roughly the same distributional effect?

Though seductive, this argument ultimately fails. Classifications that incorporate invidious stereotypes violate juridical equality not solely because of their distributive impact but also because the justification of the classification appeals to facts emblematic of past domination. As such, it can hardly count as a constitutional justification for a disadvantaging effect. In the absence, however, of invidious motive, directly relevant criteria are assailable on the ground of their distributive impact alone, or on the ground of their failure to afford real equality of opportunity. The court cannot invalidate them under heightened scrutiny, therefore, except on the theory that section 15 confers positive rights of economic equality enforceable *de novo* by the courts. The weakness of this theory is revealed with special clarity in this context, for the norm of fair equality of opportunity is plainly a measure of the justice of a distributive system and not of any single law. One cannot know, for example, whether civil service entrance requirements deny equality of opportunity without taking into account (and judging the efficacy of) ameliorative measures that might be in force throughout the welfare and educational systems. And if none are in force, or if existing ones are inadequate, there is no rational basis for singling out the civil service law as denying fair equality of opportunity. Nothing in this norm necessitates the invalidation of the recruitment law as distinct from the enactment of ameliorative measures elsewhere, and certainly nothing in it prevents the legislature from attempting to reconcile fair equality of opportunity with excellence in the civil service.

One might object, of course, that the judiciary is empowered only to declare inoperative existing laws, not to command the enactment of new ones, and that its role as enforcer of positive rights will of necessity be confined to the performance of tasks within its constitutional reach. Yet this argument is flawed in two aspects. First of all, the unsuitability to a task of judicial powers is surely an argument for deference to institutions not similarly hobbled. Were courts to interfere to the extent of their powers, then the method for achieving fair equality of opportunity will have been decided not on the merits but by the constitutional infirmity of the courts. Secondly, the distinction between "invalidating" and "com-

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<sup>84</sup> See S. Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction* (1984), 73 *Georgetown L.J.* 89.

manding" is illusory in this context, since by invalidating the law of recruitment, the court is really commanding the legislature to take a particular affirmative measure to admit those hitherto excluded on rational grounds.

### V. *The Bailey Case Reconsidered*

Let us now apply substantive rationality review to the provisions of the Income Tax Act challenged in the *Bailey* case. Since we are measuring these provisions against a constitutional right to equal protection, there is no need to subjectivize this test in deference to Parliament. Moreover, in contrast to the Tribunal, we take an objectively reasonable classification to mean not one efficiently related to a just end but one that is simply relevant to such an end.

The purpose of the basic deduction allowed in section 109(1)(a) is to leave income earners with a minimum tax-free income with which to support themselves and their dependants with basic necessities. The deduction is available to all taxpayers, although the amount naturally varies with the number of their dependants so as to achieve equality of welfare. Pursuant to its aim, the Act defines the class of possible dependants so as to exclude common-law spouses. This exclusion treats relevantly like individuals unequally and, as an apparent violation of equality rights protected in section 15 of the Charter, requires explanation by the Crown. The latter's burden under section 1, however, should not be to justify with overriding reasons the infringement of a right, but to show by appeal to legitimate purposes that what *prima facie* appears as a violation of rights is on closer scrutiny not a violation at all. The parliamentary debate on the reformed tax law indicates that the purpose of retaining the exclusion was not to penalize those involved in illicit relationships or to place a special burden upon them.<sup>85</sup> Rather, the exclusion was retained in order to avoid the difficulty of devising and policing a rule distinguishing stable from ephemeral non-marital relationships. This is, no doubt, an argument from administrative convenience. However, there is here no good reason for a court's rejecting it, because the criterion of marital status is clearly relevant to dependency, and because the classification based on this factor is thus rationally ordered to a legitimate end.

What of section 63 of the Income Tax Act? Since the child-care expenses for which deductions are permitted must have been incurred to enable the taxpayer to earn income or to undertake occupational training, we may assume that the purpose of the provision is primarily to help women enter the labour force, thereby promoting economic equality between the sexes and providing relief for low-income families. Had no similar provision been made for men, the section would have qualified as special legislation designed to remedy past discrimination against women. How-

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<sup>85</sup> See *Bailey v. M.N.R.*, *supra*, footnote 22, at p. D/198.

ever, section 63 also allows deductions to men who are unmarried, legally separated, or married to spouses who are physically incapacitated—conditions not applicable to women. The provision thus discriminates not only on the basis of sex but also on the basis of marital status. The purpose, however, of this differential treatment is not to burden the excluded group but to minimize revenue losses by ensuring that, where husband and wife are together, the wife (who, it is assumed, will earn the lower income) will take the deduction. The provision thus relies on the existing economic inequality between men and women, but it cannot be said that it gives effect to, reinforces, or perpetuates it. On the contrary, the main thrust of section 63 is to overcome it. No doubt deserted husbands with children are in the same position with respect to the purpose of the law as deserted wives or formally separated husbands. Their exclusion is thus questionable, the more so since a provision directly requiring the spouse with the lower income to claim the deduction seems administratively simple and would eliminate the need to guard against fraudulent claims of separation. Indeed, the easy availability of a less discriminatory alternative might point to an invidious intent if not for the fact that men do not constitute the kind of historically dominated class needed to justify such an inference. Discrimination against males, in other words, does not engender a suspicion of invidious intent strong enough to warrant distrust of the professed aims of the classification on the one hand and to heighten the significance of objective indicia on the other. At most, therefore, the easy availability of a less restrictive alternative condemns the gender classification as inefficient. Since, however, it is relevant to the legitimate aim of aiding parents to earn income at a minimum cost in revenue, it is from a constitutional standpoint unimpeachable.

### Conclusion

Two brief tasks remain. We have to show how the interpretation of section 15 offered here is faithful to the words of the text;<sup>86</sup> and we have to indicate how it might be implemented within the context of the Charter.

I will assume that the phrases “equality before the law” and “equality under the law” have been sufficiently accounted for. It has been the argument of this article that the rights to these forms of juridical equality, understood as a right to impartial enforcement of the law and to impartial respect for persons in the content of the law, are the only equality rights protected by the Charter. These equality rights fully satisfy the negative requirements of the idea of law and hence are the only equality rights whose enforcement by courts is consistent with the democratic justification both of judicial review and of equality rights in general. There is, therefore, no general right under the Charter of likes to be treated alike. Unequal treatment of those similarly situated should be regarded as con-

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<sup>86</sup> The text of section 15 is set out *supra*, footnote 1.

stitutionally innocuous unless this treatment shows disrespect for persons so as objectively to vitiate the lawness of the law.

It might be objected that these conclusions are inconsistent with the words of section 15(1), which guarantees not only equality before and under the law but also the right to the "equal protection" and "equal benefit" of the law. No theory of section 15 merits consideration that cannot accommodate this deliberate phrasing. The legislative history of the Charter indicates, however, that the "equal protection" clause was inserted in order to forestall the narrow interpretation which the Supreme Court of Canada had placed on the equality provision of the Canadian Bill of Rights.<sup>87</sup> *R. v. Drybones*<sup>88</sup> excepted, that interpretation had restricted equality rights to those of impartial enforcement and had applied a strictly instrumentalist version of rationality review.<sup>89</sup> The equal protection phrasing of section 15 replicates, of course, the words of the Fourteenth Amendment of the United States Constitution and thus invites courts to adopt the essential core of the American Supreme Court's substantive rationality review. There is no reason to assume, however, that it requires assimilation holus-bolus of the much criticized and conceptually unstable three-tier structure of American equal protection jurisprudence. For in the first place, substantive rationality review is sufficient to overcome the defects of the Canadian courts' formalistic interpretation of section 1(b) of the Canadian Bill of Rights,<sup>90</sup> defects to which the equal protection wording was specifically addressed. It therefore answers completely to the hermeneutic requirement to consider the Canadian context within which the words of the Charter appear. By contrast, the three-tier structure of review is an outgrowth of the specifically American experience with an excessively deferential brand of rationality review as well as with a constitutional text that is uncongenial to a defender's burden of proof. Accordingly, since it bears no connection with Canadian institutional history, its

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<sup>87</sup> *Supra*, footnote 8. See P.E. Trudeau, *A Canadian Charter of Human Rights* (1968), p. 21: "The phrase 'equality before the law' has at least once been construed narrowly in Canada . . . . The comparable provision in the Fourteenth Amendment to the U.S. Constitution guarantees 'the equal protection of the laws'. This has generally been construed in the American courts to prohibit legislative distinctions as between various classes of persons except those rationally related to some legitimate object. If this is the result which is desired, there would likely be some advantage in using the American wording."

<sup>88</sup> *Supra*, footnote 66.

<sup>89</sup> See, for example, *Attorney General of Canada v. Lavell*, *supra*, footnote 8; *R. v. Burnshine*, *supra*, footnote 8; *Bliss v. Attorney General of Canada*, *supra*, footnote 8.

<sup>90</sup> *Supra*, footnote 8, s. 1(b):

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely: . . .

(b) The right of the individual to equality before the law and the protection of the law; . . .

applicability to the Canadian context must rest on a claim of its intrinsic merit. We have noted, however, the objections to which heightened scrutiny is vulnerable in principle. Insofar as it affirms a complete right of likes to be treated alike, it asserts an incoherent and inflated right to equal protection; insofar as it permits substantive rights of respect to be defeated by important majoritarian goals, it destroys the notion of a fundamental one.

The interpretation of section 15 offered here is also consistent with the equal benefits clause. The legislative history of this phrase reveals that it was inserted to overcome yet another kind of restrictive interpretation of section 1(b) of the Canadian Bill of Rights. In *Bliss v. Attorney General for Canada*,<sup>91</sup> the Supreme Court of Canada upheld a section of the Unemployment Insurance Act<sup>92</sup> that discriminated factually against pregnant women in the awarding of regular unemployment benefits. In doing so, the Court distinguished *Drybones* on the ground that the latter had involved an unequal restriction of liberty whereas *Bliss* concerned a definition of qualifications for entitlement to benefits. The *ratio* thus suggested that statutes discriminating in the distribution of benefits were immune from attack under section 1(b). The equal benefit phrase was added to section 15 in order to ensure that classifications will not withstand judicial scrutiny merely because they confer benefits rather than restrict liberty.<sup>93</sup> Under the approach advocated here, classifications that are underinclusive with respect to benefits will not survive constitutional challenge if the state fails to satisfy the court that they are ordered to a legitimate state purpose.

Finally, the separation of the limitation provision from section 15 provides a congenial framework for the implementation of substantive rationality review. Classifications that treat equals unequally in the distribution of economic advantages are *prima facie* irrational in their effect and so raise a suspicion of particularity in the aim of the legislation. Once under- or overinclusiveness is shown by the challenger, therefore, the onus should be on the Crown under section 1 to show that the classification is reasonably related to an intended public purpose. The burden of persuasion may then be varied depending on whether the basis of classification is or is not an enumerated ground in order to reflect sensitivity to the likelihood that certain groups will have been excluded from the processes of political accommodation as well as to the untrustworthiness where these groups are concerned of the legislative record. Thus, where

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<sup>91</sup> *Ibid.*

<sup>92</sup> Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 46.

<sup>93</sup> See Special Joint Committee on the Constitution of Canada, Minutes of Proceedings and Evidence (1980-81), 32nd Parl., 1st Sess., 9:125-8; 22:56-9. See also M. Gold, A Principled Approach to Equality Rights: A Preliminary Inquiry (1982), 4 Supreme Ct. Law Rev. 131, at pp. 135-136.

the state has classified on a neutral ground, it will normally suffice to allay the court's suspicion of partiality to produce statistical evidence of relevance as well as materials drawn from legislative history to show that the purpose it advances in court was the one actually intended. Where, however, it has classified so as to disfavour an historically subordinated class, the Crown should be required to show that the classification is substantially related to a legitimate (though not necessarily overriding) aim and that a less discriminatory approach would be significantly more costly. On the other hand, a classification that meets these requirements should still be invalid if from all the circumstances the court can infer an invidious intent. Moreover, if the classification incorporates in its justification a stereotype contingent on past domination, the state should bear the burden of showing that its tendency will be to overcome rather than perpetuate the stereotype. And if a recruitment statute using directly relevant criteria disproportionately burdens an historically disadvantaged group, the onus should be on the state to allay the court's (weak) suspicion of invidious motive.<sup>94</sup>

No balancing, however, should be undertaken by the court between the costs and benefits of factual discrimination and no constitutional requirement should be imposed on the legislature to maximize net benefits. If the classification meets the test of rationality review, the fact that it is justified by convenience rather than necessity should not defeat it even if the court believes that the Crown has overestimated the costs of individuation. For these considerations go to the wisdom and efficiency of the law, not to its legitimacy. On the other hand, if it is established under section 15(1) that a statute subjects one class to penalties for an activity that is permitted others, then I do not think that section 1 can come into play. Short of an imminent threat to the existence of the state, there are no reasonable limits in a democratic society to the right to equality of reasonably limited liberties. Any inequality in this respect fragments the general will, whose integrity is democracy itself. Should it nonetheless become necessary for the preservation of the state to restrict liberty unequally, then it is conceptually as well as politically appropriate to impose this limitation by means of the legislative override<sup>95</sup> rather than by section 1. It is politically more appropriate because litigation of the issue would disguise a political question as a legal one and permit the executive to avoid accountability for its action. It is conceptually more appropriate because whereas the application of section 1 to final rights implies the submersion of rights in political goals, the override suspends (without logically destroying) such rights for the sake of the substance within which alone rights become actual.

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<sup>94</sup> A disproportionate impact on an historically subordinated group should, however, raise a strong presumption of invidious intent where it results from the exercise of administrative discretion. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>95</sup> Canadian Charter of Rights and Freedoms, *supra*, footnote 1, s. 33.