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TITLE: Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality

AUTHOR: Marcia H. Rioux

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1 The ways in which a society provides for people who, for one reason or another, are more socially and economically dependent throws into sharp focus the problems of equality as a political construct. The basic dilemma of social dependency is that of reconciling the responsibility of the state to ensure equality with the rights and needs of those who are dependent. The social, legal and economic policies in place at any given time in history reflect the ways that principles of justice have legitimated differential treatment. To study the case of intellectual disability,¹ therefore, is to reflect upon the legal microcosm of the struggle for social justice and the parameters of political obligation to ameliorate inequality.

2 This paper identifies a number of major shifts in the framing and justification of state obligations in Canada towards persons with disabilities. We shall examine the way in which those with intellectual disabilities have been distinguished from other citizens to enable differential treatment and to justify fewer rights while purportedly upholding the central democratic tenet of equality. While economic efficiency and effectiveness have historically taken precedence over equality in determining state obligations, recent conceptions of intellectual disability and the enactment of the Canadian Charter of Rights and Freedoms² have resulted in the demand for a more complex critique of whether state obligations can be limited according to these criteria within an equality framework.

3 Assumptions about the meaning and content of equality can be identified in the mechanisms for distributive justice applied to disability. In other words, equality has implications for resource allocation but resource allocation also reflects certain notions of equality. The premises on which distributive justice is argued to be upheld may vary significantly depending on the underlying meaning of equality and the means adopted to achieve it. From a historical perspective it is clear that this is not a new dilemma. The understanding of disability itself has been shaped by political conflict about distributive criteria including criteria concerning appropriate recipients of social assistance or support, and the nature of legal entitlements and of citizenship rights.

4 The theoretical constructs of equality fit into three general categories, each justifying different claims about entitlements and the legitimating criteria for differentiating or distinguishing people. One is the formal theory of equality,³ that is, the equal-treatment model. The second is the liberal theory of equality,⁴ incorporating both the ideals of equality of opportunity and special treatment. The third is the equality of outcome or equality-of-well-being⁵ model.

5 What will constitute equality generally and equality with respect to intellectual disability in particular and which model of equality is most likely to ensure a just distribution of goods, services, and support to individuals in achieving

equality is yet to be resolved.⁶

6 This resolution will be particularly significant for persons with intellectual disabilities, because their differences tend to stem from a deficiency in those characteristics on which participation in the social structure and determination of equal status have been designed. The traditional assumption is that, having few of the needs or abilities considered to be intrinsic to citizenship or the capacity to exercise conventional legal rights, people with intellectual disabilities have had no basis for a claim to equality: only to the extent that they can approximate other citizens can they establish such a claim. This assumption raises three questions: One: Do all classes of persons have the same needs, and if not, what are the criteria on which society may justly disentitle people? Two: Must one have the capacity to exercise a right to have that right? If not, are there other grounds for denying rights? Three: Is equality consequent on overcoming natural characteristics (and becoming as much like "the norm" as possible) or does it result from the equal value, benefit, and rights of all irrespective of their relation to "the norm?"

7 The three models of equality reflect different assumptions of what constitutes equality. The models therefore draw the line between justified and unjustified distinctions at different places. A question remains as to whether the recent shift in legal direction found in the Charter is substantive or whether it will simply re-legitimize the prevailing inequalities founded on the values and assumptions of nineteenth-century liberalism.

8 The history of how disadvantage has been created and how inequality has been constructed and justified is critical to an understanding of equality as a principle of social obligation. This paper argues that both the equal-treatment and equal-opportunity models of equality, as well as the type of redress they enable, are inadequate to address inequalities faced by those with disabilities. A more expansive notion will enable the underlying foundation of inequality and equality to be dealt with by focusing on participation and inclusion of victims of disadvantage rather than on particular actions or perpetrators of discrimination. Removing the barriers to equality, particularly for those with intellectual disabilities, means addressing the existing policies that represent and foster a dominant social agenda. Included among these barriers, particularly for those with intellectual disabilities, are practices that incorporate notions of efficiency and fairness in the context of merit.⁷ The question that surfaces in proposing the concept of equality of well-being is how to achieve a social agenda that can acknowledge difference (pluralism) without resulting in inequitable or unfair practices, while at the same time ensuring the benefits of integration (assimilation) into the economic and social structure. Assimilation has to be achieved without overlooking the unique needs faced by disadvantaged individuals and groups that must be addressed to realize those benefits.

Institutionalizing Inequality as Inherent to Disability

9 Western democratic ethos assumes that likes will be treated alike and that the rule of law will assure rational and fair treatment. The legitimization of the way of differentiating between people therefore became important, as a basis for entitlement, disentanglement and as a means of social control.

10 The conventional basis of social obligation to those with disabilities has been some notion of beneficence and charitable-privilege.⁸ Reflecting its origins in the English Poor Laws, early Canadian policy aimed to protect society from those with handicaps and from the drain on social resources that they represented. If, however, it could be shown that there was a rational, objective basis for differentiating and limiting claims to rights and entitlements, then social justice could be still be claimed even while some were disadvantaged.

11 The use of science and medicine (biological determinism and scientific positivism) as political legitimization for differentiation and unequal treatment of those with intellectual disabilities was supported by eugenics theory in the first half of this century and by the authority of medicine, the latter spanning into the second half of the century. Political inequality was justified on the basis of biological inequality demonstrated through IQ and merit. Biological determinism is purported to explain social and economic differences between social groups on the basis of inherited distinctions. Accordingly, society simply reflects this inborn biological order in the distribution of rewards.

12 Worth can also be assigned to individuals and groups by measuring intelligence if it can be conceptualized as a single quantifiable unit. This became possible primarily through the development of intelligence tests, which purported to provide an "objective" standard by which persons could be placed in an intelligence hierarchy. Those below a certain point in the hierarchy were designated as intellectually disabled. Such an "objective" classification enabled law and policy to exclude or to treat differently those so designated.

13 Basic to psychometric science, mental measurement and testing is the concept of general intelligence, a major component of all forms of human excellence. The issue is not with the concept that intelligence or IQ is to some extent hereditary but with two other claims made by those who have used such tests for the maintenance of social ranks and distinctions. One is the fallacy of "reification", assigning to "intelligence" complex human capabilities that support "the importance of mentality in our lives and ... characterize it, in part so that we can make the divisions and distinctions among people that our cultural and political systems dictate."⁹ The other dubious claim is the notion of "ranking" or hereditarianism, which equates "heritable" with "inevitable", downplaying or ignoring the role and range of environmental conditions in setting and modifying inherited characteristics. Ranking requires a criterion for assigning status in a single hierarchy; intelligence has been the principle tool for doing so. Although there is little empirical evidence to support the concept that human beings can be ranked from the "naturally" most able to the "naturally" least able, such ordering was, in the nineteenth century up to recently, argued to be practicable using standardized IQ tests. Psychometrics initially attracted eugenicists because it complemented their general view of the social order. As Evans and Waites point out:

in the heyday of eugenics, high intelligence or "civic worth", was considered to encompass all forms of moral and political wisdom, and low intelligence was considered the cause of all forms of turpitude and degeneracy, which the eugenicists sought to eliminate?¹⁰

14 The enthusiasm of the eugenicists and psychometricians for finding a scale to measure innate difference was translated into scientific evidence of inferiority and superiority. In the hands of governments and law makers, the scale became a means to differentiate and justify unequal treatment, including the restriction of basic citizenship rights such as procreation, marriage, immigration, education, property ownership and ability to contract. Hereditarian theory reduced the state's responsibility for eliminating the discrimination and inequalities that arise because scientific legitimacy provided the basis for policy development. "Lower innate intelligence" explained the lower achievement by designated groups,¹¹ and the complex phenomenon of social and educational inequality was discounted.

15 When the source of inequality is located in the individual in this way, there is a ready rationale for social inequality and limiting social entitlement. The political and social strategies of such technocratic rationality are then presented as value free. By discounting the socio-political context of scientific inquiry and by reinforcing it with the principle of "desert," measured by economic and social self-sufficiency and independence, it is possible to formalize inequitable social relations while still maintaining that distributive justice is being upheld and the principle of equality met. Because entitlement to social and economic benefits and the level of benefit is argued to be based on social conformity, the adjustment of the individual to the existing social system and paternalism (beneficence), equal treatment and equality-of-opportunity are achieved.

16 Legislation, including welfare law, has legitimized such a legal status of civil disability, that is, of persons subject to state control in exchange for state benefits and support. Thus the state is relieved of all but minimal social obligation to those with intellectual disabilities and the debate on social justice, including the meaning of equality, is circumvented. The question of why the ethical principle of "desert" as a basis for distributive justice should hold sway over other ethical principles -- including individual worth or some absolute notion of need -- can be avoided. Thus, the principle of desert, based on scientific positivism and biological determinism, remains entrenched as the legal basis for differentiating people and for unequal treatment.

17 A major obstacle to the political equality of those with intellectual disabilities is the reification of the term (or like terms) itself. Groups within the scientific community have, to a greater or lesser extent, come to accept that the term is

principally an administrative one. Hayman has pointed out:

But the legal and political worlds continue to apply the label as if it had a validity independent of its sociopolitical origins. By accepting the reified construct of [intellectual disability], the law limits the permissible inquiry into the nature of the construct: it conceals the politics, prejudices, and now discredited scientific theories that have helped to create -- and then re-create -- [intellectual disability].¹²

18 Intellectual disability, unlike gender, physical disability or race, is not an objective condition. In many cases, the objective criteria on which to distinguish intellectual disability are weak.¹³ For example, there are a vast number of conditions that might fall within the purview of mental handicap, yet might be classified as something other than mental handicap depending on external factors. People with learning disabilities have been classified as having intellectual disabilities in some situations but not in others. Individuals identified as intellectually disabled in some situations (e.g., at school) may not be so identified in other situations (e.g., at work).¹⁴ The emergence of the definition has been driven, in part, by the need of individuals and agencies to classify people according to individual need or benefit.¹⁵ The meaning of mental handicap is imbedded in entitlements and disentanglements, but reflects the weak objective definition. Arguably, the concept of inequality is inherent to the very classification. The "norm," by definition, precludes those labelled as having intellectual disabilities and the definition of intellectual disability presumes and legitimizes this inequality. If being unequal is one of the inherent premises of the concept of intellectual disability, then there must always be a class of citizens who are denied the ability to exercise citizenship.¹⁶

Remaining Neutral to Disability

19 The implications of a priori assumptions about the genesis and relative value of human characteristics are significant to the capacity to ensure equality. As important are the elements understood to comprise equality. First, if the status quo is assumed to be necessary for society to function and differences are defined as intrinsic to the individual, and in conflict with the status quo, then those who might make a claim for greater equality (that is, those with differences) have no grounds on which to challenge the designation of difference and its consequences which include inequality.

20 Second, if equality depends on sameness or on being similarly situated, then the fact of difference warrants unequal treatment. A concept of equality that requires that likes be treated alike and unlikes be treated differently presumes the impartial enforcement of legal and social rights. It makes no difference to attempt to clarify what makes people equal in particular circumstances or for particular purposes. There is no prescriptive element to the principle on which governments might base their decisions about which people are to be accorded the unequal treatment. The principle simply establishes the generally accepted rule of law¹⁷ that procedural fairness must be applied for law to be legitimate. Neutrality in the application of the law and the absence of different treatment are presumed to result in equality.

21 For example, people who cannot fill out forms are denied the right to vote, while others, who can read and write, are afforded that right. The law is equally applied to all those who cannot provide the information; therefore the fact that it has a differential impact on those with intellectual disabilities is insignificant. So are the extraneous causes for such a lack of ability: neither the systemic, legal exclusion of those with intellectual disabilities from the regular education system nor the means of eliciting the information, which is in a mode of communication less accessible to them than to others, are taken into account in determining justified and unjustified distinctions.

22 Another example is the legal denial, until recently, of the right to vote by people confined to institutions¹⁸ -- independent of their capacity to exercise that right. This disenfranchisement was justified on the premise that all persons in institutions were being treated equally. In that regard people who were similarly situated were being treated the same and thus justice was assumed to be safeguarded. However, the people who were being treated the same in this instance were being denied their vote on the basis of a false premise: that people in institutions were incompetent as voters.

23 In those circumstances where classes of people are identically situated with respect to opportunity sought, formal

equality may perhaps lead to factual equality. In most cases, however, identical treatment leads to disadvantage or inequality the less a class of people approximates the advantaged group who sets the standards.¹⁹

24 Many laws affecting people with disabilities do, however, pass a test of formal equality. When the laws were implemented, people with intellectual disabilities were viewed as less than human. Therefore, no consideration was given to their being able to exercise the usual rights of citizenship, including the right to the rule of law or to procedural fairness.

25 In the case of people with intellectual disabilities, it would be difficult in many circumstances to argue that formal equality is not being achieved, as differentiations drawn between groups of people are justified according to an established set of criteria, and are applied equally. Such formal equality, however, has led to situations that are discriminatory (in its pejorative sense) and unjust. For example, the law denying people with intellectual disabilities immigration to Canada could not easily be justified, even where the limited framework of formal equality was achieved.²⁰ The law specifically excludes those with intellectual disabilities on the grounds that those individuals are likely to become dependent on the state. There is no onus on the state to show that any particular individual with an intellectual disability will drain the resources of the state. It is only necessary to show that a person has an intellectual disability. In the case of minor children, even the test of formal equality is not being met. Other families applying for immigrant status are not required to prove that their minor children will not become a "burden" on society.

26 Critics of the formal principle of equality have argued that the rights achieved under this construct of equality may benefit some members of a disadvantaged class more than others. Andrew Petter, for example, argues:

One of the dangers identified by critics of formal equality rights is that such rights, in addition to benefiting men at the expense of women, could serve to benefit extraordinary or elite women at the expense of ordinary women. The danger is a real one. While the guarantee of "equal treatment" serves to entrench the subordination of the majority of women who languish at the bottom of the social ladder, it promises tangible benefits for those few women who have ascended to higher rungs.²¹

27 The closer an individual can approximate the characteristics of the norm, the more likely they will benefit from an equal-treatment model. The black lawyer, the exceptional female athlete, the person with a mild intellectual disability, the professional who uses a wheelchair -- all of whom might qualify except for a discriminatory regulation -- are more likely than others who are black, female, or who have a more severe intellectual disability to benefit from the equal-treatment model. Those who share fewer of the characteristics of the advantaged group do not gain because the underlying substantive inequalities are not addressed and resolved.²²

28 Canada's failure in the 1940s to provide formal education for children with intellectual disabilities was argued by families who wanted services for their children to be unequal treatment. It is only in the past decade, however, that the separate education provided to remedy that unequal treatment has been raised as an equality issue. This follows from the arguments against "separate but equal" education for blacks in the United States, where it was accepted that the two terms were mutually exclusive and that the criteria even for formal equality could not be met within that formula.²³ Besides the understanding that dividing schools created a disadvantage for blacks, it was also argued that cultural discrimination resulted from such segregation. The objection to excluding people with intellectual disabilities from local schools stems from similar arguments.

29 The rationale for continuing to segregate students, based as it is on a judgement of whether a child has the capacity to learn, perpetuates the historical prejudice about people with disabilities and their abilities without considering the limitations of pedagogical theories or the general quality of education being delivered under the existing system. In other words, it excludes those with intellectual disabilities on the presumption that other students are able to benefit from the education system. Exclusion of this class of children also results in all children being deprived of affiliating, in the one case with non-disabled children, in the other with disabled children; arguably, both groups of children are

equally harmed by such segregation on a number of grounds.

30 Formal equality theory, with its principles of homogeneity, individualism, and interchangeability, has no entry point for those with intellectual disabilities seeking equality. Social dependency remains the justification for disentanglement to claims for even limited equal treatment.

Compensating Disability

31 Much recent discourse on equality, particularly since the enactment of the Canadian Charter of Rights and Freedoms, has addressed the inherent problems with a formal theory of equality by pointing to the substantive inequality between advantaged and disadvantaged groups.²⁴ Equality of opportunity²⁵ addresses some of the limitations of formal equality by taking into account and redressing historical conditions of inequality. It removes the necessity for the disadvantaged group to prove that they are "similarly situated" to a standard. However, it does not address all the fundamental differences that have conventionally provided a basis for disentanglement of those labelled intellectually disabled and it masks the significance of the "dilemma of difference."²⁶

32 Attempting to establish equivalence between "the intellectually disabled" and "the mentally competent" reifies a material definition of difference.²⁷ A framework of equality that incorporates notions of difference, ideologically constructed and manifested in social and legal practices, can, however, provide the basis of a claim for equality. It recognizes the need to balance equality and privilege and assimilation²⁸ and pluralism.

33 Not only due-process rights but substantive rights have been recognized in recent court decisions on the meaning of equality,²⁹ the right to treatment, the right to refuse treatment, the right to vote,³⁰ and involuntary sterilization.³¹ The Charter provides a basis for arguments that diverse group interests have to be recognized in achieving equality, and that recognition of the fact and legitimacy of diversity must be taken into account.³² In going beyond equality before the law and incorporating equality under the law, the Charter, at least in principle, recognizes a form of substantive equality.

34 Theories of compensatory justice within the model of equality of opportunity move beyond radical individualism³³ and formulate discrimination as a group phenomenon.³⁴ They attempt to delineate the basis of compensation or reparation, the nature of groups, and "the form and extent of their disadvantage." Broad guarantees of equality, as well as acknowledgement of the legitimacy of affirmative-action or employment-equity programs,³⁵ have led to the recognition of group rights as well as individual rights.³⁶ Because some groups have been unjustly disadvantaged, it can be argued that they have a legitimate claim to compensation. Preferential treatment is justified on the grounds that its ends are justified or that it is justified because of documented past injustice.³⁷ Affirmative action is justifiable, if not imperative, to provide equal opportunity to those groups who have been historically hindered and precluded from participation. To enable those groups to participate on an equal basis, government intervention is necessary.

35 A number of cases decided by the Supreme Court have recognized the legitimate claims of groups who have faced systemic inequality. Besides the Andrews decision,³⁸ a 1988 opinion³⁹ by Justice Bertha Wilson acknowledged the historical basis of women's experience of inequality. In the Eve decision, decided before section 15 of the Charter came into effect, Justice La Forest reflected a similar concern for the condition of women with intellectual disabilities and their right to assert their dignity and choice.⁴⁰

36 Recognition of the historic and systemic basis of the inequality of groups underlying the equality-of-opportunity model can redress some of the persistent effects of discrimination; however, it is problematic as a model for cases (sex, religion, national, or ethnic origin, and physical or mental handicap) other than its paradigmatic case, racial discrimination.⁴¹

37 The major flaw in this model for enabling equality for people with intellectual disabilities is that their differences are not solely the result of historic circumstances. In most cases, they cannot overcome natural characteristics and become like the "norm," even with equality of opportunity, because it is based on the assumption that the aim of equal opportunity is to provide access to the competitive, individualistic market, not to such non-comparable goods as

minimal nutritional and medical support. The basis for their claim to equality can be made only on their citizenship or on their humanness or on a general egalitarian value assumption -- for example, that all people should be accorded equal respect by their government because they are persons,⁴² not because of their ability to compete. Their claim on resources is to enable participation, although it will be unlikely,⁴³ even in the long term, that they will be competitive (within the existing social and economic climate) without some degree of ongoing support. It is not a claim for support to redress past discrimination or support to overcome particular barriers to participation (equality of opportunity). Instead, their claim is for redistribution of state resources and for on-going systemic support to be able to exercise the same rights as others. This claim is not premised on the measurable social benefits (economic efficiency and effectiveness) foreseen to be achievable in exchange for additional state benefits which is the case for other disadvantaged groups.

38 The unarticulated premises of the equality-of-opportunity model are homogeneity and interchangeability. Some feminist liberal equality theorists in the United States⁴⁴ have posited that one of the routes to overcoming the problems of the equality-of-opportunity model is equal recognition of identifiable, immutable difference, which they term the "special benefit rule." In the case of women, it is argued that lactation and pregnancy ought to be given special provision in the equality equation as differences for which equality cannot be denied and accommodation provided. The effect, however, is virtually the same as that arising from the formal equality model with the addition that special status or priority are assigned for objectively definable characteristics. Where an objective distinction having a consequent systemic disadvantage can be identified, this may be marginally helpful. Given the wide diversity within the class of individuals who might be identified as "disabled", establishing such a constant is problematic. In any event, it does not address the underlying principle -- the substantively male non-handicapped standard, and the dominance and subordination of other groups. The organization of society around people with an intellectual disability is premised on an implied assumption that intellectual disability is an intrinsic inequality. The differentiation between intrinsic and extrinsic inequality is not made. As a result, inequalities arising from extrinsic factors, such as income, employment, housing and services, are presumed to arise because of factors intrinsic to the individual. Simply establishing that a class of individuals possess a specific characteristic does not address such a problem. The weakness of this approach can even make disadvantage invisible⁴⁵ because it is difficult to identify anything but the most obvious intrinsic distinctions and to ignore subtler but pervasive issues of power in society that create disadvantage. It is true that the equality-of-opportunity model can recognize and address blatant prejudice; however, it is questionable whether people with intellectual disabilities are disadvantaged by inequalities arising from prejudice rather than from the much more extensive inequalities arising from how society is organized.

The Limits of Affirmative Action in Enabling Equality for People with Disabilities

39 Affirmative action has been widely advanced as a means for dealing with systemic inequality.⁴⁶ Its purpose is to identify and eliminate policies and practices that result in a group having less than its fair share of, or proper place in, jobs and other opportunities. In other words, it sets out to address the systemic rather than the individual nature of inequality.

40 Affirmative action addresses inequality in a number of ways. First, it views the issue from a group rather than an individual perspective. The impact of practices on a designated group is identified by statistical evaluation of the discrimination effects of a given practice on the group. Second, unintentional discrimination is considered to be as problematic as intentional discrimination. And third, affirmative action is recognized as a necessary positive intervention for eliminating the inequality in outcome produced by existing structures. From this perspective it provides a working programme for surmounting some of the most problematic aspects of both the equal treatment and equality of opportunity models of equality.

41 The weaknesses in the application of conventional affirmative action to the case of intellectual disability⁴⁷ are, however, significant. Methodologically, the statistical comparison of participation creates some problems.⁴⁸ As well, there are problems with the assumptions underlying the objective. The model generally assumes that barriers can be removed without substantially changing the nature of the work or of the provision of goods and services, but for people

with intellectual disabilities participation in the workforce or in the community generally requires changing the nature of the work or activities. The concept of "reasonable accommodation," which has been incorporated into equal opportunity, does not extend to the systemic changes that would be required to restructure and redesign jobs and participation in the community. For example, the affirmative action model does not address the issue of job support that would enable access to the labour force for some people with intellectual disabilities. In most cases, "reasonable accommodation" has not been wide ranging enough to cover these circumstances even if it were to be implemented. Part of the reason for this is the continuing assumption that there are people who will never be assimilated into society and that they are provided for in other ways -- the legacy of the "worthy poor" welfare principle.

42 In addition, affirmative action does not address the hierarchical division of labour nor the assumptions, first, that access to status, wealth, position and other economic assets, and even access to participation in the labour market and in political and social life, should be distributed according to merit; and, second, that measures of merit are impartial and value-neutral and tend to be measured in market terms. Qualifying for affirmative action, like qualifying for other socially valued goods, is based on measurements of the individual technical competence according to the normative meritocratic criteria of educational credentials and standardized testing. These criteria assume some basic level of ability or potential to achieve technical competence and that the talents used for recognition and reward are necessary for social efficiency and progress.

43 Meritocracy results in opportunity for those with superior intellect by making intellectual aptitude the criterion of social reward and by defining progress as excellence and efficiency in technology.⁴⁹ This leads to a competitive ethic that reduces the value of those with limited intellectual abilities by dismissing abilities other than intelligence.

44 Equality of opportunity (and its operational mechanism affirmative action) become relevant only after the "natural" selection process of sorting on the basis of merit. Adjustments are then provided within the relationship of employer and employee (or service provider and service user) with common ends clearly in view, ends such as increased access to the labour market or gaining an education qualification. This may suit many cases of race or gender; however, it is problematic where disability is at issue. For example, barriers external to the individual-employer relationship create disadvantages that make it difficult for people with disabilities to establish merit. Thus the natural selection process does not become operative in the first instance for many. The goals that are to be achieved in the individual-employer relationship must be rethought if the individual and extrinsic circumstances render the achievement of typical goals difficult. Often, this means re-defining the goal of, for example, work in ways that are foreign to market economy notions of work.⁵⁰ If commitment to such redefined goals is lacking, mechanisms such as affirmative action are likely to be ineffective.

45 As affirmative action is conventionally viewed as a means of redressing the legacy of discrimination and inequality, it is seen as a temporary measure. After it removes and eradicates past injustices it will no longer be appropriate. The underlying premise of redressing inequitable status is that there are no immutable differences between the disadvantaged group and the advantaged group; therefore any mechanism that attributes differences in achievement to past discrimination will arguably lead to greater equality, thus rendering the mechanism less and less necessary.

What affirmative action is not is a program designed to create an adjustment to permanent differences (real or imagined) between [different groups] ...⁵¹

46 It therefore fails to take into account the inherent differences of the disadvantaged group. Equal outcomes in participation for people with intellectual disabilities require more than affirmative action. Adaptations can be accommodated within the framework of affirmative action, as they have for women, when immutable differences are taken into account in limited identifiable circumstances. It is more difficult, however, to stretch the concept for those with mental and physical disabilities, as the differences are less easily delineated and there are no characteristics which are shared by all members of the class. Equality for those with intellectual disabilities (or physical disabilities) requires long-term, ongoing means of establishing equal outcomes as well as a mechanism for removing persistent discrimination. No single uniform mechanism (such as the "special benefit" rule) will result in the permanent removal

of existing and ongoing barriers to their participation and the exercise of their right to achieve their full potential.

47 Affirmative action does recognize the need for pluralism in ensuring equal outcome, and does take into account some of the issues of permanent intrinsic barriers to participation. However, it only is helpful where there are identifiable, shared group characteristics. It would be difficult, at best, to determine what characteristics would be included in the case of people with intellectual disabilities. Moreover, even if one could make that determination, affirmative action would not necessarily lead to any greater equality of outcome, as it does not address the historically constituted relations of power and privilege and the assumption that social progress depends on the social order as it is presently constituted. Affirmative action does not impact on characteristics that limit the ability to participate in economic and social life without ongoing accommodation and support.

48 A question arises whether a coherent concept of equality that takes into account issues of disability can be framed within the context of a market economy. The only resolution may be a restructuring of the marketplace and of the fundamental values underlying the social contract. The presumption about equality underlying affirmative action -- that it can be achieved through competitive individualization in the societal marketplace, with entitlement to social and economic goods based on merit -- does not provide any greater advantage to those with intellectual disabilities than models of law that do not use equality as an ethical and legal basis for entitlement. Under affirmative action individual self-reliance and social efficiency remain the cornerstones of disentanglement and equality remains founded in the nature of discrimination rather than in the ethical imperative of equality as a valued end in itself.

Equality Of Well-Being⁵²

49 The issue of equality for people with intellectual disabilities requires more than simply being treated alike ("formal equality") or provided equal opportunity to obtain access ("equality of opportunity"). Biological and sociological meanings of intellectual disability as a means of dividing a group from the rest of society are not addressed by these models of equality.

50 The weakness of the formal and equal opportunity models of equality for disability could be overcome by a model of equality based on well-being as an outcome. This concept of equality incorporates the premise that all humans -- in spite of their differences -- are entitled to be considered and respected as equals, and have the right to participate in the social and economic life of society. Unlike the other models of equality it would take into account the fact that the conditions and means of participation may vary for each individual, entailing special accommodation to make participation possible. While the outcome -- equality of well-being -- would be universal, the programs or means to ensure equality could justifiably be targeted to enable those least able to achieve well-being to be supported on a temporary or long-term basis. Difference would both be acknowledged and be accommodated in ensuring the outcome. Political and legal decisions would have to take difference in the achievement of social well-being into account in the distributive paradigm of social justice.

51 Well-being has a number of components including equal achievement of self-determination, participation and inclusion in social life, and the exercise of fundamental citizenship rights. Equality itself would be an end not a means to meeting other social goals.⁵³

52 Self-determination includes notions of choice, personhood and dignity. In its broadest sense this would incorporate Lukes' notion of a society with equal respect as one in which:

there are no barriers to reciprocal relations between relatively autonomous persons, who see each other and themselves as such, who are equally free from political control, social pressure, and economic deprivation and insecurity to engage in valued pursuits, and who have equal access to the means of self-development.⁵⁴

53 It would recognize that while people are not equal in talent, social usefulness or willingness to serve the community, they are entitled to make choices about how they want to live and what constitutes the good life for them, so long as it

operates within the framework of the mutual recognition of others' self-determination.

54 Equality defined as the inclusion and participation of all groups in institutions and positions⁵⁵ makes clear the onus to include even those people who cannot meet the standards of economic self-sufficiency. This interpretation of equality shifts the basis for distributive justice away from economic contribution as the primary factor of entitlement and recognizes other forms of participation as valuable -- including those non-market, non-productivity contributions that people with intellectual disabilities can make. The reproduction of the material and ideological conditions that benefit only one segment of the population would no longer be the primary rationale of social institutions, law and policy. Rather the rationale of social institutions, law and policy would be to support the outcome of equality of well-being.

55 Equality of well-being would ensure the exercise of fundamental citizenship rights by all citizens independent of their economic and social contribution. The question would be how to determine which rights would be guaranteed to all citizens (that is, what is fundamental) and how to ensure that all individuals have the support to exercise those rights.

56 Traditional limits that have circumscribed political obligation to ensure equality⁵⁶ become suspect when the meaning of equality incorporates the notion of well-being, with its implications for resource distribution.⁵⁷ Entitlement is based on a comprehensive notion of citizenship (that is, the intrinsic worth of the individual and on some absolute notion of need) not on one's status as a member of the class of worthy poor, or on inequality of talent or social usefulness.

57 As discrimination faced by those with intellectual disabilities is tied to traditional notions of worth, merely changing conventional definitions of discrimination may not by itself result in substantive equality. Structural changes are likely to be necessary on the political and legal levels. If the right to participate is to be recognized, the notion would have to be jettisoned that people with intellectual disabilities are members of a class provided with goods and services because they are worthy of care rather than by right of citizenship.

58 Unlike the two other models, equality of well-being starts not with an assimilationist view but with a pluralist perspective on how people with differences and similarities ought to see each other in a just society. It argues that formal barriers have placed groups in substantively different social positions, i.e., that differences have become sites of social disadvantage. Consequently, removing the barriers without also redressing associated disadvantage does not result in significant change. This model also assumes that systemic discrimination against groups is not a "mistake" but an integral part of policies fostering a dominant social agenda.⁵⁸ As such, it provides an alternative context for examining legal and social equality. To enable equality that takes into account immutable differences, differences must be accommodated in order to neutralize their effect as barriers to personal achievement and to entitlement as fully participating members of society, that is, barriers to personhood, dignity and self-determination. The emphasis is then on the means of reasonable accommodation, rather than affirmative action.⁵⁹

59 A question that arises is: can an equality of well-being model take difference into account through law and policy so that equality would be achieved for those with intellectual disabilities?

60 The inequalities faced by those with intellectual disabilities are substantively distinct from those of other groups and this affects the nature of their claims. For instance, a number of feminist theorists have argued for a political theory and practice that recognizes the pluralist nature of claims -- one that values different cultures, experiences, and interests,⁶⁰ since annihilating or ignoring differences (the assimilationist approach) has been ineffective in addressing inequality.⁶¹ However, if people with intellectual disabilities are to achieve equality of well-being, their claims have to be of both a pluralist and assimilationist nature. It is true that the point of similarity that disabled people share with racial minorities is that they are disadvantaged by the genetic supremacy claimed by proponents of segregation; but as well they share a point of similarity with women -- the claim that they are entitled to consideration of their immutable differences. A means therefore has to be developed that incorporates both the assimilationist claims (i.e., participation and inclusion) and the pluralist claims⁶² (i.e., accommodation) without losing the benefits of either.

61 The eradication of oppression against those with intellectual disabilities thus requires a more fundamental alteration of the existing legal and social order than does the elimination of race or gender discrimination. However, people with intellectual disabilities have not received much consideration as-intellectually-disabled. It is true that certain benefits have accrued to them yet these benefits have resulted from their belonging to another category of deserving poor, such as persons in need or equality seekers.⁶³ Consequently their particular equality claims have been circumscribed. A claim based on outcome would require that society surrender the basis on which power is distributed, not simply redress discrimination. An encompassing model of equality must confront intellectual differences, not ignore them. It is not a matter of irrational prejudice focused on superficial differences but the elimination of assumptions about the basis of legitimate claims to limited state resources for people with greater needs and dependencies than others, people whose salient differences will not diminish.

62 Claims, both of assimilation and of pluralism, are being made by disability advocates. They claim entitlement, for example, to public education within the regular non-disabled school system and access to employment opportunities in the regular labour market. Both are assimilationist claims. In both cases, however, they are also making claims to consideration of their differences and to additional resources, including personal supports, that will enable them to participate (to be assimilated) in spite of their differences.

63 Redress is also sought, as it is for minorities and women. To satisfy the equality claims of this group, redress must be found for both discriminatory impact as well as discriminatory form. Further redress is sought for claims about the basis for disentanglement. In other words, for those with intellectual disabilities the equality issue is not simply that they have not been fairly tested or evaluated in terms of their right to have a particular job but that classes of jobs have not been created for which they could legitimately qualify. It is not a matter of simply ensuring equal opportunities to compete for jobs and fair processes of determining qualifications (as is the case with race) or even restructuring existing jobs according to specific recognizable differences (as is the case for women), but entitlement to enter the job market itself, even if existing qualifications, determined to be fairly established, cannot be met.

64 Like women, people with disabilities have sought access to social benefits available to non-disabled persons without relinquishing the special benefits they have received in virtue of their disabilities.⁶⁴ In other words they are attempting to achieve social benefits without giving away the basic human rights that have traditionally been their form of barter.⁶⁵ They are also facing challenges from non-disabled persons who want access to preferential treatment such as individualized instruction or support in the classroom,⁶⁶ just as men make claims for the special benefits claimed by women.

65 The premises of this model of equality are that all persons of distinguishable groups have the same needs for equality; that the capacity to exercise a right is not a distinguishing characteristic for the purpose of recognizing or denying that right; and that equality is consequent on the equal value, benefit, and rights possessed in differences from the norm, not on overcoming natural characteristics and becoming as much like the norm as possible.

66 To achieve this form of equality would require the redistribution of state resources to actualize equality of well-being. Inequality would no longer be embodied in the concept of intellectual disability nor would intellectual disability be the basis for denying citizenship. The granting of entitlements could be attached purely by reason of an individual's being, independent of their potential to compete. This would refocus the concept of equality, both legally and socially, from the negative notion of "discrimination," to a positive means of integration. Distributive justice based on this idea of equality would require that social transfers were made not just in financial terms but in the basis of other needs as well, including support to participate.

67 This model makes irrelevant the question of similarly situated persons, which has established non-disabled as the normative model. It also addresses the issue of the white, male, able-bodied culture as the normative model and all others as deviations from that ideal.

68 Setting the equality standard as an outcome measure removes the need for each disadvantaged group to demonstrate

discrimination. It replaces the capacity to compete as the basis for political obligation. It takes into account the social reality of the disabled and non-disabled as well as their biological differences. And it thus makes the achievement of social justice dependent on a recognition of those differences that must be accommodated to achieve equality of well-being.

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RE AUTHOR:-- Marcia H. Rioux (B.A., M.A., Carleton; Ph.D., University of California, Berkeley, 1993) is director of The Roeher Institute in Toronto and Assistant Professor (part-time) at York University. Her research interests lie in the areas of social policies and human rights.

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1 Intellectual disability is used throughout this text -- it includes individuals who have been variously labelled as mentally retarded, mentally handicapped, mentally disabled, mentally impaired, intellectually impaired, developmentally disabled, and developmentally delayed and any other condition resulting in intellectual impairment.

2 Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, ch. 11 [hereinafter Charter].

3 J. Sterba, *Justice: Alternative Political Perspectives* (Belmont, California: Wadsworth Publishing Company, 1980); R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books Inc., 1974); J. Rees, *Equality* (London: Pall Mall Press, 1971).

4 J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); B. Williams, "The Idea of Equality" in P. Laslett & W.G. Runciman, eds., *Philosophy, Politics and Society*, 2nd series (Oxford: Basil Blackwell, 1962) 110; W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism" (1982) 7(3) *Women's Rights L. Reporter* 175.

5 R. Veatch, *The Foundations of Justice: Why the Retarded and the Rest of Us Have Claims to Equality* (New York: Oxford University Press, 1986); S. Lukes, "Socialism and Equality" in Sterba, *supra* note 2, 211; C.E. Baker, "Outcome Equality or Equality of Respect: the Substantive Content of Equal Protection" (1983) 131(4) *U. Penn. L. Rev.* 933; R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

6 Under the Canadian Charter of Rights and Freedoms, people with intellectual disabilities ("mental disability") are specifically listed as a class of persons entitled to equality; that is, they have a prima facie entitlement to equality. The Charter also specifically excludes programs established to redress discrimination from being classified as discriminatory. In other words, special measures are deemed to be consistent with equality.

7 As Hutchison and Potter put it, the oppression and inequality that "flow from the seemingly natural operation of the economy." A.J. Hutchison & A. Petter, "Paradise Postponed" (1990) [unpublished].

8 That is compassionate care, based on the notion that people with disabilities while pitiable are deserving of charity and benevolence. Within both the policy and legal framework, arguments are made that any different treatment of people with disabilities is justified because it is in the best interests of the individual according to some external set of standards. Differentiation has included the suspension of citizenship rights and the formalization of the dependent relationship of the individual to the state through legislation that provides unequal social and economic benefits.

9 S.J. Gould, *The Mismeasure of Man* (New York: Norton, 1981) at 24.

10 B. Evans & B. Waites, *I.Q. and Mental Testing: An Unnatural Science and Its Social History* (London: Macmillan Press, 1981) at 188.

11 Implications of hereditarian thinking are as devastating for those distinguished as less equal by virtue of their race as for those labelled intellectually disabled.

12 R.L. Hayman, Jr., "Presumptions of Justice: Law, Politics and the Mentally Retarded Parent" (1990) 103(6) *Harv. L. Rev.* 1201 at 1248.

13 Generally the criterion for being classified as intellectually disabled is that there is some significant intellectual impairment or developmental deficiency, the onset of which occurs in the early years of development (M.L. Batshaw & Y.M. Perret, *Children with Handicaps: A Medical Primer* (Baltimore: Paul H. Brookes Publishing Co., 1981)). More recently, difficulty adapting to environmental circumstances has been added to the definition as a further criterion (American Association for Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support*, 9th ed. (Washington, D.C.: A.A.M.R., 1992)). There are some specific objective conditions such as Down Syndrome that have always been classified and continue to be classified as mental retardation; other conditions, such as epilepsy, were at one time classified as mental retardation but are no longer. Finally, the term has not conventionally included such conditions as Alzheimer's Disease or senile dementia, because their onset is later in life. However, if the basis of distinguishing difference is competency rather than condition, these conditions would be included.

14 J.R. Mercer, *Labelling the Mentally Retarded: Clinical and Social System Perspectives on Mental Retardation* (Berkeley: University of California Press, 1973).

15 The activities of medical and therapeutic professions reinforce this construction of disability and inequality. Theirs are not merely technical or commercial interactions, but express the values of society generally. They operate as gatekeepers to the exercise and enjoyment of citizenship rights. The labelling of people as intellectually disabled is not therefore simply a technical medical "diagnosis". It affects the economic, social, and legal interactions in which a person will participate and legitimizes political decisions concerning the relationship of that class of persons to society. The illusion that such decisions are "apolitical" has masked the practical political implications of the decisions and has enabled widespread discrimination and inequality without a political debate on procedural or substantive justice.

16 The definition of intellectual disability can always be applied to a segment of the population. This is because the definition is based on a relative measure. There will inevitably be a class of persons who are intellectually significantly less able in comparison to others and who have comparative difficulty adapting to their environment.

17 W.S. Tarnopolsky, "The Equality Rights" in W.S. Tarnopolsky, & G. Beaudoin eds., *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 399-401. For other discussions of the rule of law see International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions as Elaborated at the Congresses and Conferences Held Under the Auspices of the International Commission of Jurists* (Geneva: I.C.J., 1966); G. DeQ. Walker, *The Rule of Law: Foundations of Constitutional Democracy* (Carleton, Vic.: Melbourne University Press, 1988); A.C. Hutchison & P. Monahan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987); F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington, Eng.: Dover, N.H.: Berg Publishers, 1986).

18 In this paper, institution refers only to residential institutions for people with psychiatric or intellectual disabilities.

19 Feminist theorists have argued that the adherence to a formal view of equality, i.e., equality of treatment, perpetuates and legitimizes women's substantive inequality, i.e., equality, of condition. G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (Ottawa: The Canadian Advisory Council on the Status of Women, 1989); J.W. Scott, "Deconstructing Equality-Versus Difference: or, The Uses of Poststructural Theory for Feminism" (Spring, 1988) 14(1) *Fem. Studies* 33; J. Flax, "Postmodernism and Gender Relations in Feminist Theory" (1987) 12(4) *Signs: J. of Women in Culture and Soc.* 621.

20 Peter Westen argues that the notion of equality added nothing to the determinations of proper treatment. His critique of the formal principle of equality as an empty idea reinforces the argument that equality could be achieved under that limited principle without the achievement of any substantive rights. "The Empty Idea of Equality" (1982) 95(3) *Harv. L. Rev.* 537.

21 A. Petter, "Comment: Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) 34 *McGill L. J.* 358 at 363.

22 The substantive inequality may even be legitimated by court decisions that find in favour of an equal-treatment model of equality because it can lead to advantaged groups winning their claims to scarce resources that are designed to remedy the acknowledged disadvantage.

23 *Brown v. Board of Education* 349 U.S. 294 (1955).

24 G. Brodsky, & S. Day, *supra* note 20; G.C. More, *Competing Conceptions of Sexual Equality in the European Community and Canada: Formal and Substantive Models* (Ottawa: National Library of Canada, 1991); D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990); K. Swinton, *Advanced Constitutional Law: Equality Rights, 1988-89 ed.*, (Toronto: Faculty of Law, University of Toronto, 1988-89); A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985); K. Lahey, "Equality and Women's Specificity in Feminist Thought" (1983) [Unpublished] cited in M. Mossman & D. Majury eds, *Readings for Law, Gender, Equality* (Toronto: Osgoode Hall Law School, York University, 1989-90) at 338.

25 While there is no general agreement of the precise components of equality, of opportunity, it generally presumes that people of equal need and ability, desirous of a scarce resource not available to everyone, should have an equal opportunity to obtain it. In other words, extraneous social categories, such as sex, race and disability are excluded from the consideration in determining who gets the scarce resource. See for example, R. Veatch, *supra* note 6, and B. Williams, "The Idea of Equality", *supra* note 5.

26 Martha Minow refers to the following question as the dilemma of difference: "When does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis?" [emphasis in original] M. Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990) at 20.

27 Minow characterizes the traditional view that classifies people on the basis of mental incompetence, understood to be immutable and natural, as the "abnormal persons" approach. The assignment of difference is based on the person's basic or immutable nature and, in the law, the facts concerning a person's mental competence and capacity. Subtle differences are ignored: one is either normal or deviant. The mental capacity of those with a mental handicap is the determining factor in any case. Minow points out that this approach owes much to notions of fixed status relationships. M. Minow, "When Difference has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference" (1987) 22(1) *Harv. Civil Rights/Civil Lib. L.R.* 111.

28 During the 1960s intellectual disability began to be reconceived as a developmental issue rather than a biological one or a matter of public threat. The concept of normalization ("utilization of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviours which are as culturally normative as possible": W. Wolfensberger, *The Principle of Normalization in Human Services* (Toronto: N.I.M.R., 1972) at 28), developed during the 1970s, rested on the premise that persons with intellectual disabilities are entitled to some self determination and freedom of choice in a context of assimilation. The goal was to break down the philosophical and material barriers between "normal" and "deviant" or "abnormal." Rights won in court and the concept of normalization had a powerful ideological and material impact in Canada, providing a crucial rationale for the efforts of those concerned with deinstitutionalization and development of community-based services. The limitation of normalization, however, was that it did not provide a theoretical basis that, in practice, gave much scope for pluralism.

29 In its first interpretation of the equality provisions of the Charter, the Supreme Court recognized that S. 15 protects against both impact as well as intent of disadvantage; that there must be an equality of both benefit and protection of the law; that difference in treatment will not necessarily result in inequality and that sameness in treatment may result in serious inequality. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1. In a 1988 opinion, Justice Bertha Wilson acknowledged the historical basis of women's experience of inequality. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

30 The Federal Court of Canada declared S. 14(4)(f) of the Canada Elections Act unconstitutional in October 1988 on the basis that "the assumption that a person suffering from any mental disability is incapacitated for all purposes, including voting, is simply a false assumption". *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 at 625, per Madame Justice Reed.

31 *Re Eve*, [1986] 2 S.C.R. 388.

32 Brodsky and Day argue that Section 15 of the Charter should provide a basis for formal claims (process claims) as well as substantive claims to ensure that equality rights can be achieved. They point out that formal equality claims will in many cases compete with substantive equality claims particularly in cases of distributive justice. They propose that "section 15 [complaints] should be available for substantive equality claims by disadvantaged groups and that members of advantaged groups who are disadvantaged only by virtue of their individual circumstances ought not to be able to bring substantive equality claims. ... This would not mean that members of advantaged groups would be completely without equality rights, however. The process rights component of section 15 should be recognized and available to all. But it should be developed in a limited way to protect rights traditionally associated with the rule of law, such as access to the courts." Brodsky & Day, *supra* note 20 at 197.

33 See, for example, W.A. Block & M.A. Walker, eds., *Discrimination, Affirmative Action and Equal Opportunity: An Economic and Social Perspective* (Vancouver: Fraser Institute, 1981). In this conceptualization of equality goals, the liberal values of competition, freedom and radical individualism are relied on to argue that there is no need for government intervention. Competition in the marketplace is the equalizer in the sense that those who have been disadvantaged will cost less to employ, and consequently the marketplace will regulate itself. Rights to autonomy and rights to freedom are conceptually linked to the fair play paradigm. See, for example, R. Nozick, *supra* note 4.

34 See, for example, C.A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979); Livingston, *infra*, note 50; L.C. Thurlow, "A Theory of Groups and Economic Redistribution" (1979) 9(1) *Phil. & Publ. Affairs* 25; A.H. Goldman, "Reparations to Individuals or Groups?" in B. Gross, *Reverse Discrimination* (Buffalo: Prometheus Books, 1977); and T. Nagel, "Equal Treatment and Compensatory Discrimination" (1973) 2(4) *Phil. & Publ. Affairs* 348; J.W. Chapman ed., *Compensatory Justice* (New York: New York University Press, 1991); T. Nagel, "Equal Treatment and Compensatory Justice" in M. Cohen, T. Nagel & T. Scanlon, eds., *Equality and Preferential Treatment* (Princeton, N.J.: Princeton University Press, 1977) 3.

35 S. 15(2) of the Charter.

36 *In ibid.*, s. 15(2), s. 23, s. 25, s. 27, s. 28, s. 29.

37 Equality claims are framed by some as paramount to freedom claims. Macpherson claims that the premise on which equality of opportunity in liberal theory is based is "to provide the conditions for the free development of human capacities, and to do this equally for all

members of society." He places this within the framework of serving the needs both of freedom and of equality, that is, "freedom of each individual from subservience to the wills of others and equality in this freedom." While acknowledging the ethical significance of equality, this does not address the issues of history and nature. C.B. Macpherson, *The Real World of Democracy* (Toronto: Canadian Broadcasting Corp., 1966) at 58, 59.

38 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

39 However, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, was not decided on the equality issue.

40 *In Re Eve*, [1986] 2 S.C.R. 388 at 427-28, 434.

41 As Smith argues: "It is easy for most people to accept that the physical differences between the races do not matter and should be legally irrelevant. The equal opportunity model, in which justice is seen to be done when everyone is permitted to run the same race from the same starting line, fits relatively well when the contestants differ only in the colour of their skins. (The problem, of course, is how to achieve the same starting line in a meaningful way.) However, there are physical differences between the sexes in relation to child-bearing and breast-feeding which make identical treatment of the sexes unequal in some contexts. Running the race from the same starting line does not solve the problem of maternity along the way. Classifications based on sex may be legally relevant. Similarly, there are differences between the able-bodied and the disabled and between young, middle-aged, and old people which can make identical treatment unequal. Simple equality, of opportunity, cannot conceivably produce equality of results in many of these situations. Such issues do not arise as squarely with respect to racial discrimination". L. Smith, "A New Paradigm for Equality Rights" in Lynn Smith et al., eds., *Righting the Balance: Canada's New Equal Rights* (Saskatoon: Canadian Human Rights Reporter Inc., 1986) 353 at 365.

42 See K. Greenawalt, "How Empty is the Idea of Equality" (1983) 83(5) Col. L. Rev. 1167.

43 As the classification "mentally handicapped" includes an enormous range of intellectual capacities, it is difficult to generalize claims.

44 A.E. Freedman, "Sex Equality, Sex Difference, and the Supreme Court" (1983) 92(6) Yale L. J. 913; S.M. Wildman, "The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence" (1984) 63(2) Oregon L. Rev. 265; A.C. Scales, "Towards a Feminist Jurisprudence" (1980-81) 56(3) Indiana L. J. 375; W.W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" (Spring 1982) 7(3) Women's Rights L. Reporter 175.

45 Brodsky and Day argue that the formal equality model, directed as it is to like treatment and different treatment, assumes that equality is a matter of sameness and difference under the law rather than dominance and subordination of groups. Brodsky & Day, *supra* note 20 at 149.

46 Canada Commission on Equality in Employment, Report Commission on Equality in Employment (Ottawa: Supply and Services, 1984) (Commissioner: R.S. Abella). The concept was derived in large part from affirmative action in the United States, designed to deal primarily with racial inequality.

47 It also raises some similar problems for physical handicap.

48 W. Black identifies five specific problems with the statistical model of comparison in the case of disability. These include: (1) Statistical comparisons require the identification of who is in the groups being compared. With disability it is difficult to determine who falls within the category because of the wide variety and number of conditions, the impact of the conditions also may range from minor to very significant; (2) There is little data available about the participation rate in the general labour force of persons with disabilities; (3) Program targets established on the basis of current participation rates is a general problem with affirmative action because the rates set incorporate the effects of past discrimination; (4) The small numbers of persons with disabilities who have generally participated in the labour force mean that any statistical information is not reliable; (5) A statistical approach requires gathering of information about disabilities of employees, which raises problems of labelling or categorization which may be an infringement on the rights of those categorized and may reinforce stereotypes. W.W. Black, "Discussion Paper Prepared for the Manitoba Human Rights Commission: Affirmative Action for Persons with Disabilities" (Ottawa Human Rights Research and Education Centre, University of Ottawa, 1990).

49 J.C. Livingston, *Fair Game? Inequality and Affirmative Action* (San Francisco: W.H. Freeman, 1979).

50 In the sphere of education, learning may be thought of as a means to other ends such as social status, employment, income, ethical behaviour. However, learning could also be defined as arriving at new insight -- an end in itself. Pedagogical practice can be structured for these ways of looking at learning. Typically, however, the arrival at new insight is considered a less desirable focus of educational practice than promoting access to those other goals.

51 W. Williams, *supra* note 5 at 180 n.35 (emphasis in original).

52 Variations of this model have been called "equality-of-outcome" or "equality-of-resources". R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) 297-301; K. Neilson, *Equality and Liberty: A Defense of Radical Egalitarianism* (Totowa, N.J.: Rowman

and Allenheld, 1985) 46-60; R. Dworkin, "What is Equality": "Part 1, Equality of Welfare" (Summer 1981) 10(3) *Phil. & Publ. Affairs* 185; "Part 2, Equality of Resources" (Fall 1981) 10(4) *Phil. & Publ. Affairs* 283; "Part 3: The Place of Liberty" (Oct 1987) 73(1) *Iowa L. Rev.* 1; "Part 4: Political Equality" (Fall 1987) 22(1) *U. of San Fran. L. Rev.* 1; P. Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of Equality in Moral and Legal Discourse* (Princeton, N.J.: Princeton University Press, 1990); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, No. 34 (Ottawa: L.R.C.C., 1991) 9-12.

53 Equal treatment and equal opportunity in most of their formulations treat equality as a means to ensure fairness in achieving some other ends. Thus in the latter case, people of equal need and ability should have equal opportunity to obtain desired scarce resources not available to them.

54 Lukes, *supra* note 6 at 218.

55 Young proposes this as a characteristic of an equality of outcome and argues that it allows affirmative action to be seen not as an exception to the principle of nondiscrimination but a policy instrumental in undermining oppression. I.M. Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990) at 195.

56 For example, as found in the Canadian adaptation of the English Poor Laws and in subsequent law and policy, based on a status of civil disability law and policy based on charity and paternalism, and law and policy based on equality of opportunity.

57 Resource redistribution necessary to ensure equal well-being would require both the redistribution necessary to enable equal opportunity as well as the redistribution necessary to take into account unequal needs because of physical and mental differences. The equal treatment principle of equality, by contrast, supports deinstitutionalization and integration in the community -- but not the provision of services to make this possible for those people with intellectual disabilities who might have trouble in a complex environment. The "special treatment" model which is a form of equality of opportunity, alternately supports the development of specially tailored assistance programs, but might also support institutional treatment.

58 See T.B. Dawson, "Equality Strategies -- Legal Options and Approaches" delivered at the Human Rights Summer School, University of Ottawa, August 7, 1990; C. MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7(3) *Signs: J. of Women in Culture and Soc.* 515; C. MacKinnon, "Difference and Dominance: On Sex Discrimination" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) 32; L.M.G. Clark, "Politics and Law: The Theory and Practice of the Ideology of Male Supremacy; or It Wasn't God Who Made Honkey Tonk Angels" in D. Weisstub, ed., *Law and Policy* (Toronto: Osgoode Hall Law School, York University, 1976) at 35-73.

59 Fox and Willis suggest the significant difference between policy in the area of disability and other policy. "No other area of policy is precisely analogous to disability. An inexact analogy might be the mobilization of a country for modern warfare. Only in wartime have the people who make policy, explicitly negotiated about who will be expected to work or to fight and then organized health and social services on the basis of negotiations." D.M. Fox & D.P. Willis, "Introduction: Disability Policy: Restoring Socioeconomic Independence" (1989) 67(Supp. 2)(1) *Milbank Quart.* 1 at 2.

60 I.M. Young "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" (1986) 5 *Praxis International* 382; M. Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990); I.M. Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990).

61 Herma Hill Kay concludes that it is necessary to preserve the comparative element of the anti-discrimination principle as the normal standard of measurement and make an exception only in those cases where legal problems are raised about reproductive sex differences. Wildman, *supra* note 45, has proposed that the comparative standard between men and women be discarded as a basis for the anti-discrimination principle. She argues that women have been the victims of sex discrimination not men, just as blacks are the victims of discrimination not whites. She argues for full societal participation to eliminate sexual discrimination against women. She does not accept the view of writers like Kay, who posit that discrimination is practised against both men and women and that must instruct the legal model adopted. S.A. Law, "Rethinking Sex and the Constitution" (1984) 132 *U. Perm. L. Rev.* 955 offers a position that adopts both models. She would have laws regulating reproductive biology brought within the Fourteenth Amendment's guarantee of equal protection but not subjected to the anti-discrimination principle, while laws that made explicit sex classification would remain subject to the antidiscrimination principle. H.H. Kay, "Models of Equality" 1985(1) *U. Ill. L. Rev.* 39.

62 Scott and Minow argue that the framing of equality and difference as mutually exclusive terms misrepresents their relationship. Placing equality and difference in an antithetical relationship denies the way in which difference has figured in political notions of equality; it also suggests that sameness is the only ground on which equality can be claimed. Equality, as developed in the political theory of rights, is understood to mean the elimination of a particular set of differences at a particular time. Therefore its starting point is the acknowledgement of a group of people as different. "The political notion of equality thus includes, indeed depends on, an acknowledgment of the existence of difference" (Scott, at 44). If individuals were "the same" there would be no need to ask for equality. Equality could be defined not as the elimination of difference but as indifference to difference. The political issue is therefore to find a notion of equality predicated not on sameness but on difference. Joan Scott, "Deconstructing Equality versus Difference: or the Uses of Poststructuralist Theory for Feminism

(1988) 14(1) Fem. Studies 33; M. Minow, "When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference" (1987) 22(1) Harv. Civil Rights/Civil Lib. L. Rev. 111; M. Minow, "Learning to Live with the Dilemma of Difference: Bilingual and Special Education" (1985) 48 L. and Contemp. Prob. 157; J. Flax, "Postmodernism and Gender Relations in Feminist Theory" (1987) 12(4) Signs: J. of Women in Culture and Soc. 621.

63 They have also been disadvantaged by being subsumed within these categories.

64 Some special benefits have been provided by government such as the augmented welfare provisions and Vocational Rehabilitation for Disabled Persons program and special services. Others have been made available through charitable organizations.

65 M.H. Rioux, "Exchanging Charity for Rights: A Challenge for the 1990's" (1991) 6(2) *entourage* 3.

66 There have not been any legal challenges of this nature in Canada, although arguments were made in the Robichaud and Rowett education integration cases (unreported) about the benefits received by the students (who had an intellectual disability) in special schools. There were also arguments about the effect of a student with an intellectual disability on the achievement of other students.