The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 24 (2004) Article 8

In Harm's Way: The Limits to Legislating Criminal Law

Roslyn J. Levine Q.C.

In Harm's Way: The Limits to Legislating Criminal Law

Roslyn J. Levine, Q.C.[*]

I. INTRODUCTION

After years of reference to the "harm principle", the Supreme Court found the issue of the principle's proper role in the section 7 Charter analysis squarely before it. The question appeared directly in the marijuana cases (*R. v. Malmo-Levine; R. v. Caine;*)[1] and indirectly in the "spanking" case (*Canadian Foundation for Children Youth and the Law v. Canada*).[2] This paper analyzes the decisions in those cases and their effect on Parliament's discretion to carry out its functions. This discussion also questions whether the Court's continued reliance on aspects of the harm principle really leaves any meaningful legislative scope to advance positive community or collective values, other than those embodied in the Charter rights themselves.

II. HISTORY OF THE HARM PRINCIPLE IN CANADIAN LAW

Our penchant for esoteric statistics about the Supreme Court's work reveals that the political philosopher most often quoted by the Court is John Stuart Mill.[3] Mill's fundamental ideas about the breadth of individual liberty and the limits of state intrusion are the source of most of the Court's references. These ideas centre on what is now known as the

---

[*] Counsel for the Department of Justice (Canada). The views expressed are those of the author and not the Department of Justice. The author gratefully acknowledges the assistance of Jacqueline Dais-Visca.

[1] 2003 SCC 74, [2003] S.C.J. No. 79.

[2] 2004 SCC 4, [2004] S.C.J. No. 6.

[3] D. Brown, "Sauvé and Prisoners Voting Rights: The Death of the Good Citizen", in *2002 Constitutional Cases* (Toronto: Osgoode Hall, 2003).

"harm principle". In his essay *On Liberty*, Mill outlined the classic statement of the principle:

> The object of the Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. The principle is the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection… *The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.* His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. *To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else.* The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. [Emphasis added.][4]

In the context of modern law, and Charter cases in particular, the principles that define the limits of individual liberty equally define the limits of government legislative capacity. The logical expectation is that increased reliance on J.S. Mill's principle will diminish the state's legislative discretion. That general trend is borne out by the Supreme Court's decisions since 1992, although the Court's attachment to Mill's ideals has been somewhat erratic. A clear divide among the justices emerged about the role of the "harm principle" in Charter development and the extent to which public morals or similar values could continue to justify impugned legislation.

---

[4] J.S. Mill, *On Liberty* (1869), online: New York: Bartleby.Com, 1999 (4 August 2004), <http://www.bartleby.com/130/l.htm>.

The harm principle has fostered classic academic works[5] along with raging debates between its loyal defenders and committed detractors.[6] Ideas about the principle's soundness or value, as an organizing principle for the competing interests of individual autonomy and state regulation, continue to fill journal pages almost 150 years after Mill's original essay. The detractors have strongly criticized the principle's disregard of collective life and its essential inability to function as an appropriate test for subtle and complex circumstances; even its proponents have admitted its imperfection. The history of the principle lies entirely outside of modern constitutional law.[7] Nonetheless, it became a valued feature of our Supreme Court's analysis of the section 7 Charter right to "life, liberty and the security of the person".

The first mention of the harm principle was the dissent of Wilson J. in *R. v. Jones*,[8] where she adopted Mill's premise. However, Wilson J. was not as unequivocal as Mill in applying the principle:

> Of course, this freedom is not untrammeled. We do not live in splendid isolation. We live in communities with other people. Collectivity necessarily circumscribes individuality and the more complex and sophisticated the collective structures become, the greater the threat to individual liberty in the sense protected by s. 7.

Justice Sopinka, for the majority, in *R. v. Butler*,[9] dealing with pornography, expressed the first notion of the harm principle's real importance for Canadian constitutional law:

> The objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*.

The majority decision in *Butler* accepted that the protection of "societal harm" came within Mill's concept of "harm to others". The significant

---

[5] J. Feinberg, *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984).

[6] The debates between J.S. Mill and James Fitzjames Stephen and between H.L.A. Hart and Lord Patrick Devlin are renowned. The modern proponents of Mill's theory are Joel Feinberg, Thomas Nagel and Ronald Dworkin. See G. Dworkin, "Devlin was Right: Law and the Enforcement of Morality" (1999) 40 Wm. & Mary L. Rev. 927.

[7] R. Epstein, "The Harm Principle — and How it Grew" (1995) 45 U.T.L.J. 369.

[8] [1986] 2 S.C.R. 284, at 319, [1986] S.C.J. No. 56.

[9] [1992] 1 S.C.R. 452, at 498, [1992] S.C.J. No. 15.

point in the decision was the adoption of the Millian philosophy that *only* harm to others could justify the infringement of personal liberty.

Up to that point, moral values had been accepted in the mix of potential justification for infringement of Charter rights. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,[10] the majority found that ridding city streets of the "social nuisance" of solicitation by prostitutes was a valid objective that justified infringing freedom of expression. This was consistent with the earlier statement in *R. v. Big M Drug Mart Ltd.*, by Dickson J., as he then was:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[11]

Justice Gonthier dissented in *Butler*, holding firm in his own opinion that moral values could continue to validate criminal legislative action:

> Indeed the problem is not so much to assess whether morality is a valid objective under the Charter as to determine under which conditions it is a pressing and substantial objective. Not all moral claims will be sufficient to warrant an override of Charter rights.
>
> …
>
> First of all, the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste. Parliament cannot restrict Charter rights simply on the basis of dislike; this is what is meant by the expression "substantial and pressing" concern.[12]

Justice Gonthier's dissent in *Butler* is not surprising as, in the period since that decision, he continued to strengthen his support for moral or other values as justification for state intrusion on individual rights. He recognized that social well-being is sacrificed by the primacy of individual liberty and remained wary of the limitations that the Millian approach places on legislative discretion that serves the collective inter-

---

[10] [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52.
[11] [1985] 1 S.C.R. 295, at 337, [1985] S.C.J. No. 17.
[12] *R. v. Butler*, *supra*, note 9, at 523.

est. As referenced later in detail, he argued for a legal model that would encompass and nurture broader social values at the expense of some individual liberty.

After *Butler*, three points became clear. First, the Supreme Court and the Courts of Appeal moved increasingly toward a form of Charter analysis that *required* a legislative objective of harm prevention to justify infringements of Charter rights. Second, the "harm principle" became increasingly important in *both* the "fundamental justice" analysis in section 7 and the balancing approach in section 1. Finally, it became gradually more difficult for governments to justify legislation because evidentiary proof, even of a reasonable apprehension of harm, was usually problematic. Discerning when scientific proof would be necessary and when common sense might be adequate to satisfy the burden became a job better suited to psychics than lawyers.

Certainly, part of the harm principle's early appeal was its rejection of morality as justification for state interference in private individual action. However, morality, as understood by Gonthier J. and others, also claims a broader sense, encompassing community values that aim to improve the community's sense of well-being. Public litter probably causes little or no direct harm, but it is reasonable to assume that a clean environment is almost universally preferred. In the same vein, attempting to achieve a society that is free of psychoactive drugs is a laudable goal with collective benefits of well-being, even conceding that the individual use of such drugs does no harm in the Millian sense.

As Wilson J. pointed out in *R. v. Jones*, the community or collectivity — the counterbalance to individuality — is placed at risk if the justification analyses under the Charter become overly saturated by the harm principle to the exclusion of value and even moral based justifications.

While individual liberty is protected against the conventional or majoritarian opinion, the majority must perpetually endure the activity it may detest almost universally. Some will always argue that the price paid by the collective is appropriate to the value of the freedom it brings to the individual, but the reality is that the collective pays the price, nonetheless, by holding its collective nose forever. (In this regard, the huge increase in both the amount and pervasiveness of pornographic matter is a perfect example.)

The important point is, when the harm principle is applied as the *exclusive* rule to mediate the tension between individual liberty and constitutionally-permissible limits of legislative action, the inevitable result is

a social environment that operates only at the lowest common denominator of intolerance for widely abhorred activity. If the intent of the Charter was to create that social state, then it may still achieve its goal in spite of the most recent cases that appear to disavow the strict harm principle.

Less than a year after the *Butler* decision, with its clear endorsement of Mill's ideals, the Supreme Court appeared to waver for a moment, in *Rodriguez*,[13] where the criminal prohibition against assisted suicide was challenged under section 7 but upheld. Justice Sopinka, for the majority, seemed to recant the Court's distaste for moral justification of liberty infringement. Mill's exception for the protection of vulnerable groups could have provided a consistent rationale for the decision, as the vulnerability of the disabled was at issue. However, the clear focus of the *Rodriguez* judgment was aimed in a more contradictory direction.

Justice Sopinka laboured to find the required factors to contextualize and discern the principles of fundamental justice that might be violated. He deemed the consensus of societal opinion important to ascertaining principles of fundamental justice and then identified the "sanctity of life" — perhaps the quintessential moral-laden concept — as the principle of fundamental justice engaged in the circumstances. Justice Sopinka acknowledged the moral nature of the issue and negated both Mill's contempt for public opinion and his principle that each person is the guardian of his or her own bodily and spiritual health:

> I wholeheartedly agree with the Chief Justice that in dealing with this "contentious" and "morally laden" issue, Parliament must be accorded some flexibility. … In light of the significant support for the type of legislation under attack in this case and the contentious and complex nature of the issues, I find that the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment.[14]

In this sense, the judgment reflected the dissent of Gonthier J. in *Butler*, where public opinion or support for a measure along with morality are tied to the meaning of harm in the justification process:

---

[13] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, [1993] S.C.C.A. No. 108.

[14] *Id.*, at 614-15.

> [A] consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people. In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. The guarantees of s. 2 of the *Charter* protect this pluralistic diversity. However, if the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s. 2 of the *Charter* becomes less insurmountable an objection to State action…In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality. This is also comprised in the phrase "pressing and substantial".
>
> The avoidance of harm caused to society through attitudinal changes certainly qualifies as a "fundamental conception of morality". After all, one of the chief aspirations of morality is the avoidance of harm. It is well grounded, since the harm takes the form of violations of the principles of human equality and dignity. Obscene materials debase sexuality. They lead to the humiliation of women, and sometimes to violence against them. This is more than just a matter of taste.[15]

The majority judgment in *Butler* also departed from the admonition of Lamer J. in *Re B.C. Motor Vehicle Act*, that "the principles of fundamental justice" are found in "the basic tenets of our legal system", and "do not lie in the realm of general public policy".[16]

Although a constitutional challenge was not in issue in *R. v. Hinchey*,[17] some support for moral values was evident again when L'Heureux-Dubé J. defined the scope of the criminal law by reference to *Mewett & Manning on Criminal Law*:

> In fact, the harm caused, while one element to be considered, is only one element. Indeed in some crimes such as conspiracy or attempt, no harm at all may actually materialize…
>
> Criminal law is premised on the belief that there are some acts that ought to be prevented and on the belief that a criminal process is the best way to achieve this…[18]

---

[15] *R. v. Butler*, *supra*, note 9, at 523-4.

[16] *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] 2 S.C.R. 486, at 503, [1985] S.C.J. No. 73.

[17] [1996] 3 S.C.R. 1128, at 1144, para. 26, [1996] S.C.J. No. 121.

[18] A.W. Mewett, and M. Manning, *Mewett & Manning on Criminal Law*, 3rd ed. (Markham: Butterworths, 1994), at 16-17.

In 1998, in *Thomson Newspapers Co. v. Canada (Attorney General)*,[19] Bastarache J. held that the government had not succeeded in establishing the harm it intended to avoid by the imposition of a three day blackout period for the publication of poll results prior to an election. He held that the object of preventing the possibility that some voters might be misled by inaccurate polls was pressing and substantial. Nonetheless, the government had not proven that the harm it sought to prevent was widespread or significant. The Court found that where common sense dictated the harm was slight, the government was entitled to little deference.

Justice Gonthier dissented in *Thomson Newspapers*, once again and stated:

> The *Charter* should not become an impediment to social and democratic progress. It should not be made to serve substantial commercial interests in publishing opinion poll results, by defeating a reasonable attempt by Parliament to allay potential distortion of voter choice.[20]

Justice Gonthier's continuing message about collective responsibility is found, not surprisingly, in his ideas about the legislative function:

> Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.[21]

In 2002, the *Sauvé* case became the ensuing battleground for the role of social and moral values in the constitutional review of legislation. The Chief Justice was categorical in eliminating social policies from the justification discussion, relying exclusively on harm, where the *Election Act* removed penitentiary prisoners' right to vote.

---

[19] [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44.

[20] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at 908, para. 30, [1998] S.C.J. No. 44.

[21] *Id.*, at para. 42.

> Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process.[22]

No harm was identified. The government characterized the object of the legislation as a positive measure towards improving prisoners' views of social responsibility and the rule of law. The majority could not accommodate any legislative deference where the object of the disenfranchisement was "the enhancement of civic responsibility" through a value-laden message about the consequences of anti-social (criminal) conduct. Not only did the Court give short shrift to legislative deference, it also trounced the "dialogue theory" that had provided a notional framework for the relationship between the judicial and legislative branches of government. In the result, legislative discretion to implement positive social values, in the absence of objective harm, was virtually removed.

Here, again, Gonthier J. wrote the dissenting opinion, but also on behalf of three other justices. First, he determined that morality is not banned from the process of justification:

> In my view, the real challenge is not justifying state activity on the basis of morality in the abstract, but determining which specific moral claims are sufficient to warrant consideration in determining the extent of *Charter* rights…
>
> The issue is therefore identifying what amounts to a fundamental enough conception of morality.[23]

Justice Gonthier also recognized that scientific proof had become the inevitable requirement to satisfy the harm test (which, for example, is the reason the government failed in its justification efforts in *Thomson Newspapers*). He understood that considerations in the justification process might not be capable of "scientific proof".

> [T]he harm which flows from serious offenders voting is obviously not empirically demonstrable. As long as one holds democracy to be an

---

[22] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at para. 23, [2002] S.C.J. No. 66, at para. 23.

[23] *Id.*, at para. 113.

> abstract good, to find that empirically measurable harm flows from the result of any fair democratic process is an impossible argument to make.[24]

Most importantly, the minority opinion recognized that values *outside* those embodied in Charter rights, such as the promotion of the rule of law, might be fundamentally important and provide adequate justification to limit individual rights or freedoms.[25]

Despite the Supreme Court's overall trend of increasing restriction on the scope of legislation where the harm principle is not served, the Court appeared to soften its position in the most recent cases. That appearance, however, belies the reality. In spite of the Court's rejection of the classic Mill principle as "a principle of fundamental justice", for the purpose of section 7, the Court is likely to continue invalidating legislation unless it meets a harm threshold. The marijuana and spanking cases engaged two very different but complementary issues relating to Parliament's constitutional scope to create criminal offences. In *R. v. Malmo-Levine; R. v. Caine* and *R. v. Clay*[26] the Court considered the validity of criminal sanctions for the private recreational use of marijuana. In *Canadian Foundation for Children Youth and the Law v. Canada* — the "spanking case" — the Court determined the validity of the criminal defence for parents who use reasonable corrective force, *i.e.*, spanking, on their children.

The criminal law requires special consideration in the discussion of liberty interests and the harm principle. As seen in *Malmo-Levine and Caine*, imprisonment and subjection to the criminal law process and conviction engage serious deprivations of the section 7 liberty right. The fundamental point about the limits of criminal law were stated by Dickson C.J. in *Re B.C. Motor Vehicle Act*:

> A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter of Rights and Freedoms.*[27]

---

[24] *Id*., at para. 179.

[25] *Id*. at paras. 114-15.

[26] [2003] S.C.J. No. 80, 2003 SCC 75; *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 [hereinafter "*Malmo-Levine and Caine*"]

[27] *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, *supra*, note 16, at 492.

This principle of fundamental justice begs the question for the present discussion, as it fails to determine what qualifies as a constitutionally valid "wrong". Can a contravention of legislation, which aims simply to promote or significantly increase social well-being, constitute a "wrong"? Whether an activity can constitute a "wrong", without proof of its harm to another or to society, remains the issue.

Both the majority and minority opinions in *Malmo-Levine and Caine* agreed that Parliament is entitled to complete deference on the wisdom of criminalizing any particular behaviour.[28] That deference is limited only by constitutional rights. For Arbour J., however, imprisonment is the controlling consideration that limits legislative discretion immediately, apart from the necessity to meet the principles against arbitrariness, rationality and gross disproportionality.[29]

III. THE MARIJUANA CASES

With respect to recreational marijuana use, the challengers in *Clay*, and *Malmo-Levine and Caine* invoked Mill's harm principle as an independent principle of fundamental justice. They asked the Court to strike the marijuana laws on the basis that a criminal sanction for an activity that did not harm anyone, except (possibly) the marijuana user, violated the user's section 7 liberty (or privacy) rights. (The argument in *Clay* emphasized the privacy aspect of marijuana use in the section 7 right, claiming that "not an insignificant" amount of harm is necessary to validate the prohibition.) The consensus of the evidence in the cases was that a small percentage of persons are vulnerable to the effects of marijuana and could harm themselves, while chronic use could harm most individuals' health.

The question for the Court, clearly stated, was whether the government could criminalize any behaviour that does not meet the harm principle — as a principle of fundamental justice — within the meaning of section 7. The context, which was pivotal to the Court's decision, was the criminal nature of the intervention, the possible sanction of imprisonment and the usual sanction of a lesser punishment. At the outset, the

---

[28] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, at para. 215, *per* Arbour J.; at para. 173, *per* McLachlin C.J..

[29] *Id.*, at para. 69, *per* Arbour J.

Chief Justice, for the majority, distinguished J.S. Mill's philosophical exercise from constitutional interpretation. Further, the Court acknowledged the overly simple nature of Mill's formulation.[30]

The first blow to a formal role for the harm principle in section 7 was the finding that it was an "important state interest" rather than a normative "legal" principle. Consequently, the principle failed the *B.C. Motor Vehicle* and *Rodriguez* threshold test that determines what is a principle of fundamental justice. The Court also found that the principle suffered from a lack of "significant societal consensus" or "general acceptance among reasonable peoples". The Court's own experience with the principle could have been sufficient proof, although the Court cited diverse sources, from Mill's critics to the Law Reform Commission of Canada.[31] The Commission had tackled the question of what the objective or limits of criminal law should be, stating that it should be reserved for "conduct that is seriously harmful" but:

> ... [harm] 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. [32]

The majority of the Court dispensed with any distinction between criminalizing acts of harm to self and harm to others.[33] But Arbour J.'s view was that legislation could not remain constitutional when it threatened imprisonment of the vulnerable for their own self-protection. The evidence that imprisonment for the relevant offences has been used only in exceptional circumstances appeared to be a key factor in the majority's decision to uphold the legislation. The majority determined the *threat* of imprisonment was not unconstitutional, as individual sentences would remain susceptible to constitutional scrutiny.[34]

Most significantly, the Court determined that the harm principle "does not provide a manageable standard under which to review the criminal or other laws under s. 7 of the *Charter*". But, the Court's defer-

---

[30] *Id*., at para. 109, *per* McLachlin C.J.
[31] *Id*., at paras. 115-22.
[32] *Id.*, at para. 122 [emphasis added by Court].
[33] *Id*., at para. 124.
[34] *Id*., at paras. 148-49.

ence to Parliament to designate activity as criminal, in order to promote other state interests (*i.e.*, other values), is illusory, as illustrated by the following:

> Parliament, we think, is entitled to act under the criminal law power in the protection of legitimate state interests other than the avoidance of harm to others subject to *Charter* limits such as the rules against arbitrariness, irrationality and gross disproportionality…[35]

In other words, failure to establish harm beyond a *de minimis* standard for a criminal legislative action likely would result in a violation of section 7 on the grounds of arbitrariness, irrationality and gross disproportionality. In the case of marijuana use, the severity of problems for some people, like the vulnerable, was enough to satisfy an attack based on arbitrariness. However, society's collective disapproval of the use of psychoactive drugs apparently would not have sufficed.[36]

In *Clay*, Gonthier and Binnie JJ., for the majority, stated that "[t]he task of the Court … is not to micromanage Parliament's creation or continuance of prohibitions backed by penalties" neither is its concern "with the wisdom of the prohibition".[37] This separation of function will be difficult to heed, however, even without a formal constitutional "harm principle". Legislative discretion under section 7 remains limited by the notion of disproportionality, which calculates whether the legislative measures used are "so extreme that they are *per se disproportionate* to any legitimate government interest".[38]

In *Clay*, legislative "overbreadth" was claimed and the Court found that this aspect was also governed by the standard of "gross disproportionality".[39] The connection to harm avoidance is maintained under this test, although not articulated in that way, as the court must measure the positive contribution or effect of the legislation (*i.e.*, its effectiveness in harm avoidance) in proportion to its adverse affects on section 7 liberty interests of the individual.

---

[35] *Id.*, at para. 129.
[36] *Id.*, at para. 136.
[37] *R. v. Clay*, [2003] 3 S.C.R. 735, at para. 4.
[38] *R. v. Malmo-Levine; R. v. Caine*, *supra*, note 28, at para. 143, *per* Mclachlin C.J. [emphasis in original].
[39] *Id.*, at para. 38.

> [I]f the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.[40]

Although the onus is on the claimant and the threshold is high in this respect, assertions about a provision's positive contribution may be incapable of any scientific proof necessary to rebut the allegations of a breach of fundamental justice.

The Court also examined the spectre of a criminal conviction and a record for the impugned offence in relation to the test of gross disproportionality. Once again, the avoidance of harm figured prominently in supporting the prohibition's validity. The Court showed deference to Parliament's policy choice in employing the criminal justice system to enforce the prohibition. Nevertheless, failure of the disproportionality test under section 7 would have rendered meaningless the initial deference. The legislation passed the test only on harm-based considerations:

> Once it is determined that Parliament acted pursuant to a valid state interest in attempting to suppress the use for recreational purposes of a particular psychoactive drug, and given the findings of harm flowing from marihuana use, already discussed, we do not think that the consequences in this case trigger a finding of gross disproportionality.[41]

While the harm principle failed to find a unique or independent function in the section 7 analysis, the decisions in the marijuana cases remain replete with "harm speak". The Court's section 7 analysis made little real room for state interests that comprise pure, positive state action to improve social well-being, rather than support the reduction of apprehended harm. Parliamentary deference in the creation of the criminal law is endorsed, but social values of fundamental importance, by themselves, will not pass section 7 Charter scrutiny under principles of arbitrariness, rationality and disproportionality, unless some harm is avoided. The only reasonable conclusion from the decisions in *Malmo-Levine and Caine* is that the harm principle may be outwardly invisible, but it still stalks the Charter's liberty right.

---

[40] *Id.*, at para. 169.
[41] *Id.*, at para. 174.

IV. THE SPANKING CASE

In *Malmo-Levine and Caine* the Court allowed that, as a matter of constitutional law, Parliament could decide what is *not* criminal as well as what is.[42] In the spanking case, which was argued prior to the decision in *Malmo-Levine*, the Foundation for Children Youth and the Law attempted to enforce a constitutional corollary to the principles in the latter case: the state *must* intervene where there is at least an apprehension of harm. For the majority of the Court, the section 15 equality right answered the challenge completely. Justice Arbour addressed the section 7 argument and found that section 43 breached a child's right to liberty and security.

The Foundation challenged the defence contained in section 43 of the *Criminal Code*, which exempts parents (and teachers) from criminal conviction for assault (section 265) if they use "reasonable force in the circumstances" for correction of a child. The Foundation based its challenge on children's section 15 equality right but also, more importantly for this discussion, on a child's section 7 liberty interest (to be free from physical force). The Foundation invoked the harm principle, although to a different end. It argued that the government is required to take positive action to *create* a criminal offence (by removing a defence) where the activity in issue is harmful.

The consensus of the evidence in the spanking case was that some types of corrective force may be harmful, depending on the age of the child and where on a child's body the force is applied. The government argued that any potentially harmful acts lay outside the scope of the defence, when interpreted in accordance with the *Constitution*. The Foundation's evidence never established that children are harmed by a parent's disciplinary use of mild to moderate, normative force, such as "spanking". By contrast, the evidence did establish that employing the criminal process in a family setting, to address the trivial assault involved in a spanking, would be harmful to the family as a collective unit.

In theory, the spanking case provided a test for the exception to Mill's principle, as the matter concerned the rights of children — a vulnerable group.

---

[42] *Id.*, at para. 140.

> Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.[43]

The Attorney General did not argue that physical discipline is necessary to protect children against their baser nature or to foster their proper development, although some persons traditionally hold the contrary view. The Court did not consider this aspect of the principle.

The case rested on the perspective of the victim in the criminal justice system and the victim's liberty interests. In effect, the circumstances created the photographic negative of the harm principle, arguing for state intervention in the presence of harm. Was this approach entitled to succeed? The victim's liberty interests in relation to the state's action are indirect at best. The state's failure to criminalize the acts of others is not the source of the intrusion on the victim's liberty. The Foundation's theory placed a positive obligation on the state to protect the victim's liberty interest. The argument might have invoked the Millian exception for the vulnerable as a legislative imperative. The case was not decided on that basis, however, since the majority interpreted section 43 as not extending to force that results in harm or a prospect of harm.[44] Nonetheless, the risks of harm and arbitrariness were addressed by the Court in the context of the appropriate use of criminal sanctions. The majority noted that the presence of the section 43 defence avoids more harm than it might cause:

> But s. 43 also ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.
>
> …
>
> Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or

---

[43] J.S. Mill, *On Liberty*, *supra*, note 4, at 52.

[44] *Canadian Foundation for Children Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 30.

> a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning.[45]

Justice Arbour, for her own minority opinion, addressed the child's section 7 rights and determined that the defence of *de minimis* would satisfy all concerns about the inappropriate use of criminal sanctions for non-harmful parental actions. In resurrecting this defence, Arbour J. referred to her opinion in *Malmo-Levine*, which resolved that there is no culpability for harmless and blameless conduct.[46] This principle was originally intended to protect the traditional section 7 interests of the *accused* — in the case of section 43, the parents who might be charged with a criminal offence. The application of that principle to vindicate the section 7 liberty interests of *victims* is problematic for the harm principle, as it engages competing harms. (The majority held that it was more harmful to criminalize mild parental force than to allow a parent to use that force.) Moreover, if the defence were removed, both the victims and the accused would need to rely heavily on police and prosecutorial discretion, which are simply other varieties of state intrusion (by commission or omission) for the parents and children on either side of the disciplinary force.

Justice Arbour's judgment also provided her view of the proper roles for courts and legislatures in creating criminal offences. She refused to read constitutional limits into the defence as the majority did, to avoid its application to harmful actions, because when a defence is diminished, criminal culpability is expanded.[47] In her opinion, Parliament can create offences and the courts may narrow them or remove them when they breach constitutional limits. However, courts are not entitled to enlarge or create criminal law. In philosophical terms, the courts cannot assist the State's intrusion upon the liberty of the individual, but only protect against it. This view applies Mill's theory in its original and pure form.

---

[45] *Id.*, at paras. 59 and 68.

[46] *Id.*, at para. 204.

[47] See *R. v. Ruzic*, [2001] 1 S.C.R. 687, [2001] S.C.J. No. 25, where the Court struck a statutory defence because it had narrowed the previous common law defence, thereby enlarging criminal culpability without justification.

V. THE HARM PRINCIPLE — WHY NOT

The Supreme Court was right to reject the harm principle as an independent principle of fundamental justice for reasons other than those stated in the marijuana cases. Section 7 requires an internal balance of individual liberty rights and state interests to determine the relevant principles of fundamental justice,[48] aside from the balance in section 1. As a principle of fundamental justice, the harm principle would permanently predispose the section 7 balance in favour of the individual's interest, significantly changing the content of the section 7 right. As the Court reiterated in *Malmo-Levine and Caine*, the onus in establishing the section 7 breach must be borne by the claimant. Injecting the harm principle into the section 7 right would reverse the burden at the outset. The government would have to establish proof of harm in every section 7 case, whether or not it had some *other* valid justification at the section 1 stage.

Further, the harm principle is a rigid idea that is inconsistent with broader Canadian ideals supported elsewhere in the Charter. Modern governments are remarkably more sophisticated than they were at the principle's inception. Their approach to regulation is multi-layered and varied. Most importantly, governments must execute their craft within constitutionally-entrenched limits. The original harm principle was aimed simply to limit government action against the individual and was articulated at a time when society was homogenous and government had unfettered legislative discretion. Some factions in modern society welcome, if not demand, government action for their protection and to mediate between the disparate social interests of a diverse modern society. The challenge in the spanking case makes this point exactly.

As Epstein explains, the modern concerns of discrimination, victimization and marginalization were "not even remote specters in Mill's moral or descriptive universe".[49] Our own Court has coalesced ideas about human dignity and avoidance of degrading or dehumanizing activity into the underlying themes or policies of a number of different Charter rights. These ideas, too, were not part of the language of the harm principle's original formulation; the principle requires a real

---

[48] *R. v. Malmo-Levine; R. v. Caine, supra*, note 28, at paras. 94-99, *per* McLachlin, C.J.

[49] R. Epstein, "The Harm Principle — and How it Grew", *supra*, note 7, at 374.

stretch to accommodate them. In the *Keegstra* case,[50] the Court upheld the criminal offence of inciting hatred by the narrowest margin. The majority thought it was necessary to find that harm avoidance was the pressing and substantial objective to justify the offence. The simple, but fundamentally important, objective of promoting social harmony in a diverse society would not have been sufficient. The harm principle respects autonomy,[51] but does not necessarily honour human dignity.

Epstein also notes that the harm principle is based on individual transactions or occurrences, an approach that has little resonance in a modern world of great social interaction, where a multiplicity of other interests is engaged by individual actions. Additionally, the principle was never designed to handle mass social organizations, such as labour unions or trusts, and does not provide any guidance to measure or value numerous competing interests.

Justice Gonthier captured many features of these concerns and the harm principle's discordance with modern societal values through a slightly different discussion. According to his theory, we have overlooked the principle of "fraternity" while concentrating on "liberty" and "equality".[52] Justice Gonthier asks what happened to the concept of fraternity in North America. He postulates that the omission constitutes the triumph of individualism over communalism. He defines fraternity in the following terms:

> It is the glue that binds liberty and equality to a civil society. It is intuitive. It is the forging element of a community. It advances goals of fairness and equity, trust and security, and brings an element of compassion and dedication to the goals of liberty and equality… Whereas liberty protects the right to live free from interference, fraternity advances the goals of commitment and responsibility, of making positive steps in the community… Further, the goal of fraternity is to work together to achieve the highest quality of individual existence. In short, liberty and equality depend on fraternity to flourish.[53]

---

[50] *R. v. Keegstra*, [1995] 2 S.C.R. 381.

[51] L. Alexander, "Harm, Offense and Morality" (1994) 7 Can. J. L. & Juris. 199-216.

[52] C. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill L.J. 567-89.

[53] *Id.*, at para. 3.

Likewise, the harm principle denies any place in law for the values that underpin ideals such as fraternity. It robs the individual of the benefits of communalism by addressing only those detrimental aspects of community that limit individual liberty. The values of the collective are described by Gonthier J. as follows:

> The constituent elements of fraternity are a number of values which, like liberty and equality, are fundamentally moral values, values to which we aspire but seldom attain. Each of the values interacts with liberty and equality while also interacting with the other fraternal values. The result of this process, or the result to which we aspire, is a better community.[54]

The possibility of an improved community can never be addressed directly by the legislator under the scrutiny of the harm principle. The principle, by itself, is not elastic enough to validate positive legislative steps aimed simply at advancing greater social well-being.

As the Supreme Court noted in *Malmo-Levine and Caine*, recent academic thinking also concludes that the harm principle has collapsed under its own weight.[55] Bernard Harcourt documents the shift in justification of legislative intervention from morality to harm, in circumstances that would have been precluded by the harm principle thirty years ago.[56] He sees today's debate between autonomy and state intrusion "as a cacophony of competing harm arguments without any way to resolve them" because "the original harm principle was never equipped to determine the relative importance of harms".[57]

Richard Epstein also points to this trend. He argues that while the principle itself is essentially the same, "far more content has been poured into the exception 'harm or evil to others", to justify all manner of government intervention.[58] We see this effect in the efforts to craft policy statements in the language of harm to support the passage of legislation. We also see the huge evidentiary records and the witness contests in constitutional litigation — all aimed to prove or disprove harm. In the spanking case, almost 20 volumes of affidavit evidence and

---

[54] *Id.*, at para. 7.

[55] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, at para. 127.

[56] B. Harcourt, "The Collapse of the Harm Principle" (1999) 90 J. Crim. L. & Criminology 109.

[57] *Id.*, at para. 13.

[58] *Supra*, note 49, at 371.

cross-examination transcripts were produced to support or debunk the allegations of harm from physical punishment. The huge amounts of time and resources required to litigate harm have changed the constitutional litigation landscape.

In Epstein's view, the result of this shift in focus is the application of the principle as a sword against individual liberty rather than a shield to protect it. From the legislator's view, however, this transformation places a huge burden and resulting chill on legislative capacity and creativity. The government must abdicate any proactive role in improving social conditions since it is nearly impossible to provide the proper evidentiary case for harm that is merely apprehended or anticipated.

In Harcourt's view, the collapse of the harm principle is beneficial, because it highlights the harm that is usually present on both sides of the equation and requires balancing. As the Court pointed out in the marijuana cases, the parties busied themselves with either proving harm from the intrusion and the harm from prohibited activity, with neither side giving much credence to the other's harms. However, the ineffectiveness of the harm principle is also more apparent, because it does not provide any guidance on balancing the competing harms. The spanking case provided a case in point on this account as well. While the potential for harm to a child exists in the use of physical disciplinary force, the Court validated the defence partly because it found more potential harm for the family and society in criminalizing trifling parental actions.

While the concerns about the harm principle and its restraints of legislative capacity have an abstract quality, the *Assisted Human Reproduction Act*[59] supplies a reality check. This very recent legislation prohibits human cloning and mandates serious criminal sanctions for its contravention. Ten-year terms of imprisonment, in addition to fines up to $500,000, may be imposed. The questions around cloning are ethical and moral. The legislators, as representatives of our collective interest, have a sense that a ban on cloning is necessary for greater social well-being and the preservation of human dignity. The legislative objective relates to ideas about the sanctity of life. If the section 7 rights of the Act's offenders are *prima facie* violated, because moral values alone (without proof of harm) cannot surmount the existing principles of fun-

---

[59] Bill C-6 received Royal Assent on March 29, 2004, S.C. 2004, c. 2, in force April 22, 2004.

damental justice, the government loses the benefit of its interest in the section 7 right and its section 1 burden is automatically engaged. If the reasoning in *Sauvé* governs the section 1 analysis (rather than the earlier reasoning in *Rodriguez*), the section 1 analysis to justify the cloning prohibition based on "other values" and moral grounds may be doomed as well.

VI. CONCLUSION

The Canadian experience with the classic harm principle advocated by Mill is inconsistent. At the outset of its Charter analysis, the Supreme Court's alternating dismissal and embrace of moral values as justification for limitations on personal liberty left the scope of legislative deference in limbo. By increasing its adherence to the harm principle, the Court narrowed the limits of legislative discretion and removed the opportunity to foster collective ideas of social improvement. While the Court has finally determined that the harm principle is not a principle of fundamental justice against which the section 7 liberty right is measured, the principle remains a live part of the existing fundamental principles against arbitrariness, irrationality and gross proportionality.

The critiques offered by numerous authors should renew the question of the necessity of referring to the principle at all, since it falls so short on many accounts. If the criticisms of the harm principle are legitimate, then the principle should have no greater utility as a standard in its subordinate role in section 7 than it would have as an independent principle of fundamental justice. Although it seems that the Supreme Court has dealt conclusively with the harm principle in the marijuana cases, the decisions forewarn that discussions about the principle will continue for some time.