Equal Protection in Enforcement Towards More Structured Discretion

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Recommended Citation
Peter Finkle and Duncan Cameron, "Equal Protection in Enforcement Towards More Structured Discretion" (1989) 12:1 Dal LJ 34.
I. Introduction

How often has it been said by administrators, politicians and members of the general public that a certain law is good, the problem is that it is not enforced? The very form of the question expresses the fact that for the general public and politicians alike, not to mention the legal profession, the law is usually thought of as that which is written in the books. In reality, however, that written law is only part of a much broader legal process which includes the decisions of those charged with the responsibility of enforcement and, indeed, the activities of judges and juries as well.

A serious, even critical, problem ensues when the law is considered to be only that which is written in the statutes and case books, and is severed from the enforcement decisions of prosecutors and administrators. The fact is that decisions made by these individuals breathe life into the law. If the courts and the legal profession ignore that reality, then the promise of fundamental rights as enshrined in the Canadian Charter of Rights and Freedoms will be only partially met. Regardless of the difficulties, law must be viewed as a process whose real effects can be measured only in the impact it has on the lives of those who are subject to it. Only from that perspective can it be seen that decisions about enforcement are as important — perhaps even more important — than decisions about the written law.

This paper focuses on situations where people are exposed to unequal legal treatment based not on who they are, but on mere chance in the enforcement of the law. The unequal treatment is not aimed at anyone's
group characteristics but rather occurs because an administrator or a prosecutor enforces a regulatory regime or law in a manner that treats similarly situated people in a dissimilar fashion.

There are two basic types of enforcement situations which we will consider. One is where a prosecutor is bringing an action under the Criminal Code; the other involves an administrator who decides to bring an action under a regulatory regime. The administrator, in Canada, does not bring the action directly, but recommends to the Justice Department that charges be laid. Generally, the recommendation is adopted if, in the opinion of the Justice Department, there is sufficient evidence for counsel to make a respectable case. Thus, considerable discretion exists. Unfortunately, both the prosecutor and the administrator often exercise their discretion in ways that result in similarly situated people being treated differently. In fact, as will be explored below, the traditional judicial approach to prosecutorial and administrative discretion in enforcement has done very little to control the various adverse effects that can result from such unchecked discretion.

Traditional notions of equal protection are rarely applied to prosecutorial or administrative discretion in enforcement. Usually, only the laws and regulations are analyzed to ascertain whether they provide for equal treatment; but frequently variations in treatment under the law occur solely because of prosecutorial or administrative discretion in enforcement. In Britain and Canada (before the Charter) the traditional view was that virtually unfettered discretion should be afforded administrators or prosecutors. The American approach is similar, except where discretionary administrative behaviour has deliberate adverse effects on certain racial groups.³

This paper will explore the question whether administrative or prosecutorial discretion should be more closely controlled by the courts in order to afford a greater degree of equality and fairness; and, if so, how such equal treatment might actually be provided. In order to analyze these two questions, an important preliminary issue needs to be addressed: should the actual outcomes that result from discretionary decisions about enforcement be subject to a judicial standard of fairness and equality?

and quasi-criminal administrative legislation. We do not address the much broader issue of the policy considerations which lie behind implementing such laws, which would involve the analysis of their corresponding regulatory inducements and enticements.

³ The American approach to administrative and prosecutorial discretion in enforcement has been shaped significantly by the 1886 decision of the United States Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886). In this case, which dealt with deliberate, racial discrimination in the granting of a municipal licence to operate a laundry, the Court established that administrative discretion will be limited where equal treatment is deliberately denied on racial grounds.
While many commentators and some Anglo-Canadian judicial decisions suggest a positive answer to this question, current legal thinking has yet to focus on how exactly the outcomes of prosecutorial and administrative decisions to enforce should be reviewed. This difficulty arises because traditional legal thinking largely ignores the fact that while legislation or regulations may demand a certain standard of enforcement, the actual behaviour of officials charged with enforcement creates a different standard. Such a situation occurs because officials or prosecutors fail to enforce to the extent demanded by the law entirely or because they enforce according to a different standard than that required by the legislation or regulations. The difficulty that our legal system continues to have in grappling with the problem of administrative and prosecutorial discretion in enforcement frequently results in the creation of a significant gap between the law as it is written and the law as it is practiced.

II. The Gap Between Law and Practice

On reflection, few are surprised at the fact that there is often a substantial gap between the law as it is written, which we will term the black letter law, and the law as it is applied, which we will term the _de facto_ norm. While lawyers and judges tend to focus on the black letter law, for those subject to the law, it is largely the _de facto_ norm which matters. An example will clarify this point.4

Suppose that there are legislation and regulations in force (black letter law) which strictly limit pollution from pulp and paper mills, but that there are no prosecutions despite continuing violations. Instead, the administrators charged with enforcement insist on pursuing negotiations that result in "agreements" that the various mills will undertake to meet a lesser standard over a period of time. The _de facto_ norm in this situation is that most mills need not fear prosecution but must be prepared to negotiate the time required to meet the lesser standard. What is important to the mill owner is the _de facto_ norm, not the black letter law (unless they are the same). In order to decide whether he should install expensive pollution control equipment, the plant owner must make a calculation based primarily on his expectation of the likely behaviour of officials. The legislation and regulations must also be considered, however, because it

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is always possible that officials might choose to act according to the black letter laws. It is worth noting that most drivers make a similar calculation when they choose to violate speed laws on the highway.

Whether it is acknowledged or not, the *de facto* norm is of central concern to those who are subject to the law. Indeed, it may be argued that the *de facto* norm is, in fact, the real rule. This norm is derived from the behavior of officials and the consequent expectations of those subject to that behaviour and may or may not be related to the black letter law. The *de facto* norm may be quite clear, where there is a discernible pattern of official behaviour, or it may be almost without content, where officials seem to be acting in an *ad hoc* manner. When the black letter law is enforced, then it becomes the *de facto* norm.

If the *de facto* norm is based on discernible regular official behaviour, those subject to the law can order their behaviour in conformity with it. But there looms the ever present threat that the official might "throw the book" at the person obeying the *de facto* norm by enforcing the law according to the black letter law. Such arbitrary behaviour would be both unfair and unequal. Moreover, not everyone may be aware that a lesser level of compliance is required, resulting in the unequal application of the law. Indeed, the fact that a lesser standard is required is sometimes deliberately concealed from the general public. Hence, the less knowledgeable or more naive may adhere to the black letter law with the result that they are penalized compared with those who follow the *de factor* norm as compliance with the black letter law will require a greater expenditure of effort or resources.

A more serious problem arises when the black letter law is not regularly enforced by officials and there is no discernible pattern to provide those subject to the law with a reasonable expectation about what behaviour might be anticipated regarding enforcement. In such a situation, there is no *de facto* norm or it may be said to lack content. Here, there is a virtual certainty that equal protection will not, indeed cannot, be afforded to those subject to the law. Similarly, those subject to the law cannot reasonably order their behaviour since they don't know what to expect. Those who choose to obey the black letter law receive an insurance policy against the sanctions of the regulation, but the cost is excessive, especially if no enforcement actions are taken against non-complying competitors. In this situation, the law abiding person is almost always penalized as against the law breaker.

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5. We are indebted to Professors Myres McDougal and Harold Lasswell for their work in the area of policy-oriented decision-making. See especially M.S. McDougal, "Law as a Process of Decision: A Policy-Oriented Approach to Legal Study", (1956) 1 Nat.L.F. 53.

An interesting case upholding the legality of prosecutorial action based on black letter law in the context of a 'no prosecution' policy is *R. v. Cataqas* (1977), 2 C.R.(3d) 328.
It is clear that the behaviour of officials regarding the enforcement of legislation or regulations is, from the perspective of those subject to the law, a significant variable, if not their most important single concern. When official behaviour towards legislation or regulation diverges widely from the black letter law then, as we have seen, significant problems may arise for those subject to the law. Indeed, the legislation or regulations may be modified in ways wholly unanticipated by Parliament or the responsible minister or it may effectively be nullified. In spite of this, the traditional judicial approach to discretion in enforcement has been to allow virtually unlimited latitude to administrators and prosecutors.6

III. The Traditional Approach Reconsidered

In the traditional, pre-Charter Anglo-Canadian approach to the discretion of officials to prosecute in criminal cases, the courts have jurisdiction and can order officials to prosecute in order to uphold the law. On the other hand, prosecutors have wide discretion to decline prosecution of individual cases or even whole classes of cases. There have been very few attempts to enforce the duty to prosecute, perhaps because in nearly every situation the discretion of officials to decline prosecution has been upheld. The traditional approach is derived largely from case law; legislation regarding prosecutorial discretion has either codified the case law or, by virtue of its silence, approved the status quo.8

Two British cases provide a clear statement of the traditional approach to prosecutorial discretion. The cases are particularly striking because in

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6. While this paper is essentially analytical, there is some descriptive literature which suggests that a serious substantive problem of uneven enforcement results from uncontrolled prosecutorial and administrative discretion. See generally: "Compliance with Federal Statutes: A Draft Information Paper", (Unpublished) Department of Justice, Ottawa, 1984, which describes considerable disparity in the enforcement of federal legislation, particularly at pages 5-13. The Aeronautics Act, R.S.C. 1970, c. A-3, and its regulations are one example cited at p.11, though the paper is essentially an overview. See also A. Sanders "Prosecution Decisions and the Attorney General's Guidelines", 1985 Crim.L.Rev., at p.4, which documents very considerable disparity in handling various enforcement situations by the police in Britain. Disparity in treatment is related to geography (rural v. urban), class, race, and sex.

While there has been, rightly, a call for more work in Canada on the actual facts of disparity in enforcement, such work is by its very nature difficult to undertake because so many decisions are made informally and at a relatively low level. Experience in the Canadian federal context suggests that such work can be undertaken most easily only with the full cooperation of the administrators themselves.

7. We are indebted to Donna Morgan for her excellent examination of this area: "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of the Charter" (1987), 29 Crim. Law Q. 15, in which she describes the traditional approach to unfettered discretion, and the potential for abuse of power which this approach fosters when prosecutorial action is insulated from judicial review.

8. By virtue of their silence, both the Judicial Review Procedure Act, R.S.O. 1980, c.224, and the Federal Court Act, R.S.C. 1970, c.10, are consistent with the traditional approach.
both the courts acknowledge that the decision of the prosecutor not to enforce can and does annul the effect of the legislation in question. The *Ex Parte Blackburn* cases involved the decision of officials not to prosecute cases arising under the gaming laws in 1968 and under the pornography laws in 1973. In both cases, the Court of Appeal affirmed the jurisdiction of the courts over prosecutorial discretion and suggested that there is a legal remedy in a writ of *mandamus* to order an official to prosecute. Similarly, the court in both cases found that the officials responsible for prosecutions are under a duty to prosecute in order to uphold the law. However, the court also held in both cases that there is a discretion to decline to prosecute for a wide variety of reasons. As a result, it respected the discretion of the officials in question in each of the cases and declined to order prosecutions.

While these two cases provide a useful statement of the law as it has been understood by the courts, the reasoning that lies behind it is not so clear. For example, there is no guidance in either judgment as to when a *mandamus* would be granted. In the pornography case, there was no explanation of why the Court of Appeal declined to grant the writ. In the first *Blackburn* case the court did explore the nature of ministerial control over the prosecutor in the specific situation under consideration. It found that there was no direct political control and that if control existed it was indirect through the power of dismissal or the budgetary process. Leaving aside the accuracy of this finding, it is somewhat surprising that the court did not link this discussion to its decision not to control prosecutorial discretion.

The two *Blackburn* cases are similar to most pre-Charter Canadian decisions on prosecutorial discretion in several ways. First, the courts in Canada as in Britain assert jurisdiction over this discretion. Further, the courts in both countries suggest that there is a legal duty to enforce the law and that prosecutors could be enjoined to enforce, either because failing to do so would be a breach of that duty or because they might abuse their discretion in other ways. In the final analysis, however, in both countries it is difficult to find any case where a court has, in fact, controlled the discretion to prosecute by actually enjoining a prosecutor.

Administrative discretion to enforce regulations or legislation has been classified and treated differently from prosecutorial discretion. However, the actual outcomes and problems that result from uncontrolled
administrative discretion are similar. Before turning to a closer examination of the problems which arise from uncontrolled discretion in enforcement,\textsuperscript{11} it may first be useful to review briefly the traditional, pre-

Charter Canadian approach to administrative enforcement.

In \textit{Harcourt v. Minister of Transport},\textsuperscript{12} the trial division of the Federal Court held that it would not substitute its judgment for that of the officials concerned so long as they acted reasonably in reaching their decision not to prosecute. This traditional administrative law doctrine was reaffirmed by the Supreme Court shortly after \textit{Harcourt} in a 1975 decision of Dickson J. (as he then was):

There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions in any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. \textit{But if the Board acts in good faith and its decisions can be rationally supported on a construction which the relevant language may reasonably be considered to bear, then the Court will not intervene.} (emphasis added)\textsuperscript{13}

The result of the application of this doctrine to administrative discretion in enforcement is that courts will rarely interfere with the discretion. Hence, administrators are free to exercise their discretion to prosecute in virtual disregard of the surrounding circumstances.

While the courts and legal commentators have put forward explanations for this traditional approach to administrative discretion, few attempts have been made to explain the special issues which relate to the discretion to prosecute. Yet these special issues are quite similar, whether the discretion to enforce is being exercised by prosecutors or administrators.

When a court is faced with issuing a writ of \textit{mandamus} which orders officials to prosecute in a particular action or class of actions a supervisory problem arises. The court is faced with having to supervise or to manage the activities of the official(s) it has placed under court order. This is a particularly difficult and complex undertaking in the context of an order to prosecute since it could involve, at least indirectly, all the

\textsuperscript{11} It should be understood that what we term "uncontrolled discretion" is actually discretion that is subject neither to political nor judicial control; there may, of course, be internal bureaucratic control being exercised but the exact nature of that control is difficult to ascertain. It is possible that such control is reasonable and it may even accord with Charter limitations; but if it is not subject to some external scrutiny, one is left to take it in faith that Charter limits are observed.


necessary activities that go into bringing the case to trial. Moreover, such an undertaking could involve the expenditure of considerable sums of public monies and the reordering of budgetary priorities. While it is evident that the problems of supervision in such circumstances are formidable, it is the political issues which probably have been decisive for the courts.

Perhaps the single most persuasive consideration that has kept courts from interfering with administrative and prosecutorial decisions regarding enforcement of the law or regulatory regimes has been that the officials exercising discretion were thought to be directly or indirectly subject to political control. Since administrative discretion in enforcement could be controlled by Ministers or other responsible politicians, judicial intervention need extend, with certain exceptions, only to the control of quasi-judicial bodies which are not directly subject to political control. This argument was persuasive, even convincing, in Britain and Canada when ministerial supervision of officials was more reality than myth and in the absence of constitutionally entrenched rights to equality and fairness.\textsuperscript{14} Changed legal circumstances combined with accumulated experience suggest that a reconsideration of the traditional Anglo-Canadian approach to administrative discretion is timely and may be necessary in view of the requirements of the Charter. Unfortunately, the traditional approach remains highly influential and it may be difficult to develop meaningful judicial standards to control the discretion of prosecutors and administrators in enforcing the law.

There is today a real need to develop a new judicial approach to controlling discretion in enforcement, whether prosecutorial or administrative. The most important reason to enhance judicial control of discretion in enforcement is rooted in the fact that the way the law is enforced shapes the reality of the law for those subject to it. That the approach to enforcement taken by officials can have the effect of annulling the law and changing regulatory standards and that serious unfairness and inequality in treatment result, should constitute a most persuasive argument for enhanced judicial supervision. There are, however, other reasons to develop a new judicial approach to discretion in enforcement.

First, while the concept of ministerial responsibility remains the most salient means of assigning responsibility in a parliamentary system, the routine decisions of officials regarding enforcement are, in fact, rarely

\textsuperscript{14} Now that both officials and their ministers are subject to Charter limitations with respect to their decision-making powers, direct judicial supervision of officials' discretionary power seems to be less of a break with the tradition of parliamentary government than has previously been argued. \textit{See Operation Dismantle Inc. v. R.}, infra, note 46.
supervised by ministers or other elected officials. The administrative apparatus in virtually all Western democracies has become so large and complex that it is nearly impossible for ministers to be aware of individual actions. Moreover, there are few effective policies to govern administrative discretion in enforcement. Even if more of such policies were developed, they would still be implemented without close ministerial supervision. While ministerial involvement does still exist in terms of political responsibility, actual supervisory control has passed to officials except in unusual circumstances.

Another reason why judicial standards should now exert real control over prosecutorial and administrative discretion in enforcement is that there is no other way to assure that Charter-based protection can be meaningfully provided to those entitled to it. The legal system must provide such protection if citizens are to believe that the law as they experience and perceive it meets the standards of fairness and equality set down in the Charter. A retreat from reality into formalistic legal fiction would render a most important aspect of Charter protection moot. It should be recognized that if the courts are actually to provide for fundamental fairness and equality then it is inevitable that prosecutorial and administrative discretion in enforcement will have to be judicially limited and structured.

If Canadian courts are to undertake the difficult task of structuring official discretion in enforcement in order to assure more equal and fair treatment of those subject to the law, they must be persuaded that without their intervention a significant aspect of equal protection will be lost. The courts must, in addition, be convinced that a workable standard can be developed that would, at once, structure the discretion of officials in a way that would provide fair and substantially equal treatment, while allowing sufficient discretion to permit variation where this is equitable and to provide for a reasonable measure of administrative flexibility. This paper will later address Canadian Charter-based arguments to structure discretion in enforcement in order to provide for greater fairness and equality of treatment in enforcement. First, however, it may be useful to discuss the American experience with prosecutorial and administrative discretion in enforcement in order to ascertain if their approach to this problem can offer any insights that may be relevant to our situation in Canada.

16. It has been argued that perhaps the most important function of a charter of rights is to influence the values and expectations of citizens. For a discussion and defence of this argument, see Alan C. Cairns, "Comment on 'Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation'", C.J.P.S. 1986 vol. 19:3, at 521.
IV. The American Approach

The American approach to both prosecutorial and administrative discretion in enforcement has been characterized by even greater judicial reluctance to interfere than that demonstrated by Anglo-Canadian courts. From the earliest cases to the most recent, the United States Supreme Court has consistently held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." In fact, in several cases where mandamus was being sought to force prosecution by a United States Attorney, courts have held that they do not have jurisdiction to interfere.

This approach to prosecutorial discretion is somewhat surprising given legislation which states that "Each United States Attorney, within his district, shall prosecute for all offences. . ." (emphasis added). In fact, the statute is commonly interpreted to mean that an Attorney may prosecute for some offences. While it would appear on first glance that the legislation would support those who wish to bring suits in mandamus against the Attorney General to compel that official to take an action, in practice this has not been the case. The reason can be traced to the 1868 Supreme Court decision in the Confiscation Cases. Although they did not involve a prosecution, the Court nevertheless took the opportunity in obiter dicta to interpret the U.S. Attorney's statute as conferring an absolute discretionary rather than imperative power. The Court stated:

Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a nolle prosequi at any time before the jury is empanelled for the trial of the case, except where it is otherwise provided in some act of Congress.

This "hands-off" approach to prosecutorial discretion has come under some criticism from within the American judiciary, as exemplified by the 1956 Supreme Court decision in Berra v. U.S. In that case, Black and Douglas JJ. argued in dissent that prosecutorial discretion was too broad, especially when it "challenges our concept that all people must be treated alike under the law. This principle means that no different or higher

21. 19 L.Ed. 196, 7 Wall. (74 U.S.) 454 (1868).
22. Id., 7 Wall. (74 U.S.) 454, at 457.
punishment should be imposed upon one than another if the offence and circumstances are the same.”

The case involved the discretion of the prosecutor to choose either a felony or misdemeanor prosecution under identical facts. At trial, the judge denied the jury the opportunity to hear and to make a choice between the two violations and it was on this basis that the case was appealed. Despite the dissent by Black and Douglas JJ., the practice of permitting virtually unfettered discretion to prosecutors has continued.

The American approach to administrative discretion in enforcement has been marked by this same reluctance by the courts to interfere. However, the reasoning in such cases has been somewhat different in that the courts have at least asserted their jurisdiction to review. Two striking illustrations of the way American courts have treated administrative discretion to enforce are Mooq Industries v. F.T.C. (1958) and F.T.C. v. Universal-Rundle Corp. (1967). In both these cases, the Federal Trade Commission brought a prosecution against one company for a trade practice that was industry wide. The prosecuted companies sought stays of prosecution until cases could be brought against the rest of the violators in the industry arguing that otherwise they would be put out of business. In both cases, the Supreme Court permitted the administrator unfettered discretion stating in Universal-Rundle that:

> Even if a petitioner succeed(s) in demonstrating to the Commission that all of its competitors were engaged in illegal price discrimination practices identical to its own, and that enforcement of an order might cause it substantial financial injury the Commission would not necessarily be delayed to withhold enforcement of the order.

There are few indications in the cases why the U.S. Supreme Court, which has been boldly creative and interventionist is no many situations, has taken such a narrow approach on the issue of prosecutorial or administrative discretion in enforcement. There are probably two reasons for the Court's reluctance to intervene in these situations.

First, according to K.C. Davis, legal thinking in the United States is unable to conceive of a reasonable alternative that would allow justice to be rendered on an individualized basis other than by broad discretion in enforcement. Davis also believes that the courts and legal commentators in the United States are concerned about how to deal with essentially symbolic legislation that is too strict to be enforced without a great deal

24. *Id.*, at 140 (U.S.), 691 (S.Ct.).
27. *Id.*, at 251 (U.S.), 1627 (S.Ct.).
of leeway as provided by administrative or prosecutorial discretion.\textsuperscript{29} Davis has led the recent academic challenge to the traditional American approach to discretion in enforcement. His works have provided alternative models, drawn from the experiences of other countries, and he asserts that the American approach may be the least satisfactory of all.\textsuperscript{30}

A second concern of the U.S. Supreme Court in this matter is with the interference with the division of powers which would arise if the judiciary were to control the executive’s power of discretion. This reason was cited as being decisive in several cases.\textsuperscript{31} The Court has, however, on many occasions put limitations on how the executive may undertake its activities, and has not shied away from holding state and federal legislation to be unconstitutional. The argument that the division of powers in and of itself precludes any judicial control of discretion in enforcement is somewhat strange since the entire subject of administrative law involves nothing more than constraining, shaping, and controlling executive and legislative power.

It is both surprising and disturbing that the American courts have not been more active and innovative on this subject. Despite being in the home of legal realism,\textsuperscript{32} the courts in the United States have steadfastly refused to consider the actual outcomes that have followed from the exercise of discretion. Instead, they have taken what can only be described as a formalistic approach which denies or ignores the actual effects that enforcement decisions have on those who are actually subject to the law.

The abuses of process which have resulted from this approach are well documented by Davis and others.\textsuperscript{33} However, the public cynicism and distrust that may be engendered by this failure by the judiciary to supervise the administration of justice cannot be adequately documented; these are the serious hidden costs of unstructured and arbitrary discretion.

\textsuperscript{29} See Edelman, \textit{The Symbolic Uses of Politics}, supra, note 2.
\textsuperscript{30} Of the alternatives put forward by Davis in Part VII of his text, he cites the West German prosecuting system as a viable alternative to broad prosecutorial discretion in enforcement. See supra note 29, at 191-195.
\textsuperscript{32} The credo of the American legal realist movement is that the courts should address the actual effects of the legal process rather than continue to follow a mode of legal analysis which obscures the reality of that process as it is experienced by those engaged by it. The theory finds cogent expression in Llewellyn, \textit{Jurisprudence: Realism in Theory and Practice}, (1962).
\textsuperscript{33} See particularly Davis’ examination of unstructured discretion in the contexts of banking regulations, the United States Parole Board, and sentencing procedures in the United States, \textit{supra}, note 29, at 120-140.
In the final analysis, the American experience provides an illustration of what lies at the end of the wrong road.

V. The Post-Charter Canadian Approach

Prior to 1982, the Canadian approach to administrative and prosecutorial discretion was consistent with the traditional British approach, as stated in the *Ex Parte Blackburn* cases. As discussed above, the hallmark of this approach is that while the courts are willing to claim jurisdiction over the executive in matters concerning the exercise of a prosecutor's discretion in enforcement, they are unwilling to interfere with that discretion, even where this may result in a *de facto* annulment of the black letter law. A similar approach was taken regarding administrative discretion in enforcement.

The tolerance which this traditional approach showed for virtually unfettered discretion in enforcement by the executive remained unaffected by the coming into force of the *Canadian Bill of Rights* in 1960. The key reason why the *Bill of Rights* failed to effect any significant change in the courts' approach to reviewing discretion was that, as a statute, the *Bill of Rights* did not demonstrate any intent by Parliament to change the status quo. This principle was articulated by the Supreme Court of Canada in *R. v. Drybones*, The first and only case in which the Court held a section of a federal statute to be inoperative by virtue of its inconsistency with the *Bill of Rights*.

This judicial attitude to the *Bill of Rights* was echoed by the Court in the 1971 decision in *Smythe v. The Queen*. In that case, Fauteux C.J.C. held that the Attorney General's discretion in proceeding summarily or by way of indictment under s.137 of the *Income Tax Act* was absolute. The American constitutional guarantee of equality before the law had no effect on the Canadian interpretation of the equality provisions of the *Bill of Rights*, "notwithstanding any similarity of wording between the 14th Amendment of the Constitution of the United States of America and the relevant provisions of the Canadian Bill of Rights."

The basis of Fauteux C.J.C.'s finding was the proposition that it is an essential feature of our Anglo-Canadian concept of equality before the law that all individuals be subject to the same forces of executive power, even where that power is manifest in the Attorney General's absolute

discretion to elect the mode of a criminal prosecution. In other words, the equality which Fauteux recognized was the equality to be treated as the Attorney General so decided, even where that decision resulted in unequal treatment. It was from this stance that the Chief Justice concluded:

... I am unable to infer from the provisions of the Canadian Bill of Rights any suggestion that Parliament differed from that view or had any intention to depart so radically from that state of the law ... In brief, appellant's submission is potentially destructive of statutory ministerial discretion ... and tantamount to a recognition that Parliament has used an oblique method to paralyze the administration of the law.

Judicial acceptance of this interpretation of equality under the Bill of Rights, and particularly the approach allowing complete, unfettered discretion in enforcement, has remained unchanged for the last two decades. The spirit of the Bill of Rights was never fully realized because the courts consistently refused to interpret it in a broad, far-reaching manner.

Indeed, it was not until the coming into force of the Charter that a special, constitutional status was given to fundamental rights in Canada. In the present context, the key Charter provisions are section 15 on equal protection and treatment before the law and section 7 on fundamental fairness. In considering the legal impact of these sections, it is necessary to recognize the new and developing approaches taken by the Supreme Court in interpreting the Charter. From the Court's first decision under the Charter, Law Soc. of Upper Canada v. Skopinker, the court has made it clear that it will give a broad, purposive interpretation to fundamental, individual rights. The narrow approach taken with the Bill of Rights is to have no place under our new Constitution. As Estey J. wrote on behalf of the Court:

There are some simple but important considerations which guide a Court in construing the Charter, and which are more sharply focussed and discernible than in the case of the federal Bill of Rights. The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law.

Five months later the Chief Justice was to strengthen the claim that a new approach to the interpretation of rights must be taken under the Charter when he wrote:

42. Id., at 366 (S.C.R.), 200 (C.R.R.).
The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. *It is intended to constrain governmental action.* (emphasis added)

As broad and far-reaching as these expressions of the Charter's scope seemed to be, it was not until May, 1985 that the Court was finally to remove all doubt that all acts of government must comply with the requirements of the Charter as "the supreme law of Canada", whether they be authorized by royal prerogative or statute. The turning point can be found in the decision of the Court in the controversial case of *Operation Dismantle Inc. v. R.* The significance of this decision, both in terms of strengthening the power of the Court as well as reaffirming the primacy of the Charter, lies in the Court's assertion that even discretionary foreign policy decisions of Cabinet are subject to the review of and are limited by the Charter. Prior to this decision, a distinction had been implicitly drawn whereby orders-in-council derived from Cabinet's legislative authority were susceptible to judicial review, whereas those derived from Cabinet's sovereign, prerogative power were not. Wilson J. clearly scotched that distinction when she wrote:

> Since there is no reason in principle to distinguish between cabinet decisions pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also.

The effect of this decision can be compared to the famous *Marbury v. Madison* decision of the United States Supreme Court because it significantly broadened the class of government actions which fall under the Court's supervisory jurisdiction. *Operation Dismantle* goes even further than this landmark American case because it makes it clear that all aspects of legislative and executive decision-making must satisfy the requirements of the Charter, and that the Court has jurisdiction to strike down any executive action or law which is inconsistent with those requirements to the extent of its inconsistency.

Of particular relevance to this paper is the question of what effect the *Operation Dismantle* principle will have on the exercise of judicial control over administrative and prosecutorial discretion in enforcement.

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44. *Constitution Act, 1982*, Part I, s.52(1).
46. It should be noted that in a pre-Charter decision, the Supreme Court held that Cabinet decisions made by order-in-council are reviewable on grounds of procedural fairness: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
48. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).
It seems clear that, on the basis of the reasoning in *Operation Dismantle*, the Court can and will exercise some kind of judicial control over these types of discretion. It seems equally clear that the *Charter* applies to both prosecutorial and administrative decisions regarding enforcement. What remains unclear is whether the guarantees of equal protection and fundamental fairness will be applied by the courts to discretion in enforcement in a meaningful way. This question has yet to be addressed by the Supreme Court. Two lower court decisions, however, attest both to the complexity of the issue and to the difficulty the courts are having in applying the concepts of equal protection and fairness to an area traditionally untouched by meaningful judicial review.

The first case to address the effect of s.15 upon the prosecutorial discretion of the Attorney-General was *R. v. Kevork et al.* In that case, the Ontario High Court held that the discretionary power of the Attorney-General to elect the mode of prosecution does not violate s.15 because it does not affect similarly situated persons dissimilarly. Smith J. based his conclusion on the argument that any difference in treatment between alleged offenders must exist only because of the circumstances of each case, and this is not inequality *per se* because no two cases are the same. The issue of what degree of ‘sameness’ would be required in order to show a violation of s.15 was not addressed by the court. However, it held that “the absence of those standards does not render the act of the Attorney-General arbitrary”. The court demonstrated that it was content to follow the traditional doctrine that, so long as the decision was exercised ‘reasonably’ and not arbitrarily, there will not be sufficient grounds for review. The argument that no two cases are the same would nullify the equal protection guarantees of the Charter because under such reasoning they could never apply in any case.

This same conclusion was reached by the Ontario Court of Appeal the following year in *R. v. Ertel*. Following the finding in *Kevork* that “the purpose of s.15 is to require that those who are similarly situated be treated similarly”, the court in *Ertel* then attempted to reduce some of the uncertainty created by the adoption of this standard by establishing a three-step test for determining when s.15 has been violated. Unfortu-

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49. (1986), 20 C.R.R. 325.
50. *Id.*, at 335.
51. *Id*.
nately, this attempt to clarify the concept of being ‘similarly situated’, has in fact only added to the confusion surrounding s.15.54

The test posited by the court consists of first determining whether the impugned law treats the plaintiff differently from persons situated similarly to him. Parties are deemed to be similarly situated notwithstanding differences between them if those differences do not concern the impugned law’s purpose. According to this formulation, determining what the law’s purpose is will determine whether inequality has occurred. The absence of judicial standards by which to determine a law’s purpose has caused one commentator to note that “the similarly situated’ requirement is at bottom an empty concept”.55 It also requires the court to determine the purpose of a law, when there may be many purposes or none, depending on the law.

The second step in the Ertel test is equally vague. It requires the court to determine whether the different treatment suffered by the plaintiff amounts to an “inherent disadvantage”.56 The test is vague because the court offered no criteria by which to measure the claim of an inherent disadvantage. Furthermore, the onus of proof is on the plaintiff in making such a claim. The lack of guidance as to the meaning of this concept and the difficulty in determining the difference between a simple disadvantage and an inherent disadvantage, make this part of the test so vague as to be practically unusable.

The final step in the test is arguably the most unacceptable. It requires that a court not find ‘discrimination’ contrary to s.15 even in the presence of unequal treatment and inherent disadvantage unless a “fair minded person, weighing the purposes of the legislation against its effects. . .would conclude that the means adopted are unreasonable or unfair.”57 The key problem with this standard is that it again places an undue burden on the plaintiff asserting that he has suffered unequal treatment. By requiring proof that the impugned law is unreasonable, the Ertel test places on the shoulders of a plaintiff a burden normally attributed to the state under s.1. Furthermore, the Supreme Court has stated unequivocally that a s.1 analysis of legislative reasonableness and proportionality must only come after a Charter right has been violated, and not in the process of providing the violation in the first place.58

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54. M. Leopofsky and H. Schwartz have written an interesting case commentary on R. v. Ertel outlining a number of key problems with the standard developed in the Court of Appeal’s decision. See 67 Cnd. Bar Rev. 115.
55. Id., at 122.
Despite its deficiencies, the Ertel case illustrates the many complexities facing the courts in their quest for an acceptable standard by which to measure the reviewability of prosecutorial discretion under the Charter. While the test offered in the case is unacceptable for the reasons given, it is an example of how the courts are searching for a standard which strikes a balance between permitting the administrator/prosecutor to exercise reasonable discretion on the one hand and, on the other, requiring that discretion be subject to Charter limitation. It is to the formulation of a practical solution to the problem of unstructured discretion that we shall now turn.

VI. Toward a Remedy and a Judicial Standard

The general thrust of thinking about Canadian administrative law over the last decade has clearly been in favour of greater judicial deference to administrative action. Perhaps as a consequence of this deference, there has been increased concern to find non-judicial means to review administrative decisions. But the adoption of an entrenched Charter may have changed the legal landscape to such a degree that the traditional approach may not now be viable. From a political perspective, a constitutional Charter of Rights has created a more 'rights-oriented' society in which there is an ever greater concern with both equality and fairness. In such an atmosphere judicial deference to administrative action is less tenable. From a legal perspective, the Charter necessitates authoritative interpretations, especially of its more politically volatile sections. This interpretative function will remain one of great importance for the courts. It would seem to follow that the judiciary must also, at least ultimately, decide whether certain forms of administrative behaviour comply with its interpretation of the Charter. Even if it did not, escalating political demands for Charter-based rights will, in our view, ensure that the judiciary has both a central role in interpreting, and a final say in enjoining, compliance with the Charter. In short, it seems

59. We are endebted to K.C. Davis for his groundbreaking work, Discretionary Justice, supra, note 29, which has lead to our own recommendations.

60. This topic was discussed at a recent conference in Toronto which focused on developing trends in administrative legal theory and the viability of non-judicial mechanisms for reviewing administrative and prosecutorial action. “Law and Leviathan: The Administrative Law Challenge in the 1990’s” was sponsored by the Law Reform Commission of Canada and the Faculty of Law, University of Toronto, and took place September 29-30, 1988. The proceedings from this conference are expected to be published shortly by the University of Toronto Press.

61. Id. This thesis is closely examined by Alan Cairns in his paper, “The Nature of the Canadian Administrative State”, which he delivered at the conference. It is expected that this paper will be published with the proceedings of the conference.
to us inevitable that the courts will be driven to re-examine the degree of
deviance accorded to administrative decisions.

While the shortcomings of judicial review as a means of controlling
administrative actions are well known, it is difficult to see what other
institution could realistically supplant the courts. Even if such an
institution exists or were created, its view on the meaning of the Charter
and its applicability to administrative action would almost certainly be
subject to judicial review regardless.

With this in mind, we believe that judicial interpretation and
application of the Charter must become a key element in shaping
Charter-based limits to administrative action, particularly in the area of
administrative and prosecutorial discretion in enforcement. This may
necessitate a more innovative and creative approach to judicial review. In
considering a judicial standard to limit administrative and prosecutorial
discretion in enforcement, it may be worthwhile to recall briefly the three
principal concerns which arise from unchecked and unstructured
administrative or prosecutorial discretion.

First, the use of unstructured discretion to prosecute in order to
provide individualized justice, which some consider its most compelling
justification, may result in a denial of equal protection. Purely
individualized decisions almost always result in similarly situated people
being treated dissimilarly. A second concern is that it permits the
prosecutor or administrator to make de facto changes in laws or
regulations ranging from modification to outright annulment. What we
have termed de facto norms may thus be created without public
knowledge and in the absence of political scrutiny. The use of discretion
to modify or to annul legislation is justified as being necessary in order to
adapt the law to reality. Finally, unfettered discretion in enforcement has
traditionally been justified because decisions about enforcement are
considered to be either political in nature or administrative tasks that
require a particular type of expertise. Considered in either context,
decisions about enforcement are thought to involve non-judicial, perhaps
even non-legal, considerations. Hence, except in the rare circumstance of
clear and deliberate abuse, the courts should not interfere with discretion
in enforcement.

It may also be useful to consider the difference between a judicial
standard and one that might be used by an administrator or prosecutor.
A judicial standard must be applicable to many different situations, and
usable by diverse officials. Hence, it needs to be formulated in quite
general terms. In addition, a judicial standard must be formulated both
on the basis of Charter requirements and in a manner that takes account
of practical problems such as the difficulties involved when courts are
called on to supervise or manage complex tasks. Finally, a judicial standard should be clear in guiding officials with respect to how they should act. An administrative standard, in contrast, should be designed to meet the needs of a particular organization in any of a variety of ways and, where appropriate, must fit within the judicial standard.

Judicial standards are generally thought of as being developed gradually on a case by case basis. While some judicial standards have evolved in this manner, others have arisen in a leading case and persisted in much the same form thereafter. In considering prosecutorial and administrative discretion in enforcement, there are compelling reasons for the courts to lay down a comprehensive approach to such discretion in a single case. One reason is that, as is often the case in the common law, there may be considerable resistance to change from the inertia of tradition. The existence of inertia is exacerbated by the plain fact that few officials are willing to give up power, and discretion is power. Hence, the courts should provide a clear, comprehensive standard for discretion in enforcement. If necessary, the leading decision with its comprehensive standard can be modified over time in subsequent cases.

A final consideration relates to the Charter protections that are applicable to the problem of discretionary enforcement. Both sections 7 and 15 provide the basis for the formulation of a judicial standard to control prosecutorial and administrative discretion. Section 15 would be most useful for developing a judicial standard because the idea of treating similarly situated people the same is for most people easier to understand than the concept of fundamental fairness. The problem with basing a judicial standard on equal protection is that section 15 applies only to individuals and not to corporations or other legal persons. It would be difficult to formulate one standard for individuals, based on section 15, and another for corporations, based on some other section, probably section 7.

As is the case with section 15, there are both advantages and disadvantages to using section 7, the guarantee of fundamental fairness, as the basis of a judicial standard for limiting discretion in enforcement. Its main advantage is that it embraces both individuals and other legal persons so that any standard based on section 7 would be comprehensive in application. On the other hand, the idea of fairness, as a legal concept, may be viewed narrowly as applying only to procedure. Recent

decisions of the Supreme Court, however, would seem to indicate that the right to fundamental justice enshrined in section 7 includes a right to substantive fairness.  

Nevertheless, even procedural fairness may be seen to be applicable to the exercise of discretion in enforcement by officials and prosecutors. This becomes clearer when one considers the purposes of the doctrine of procedural fairness. From the perspective of the administrator or prosecutor bringing an action, procedural fairness requires that a particular structure or form be followed in reaching a decision. An official is thus bound to follow a process which is less haphazard and more structured than might otherwise be employed. This form of decision-making, it is argued, helps safeguard individual rights and may aid in reaching results that are substantively fair.

From the perspective of the person who will be subject to the decision, the purposes of procedural fairness are clearer. It assures, in general, that the person has the opportunity to make his case to the official. Perhaps more important, procedural fairness requires that an official's decision be as intelligible as possible to those subject to it. In essence, the official must come to his decision through a mode of reasoning that is more open than might otherwise be the case. Procedural fairness makes the decision-making process accessible, thereby establishing a crucial safeguard against arbitrary administrative action.

As noted, the idea of fairness may also have substantive content. If so, it is likely that substantive fairness will be found to include the idea of equality, and thus may overlap with and reinforce section 15.

Whether fundamental fairness is viewed from a procedural or substantive perspective, it would appear to limit the discretionary powers


66. For an interesting discussion of the philosophical implications of the legal concept of fairness, see Rodger Reehler, “The Concept of Fairness”, Fairness in Environmental and Social Impact Assessment Processes, E. Case, P. Finkle, and A. Lucas, eds. (Calgary: Canadian Institute of Resources Law, 1983), at I.

67. See Mullan, “Natural Justice”, supra note 64, at 24-27.

of officials and prosecutors. We therefore suggest that in developing a judicial standard, both sections 7 and 15 be used as its constitutional basis. In addition, we suggest that the courts enlarge the existing common law standard of reasonableness to include the idea of treating similar situations in the same way, thereby embracing aspects of both fairness and equal protection. Finally, we suggest that the courts confront the fact that any exercise of discretion in enforcement has the potential to circumvent legislation and regulations. Put another way, the courts should take account of the problems that arise when there is a significant gap between the black letter law and the actual behaviour of officials or prosecutors in exercising discretion in enforcement.

With these problems and considerations in mind, the following judicial standard is proposed:

In order to provide for fundamental fairness in the exercise of administrative and prosecutorial discretion in enforcement, persons in similar situations should be afforded similar treatment. In considering *Charter*-based challenges to the exercise of such discretion, the court will assume the *prima facie* presence of fundamental fairness and equality:

a) if the *de facto* standard enforced under the relevant statute or regulation is authorized by a written policy developed pursuant to a process which has provided for public notice and fair public discussion, and such policy has been approved by the responsible minister;

b) where individualized justice is being provided for by prosecutorial or administrative discretion in enforcement, such special treatment must be authorized by a specific, pre-existing policy developed pursuant to a process which includes public notice and public consultation, and which has been approved by the responsible minister; and

c) the administrator or prosecutor will be deemed to have made a reasonable distribution of resources to implement an enforcement strategy where such a distribution is based on a written, reasonable plan and is approved by the responsible minister.

This proposed judicial standard attempts to increase real ministerial responsibility while providing for fundamental fairness and equal protection in administrative and prosecutorial decisions regarding enforcement. The standard is framed to provide both procedural and substantive control of discretion in enforcement. If the procedural standard is met, the burden of proof to demonstrate a lack of fairness and/or equality must be carried by those who would challenge the acts
or omissions of an administrator or prosecutor. The substantive standard remains paramount as it must. However, the procedural standard serves two important functions. First, it determines who carries the burden of demonstrating that the substantive standard was or was not met. Second, the procedural standard provides administrators and prosecutors with fairly clear guidance on how they should behave in order to provide for fundamental fairness and equality.

The procedural part of the standard ensures that responsible politicians will be apprised of and must approve enforcement decisions that may cause *de facto* deviations from legislative and regulatory standards and that they approve policies which govern the provision of individualized justice. It is noteworthy that the procedural section which provides the widest latitude concerns the distribution of resources for enforcement (section c). It should be emphasized that in order to make the proposed standard flexible, there is no formal requirement to do what is specified in the three procedural sections; the administrator or prosecutor is obliged only to afford fundamental fairness and equality in a substantive sense. In fact, however, most departments that enforce regulatory regimes, and most attorneys-general, would use the procedural sections as a guide to incorporate fairness and equality into their discretionary enforcement decisions. The net result would likely be the development of comprehensive, public, ministerially approved policies that would structure discretion in enforcement.

It should be noted that the development of public policies regarding discretion would draw attention to certain realities relating to enforcement that have so far escaped close scrutiny. The relationship between the resources provided for enforcement and the strictness of that enforcement would become evident. Similarly, the anomaly caused by the gap between black letter law and the *de facto* norms that result from enforcement decisions would become clearer. The implications of opening up enforcement to public and political scrutiny will be explored below in the conclusion. Before examining these macro effects, however, it may be useful to consider how this standard would be put to use by defendants being prosecuted or complainants seeking *mandamus* orders directing administrators or prosecutors to take action under a regulation or statute.

The defendant in a criminal or quasi-criminal administrative action would use the failure of the Crown to provide him with fundamental fairness and/or equal protection in the exercise of its discretionary enforcement power to gain a stay of proceedings. This remedy would be useful to the defendant since, at least temporarily, it would block the action being brought against him. On the other hand, if the Crown could
provide evidence that it has met the Charter requirements of fundamental fairness and equality, then the action could proceed. The stoving of proceedings in such cases, as well as the general anticipation that the courts would stay subsequent proceedings if the requirements of the Charter are not met, would encourage both administrators and prosecutors alike to adopt policies which provide for fundamental fairness and equality. The procedural sections in the proposed standard would help them design such policies.

It is noteworthy that providing the remedy of a stay of proceedings does not involve the court in the supervisory problems that may have militated against judicial involvement in enforcement situations during the pre-Charter era. Indeed, the courts need take no part whatever in formulating the enforcement policies called for by the proposed standard but need only approve or disapprove of them as measured against the requirements of the Charter.

The situation is more complex when the enforcement problem consists in a complainant seeking a mandamus because of a lack of enforcement action. In such a situation, the judicial response would still be based on the proposed standard, but the remedy would be different. In a mandamus situation, the court could enjoin the Crown not to interfere with the action of a private citizen based on a statute or regulation. The court might also enjoin the Crown, in the person of a specific administrator or prosecutor, to produce any evidence in its possession which might assist a party undertaking a private prosecution. In effect, by enjoining the Crown in this way, the court would be able to enforce a Charter-based standard without becoming enbroiled in any of the supervisory problems associated with the resulting enforcement activities of the Crown. Those seeking a mandamus will, in all likelihood, be willing to undertake a private prosecution. Even if they are not, the court's order enjoining the Crown from interfering with private prosecutions would constitute an invitation to such actions.69

By the use of this proposed judicial Charter-based standard, in conjunction with the two remedies just described, the courts could both control discretion in enforcement and ensure that enforcement decisions are being taken pursuant to policies that are subject to public scrutiny and ministerial approval. This would have not only important legal effects but could have significant political implications for the drafting of future statutes and regulations.

The adoption of the proposed judicial standard would result in more open enforcement policies that would call attention to the gap between

the black letter law and actual enforcement practices. Since few politicians would want to be associated with a policy that results in a wide gap between law as it is written and the law as it is enforced, there would be a strong incentive to bring enforcement practices into line with the written law. In turn, this would necessitate more careful scrutiny of new regulations and statutes to ascertain whether they are, in fact, enforceable. Old regulations and statutes might have to be revised or possibly repealed, particularly where their standards were not designed with a view to actual enforcement. In short, the overall political effect of adopting such a standard would be to focus much more attention on the legislative and regulatory realities of the law. It would no longer be enough for legislators to consider what statutory or regulatory standard looked best; the question of what standard is reasonably enforceable would also have to be posed and answered.

VII. Conclusion: Law as Process

The challenge now facing the courts is to make the Charter real for Canadians. This can only be done by considering the actual impact of the law on those subject to it. As we have shown, the real effects of the law flow not only from statutes and regulations, but also from the decisions of those with the responsibility to enforce the law. If the Charter is to be meaningful to Canadians, judicial scrutiny must extend beyond the written word of the law to include the law in action. In short, the courts must view the law as a process which includes the decision whether or not to enforce.

The problem with this approach is clear: if the law is treated as a process that necessarily includes the decision whether or not to enforce, the courts will have embarked on a new and largely unexplored path. Indeed, should this step be taken regarding decisions about enforcement, could not the argument be extended to ask whether judges should also examine decisions regarding the award of discretionary benefits by officials? Deciding to scrutinize seriously discretionary decisions in terms of their effects could be for the courts the thin edge of the wedge.

The conundrum is that if the courts decline to scrutinize the exercise of discretion in terms of its actual effects, then the rights and freedoms guaranteed by the Charter will mean less to those entitled to them. More importantly, when judges decline to see that which is there in plain sight, the way it is experienced by those subject to the law, where will the blindness end? Ultimately, no one knows which is the more dangerous path: the one which engages the full reality of the law or the one which avoids it.