Fundamental Justice and Political Power: A Personal Reflection On Twenty Years in the Trenches

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I. INTRODUCTION

Two decades have passed since the historic proclamation of the Charter of Rights and Freedoms and the obvious question to be posed is whether this historic event has truly had a significant impact on the balance of political power in this country. For some, the enshrinement of constitutional constraints on state power was never viewed as a crowning achievement, but rather as an impermissible shift of political power to a branch of government without electoral accountability. In the world of political theory reasonable people will continue to debate the question of the legitimate boundaries between legislative and judicial power, but as a practical matter, there can be little doubt that the proclamation of the Charter of Rights and Freedoms has had the potential to infuse a great deal more political content into the traditional adjudicative process. This brief paper will explore the extent to which the Charter has shifted the balance of power in the realm of criminal justice policy, and more specifically, whether the Charter has diminished the authority and jurisdiction of the federal government to rely upon the criminal law power to address perceived social problems.

Perhaps the most fertile ground for examining contemporary shifts in political power would be found in the equality provisions of the Charter; however, this paper will only discuss the impact of the principles of fundamental justice on the development of criminal justice policy. The vague contours of the right expressed in section 7 of the Charter are an invitation for judicial innovation, and there is little doubt that in terms of procedural justice, section 7 has had a significant impact upon the administration of criminal justice. In 20 years, the Supreme Court of Canada has amassed an impressive body of jurisprudence which has had a clear impact upon the exercise of prosecutorial and investiga-

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tive powers, but the extent and nature of this impact has yet to be fully chronicled and analyzed. This brief paper will not focus upon the procedural content of section 7 but rather upon the substantive component of the principles of fundamental justice. To truly determine whether the Charter has effected a shift in political power, it is more instructive to examine whether there is a coherent body of substantive principles of fundamental justice which constrains the power of the federal Parliament to enact criminal law. Procedure and form have always been the lifeblood of the common law, so one would expect the judiciary to approach procedural issues with some degree of confidence and audacity; however, judicial review of public policy and the merits of criminal legislation has never fit comfortably within the parameters of traditional judicial power.

The question posed herein is whether section 7 of the Charter provides a mechanism for judicial review of patently stupid laws. Suppose Parliament was to enact a law providing that all residents must exit public buildings by walking backwards in a slow shuffle with the failure to do so being punished by a summary conviction offence. Is it a breach of the principles of fundamental justice to enact criminal laws which clearly do not serve the public interest, or is this purely a question of policy best left to elected officials? Does section 7 of the Charter have a role to play when it appears that there is no constructive purpose behind a legislative enactment? We may never be required to assess the constitutionality of a law as ridiculous as the “walking backwards” legislation, but there is a small collection of criminal offences which cries out for justification and legitimation. For decades, commentators have cast doubt on the legitimacy of criminalizing “consensual crimes”, and I have come to agree with the vast majority of commentators who assert that the criminalization of consensual activity is a foolish and ill-informed policy which unjustifiably restricts liberty.

Although the line between law and politics may be far more blurry than we care to admit, it does not necessarily follow that section 7 of the Charter readily embraces judicial review of the merits of parliamentary policy choices. So for me, the intriguing question became whether or not the mounting political objections to the criminalization of consensual activity could be repackaged into a justiciable, constitutional objection.

To answer that question, I embarked upon a number of challenges to the constitutional authority of Parliament to transform perceived social problems into criminal prohibitions. In the early 1990s I brought constitutional challenges

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to the “consensual” crimes relating to obscenity and gambling to no avail, but in the late 1990s, I appeared to discover a crack in the wall in relation to the criminalization of marijuana possession. In challenging this prohibition, an extensive trial record was produced to demonstrate that marijuana consumption is “relatively harmless”, that marijuana is a benign substance and that the criminalization of marijuana has had deleterious social impact. The question posed for the Court was whether it violates the principles of fundamental justice to criminalize a relatively harmless activity. From a lay point of view, the question still remains whether or not the judiciary can invalidate a “stupid” law, but through the lens of constitutional law the question becomes whether or not the principles of fundamental justice include a “harm principle” which prevents Parliament from relying upon the criminal sanction unless it has a “reasonable apprehension” of significant harm associated with the impugned activity. In the fall of 2002, the Supreme Court of Canada will have to directly confront this issue in three related cases, and in light of the fact that the Supreme Court has yet to hear argument in this case, I will refrain from commenting directly on the merits of the challenge to the constitutional propriety of criminalizing the consensual crime of possession of cannabis sativa; however, I will outline the jurisprudential foundation for my assertion that section 7 of the Charter inexorably leads a court down the path of reviewing the merits of public policy. This can be masked or hidden, but it cannot be avoided. Section 7 does contain the seeds for a monumental shift in political power, but it is unclear whether or not the judicial branch of government is willing to realize this potential.

II. THE POLITICS OF FUNDAMENTAL JUSTICE

The strength and power of section 7 is contingent upon two variables — the interpretation of the terms, “life, liberty and security”, and the elucidation of the content of the principles of fundamental justice. The threshold issue of “life, liberty and security” serves as a gatekeeper to decide what types of claims of “deprivation” will warrant judicial review. The review under section 7 is to determine if the deprivation is in accordance with the principles of fundamental justice. The gatekeeper issue is an important component in the assessment of the impact of section 7, but in a paper of this brevity I have chosen to focus on


the more elusive question of what constitutes a principle of fundamental justice. Specifically, this paper concerns the operation of these fundamental principles in the context of criminal law, and criminal law by definition will always entail a deprivation of liberty. As such, any provision of the criminal law has to operate in a manner which is consistent with principles of fundamental justice.

Will the review of criminal legislation for consistency with ill-defined principles of fundamental justice shift the balance of power in favor of the judiciary? It is hard to tell. At times the Supreme Court of Canada takes an active lawmaking role as evidenced by the elaborate and detailed guidelines created by the Court for assessing when state conduct constitutes entrapment. At other times the Court shies away from entering the political arena. Earlier this year the Court’s only response to the important question of the proper relationship between police and prosecutor was, “while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained”. It is sometimes difficult to ascertain if the Court has a consistent understanding of its role in the post-Charter era.

Much of the confusion emanates from the fact that there still remains many principled objections to the spectre of the judiciary appropriating to itself legislative powers. Concern about judicial capacity for setting public policy and implementing rules commonly revolves around one or more of the following assertions:

1. Courts do not set their decision-making agenda. The issues raised for their consideration are restricted by the fortuities of litigation. The litigants are responsible for setting the agenda, and the issues raised may be distorted by the motives and resources of the litigants.

2. Adjudication is focussed and incremental. Judges are called upon to decide legal entitlement by determining which party has a legal right and which party has a legal duty. This process is distinct from that of a legislative planner who must ask, “what are the alternatives?” The responsibility to resolve the particular dispute handicaps the court in gaining a perspective on the broad contextual setting of the issues.

3. Judges are generalists, and they lack sufficient specialized expertise to master the intricacies of various policy problems.

4. The fact-finding process of adjudication makes it ill-suited for ascertaining relevant social facts. The evidentiary rules of admissibility place artificial

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constraints on a judge’s ability to receive information that may be vital for the development of policy yet irrelevant for the disposition of the particular case.

5. Courts lack the power to enforce compliance with their decrees. In addition, the adjudicative process is not equipped for the monitoring of the policy implications of any decision.\(^7\)

There are still many judges who are reluctant to accept a potential shift in political power. In 1982, Scollin J. warned us against the “sophisticated protective cocoon spun by a civil libertarian zealot”,\(^8\) and in 1996 McEuen J.A. bemoaned the “spectre of constitutionally hyperactive judges . . . pronouncing all of our emerging rights . . . according to their own values”.\(^9\) However, from the outset it appeared clear that the Supreme Court of Canada was ready, willing and able to set sail in uncharted, constitutional waters. Three early pronouncements under the Charter showed that the Court understood that constitutional adjudication had taken on an increased political dimension.

In 1984, the Court had its first opportunity to explore the interplay of constitutional norms in relation to the investigative process. *Hunter v. Southam Inc.* will be remembered for establishing the minimum requirements for a constitutionally valid search, but from my perspective, the importance of the case lies in a subtle point which is often overlooked. Chief Justice Dickson noted:

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. . . . It does not in itself confer any powers, even of “reasonable” search and seizure, on these governments.\(^10\)

Of course, this is an obvious point, but it also underscores a more important proposition concerning constitutional rights. The Court fully understands that the Charter does not expand state power. Constitutions are designed to be anti-government documents predicated on a healthy dose of mistrust of public officials and a fear of tyranny of the majority. Perhaps the Court did not directly express this sentiment, but the realization that the Charter can only serve to diminish, and not expand, legislative power is an important first step in accepting that the Charter mandates a shift in the existing political power structures.

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In 1985, in the context of reviewing defence policy, the Court recognized that casting an issue as a “political question” would not bar a court from exercising review under the Charter. Ultimately, the Court did not review the constitutionality of proposed cruise missile testing in Canada, but Wilson J. laid to rest the notion that political questions and constitutional questions are not mutually exclusive categories:

Because the effect of the appellants’ action is to challenge the wisdom of the government’s defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government’s defence policy is sound but whether or not it violates the appellants’ rights under s. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of “a court of competent jurisdiction”. While the court is entitled to grant such remedy as it “considers appropriate and just in the circumstances”, I do not think it is open to it to relinquish its jurisdiction either on the basis that their issue is inherently non-justiciable or that it raises a so-called “political question”.  

In 1986, the Supreme Court rejected the notion that the principles of fundamental justice solely embraced procedural concerns. The argument had been advanced in the Supreme Court that judicial review for conformity with the principles of fundamental justice should be restricted to procedural concerns because “the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority are selected and given effect in the laws of the land”. Mr. Justice Lamer (as he then was) quickly dismissed this argument:

This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the Constitution Act, 1982. It ought not be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility.

The Court proceeded to dismiss the relevance of the substantive/procedural dichotomy as being a uniquely American approach. It is true that the American doctrine of substantive due process allowed American courts to extend constitutional protection beyond the four corners of the guarantees explicitly pro-

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vided for in the Constitution, and as such, the doctrine appeared to infuse American courts with greater political clout. However, the Court concluded that “the substantive and procedural dichotomy narrows the issue almost to an all or nothing proposition”. Careful to ensure that review of public policy and the merits of legislation still remained beyond the scope of constitutional review, the Court had this to say about substantive principles of fundamental justice:

[There is an assumption] that only a procedural content to “principles of fundamental justice” can prevent the courts from adjudicating upon the merits or wisdom of enactments. If this assumption is accepted, the inevitable corollary, with which I would have to then agree, is that the legislator intended that the words “principles of fundamental justice” refer to procedure only.

But I do not share this assumption.

... 

The task of the Court is not to choose between substantive and procedural content *per se* but to secure for persons “the full benefit of the Charter’s protection . . . under s. 7 while avoiding adjudication of the merits of public policy.” [Emphasis added.]

The exhortation to avoid adjudicating the merits of public policy rings hollow in light of the assertion that the application and creation of substantive principles of justice may be necessary in order to secure for persons the “full benefit of the Charter’s protection”. What is missing is a coherent statement of the nature and form of substantive principles of justice. The Court is only able to advise us of the following:

[T]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the justice system.

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Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of other components of our legal system.

We should not be surprised that many of the principles of fundamental justice are procedural in nature. Our common law has been a law of remedies and procedures. . . . This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather the proper approach to the determi-

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13 *Id.*, at 498.
14 *Id.*, at 498-99.
nation of the principles of fundamental justice is quite simply one in which... “future growth will be based on historical roots”.15

I am quite certain that Coke, Blackstone, Stephens and Lamer all entertain very different ideas as to what comprises “the basic tenets of our legal system”, so the Court’s pronouncement only informs us that fundamental justice is not restricted to procedural concerns without really providing any illumination of what will fill the gap once the restriction is lifted. In this case, the Supreme Court of Canada invalidated a provincial, absolute liability, offence of driving while under suspension. The principle of fundamental justice violated by this legislation was the notion that imprisonment cannot be imposed without some degree of fault. Fault-based criminality was declared a principle of fundamental justice, and this case triggered a series of cases which reviewed various offences to determine if the statutory definition of the crime contained a constitutionally acceptable minimum level of fault. Four forms of constructive murder were invalidated on the basis that the offence of murder requires subjective foresight of death as a minimum fault or mens rea requirement.16 It had appeared that the 1986 Motor Vehicle Reference17 signaled the beginning of an era in which the balance of power slightly shifted in favour of the judicial branch of government armed with ill-defined principles of substantive, fundamental justice.

In retrospect, the Motor Vehicle Reference did not effect a significant change in the balance of power. First, the substantive principle of fundamental justice in this case concerned issues which historically have been within the expertise of the judiciary. Mens rea, actus reus, excuses and justifications have all been developed primarily within the context of court decisions. Parliament has never provided much guidance with respect to the fault requirements of a criminal offence, preferring to leave this issue for judicial development. Consequently, judicial review for a constitutionally sound minimum level of fault echoes the role and function of common law courts for the past few hundred years. The Motor Vehicle Reference did not actually signal the beginning of a rigorous form of constitutional review which would incidentally trench upon Parliament’s policy choices — it was just a reflection of the Court engaged in a very familiar and comfortable discourse.

Second, the articulation of a principle of fundamental justice — no imprisonment without fault — may have been full of sound and fury, signifying nothing. Since the invalidation of the constructive homicide provisions in the late

17 Supra, note 12.
1980s, the courts have found few occasions to invalidate offences on the basis that they contain a constitutionally deficient level of fault. The one exception to this trend may be the recent Ruzic case,\(^\text{18}\) in which the Court concluded that normative involuntariness was a principle of fundamental justice thus requiring a more expansive approach to the limited statutory defence of duress. This case aside, the first substantive principle of fundamental justice articulated by the Court had a short life span. The Court’s doctrine stipulated that a subjective form of mens rea is constitutionally required only when the offence contains a high degree of stigma and is subject to a high level of punishment; yet, six years later this Court also concluded that the offence of manslaughter did not have a sufficiently high level of stigma and punishment to trigger the substantive requirements of fundamental justice respecting the minimum level of fault.\(^\text{19}\) If manslaughter is not a stigmatizing classification with a high penalty (maximum life), then it is unlikely that any other criminal offence will ever trigger the constitutional requirement of subjective fault. After the flurry of mens rea cases, it is clear that Parliament will never be able to combine absolute liability with imprisonment in the future, nor will it be able to create a crime of negligent murder. These were significant developments in the short history of Charter adjudication in Canada, but in a practical sense the substantive principle of fault-based criminality has been restricted to invalidating an archaic relic (constructive murder) and prohibiting a form of legislation which rarely occurs (combining absolute liability with imprisonment).

The search for specific principles of fundamental justice which arise out of the “basic tenets of the legal system” has proved to be a difficult exercise. It may appear helpful for the Court to remind us that “section 7 must be construed having regard to those interests and against the applicable principles of policies that have animated legislative and judicial practice in the field”,\(^\text{20}\) yet the problems remain in identifying principles which deserve the label of “fundamental”. Seven years after the Motor Vehicle Reference, the Court had another opportunity to illuminate the principles of fundamental justice. In Rodriguez,\(^\text{21}\) the Court addressed the question of whether the criminal prohibition on assisted suicide violated section 7 because it prevented disabled people from ending their lives as a release from chronic pain and suffering. The Court rejected the argument that respect for human dignity is a principle of fundamental justice on the basis that “dignity” is too vague a prescription to constitute a principle of

\[\text{\textsuperscript{18} R. v. Ruzic, [2001] 1 S.C.R. 687.}\]
\[\text{\textsuperscript{19} R. v. Creighton (1993), 83 C.C.C. (3d) 346 (S.C.C.).}\]
fundamental justice. As for the exercise of discerning these principles, the Court stated:

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.22

The Court also noted that the traditional roles of legislature versus judiciary should be respected; however, respect for the traditional division of powers does not mean that the courts cannot review legislation for compliance with substantive principles of fundamental justice:

On the one hand, the Court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of legislation. On the other hand, the Court has not only the power but the duty to deal with this question if it appears that the Charter has been violated. The power to review legislation to determine whether it conforms to the Charter extends not only to procedural matters but also substantive issues. The principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.23 [emphasis added]

Without identifying a specific principle of fundamental justice, the Court upheld the prohibition on assisted suicide on the basis that the state had two overriding interests: the existence of a perceived consensus in favour of an absolute prohibition and the goal of preventing abuse and exploitation of vulnerable individuals. At the most basic level of analysis, all that happened in this case was a balancing of Rodriguez’s interest against the societal interests represented by the law. There did not appear to be a clearly stated principle of fundamental justice being debated. Two years later the Court resolved another difficult and sensitive rights claim with a similar balancing act. In B. (R.)24 the Court addressed the issue of whether it was violative of section 7 for the state to

22 Id., at 590-91.
23 Id., at 589-90.
provide a blood transfusion to a child over the religious objections of parents who believe that the transfusion of blood is a sacrilege. Although the Court was badly divided on the threshold issue of “liberty and security”, a majority of the Court concluded that the legislation providing for the compelled transfusion was constitutional because the fundamental rights of the parents were overridden by the state’s right to protect the life and health of children, and because this objective had been pursued in a manner consistent with fair process.

In 1993, the Supreme Court of Canada first introduced this balancing approach to section 7, and within two years the Court was now saying that “[f]undamental justice in our Canadian legal tradition . . . is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens”. In fact, the most recent pronouncement from the Court on the meaning of fundamental justice indicates that the search for specific principles has been overtaken by the allure of balancing:

The principles of fundamental justice are to be found in “the basic tenets of our legal system”: . . . “They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the legal system” . . . The relevant principles of fundamental justice are determined by a contextual approach that “takes into account the nature of the decision to be made” . . . The approach is essentially one of balancing. As we said in Burns, “[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance”.

Any doubt about the primacy of section 7 balancing was laid to rest in an often overlooked decision of the Court in 1997. In Godbout, the Court confronted a fundamental justice claim in a non-criminal context. In order to work for a municipality the employee was required to reside in the municipality, and the Court invalidated the regulation on the basis that it unjustifiably interfered with the “irreducible sphere of personal autonomy wherein individuals may make inherently private choice free from state interference”.

Prior to Godbout, the Court had already identified that “liberty” under section 7 extends beyond physical restrictions on freedom to encompass matters which are “inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence”.

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26 Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research), [1990] 1 S.C.R. 425, at 583.
29 Id., at 615.
30 Id., at 615.
Godbout suggests that the Court will undertake exacting constitutional scrutiny when the law interferes with the right to decisions of "fundamental personal importance", and the Court has been confronted with many cases which engage personal decisions of this nature. For example, in Morgentaler the Court was faced with the right of a woman to decide what would be best for her and her unborn child. In B. (R.) the Court was faced with the right of parents to choose a medical intervention which was consistent with their religious beliefs, and in Rodriguez the issue concerned the right of a disabled person to end her life just as a non-disabled can do so. These cases all engaged fundamental, personal decisions; however, invalidation only took place in the Morgentaler case, and this invalidation was based primarily on procedural concerns and not upon any substantive principle of justice. In the other two cases the Court balanced competing interests and found a state interest to override the decision of "fundamental personal importance".

It is obvious that the Charter will be trivialized if its guarantees apply to personal decisions which are picayune and petty; however, creating the category of "fundamental personal decision" does not really help in the analysis. First, dividing personal decisions into fundamental and non-fundamental is a value-laden exercise beyond the purview of judicial understanding. Second, designating a decision as fundamental does not assist because the Court does not provide any specific or unique methodology for analyzing the constitutionality of state interference with this type of fundamental decision. The B. (R.) and Rodriguez cases both show that the designation of a decision as fundamental does not necessarily lead to the conclusion that state interference is unconstitutional.

The seeds of a coherent analysis are found in the Godbout case. First, the Court confirms that there is a substantive component to section 7. This component requires that in restricting life, liberty or security, the legislature must be pursuing constitutionally valid objectives in a procedurally fair manner. The Court stated:

The text of s. 7 provides that a deprivation by the state of an individual’s right to life, liberty or security of the person will not violate the Canadian Charter unless it contravenes the “principles of fundamental justice”. Over the years since the Charter’s inception, this Court has repeatedly been called upon to interpret that phrase, so as to determine in particular cases whether a Charter violation has, in fact, occurred. In the early days of Charter adjudication, questions arose as to whether the principles of fundamental justice included within their ambit a substantive element, in addition to the guarantees of natural justice or procedural fairness. That issue was conclusively settled by this Court in the Re B.C. Motor Vehicle Act, [1985] 2

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S.C.R. 486, 24 D.L.R. (4th) 536, where all members of the panel seized of the case agreed that the principles of fundamental justice are not limited merely to rules of procedure but include as well a substantive component. This has meant that if deprivations of the rights to life, liberty and security of the person are to survive Charter scrutiny, they must be “fundamentally just” not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally.\(^{32}\)

Once the relevant life, liberty or security interest is identified, the Court must then perform the following balancing act:

But just as this Court has relied on specific principles or policies to guide its analysis in particular cases, it has also acknowledged that looking to “the principles of fundamental justice” often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right to life, liberty or security of the person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so. To my mind, performing this balancing test in considering the fundamental justice aspect of s. 7 is both eminently sensible and perfectly consistent with the aim and import of that provision, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. We need look no further than the Charter itself to be satisfied of this. Expressed in the language of s. 7, the notion of balancing individual rights against collective interests itself reflects what may rightfully be termed a “principle of fundamental justice” which, if respected, can serve as the basis for justifying the state’s infringement of an otherwise sacrosanct constitutional right.\(^{33}\)

Consistent with American due process analysis, the Court appears to require the countervailing state interest to be both “compelling and substantial”; however, it is unclear if this high standard only applies when the state interference pertains to decisions of a fundamental, personal nature. As for substantive principles of justice, the only illumination provided is that the substantive component of section 7 allows a court to assess the “ends” sought to be achieved by a legislature to determine if these “ends” are consistent with the basic tenets of both our judicial system and our legal system more generally.

\(^{32}\) Supra, note 28, at 619.

\(^{33}\) Id., at 620-21.
This type of circular reasoning leads us back to the start. Presumably, the balancing approach to section 7 was designed to obviate the need to find elusive and specific principles of fundamental justice; however, the Court requires the balancing to take into account the “basic tenets of our judicial system”. In effect, all the Court is saying is that pursuing a legislative objective not consistent with substantive principles of fundamental justice will violate substantive principles of fundamental justice.

The movement away from “basic tenets” to “balancing” does not serve the interests of justice. First, balancing is inherently subjective and indeterminate. Second, balancing tends to allow for the undue infusion of personal, political ideology to dominate the decision-making process. Although I have asserted that the Constitution inexorably leads to increased political content in the adjudicative process, balancing still remains undesirable because it tends to mask this content in the language of neutral balancing. Third, balancing interests under section 7 makes no sense in the context of a Constitution which already contains a provision (section 1) which specifically mandates balancing as a last step in the analysis before invalidation. As one commentator has noted:

This approach is problematic in that it weakens the ability of the Charter to operate as a rights-based, counter-majoritarian instrument. Consensus may be an appropriate tool for legislators, whose function it is to weigh public policy options, but it is wholly inappropriate as a definitional element of a legal test, namely the fundamental justice test, the purpose of which is to assess whether an individual right has been violated. To say that a Charter right has not been infringed because there exists a consensus among reasonable people that the infringement is justified, nullifies the very ability of the Charter to guarantee individual freedoms. Individual rights-bearers are left unprotected against the possibility of “majoritarian malevolence, ignorance or indifference.” Furthermore, the consensus-based balancing approach to fundamental justice makes a section 1 analysis all but redundant, since it shifts the burden of proof to the Charter claimant to demonstrate the absence of a valid state interest in order to prove that there has been a violation of fundamental justice. Such a demonstration itself includes the formidable task of proving the absence of a societal consensus in support of the state interest. This formulation of section 7 of the Charter is completely at odds with that used in the context of other Charter provisions, where the burden of proving the validity of the state interest rests, as a positive burden, on the State under section 1. Indeed, as noted by McLachlin J. in Rodriguez, “it is not generally appropriate that the complainant be obliged to negate societal interests at the s. 7 stage, where the burden lies upon her, but that the matter be left for s. 1, where the burden lies on the state.”

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The “basic tenets” approach may be fraught with some conceptual problems, but nonetheless, its application should result in a more determinate and transparent process than one performed by balancing. With respect to finding specific principles of justice, it has been noted that:

Additional cases, such as Singh, Swain and Children’s Aid Society of Metropolitan Toronto have all applied this definition of fundamental justice. This approach to fundamental justice has many advantages as regards the protection of the individual freedoms of the complainant, including: (1) state interests are only considered under section 1 where the burden of proof is on the state; (2) the very existence of the principles of fundamental justice is not predicated or dependent upon societal agreement; and (3) the definition avoids an overly narrow interpretation of section 7 protections, thereby giving the Charter greater scope to operate as a rights-protecting instrument. Thus, if the objective of the Charter is to effectively guarantee individual freedoms, then clearly the Re B.C. Motor Vehicle Act definition of fundamental justice is both analytically superior and more just than its “balancing interests” counterpart in Rodriguez.35

In 1999, the Supreme Court of Canada recognized that their preference for balancing led to a confused overlap between sections 1 and 7 of the Charter. In Mills,36 the Court tried to dig themselves out of this quandary by asserting that the interests being balanced under section 7 are different than the interests balanced under section 1. The Court stated:

It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the Charter. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. As McLachlin J. stated for the Court in Cunningham v. Canada, [1993] 2 S.C.R. 143, at p. 152, regarding the latter: “The . . . question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused’s interests and interests of society.” Much the same could be said regarding the central question posed by s. 1.

However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by s. 22.1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the Charter rights.

35 Id.
Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503: “the principles of fundamental justice are to be found in the basic tenets of our legal system”. In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. stated, at p. 136, that these values and principles “embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 737, Dickson C.J. described such values and principles as “numerous, covering the guarantees enumerated in the Charter and more”.

At a superficial level this distinction makes sense; however, it naively presupposes that there is a clear line of demarcation between legal concerns and political/philosophical concerns. No such line exists, and in many cases the Court will be compelled to exercise political choices. In 1999, the Court finally recognized the paradox of balancing under section 7 followed by further balancing under section 1; however, in 1997 the Court in *Godbout* seemed to conclude that there was no clear line of demarcation between section 1 and section 7 balancing. After concluding that the residency requirement for employment in the municipality violated section 7, the Court stated:

I should explain that I see no need to examine the issues in this appeal under the rubric of s. 1 of the Charter, given that all the considerations pertinent to such an inquiry have, I think already been canvassed in the discussion dealing with fundamental justice. Moreover, and as this Court has previously held, a violation of s. 7 will normally only be justified under s. 1 in the most exceptional of circumstances.

Ironically, the movement from ascertaining substantive principles of fundamental justice to open-ended balancing was in all likelihood predicated on the fear that creating/discovering substantive principles of fundamental justice would expose the courts to accusations of appropriating political power. The primary and recurring objection to the United States Supreme Court’s employment of substantive due process, especially in the *Roe v. Wade* abortion decision, has been the claim that this process is equivalent to the clearly political enterprise of amending a constitution. If the Court was concerned that the articulation of specific principles not explicitly contained in the Constitution

37 *Id.*, at 715-16.
38 *Supra*, note 28, at 628.
would thrust the Court too deeply into the political arena, then it has been operating upon a mistaken premise because balancing is inherently more political in nature:

Where the court has not opted to use s. 1 as the venue in which to balance societal interests with individual interests, problems arise. For example, in Cunningham, McLachlin J. stated that fundamental justice entropy a question of “[w]hether, from a substantive point of view, the change in the law strikes the right balance between the accused’s interests and the interests of society”. As Hogg notes with respect to this formulation, “It is difficult to resist the conclusion that the Court was here interpreting substantive fundamental justice as justifying the court in striking down a law whenever the Court disagreed with the policy implemented by the law.”

Discerning substantive principles of fundamental justice may prove to be a futile quest even though the Court has had little difficulty discerning principles of a procedural nature. In the early cases of Mills and Rahey, Lamer C.J. asserted that sections 8-15 of the Charter “address specific deprivations” of the more general right embodied by section 7, and in this way much of the content of fundamental justice is animated and coloured by the other legal rights contained in the Constitution. This theory, which has been adopted by other members of the Court, does not augur well for the development of substantive principles because the other legal rights contained in the Charter all address procedural concerns.

In the world of procedural justice, the Court does not feel the same constraints as it would in the realm of substantive justice. Procedure and form fall within the expertise and experience of the judicial branch of government, and although procedural forms can at times serve political purposes, the reasonable observer would not accuse the Court of appropriating political power for taking an activist approach to procedural justice. For example, the right to make full answer and defence is a principle of fundamental justice. Stated at this level of generality, the assertion cannot be gainsaid. However, the Court has gone much further by providing a specific set of procedural requirements designed to protect full answer and defence. In 1998, the Court stated:

The right to make full answer and defence is protected under s. 7 of the Charter. It is one of the principles of fundamental justice. . . . The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure, the right to know the case to be met before

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opening one’s defence, the principles governing the re-opening of the Crown’s case, as well as various rights of cross-examination, among others. The right is integral to the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.\(^{44}\)

Section 7 has proved to be a very effective vehicle for enshrining procedural rights not explicitly contained in the Charter. The right to remain silent is not mentioned in the Charter, and the right against self-incrimination is restricted to the protection against testimonial compulsion (section 11(c)) and “use” immunity for any statements given in other proceedings (section 13). Nonetheless, the Court has constructed a fairly sophisticated set of rights under section 7 to protect against “subversion” of the right to remain silent, and to provide “derivative use” immunity, in addition to “use” immunity, for compelled statements.\(^{45}\) These set of rights became enshrined as “specific manifestations” of the operation of fundamental justice despite the fact that these rights were not even protected at common law. The Court has clearly adopted the “living tree” metaphor\(^{46}\) of the Charter when approaching issues of procedural justice.

In light of the vibrant and activist approach taken with respect to procedural aspects of fundamental justice, there may be some lessons to be learnt from this legacy about the operation of substantive principles of fundamental justice. First, the legacy shows that conformity with international standards is not necessarily the hallmark of fundamental justice. Although the Court has recently changed its approach to the constitutional analysis of extradition largely on the basis of becoming “informed by international law”,\(^{47}\) it is clear from the procedural cases that the Court will not invalidate legislation simply because most other common law jurisdictions frown upon the rule. In Morgentaler,\(^{48}\) the Court would not invalidate the provision allowing Crown appeals from jury acquittals despite the fact that the U.K. and the U.S. have always viewed this practice to be an attack on the integrity of the jury. In Rose,\(^{49}\) the Court would not invalidate the provision compelling the accused to address the jury first if he/she elects to call evidence in defence notwithstanding the fact that most common law jurisdictions preserve the right of the defence to address the jury last. Conversely, the Court has on two occasions declared police investigative practices to be unconstitutional despite the fact that the United States Supreme

\(^{44}\) R. v. Rose, id., at 316-17.
\(^{46}\) Supra, note 10, at 156.
\(^{47}\) Supra, note 27.
\(^{48}\) Supra, note 31.
\(^{49}\) Supra, note 43, at 316-17.
Court had previously given constitutional approval to these practices. 50 A vibrant and unique approach to the procedural components of fundamental justice required Canadian police to discontinue their useful practice of warrantless body-pack interceptions by police agents and the practice of eliciting confessions by the “potted plant” technique (i.e., placing a police agent in a holding cell with a recently arrested accused). Principles of fundamental justice do not have to be in conformity with past practice and international standards: they can be uniquely Canadian.

If past practice is not a hallmark of fundamental justice, then the historical evolution of common law rules may not be determinative of the analysis. This is best demonstrated with respect to the “right to confront one’s accuser”. The Court has said that “[t]he adversarial nature of the trial process has been recognized as a principle of fundamental justice”, 51 yet the right of confrontation has been excluded from this category. 52 This is somewhat ironic because one of the defining historical features of the adversarial process has been this right to confront one’s accuser. At an intuitive level, one might assume that a principle only becomes “fundamental” when it is an organizing and defining principle of sound historical pedigree. On the other hand, a court should not allow itself to be shackled by the dead weight of precedent.

Attenuating the connection between historical pedigree and the “fundamental” nature of a principle raises the spectre of political infiltration. Principles should be immutable, whereas political concerns change with the time. This infiltration is apparent in relation to the disparaged “right to confront one’s accusers”. The legislative encroachment of the right to confrontation has largely been predicated upon the political objective of reforming a criminal process which is frightening and alienating to vulnerable witness groups. Allowing a child to testify behind a screen is part and parcel of a larger political objective of encouraging the reporting of under-reported domestic violence. These objectives are laudable and should be promoted; however, it seems that these political objectives should be more appropriately addressed in the context of a section 1 analysis where the Court is explicitly mandated to take political objectives into consideration.

Of course, the Court is careful to ensure that its process of discerning principles of fundamental justice does not appear to be inextricably intertwined with political concerns. This may explain why public opinion is not considered a controlling feature of the principles of fundamental justice. Challenges to the marijuana prohibition and to the assisted suicide provisions both failed despite

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the fact that there have been fairly consistent public opinion polls indicating majority support for decriminalization. It is not surprising that public opinion does not define the “fundamental” nature of a principle of justice because “[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority”. Nonetheless, it is hard to escape the fact that a principle cannot really be deemed fundamental unless some degree of public consensus has emerged regarding the importance of the principle. In recently concluding that extradition which in all probability will lead to torture in the requesting state violates section 7 of the Charter, the Court noted that

“[w]hile we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian.

It is impossible to discern principles of fundamental justice without some degree of political content and ideology informing the process. Being more comfortable in the realm of procedural justice, the Court will try to find a procedural argument to defuse the potential accusation that a section 7 decision is based upon raw, political considerations. In Morgentaler, the majority of the Court was careful to base its invalidation of the abortion law on a procedurally flawed exempting process, rather than on an assertion that it is a principle of fundamental justice that a woman can exercise full autonomous choice with respect to decisions pertaining to her bodily integrity. Similarly, the 1999 volte-face with respect to extraditing individuals to face the death penalty provides an interesting example of masking politics. In a 1991 decision the Court found no constitutional violation in extraditing an individual to the United States to face the death penalty. In 1999 this ruling was reversed. Of course, one would not expect the Court to candidly admit that they had changed their political views on the justifiability of state executions, yet the rapid volte-face in its balancing act under section 7 cries out for an explanation. Accordingly, the Court tried to ground the decision on a changed perspective in relation to a procedural concern respecting the operation of the death penalty. The Court stated:

55 Supra, note 27, at 22.
We affirm that it is generally for the Minister, not the Court, to assess the weight of competing considerations in extradition policy, but the availability of the death penalty, like death itself, opens up a different dimension. The difficulties and occasional miscarriages of the criminal law are located in an area of human experience that falls squarely within “the inherent domain of the judiciary as a guardian of the justice system”.

The “balancing process” mandated by Kindler and Ng remains a flexible instrument. The difficulty in this case is that the Minister proposes to send the respondents without assurances into the death penalty controversy at a time when the legal system of the requesting country is under such sustained and authoritative internal attack. Although rumblings of this controversy in Canada, the United States and the United Kingdom pre-dated Kindler and Ng, the concern has grown greatly in depth and detailed proof in the intervening years. The imposition of a moratorium (de facto or otherwise) in some of the retentionist states of the United States attests to this concern, but a moratorium itself is not conclusive, any more than the lifting of a moratorium would be. What is important is the recognition that despite the best efforts of all concerned, the judicial system is and will remain fallible and irreversible whereas the death penalty will forever remain final and irreversible.

Although it is true that there have been recent studies demonstrating the tragic miscarriages of justice in relation to capital punishment, it is hard to imagine that the Court was not aware of this problem in 1991. In addition, much of the international objections to capital punishment had been expressed by 1991, and it cannot be said that there had been a revolutionary change in international perspectives in the intervening eight years. Balancing state interests and individual interests is an inherently political exercise — different people at different times in different contexts will strike this balance in different ways. The discourse may appear to be based upon “principles”, but in actuality it is drowning in policy. As Peter Russell has noted:

[Judges] may mask their non-legal ideas or assumptions and make their opinion appear as if it were a purely legal deduction... Judges who conceal their political, social or economic reasoning may be pursuing a fairly cunning political strategy designed to reduce the political exposure of their court.\(^\text{59}\)

\(^{58}\) Id., at 312, 355-56.

\(^{59}\) “Comment” in Linden (ed.), The Canadian Judiciary (1976), at 85-86.
III. CONSENSUAL CRIMES, THE HARM PRINCIPLE AND FUNDAMENTAL JUSTICE

With the preceding discussion in mind, we can now turn to the question posed at the outset: does section 7 of the Charter have a role to play when it appears that there is no constructive purpose behind a legislative enactment? This question is best resolved in the context of consensual crimes for which there is a great deal of debate over the justifiability of resorting to criminal law to prohibit the private, consensual, pleasure-seeking activities of adults. Whether we are examining prostitution-related offences, obscenity-related offences, gambling offences or drug offences, we are confronted with two cogent claims for decriminalization. First, it is asserted that there is no conclusive proof that these activities are harmful to society or that proof of harm is entirely lacking. Second, it is asserted that prohibiting activities fueled by human desire will only serve to create a violent black market and will inevitably trigger social and crime problems unrelated to the initial pleasure-seeking activity. The nagging question is whether these public policy concerns can be translated into a coherent principle of fundamental justice.

Of course, one need not necessarily construct a relevant substantive principle of fundamental justice if one relies upon the balancing act promoted by the Court in the past 10 years. Beyond the criticisms of the balancing act under section 7 outlined earlier, the problem with reliance upon balancing with respect to consensual crimes is that two questions remain unclear: 1) whether the need to find an overriding and compelling state interest only applies to "decisions of a fundamental personal nature", and, if so, 2) whether consensual pleasure-seeking activity engages a decision of a fundamental personal nature. Despite the fact that a strong argument can be made for characterizing hedonistic pursuits as a fundamental decision, it may be difficult to persuade a court to accept this proposition. If hedonistic pursuits are not fundamental, it is unclear under the existing doctrine how the court is to approach the balancing exercise. Nevertheless, whether the balancing approach is taken, or whether reliance is placed upon a specific and substantive principle of fundamental justice, the review under section 7 will require some assessment of the merits of public policy.

Indirect review of the merits of legislation can be achieved by reliance upon two accepted principles of fundamental justice: the prohibition of vague laws and the prohibition of overbroad laws. There is significant overlap between

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these two principles and they only permit indirect review as they are predicated on only reviewing the means chosen to achieve legislative ends. The ends or objectives of legislation are not questioned as part of this review process. However, it can be assumed that if Parliament has confusion over the objectives being sought, there is a good chance that some of this confusion will carry over to the drafting of an ill-defined and general law. Much could be written about the twin vices of vagueness and overbreadth, but the sad reality is that these doctrines are toothless. The way in which the Supreme Court has characterized and constructed the vagueness doctrine ensures that it could only serve to invalidate the most poorly-defined offence imaginable. The Court has actually only invalidated one provision (denial of bail in the “public interest”), and there is little chance that the doctrine will fare any better in the realm of consensual crime. Despite one bold invalidation by the Court, the overbreadth doctrine will fare no better. Overbreadth review raises a whole host of problems, and, as Professor Hogg has noted, the doctrine raises some practical and theoretical difficulties, and confers an exceedingly discretionary power of review on the Court. The doctrine requires that the terms of a law be no broader than is necessary to accomplish the purpose of the law. But the purpose of the law is a judicial construct, which can be defined widely or narrowly as the reviewing court sees fit. In [Heywood] for example, Cory J. who wrote for the majority, defined the purpose of the law as being for the protection of children, while Gonthier J., who wrote for the dissenting minority, defined the purpose of the law as being for the protection of adults as well as children . . . Even if agreement could be reached on the purpose of the law, the question of whether the terms of the law are no broader than is needed to carry out the purpose raises a host of interpretive, policy and empirical questions . . . It must be recognized . . . that a judge who disapproves of a law will always be able to find that it is overbroad. 63

Turning to specific consensual crimes, the bawdy house and prostitution provisions were unsuccessfully challenged in the late 1980s. A recent attempt to resurrect this challenge also failed. The provisions were found to have sufficient clarity to escape invalidation on the grounds of vagueness, and the only substantive principle of justice raised in this case was based upon the economic right to earn a living. The Court clearly rejected economic liberty as a component of the section 7 right. The section 7 arguments raised in the case did not revolve around any consideration of the merits of criminal justice pol-

63 As quoted in Hern, supra, note 40, at 501.
64 Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Canada), [1990] 1 S.C.R. 1123.
icy. No attempt was made to mount an argument that the provisions do not serve the public interest in any constructive way. Putting aside doctrinal limitations, it would be impossible to mount this argument without tendering an extensive array of legislative facts, and it does not appear that this type of evidence was introduced on this challenge. If the assessment of legislative objectives is part and parcel of a section 7 claim, and not a section 1 claim, then the applicant bears the burden of proving the violation. Although much of the information relating to legislative objectives will be uniquely in the possession of the Crown, it will be incumbent upon the applicant or accused to discharge a persuasive burden relating to proof of the absence of sound policy supporting the enactment. Rhetorical flou rises by counsel will not suffice. Invalidation will require a careful marshaling of legislative facts. As the Supreme Court of Canada has said on two different occasions:

Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions.66


In light of this exhortation from the Supreme Court, I mounted a challenge to the obscenity provisions with the aid of viva voce evidence from state officials and retailers to demonstrate that obscenity law operated as a vague prior restraint on expression.67 This challenge was eventually overtaken by the Supreme Court of Canada’s decision in Butler,68 in which the Court summarily dismissed the claim that the law was vague, and it ultimately upheld the law based upon the law being a reasonable limit on freedom of expression. Even
though *Butler* did not directly provide support for a claim that section 7 permits judicial review of the merits of the law, there were two seeds planted in this case which would become integral to the quest for finding a sound juridical basis for challenging the constitutionality of consensual crimes.

First, the Supreme Court rejected “legal moralism” as a sound justification for criminal law. The Court stated that “[t]o impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms”.69 The rejection of legal moralism (and perhaps its distant relative, legal paternalism) suggests that a harm-based justification must support the enactment of criminal law. The type of harm and the level of proof of harm is not addressed in the case, save and except for noting that in the context of obscenity, Parliament was acting upon a “reasoned apprehension of harm”.70

The *Butler* case led me to work on constructing a harm-based constitutional challenge to the gambling provisions based upon an extensive record of legislative facts showing that “legalized” gambling had become an everyday Canadian pastime. Provincial governments were amassing huge revenues from the recent explosion in regulated gambling. I argued that the intense involvement of the state in gambling activities completely undercut the argument that gambling was harmful to society. Surely the province would not engage in activities contrary to the public interest, and their decision to promote gambling showed that there has been a change in social, political and moral perspectives on gambling. Armed with *Butler*, I argued that the “harm principle” is a principle of fundamental justice, with the principle requiring that Parliament have a “reasoned apprehension” of harm before it could enact constitutionally sound criminal offences. Ultimately, the constitutional challenge to the gambling provisions failed on the basis that the Court of Appeal found that, despite the proliferation of provincial gambling ventures, there still remained some degree of harm warranting resort to the criminal law. The Court provided no comment relating to whether it considered the harm principle to be a principle of fundamental justice.

To what extent can the “harm principle” be considered a principle of fundamental justice? When does a principle become a “basic tenet” of criminal justice policy? These questions do not have simple answers, but presumably the fundamental nature of a principle can be demonstrated by showing that it is consistent with other accepted principles of justice. A vibrant section 7 right against self-incrimination was largely constructed by the Court on the basis of a synthesis of interconnected principles of common law and constitutional law. It

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69 *Id.*, at 156.
70 *Id.*, at 164.
can be seen that support for the “harm principle” can be found in the existing structure of constitutional adjudication.

First, one need only turn to constitutional review under the Constitution Act, 1867\(^1\) to see that courts are constitutionally mandated to review legislative determinations of harm. With respect to the criminal law power under section 91(27) of the Constitution Act, 1867, the following summary of the scope of this power has been repeatedly adopted by the Court:

> The traditional root of discussions in this field is found in Russell v. The Queen [(1882), 7 App. Cas. 829 (P.C.)], where Sir Montague E. Smith said at p. 839:

> Laws . . . designed for the promotion of public order, safety or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights . . . and have direct relation to the criminal law.

**That there are limits to the extent of the criminal authority** is obvious and these limits were pointed out by this Court in The Reference as to the Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference), [[1949] S.C.R. 1, aff'd [1951] A.C. 179], where Rand J. looked to the object of the statute to find whether or not it related to the traditional field of criminal law, namely public peace, order, security, health and morality. In that case, the Court found that the object of the statute was economic: . . .

The test is one of substance, not form, and excludes from criminal jurisdiction legislative activity not having the prescribed characteristics of criminal law:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or the safeguard the interest threatened.” [Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case), [1949] S.C.R. 1, at 49, [1949] 1 D.L.R. 433, at 472-3 (R. and J.), affirmed (sub nom. Canadian Federation of Agriculture v. Quebec (Attorney General)) [1950] 4 D.L.R. 689 (P.C.).] [Emphasis added.]

The Margarine Case\(^3\) provided a perfect example of the constitutional proposition that “there are limits to the extent of criminal authority”. In that

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case the Supreme Court invalidated a criminal prohibition on the sale of margarine on the basis that the original legislative assumption of harm (i.e., that margarine was injurious to health) was no longer valid in light of new scientific evidence, and in light of the fact that the government itself imported and sold margarine during the war. Originally, the law conformed to the harm principle, but with the passage of time this “reasoned apprehension of harm” was lacking. This 1949 decision provides significant support for the elevation of the “harm principle” into a principle of fundamental justice.

The spirit of the Margarine Case lives on in contemporary constitutional adjudication. Whether a court is balancing interests under section 7 or section 1, constitutional review will require a court to assess the objectives underlying an impugned law. In balancing competing interests in Rodriguez, the Court noted: “Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever that may be), it seems to me that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose.”

Clearly, this question is just a restatement of the harm principle. In the context of criminal law, asserting that a provision “does little or nothing to enhance the state’s interest” is just another way of saying that the law does not protect society from an apprehended harm. The Court is reflecting on the evil of allowing arbitrary laws to operate, and the prohibition on arbitrariness is a direction that Parliament must be combating a genuine social ill before being constitutionally empowered to enact criminal law. The section 7 vagueness doctrine is also part and parcel of the prohibition on arbitrary law. Vagueness is condemned because it violates the rule of law, and the underlying purpose of Dicey’s rule of law was to prevent arbitrary rule by lawmakers. A vague law is arbitrary because it cannot guide citizens, and a law is equally arbitrary if it serves no constructive purpose despite being crystal-clear in its prescriptions.

The harm principle is also consistent with the liberal political theory which has animated the legislative practices of most of the western world in this past century. Liberal political theory has constructed liberty-limiting principles to define the legitimate occasions for legislative proscription of conduct. Liberal legality advocates the harm principle — that is, that legislative intervention can only be justified on the basis of preventing harm. Harm is an elusive concept. It is naive to believe that Mill’s dichotomy of self-regarding versus other-regarding harm is an acceptable starting point. Harm may be defined deontologically as conduct impairing welfare interests or foundational interests that

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74 Supra, note 21, at 594.
are not contingent upon social recognition. Alternatively, harm may be defined in a utilitarian fashion as impairment of legally recognized interests that find recognition on the basis of social utility. Under either formulation there have been four basic groups of harms that have been historically recognized: 1) violation of interest in retaining or maintaining what one is entitled to have (i.e., life, liberty, security, and property); 2) offences to sensibility; 3) impairment of collective welfare; 4) violation of some governmental interest. It matters not whether we adopt Mill’s conception of the harm principle or whether we expand his notion of liberal legality to encompass legal paternalism, legal moralism, or perfectionism. Under any conception it is still necessary for the legislature to identify some discrete harm which can justify the use of state coercion.

Finally, it can be seen that the harm principle is consistent with official statements of Canadian criminal justice policy for the past 50 years. Here are three important examples. In 1969, the Report of the Canadian Committee on Corrections (Ouimet Report) noted:

The Committee adopts the following criteria as properly indicating the scope of criminal law:

1. No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society.

2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of behaviour. Other kinds of behaviour may be more appropriately dealt with by non-criminal legal processes, e.g. by legislation relating to mental health or social and economic condition.

3. No law should give rise to social or personal damage greater than that it was designed to prevent.

Further, in 1976 the Law Reform Commission advocated the use of restraint in criminal law, stating that:

If criminal law’s function is to re-affirm fundamental values, then it must concern itself with “real crimes” only and not with the plethora of “regulatory offences” found throughout our laws. Our Criminal Code should contain only such acts as are

76 Feinberg, Harm to Others (1984); Kleinig, “Crime and the Concept of Harm” (1978), 15 Am. Phil. Q. 27.
79 Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections (1969), at 12.
not only punishable but also wrong — acts contravening fundamental values. All other offences must remain outside the Code . . . To count as a real crime an act must be morally wrong. But this, as we said earlier, is but a necessary condition and not a sufficient one. Not all wrongful acts should qualify as real crimes. The real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values. These values fall into two kinds. Some are essential generally to the very existence of society. Some are essential to the existence of our own particular society as it is.  

Finally, the Government of Canada in 1982 published a policy statement with respect to the purposes and principles of the criminal law, stating that:

The basic theme, however, is important, in stressing that the criminal law ought to be reserved for reacting to conduct that is seriously harmful. The harm may be caused or threatened to the physical safety or integrity of individuals, or through interference with their property. It may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values — those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians. Since many acts may be “harmful”, and since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less coercive or less intrusive means do not work or are inappropriate.

In the Introduction, I mentioned that subsequent to having brought constitutional challenges to the gambling provisions, I discovered a “crack in the wall” which provided the fuel for continuing the battle to elevate the harm principle into a principle of fundamental justice. In 1997, the Nova Scotia Court of Appeal dismissed a challenge to another consensual crime (incest among adults). In the course of dismissing the challenge, the Court stated:

The analysis of these arguments must be undertaken with the recognition that the appellants have the burden of proving on the balance of probabilities that their fundamental rights are violated by the law in question. In that respect, I note that the appellants have not presented any evidence that indicates that incest between consenting adults is permitted by the law of any other civilized nation, nor have they filed any articles or learned publications, law reform commission papers or other material that supports their position that “recreational” sexual activity with blood relations should be legalized and constitutionally protected.

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Based upon this passage, it became apparent to me that the prohibition on marijuana possession would be the best vehicle for advancing the harm principle as a constitutional tool for decriminalizing consensual crimes. Unlike incest, with respect to marijuana consumption there is a vast body of academic literature calling out for decriminalization, many other civilized nations have changed their prohibitory policies with respect to marijuana possession, and virtually every Commission of Inquiry, including the 1972 Canadian LeDain Commission, has called for the decriminalization of marijuana possession.83 Finally, as mentioned earlier, there is considerable public support for law reform in this area. Perhaps the incest, obscenity, prostitution and gambling provisions are supported by a “reasoned apprehension of harm”, but with respect to marijuana, there is wide array of legislative facts calling into question the legitimacy of the prohibition.

The “harm principle” challenge to the prohibition on marijuana possession initiated in the Clay case84 offence was predicated on the introduction of an extensive body of expert evidence from the fields of history, sociology, psychiatry, criminology, pharmacology and medicine. Ultimately, the challenge was dismissed primarily on the basis that the question of harm is primarily a political question best left to the policy determinations of a legislature. The trial judge did not conclude that the harm principle was a principle of fundamental justice; however, in order to facilitate further judicial review in appellate courts, the trial judge was requested to make findings of fact with respect to the issue of harm, and the following findings were made:

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;

2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;

3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;

4. There is no hard evidence that cannabis consumption induces psychoses;

5. Cannabis is not an addictive substance;

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83 The literature on this issue is too voluminous to note for this brief paper, but it has been summarized in the Joint Statement of Legislative Facts filed in the upcoming appeal to the Supreme Court of Canada in the cases of R. v. Clay (2000), 146 C.C.C. (3d) 276 (Ont. C.A.); R. v. Caine; R. v. Malmo-Levine (2000), 145 C.C.C. (3d) 225 (B.C.C.A.). The appeals will be heard in the fall of 2002.

Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;

That the consumption of marijuana probably does not lead to “hard drug” use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;

Marijuana does not make people more aggressive or violent;

There have been no recorded deaths from the consumption of marijuana;

There is no evidence that marijuana causes amotivational syndrome;

Less than 1% of marijuana consumers are daily users;

Consumption in so-called “de-criminalized states” does not increase out of proportion to states where there is no de-criminalization.

Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.\(^5\)

Subsequent to the Clay case, a court in British Columbia was faced with a virtually identical record of legislative facts, and the court reached virtually identical findings of fact. The British Columbia court also provided an overview of the social and economic harms triggered by the prohibition itself:

Countless Canadians, mostly adolescents and young adults, are being prosecuted in the “criminal” courts, subjected to the threat of (if not actual) imprisonment, and branded with criminal records for engaging in an activity that is remarkably benign (estimates suggest that over 600,000 Canadians now have criminal records for cannabis related offences); meanwhile others are free to consume society’s drugs of choice, alcohol and tobacco, even though these drugs are known killers;

Disrespect for the law by upwards of one million persons who are prepared to engage in the activity, notwithstanding the legal prohibition;

Distrust, by users of health and educational authorities who, in the past, have promoted false and exaggerated allegations about marijuana; the risk is that marijuana users, especially the young, will no longer listen, even to the truth;

\(^5\) Id., at 360-61.
4. Lack of open communication between young persons and their elders about their use of the drug or any problems they are experiencing with it, given that it is illegal;

5. The risk that our young people will be associating with actual criminals and hard drug users who are the primary suppliers of the drug;

6. The lack of governmental control over the quality of the drug on the market, given that it is only available on the black-market;

7. The creation of a lawless sub-culture whose only reason for being is to grow, import and distribute a drug which is not available through lawful means;

8. The enormous financial costs associated with enforcement of the law; and

9. The inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful.  

Both cases were appealed, and both the Ontario and British Columbia Courts of Appeal concluded that the harm principle is a principle of fundamental justice. A substantive principle of justice was clearly recognized. The Ontario Court of Appeal adopted the following statement made by the B.C. Court of Appeal:

I conclude that on the basis of all of these sources — common law, Law Reform Commissions, the federalism cases, Charter litigation — that the “harm principle” is indeed a principle of fundamental justice within the meaning of s. 7. It is a legal principle and it is concise. Moreover, there is a consensus among reasonable people that it is vital to our system of justice. Indeed, I think that it is common sense that you do not go to jail unless there is a potential that your activities will cause harm to others.

... 

[T]he proper way of characterizing the “harm principle” in the context of the Charter is to determine whether the prohibited activities hold a “reasoned apprehension of harm” to other individuals or society. The degree of harm must be neither insignificant nor trivial.

The Supreme Court of Canada will hear argument in the marijuana cases in the fall of 2002, and the Court will be required to decide whether 1) the harm principle is a principle of fundamental justice; 2) if it is, is conformity with the

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principle satisfied by a reasonable apprehension of a trivial level of harm, or by a reasonable apprehension of a significant or substantial level of harm? and 3) do the legislative facts demonstrate that the prohibition on marijuana possession violates this principle, however defined? The answers to these questions will serve as further food for thought with respect to the larger question posed at the outset of this paper: has the Charter truly had a significant impact on the balance of political power in this country?

IV. CONCLUSION

In 1995, I made the following claim:

The Charter supports a vision of a lawmaking partnership between the judiciary and the legislature. Of course, the “legislature will be the dominant architect”, but, as with most joint ventures, “one partner cannot be left guessing about what the other is doing and why”. To ensure that a proper dialogue between the judiciary and Parliament is created, the Court must speak clearly and act fearlessly. It must not, by clever subterfuge, avoid the opportunities to create guidelines. . . . [If the Court avoids taking bold steps, chances are that the dialogue will never get off the ground . . .]

Since this passage was written, the dialogue between courts and legislatures has not necessarily developed in a healthy manner. With respect to the issue of production of sensitive records in the possession of third parties, the Court articulated a detailed framework only to have Parliament enact legislation similar in spirit but different in application. With respect to the defence of extreme intoxication, Parliament effectively overruled the judicial creation of this defence. Both decisions of the Court were premised upon constitutional principles, and yet this did not prevent the Legislature from adopting their own view with respect to the demands of the Constitution. If anything, this is an uncomfortable dialogue because the traditional understanding of constitutional adjudication is that the judicial branch of government has exclusive authority over the interpretation and application of constitutional norms. With the Legislature seemingly ignoring the constitutional underpinnings of two Court deci-


sions, one might wonder if the Court will fall prey to the maxim: “once bitten, twice shy”. The recent marijuana challenges will put the Court back in the political hot seat, and this case will have a direct impact upon the building of a judicial-legislative dialogue.

There is little doubt that the Charter has shifted the balance of political power in this country, but the proper understanding of the role and function of judicial review in this new order still remains fraught with some uncertainty. The most pronounced shift in power with respect to criminal justice policy would occur if the courts developed substantive principles of fundamental justice which prevent Parliament from enacting criminal prohibitions which do not serve the public interest. This type of development would thrust the Court directly into a quasi-legislative role. It is not clear whether the Court is willing to assume this responsibility. Professor Alexander Bickel aptly described the ideal judicial function in a shifting political framework in the following terms:

The search must be for a function which might (indeed, must) involve the making of policy; yet which differs from the legislative and executive function; which is peculiarly suited to the capabilities of the courts; which will not be so exercised as to be acceptable in a society that generally shares Judge Learned Hand’s satisfaction in a “sense of common venture”; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments’ performance by denuding them of the dignity and burden of their own responsibility.91

The ideal may be easily stated, but after 20 years of the Charter it still remains too early to determine if we have realized the ideal, or only idealized the real.

91 The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), at 158.