Chapter A

EQUALITY PAST AND FUTURE: THE RELATIONSHIP BETWEEN SECTION 15 OF THE CHARTER AND THE EQUALITY PROVISIONS IN THE CANADIAN BILL OF RIGHTS

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> "Equality is the great political issue of our time ... The demand for Equality obsesses all our political thought. We are not sure what it is ... but we are sure that whatever it is, we want it."1

Of all the provisions of the Canadian Charter of Rights and Freedoms,2 those concerned with equality rights are the most controversial and potentially intrusive: controversial, because we do not know that equality entails as a constitutional ideal, and intrusive, because virtually every issue that can arise under the Charter can be translated into an equality rights case.3 Indeed, the fact that governments were afforded a three-year grace period before the equality rights section came into force is ample testament to the controversial nature of equality.

A major theme that runs through the Charter cases already decided is the relationship between the jurisprudence elaborated under the Canadian Bill of Rights[4] and the demands of the Charter. The problem arises in an acute way whenever the Charter uses language identical to that found in the Bill of Rights. In such circumstances the courts are divided as to whether the interpretation developed under the Bill of Rights should continue to govern the meaning of the Charter provision.5 With respect to equality rights, the issue arises in a different way. In an important sense, the language used to define the equality rights set out in section 15 of the Charter was, in part, a response to the judicial interpretations of the equality clause of the Bill of Rights. The purpose of this paper is to analyze the extent to which those interpretations can assist us in our effort to give meaning to section 15 of the Charter.

I. THE RELEVANCE OF THE BILL OF RIGHTS

The text of section 15 must be understood as the end product of a process which began with the Bill of Rights. Section 1(b) referred to equality before the law and the protection of the law. The original draft of section 15 spoke in terms of equality before the law and the equal protection of the law, and listed a number of grounds on the basis of which discrimination was enjoined.6 In response to a large number of representations before the special Joint Committee of The Senate and House of Commons, the language of section 15 was changed to include the concepts of equality under the law and the equal benefit of the law.7 In addition, the list of prohibited grounds was expanded by the inclusion of mental and physical disability.

Two points seem clearly established by the legislative history of section 15. First, the language used to define the equality rights in section 15 was designed to repudiate some of the restrictive judicial interpretations of section 1(b) of the Canadian Bill of Rights. Second, the language was intended to make both the content of law and its manner of administration subject to the demands of equality.

Beginning with the latter point, the legislative history enables us to specify the three contexts within which claims to equality will arise. The first is where the law classifies on a certain basis and that classification is challenged as violating equality rights. Such a challenge is to the content of the law and the allegation is that there is de jure discrimination in the law. The second is a challenge to the administration of the law. The claim is not that the content of the law is discriminatory, but that it has been applied in a discriminatory fashion. The third context is a challenge to the operation of the law. Neither the content of the law nor the manner in which it has been deliberately administered is being challenged; the law appears unobjectionable on its face and it is being applied fairly according to its terms. Nevertheless, a particular group fails to benefit from the law (or is burdened by it) to a degree disproportionate to what one might expect given the proportion of the general population that such a group represents. This situation may be described as de facto, systemic or constructive discrimination. I will return to these three contexts at a later point in this paper.

The legislative history also reveals that section 15 was drafted with a view to overcoming some of the conceptions of equality elaborated under the Bill of Rights, conceptions of equality that reflected the courts' general discomfort with its role under the Bill of Rights.[8] It appears as if there were two specific decisions that were thought to be particularly important to repudiate. The first was the decision in A.G. Can. v. Lavell[9] where a majority of the Supreme Court upheld those provisions of the Indian Act[10] that disenfranchised a native woman who married a non-native man. Adapting Dicey's notion of the Rule of Law, Mr. Justice Ritchie stated that equality before the law was satisfied as long as there was equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land. This was interpreted by some to have meant that legislation could not be challenged on the basis of its content.[11] The phrase "equal under the law" was chosen with this interpretation in mind.

The second decision to which the language of section 15 was directed was Bliss v. A.G. Can.,[12] where the Supreme Court upheld those provisions of the Unemployment Insurance Act[13] that denied "ordinary benefits" to women who left work because of pregnancy. The case has been viewed as implying that the provision of government benefits was somehow immune from challenges under

section 1(b). The phrase "equal benefit of the law" was a response to this aspect of the decision.[14]

It would be wrong, however, to assume that every decision or doctrine developed under the Bill of Rights was rejected in the drafting of section 15. At least two conceptions of equality still appear to be viable in the sense that there is no evidence that they were repudiated by the drafters. Moreover, there is a third conception of equality that, although clearly rejected by the Supreme Court in The Queen v. Drybones,[15] remains a relevant conception of equality in certain contexts. I begin with this latter point.

In Regina v. Gonzales,[16] Mr. Justice Tysoe of the British Columbia Court of Appeal defined equality before the law as "a right to every person to whom a particular law relates or extends, no matter what may be a person's race, national origin, colour, religion or sex, to stand on an equal footing with every other person to whom that particular law relates or extends...."[17] The same construction was placed on the equal protection clause of the Fourteenth Amendment by the United States Supreme Court in Powell v. Pennsylvania,[18] when it wrote that equal protection was not violated so long as the law "place[d] under the same restrictions, and subject[ed] to like penalties and burdens, all who ... [were] embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same [regulated activities]".[19]

This "test" was ultimately rejected by both the Supreme Court of Canada and its American counterpart. This is best exemplified by Mr. Justice Ritchie's remarks in Drybones, which note that "the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members to "equality before the law", so long as all the other members are being discriminated against in the same way".[20] Thus, as a test directed at the content of a given law, this formulation is clearly inadequate. Note, however, that a law may be challenged not only on the basis of its content, but on the basis of how it has been administered or applied. In such cases, this conception of equality remains both relevant and necessary. In the search for the meaning of equality, the bench and bar must not forget that different considerations become relevant depending on the nature and context of the challenge under the Charter.

Two other conceptions of equality elaborated under the Bill of Rights remain viable starting points in interpreting the Charter. The first emerged from the Drybones decision, where Mr. Justice Ritchie stated that an individual is denied equality where it is made an offence, on account of his race, for him to do something that others are free to do. In my view, the essence of Drybones consists in its rejection of the stigma that the law placed upon native people by virtue of their race. By

legislating on the basis of a stereotypical image of native people, Parliament treated a whole class as if they were inherently less worthy than the rest of society. This notion of stigma is important in understanding the demands of section 15.

The second conception of equality that remains helpful was offered in the concurring opinion of Mr. Justice McIntyre in MacKay v. R.[21] In upholding those provisions of the National Defence Act[22] authorizing the trial by service tribunals of military personnel charged with offences under the Narcotic Control Act,[23] Mr. Justice McIntyre offered the following interpretation of the "valid federal object" test.

> [As] a minimum it would be necessary to inquire whether an inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective.[24]

This makes it clear that the demand of equality is that it compels government to justify the ways in which it treats people differently. The essence of his approach is that legislative criteria must not only be relevant to the purposes served by the law, but that they must not have been chosen out of a desire to burden a group because of prejudice against that group.

Both Drybones and MacKay are incomplete formulations of equality -- Drybones, because no attempt was made to evaluate the justifications for the law and MacKay, because the test offers insufficient guidance as to how closely related the means and ends must be.[25] Nevertheless, these cases suggest that two values served by equality are legislative rationality and an injunction against stigmatization by the state on the basis of a stereotype of the group burdened. How might these considerations assist us in construing section 15 of the Charter?

II. CONSTRUCTING A CONCEPTION OF EQUALITY

The text of section 15 lists a number of grounds upon which discrimination is presumptively enjoined. But the text makes it clear that other grounds of discrimination will attract judicial review.[26] Moreover, it is clear that not every distinction, whether based on an enumerated or nonenumerated ground, will be struck down. Whether we view this as turning on the application of section 1 or being part of the analysis within section 15 itself, it is clear that some inequalities will (and should) withstand judicial scrutiny.[27] It would therefore appear necessary to have some general conception of equality rights to

which we might refer in analyzing specific problems that are likely to arise under section 15.

The purpose of this section is to suggest a way of developing a conception of equality out of both the text and the legislative history of section 15, and to use such a conception to suggest a way for lawyers and judges to analyze claims based on both the grounds enumerated in section 15 and on other grounds not enumerated.

I begin with the question: what conception of equality is presupposed by the fact that certain grounds were listed explicitly in section 15? One approach might be to invoke the idea that in the great run of cases, inequalities in law will be justified so long as the basis of classification is related to a legitimate governmental purpose. This was one theme that emerged from Mr. Justice McIntyre's reformulation of the valid federal objective test, and as such, one might try to explain the grounds listed in terms of their presumptive irrelevance to legitimate governmental purposes. Indeed, at least one American judge has argued that all of equal protection doctrine may be understood in terms of relevance.[28]

The difficulty is that not all the listed grounds appear to be irrelevant to legitimate governmental purposes. Age is a relevant criterion regarding a variety of legitimate governmental ends, as reflected in the fact that age discrimination attracts minimal scrutiny in American jurisprudence.[29] Nor can the concept of relevance explain the presence of other criteria, even those where the claim of irrelevance is (today) most accepted. Race is a legitimate legislative criterion, at least with respect to certain issues pertaining to native people. Religion is relevant to the question of denominational schools. Gender is relevant as regards the child-bearing capacities of women and the special measures that equality for women demand.

It is tempting to introduce the distinction between benefits and burdens to account for the apparent relevance of these criteria. Factors of race, gender and religion may be relevant to the provision of special benefits but not to the allocation of special burdens. But if we push the analysis, it turns out to demand consideration of factors beyond relevance. Whereas a law may benefit a person on account of his or her membership in a group defined by one of the factors listed, it will necessarily deny that benefit to someone on account of their lack of membership within that group. Given the "equal benefit" clause in section 15, we cannot assert that this raises no constitutional issue. Moreover, certain benefits may be bestowed by imposing a corresponding burden on some individual outside the group benefitted, as would be the case with a quota based affirmative action programme.

The key is to invoke the idea of stigma that underlies the decision in Drybones. When a majority burdens a minority by

invoking a stereotype of their capabilities and worth, it stigmatizes that minority as inherently inferior. The same is not true when a majority burdens itself to bestow benefits on a minority group. To be sure, those benefits may be a product of an objectionable stereotype of the group benefitted, and one could talk coherently of such a minority group being stigmatized by such a plan. Nevertheless, the majority group is not stigmatizing itself by providing such benefits. A member of the majority group, deprived of a benefit or subject to a burden, cannot complain of being stigmatized by the inequality.

Even if it were the case that all of the enumerated grounds could be explained in terms of relevance, why should we assume that legislation will deploy irrelevant criteria? In other words, why assume that the legislature will act irrationally? The beginning of the answer is to appreciate that, as a matter of history, the groups defined by the criteria listed in section 15 have suffered at the hands of intolerant legislative majorities. This certainly explains groups defined by race, national or ethnic origin, colour, religion and sex. What characterizes the unequal treatment to which these groups were subjected was the judgment that they were not capable or worthy of the same measure of respect that others in society enjoyed. The same holds true for age discrimination and discrimination on the basis of physical or mental handicap. Even though societal attitudes are evolving, our laws and social practices continue to reflect very categorical judgments concerning the rights and opportunities due to individuals and groups defined by these criteria.

But the question still remains. If our societal attitudes have changed sufficiently to explain the inclusion of these grounds in section 15, why do we assume that legislators will not share those enlightened views? Again, why do we assume that they will act irrationally?

The answer to this question suggests an additional factor that might explain the grounds listed. The idea is that rational legislators will seek to maximize the political return for their actions and as such, will be inclined to benefit those whose votes or support count politically at the expense of those who are politically less important. Especially where the legislature is composed of persons who themselves would tend not to be burdened by such measures, a legislature acts rationally by burdening politically powerless groups. An analysis of the grounds enumerated in section 15 might suggest that many of the groups defined by those criteria fall into the category of the relatively politically powerless.[30]

One final element can be introduced here. Most of the grounds listed in section 15 are matters over which the individual has no control whatsoever. The only apparent exceptions are religion and, for a very small number of people, gender. This suggests that the listed grounds reflect two kinds of judgments. First, legislative burdens ought not to be allocated on the basis of

criteria over which no one has control and second, that burdens should not fall on individuals because they have exercised choices that the Constitution itself grants to them.

Summarizing the argument to this point, I have developed a set of factors that help make sense out of the grounds listed in section 15 and which are consistent with those conceptions of equality developed under the Canadian Bill of Rights that appear to remain viable under section 15. The first was the plausible relevance of a ground to a legitimate governmental end. The second concerned historical patterns of discrimination against various groups, understood to involve the stigmatization of those groups as inherently unworthy of equal treatment. The third concerned the relative lack of political power enjoyed by various groups defined in section 15, suggesting the possibility that their interests might have been bargained away in the log-rolling that characterizes modern interest-group politics. The fourth factor concerned those aspects of personhood either beyond one's control, or within that sphere where the Constitution protects the choices to be made. These factors suggest a set of reasons that should not be deemed acceptable as justifications for inequality.

The basic reason that should not count in justification would be a legislative judgment that an individual is not worthy of respect by virtue of his or her membership in the class defined by the legislative criteria.31 A related reason that should be deemed unacceptable would be a judgment that an individual or group is pursuing a life-style or life-plan that is unacceptable to the majority's conception of the good life. This is not to say that the law cannot protect against actual harm caused by such life-styles or plans. It is to argue that the idea of the individual presupposed by the idea of equality places limits on the kind of harm that can be suppressed legitimately. What should be rejected as a justification for inequality is a judgment that the life-style or life-plan is to be suppressed not because of actual harm to a societal interest deserving of protection, but because it offends the majority's conception of how others should lead their lives. The idea of equality makes no sense if it does not provide some basis for allowing individuals to pursue their own conceptions of "the good" with the acquiescence, if not the encouragement, of the state.

Finally, a judgment that an individual or group has been denied that minimum measure of respect is not necessarily the same as a judgment that a group lacks the capacity to avail themselves of an opportunity regulated by law. Legislation can legitimately determine that certain opportunities be withheld from certain groups, as it does when it denies the right to vote to three year olds. What government must do is defend its assumption of incapacity as empirically accurate. Moreover, in cases of factual uncertainty, equality rights might require legislation to make room for individuals to demonstrate that the assumptions of incapacity do not apply to them. In other words, depending on

the strength of the factual premises underlying the assumption of incapacity, government may or may not be entitled to legislate in terms of per se rules.

III. DISCRIMINATION ON NONENUMERATED GROUNDS AND THE STANDARD OF REVIEW

These considerations suggest a way that courts might approach claims of discrimination on nonenumerated grounds. In my view, the court should assess the extent to which the criterion used in the legislation is analogous to the grounds listed in section 15. The basis for drawing analogies will be the factors that we derived from the listed grounds. To the extent that the criterion is analogous, the court ought to be prepared to scrutinize carefully the reasons offered in justification. What the court should be looking for is evidence that the law was animated by an unjustified stereotype or reflects the kinds of judgments that I have suggested are inadmissible to justify inequality. To the extent that the criterion is not analogous to the grounds enumerated in section 15, the court ought to be more willing to accept the legislative distinction. This is because there is less reason to fear that the law had been enacted for an improper purpose. Even here, the court must insist that the purpose be legitimate, and that the law was not animated by improper considerations of the inherent unworth of the group burdened.

What kinds of nonenumerated grounds might attract a degree of judicial scrutiny analogous to that imposed on classifications based on enumerated grounds? One set of cases would be where the law burdens an individual or group because of the exercise of a choice that the Constitution itself allocates to the individual.[32] Another set of cases will be where the legislative criterion is analogous to the grounds listed in section 15 in the sense that there is an attenuated sense of relevance between the classification and legitimate governmental purposes, a history of discrimination and a sense that the law appears to be preferring one type of life-plan to another for no other reason than that the majority finds that life-plan intrinsically unworthy. This might include discrimination on the basis of marital status and discrimination on the ground of sexual preference.

An interesting question arises with respect to discrimination on the basis of language. How the courts analyze this situation will reveal a great deal about how they conceive of the Charter generally. If the focus is on analogies with the grounds listed, such discrimination might be viewed with considerable suspicion. At the same time, the language rights guarantees in the Constitution are fairly specific in their contexts. If the courts read the language rights provisions as specific codes of entitlement, then discrimination on the basis of language outside those contexts might not be looked upon with any great suspicion.

It only remains to connect this analysis with the question of the standard(s) of review. In general terms, the standard of review applied in any given case must be rigorous enough so that any improper considerations underlying the impugned law will be brought to light.33 At the same time it should be sufficiently flexible to allow the question of justification to be addressed in a full way. For these reasons I continue to believe that something akin to the American standard of intermediate scrutiny is the appropriate standard for all claims of inequality under section 15. This is not to say that there ought to be no difference between cases of discrimination on enumerated and nonenumerated grounds, but the difference will be seen not in the standard of review but in the extent of the courts' willingness to tolerate some "misfit" between ends and means.

In cases of discrimination on an enumerated ground, or on a nonenumerated ground which can be seen as analogous to an enumerated ground, the court should ask if the legislative classification is necessary to achieve an important government purpose. If there is another way for the purpose of the law to be achieved, courts should insist that the legislation be redrafted. In cases based on nonenumerated grounds not analogous to those enumerated, the court should be prepared to tolerate a greater degree of misfit between the means and the ends. In all cases the focus should be on the quality of the reasons offered in justification, not on the automatic application of tests (like strict or minimal scrutiny) that once chosen, virtually dictate the result.

So far I have discussed these issues in the context of challenges to the content of legislation, arguing that in a considerable number of cases, courts ought to approach discrimination on nonenumerated grounds in a manner similar to that for discrimination on enumerated grounds. How should the courts approach the issue when it arises in connection with challenges to either the administration or the operation of law?

Challenges to the administration of law can be broken down into two categories. The first is where a law sets out certain conditions for its application, these conditions being unobjectionable from a constitutional point of view. A person appears to fulfill the conditions of the law, but is denied the benefit because he is a member of a certain class, that class being nowhere mentioned in the law. Should the judicial analysis be different depending on whether the group is defined by criteria enumerated or not enumerated in section 15? In both cases the law is being applied in a manner inconsistent with its terms. It is not clear that the judicial analysis should be different if the individual is denied a benefit because he is homosexual as opposed to belonging to a particular ethnic group. To be sure, one can (and should) argue that in a case of discrimination on an enumerated ground, the person administering the law is "on notice" that these grounds are not permissible, so that the onus would shift immediately to him or her to justify

the use of such a criterion. In the case of discrimination on a nonenumerated ground, no such explicit notice has been given. Nonetheless, once the applicant demonstrates that the law has not been applied according to its terms, the onus would still shift to the person applying the law to justify his or her actions.

The harder case is where a wide discretion is bestowed upon an official in administering a law. If the official uses race or sexual preference as a criterion for the exercise of that discretion, should the courts treat the two cases in a different way? Here the argument about "notice" is stronger; section 15 demands that the enumerated grounds not be used to pattern the exercise of official discretion. Respecting nonenumerated grounds, the official has not been put on notice. In such cases, the court should refer to the two basic values served by equality rights. Assuming that the courts will tolerate the use of discretion in such matters,[34] they must ensure that the criterion used is both relevant to the purposes of the law or programme and that the official's judgment about relevance was not tainted by unjustified stereotypes that stigmatize the group in question. In this respect the inquiry is not substantially different from that undertaken in connection with a challenge to the content of the law.

Challenges to the operation of the law raise a number of difficult threshold questions, the most important of which is whether section 15 is even implicated absent any discriminatory purpose underlying the law. Assuming that section 15 does extend to such cases, the "notice" factor suggests treating groups defined by the enumerated grounds differently from those defined by criteria not enumerated. The idea is that the grounds listed in section 15 represent a cue to the legislature that the interests of the groups listed must be taken into account when a law is being conceived and implemented. In other words, the enumerated grounds function as an injunction against ignoring the interests of the groups so defined. If this is right, then groups defined by nonenumerated criteria (or criteria not otherwise protected by the Constitution) might not enjoy the same protection: one cannot "not ignore" a group when the nature of that group is unknown.[35]

CONCLUSION

It is somewhat anomalous to write a conclusion on the subject of equality rights. If anything is clear about the subject, it is that conceptions of equality change over time: it would be foolish to assume that we have arrived at some final resting space. In truth, the evolution of our conceptions of equality mirror our changing views about the proper relationships between individuals, groups and government. All that can be predicted with confidence is that the legal community will be wrestling with these issues for a long time to come. It falls on all of us to ensure that this struggle yields just and sensible results.

FOOTNOTES

1. Lucas, "Against Equality", in Bedau (ed.), Justice and Equality (1971), at 138.

2. Canada Act 1982, c. 11 (U.K.), Schedule B (The Constitution Act, 1982), Part I (hereinafter referred to as the Charter).

3. See, e.g., Law Society of Upper Canada v. Skapinker (1984), 53 N.R. 169.

4. R.S.C. 1970, App. III.

5. See, e.g. R. v. Simmons (1984) 45 O.R. (2d) 609 (O.C.A.).

6. The original version of section 15 was introduced in the House of Commons, as part of the federal government's initiative, on October 6, 1980. It read:

> 15(1) Everyone has the right to equality before the law and the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
>
> (2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

7. The Special Joint Committee was established on October 23, 1980, and the federal resolution was referred to that Committee on November 3, 1980. In the course of its deliberations, the Committee considered close to 1,000 written and oral submissions. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (February 13, 1981), at 56:47 to 57:97.

8. See Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall Law Journal 336.

9. [1974] S.C.R. 1349.

10. R.S.C. 1970, c. I-6, s. 12(1)(b).

11. For telling criticisms of his conception of equality, see Tarnopolsky, The Canadian Bill of Rights (2d ed. 1975).

12. [1979] 1 S.C.R. 183. For a critical analysis see Gold, supra note 8.

13. S.C. 1970-71-72, c. 48.

14. "The addition of the words "and equal benefit" of the law after "protection" would extend the right to ensure that people enjoy equality of benefits as well as the protection of the law." Minister of Justice and Attorney General of Canada, Government Response to Representations for Change to the Proposed Resolution (January 12, 1981), at 4.

15. [1970] S.C.R. 282.

16. (1962) 32 D.L.R. (2d) 290.

17. Id., at 296.

18. 127 U.S. 678.

19. Id., at 687.

20. Supra, note 15, at 297.

21. (1980) 114 D.L.R. (3d) 393.

22. R.S.C. 1970, c.N-1.

23. R.S.C. 1970, c. N-1.

24. Supra, note 21, at 423.

25. See Gold, "Comment: MacKay v. R." (1982) 60 Can. Bar Rev. 137.

26. The federal government has taken this position as well. See, Department of Justice, Equality Issues in Federal Law: A Discussion Paper (1985).

27. For some thoughts on the relationship of section 1 to section 15, see Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Supreme Court L.R. 131.

28. See Michael M. v. Superior Court of Sonoma County, 101 S.Ct. 1200, at 1218, n. 4 (1981) (Stevens J., dissenting).

29. See generally Tribe, American Constitutional Law (1978).

30. This is an elaboration of the motion of "discrete and insular majorities", that underlies one strand of strict scrutiny analysis in American jurisprudence. For an elegant attempt to explain all of American constitutional law in this spirit, see Ely, Democracy and Distrust (1980).

31. This does not mean that every burden or denial of benefit amounts to a judgment that the individual is unworthy of respect. To illustrate the point, consider a law that imposes a sanction for breaking the law.

There is no doubt that the law judges the class of

law-breakers as less worthy of respect than the class of law-abiding people. There is also no doubt that law-breakers have been specially burdened historically and have little political influence. Were these the only relevant considerations, one might be forced to conclude that the law could not punish anyone! But not only is this counter-intuitive; it ignores other considerations identified earlier. First, assuming that the law under review is not offensive to any other constitutional standard - that is, that it is constitutionally permissible for the legislature to prohibit the activity in question - there is a relevant connection between the class defined (law-breakers) and the purposes of the law however defined (protection of harm, retribution, deterrence). Second, the legislation does not burden an individual on the basis of a trait beyond his or her control. (To the extent that a person cannot control his or her criminal activities, the law would be justified in taking special measures to protect the welfare of society.) Finally, the law does not burden a choice that we want people to exercise freely in our society.

32. Examples would include discrimination on the grounds of one's political belief, and discrimination on the basis of province of previous residence (probably subject to the spirit of the limitations set out in section 6 of the Charter).

33. On the relationship between the standard of review and the question of legislative motive, see Ely, supra note 30, at 145-148.

34. See Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984) 5 D.L.R. (4th) 766 (O.C.A.).

35. This argument was suggested to me by David Lepofsky.