

2006

From the MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7

Jamie Cameron

Osgoode Hall Law School of York University, jcameron@osgoode.yorku.ca

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Cameron, Jamie. "From the MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 34. (2006).

DOI: <https://doi.org/10.60082/2563-8505.1094>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol34/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7

Jamie Cameron*

I. INTRODUCTION

It was unfortunate, if not inevitable, that section 7 became the Charter's problem child.¹ Inevitable, perhaps, because the guarantee's structure and text present interpretive puzzles.² To begin, section 7 calls on courts to build concrete definitions from abstract concepts like liberty, security and fundamental justice.³ Its structure requires judges to develop a relationship between its first clause, which identifies "entitlements", and a second clause, which is concerned with "deprivations". The conjunctive "and" does not settle whether the guarantee protects two rights or one. Further confusion arises under the second clause, which contains an internal limit and suggests that entitlements can be infringed, as long as the deprivation complies with textually indeterminate principles of fundamental justice ("PFJ"). Yet an internal limit of that kind can only confound the relationship between section 7's concept of fundamental justice and section 1's standard of reasonable limits. If it is plain that a justification exercise is pointless after section 7 has balanced interests, section 1 nonetheless demands that infringements

* Osgoode Hall Law School. I am grateful to Jonathan Bricker (LL.B. 2008) for his assistance in the editing process, and to Bridget Hauserman (LL.B. 2007) for research assistance in the preparation of the conference draft. I would also like to recognize my Section 7 Seminar class (Winter 2006), and to acknowledge how much I learned about s. 7 from class discussion and research papers.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² A chronological list of the key cases discussed in this article is provided; see Appendix, Master Case List.

³ Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

undergo a reasonable limits analysis. In a broader context, the guarantee heads up the Charter's "Legal Rights", and should be understood alongside its other entitlements. Unlike section 7, which references abstract concepts, those provisions specify the protections they offer.

Section 7's problems are unfortunate, too, because at least some of them could have been avoided. If it was difficult enough that the text consigned the above questions to the courts, the guarantee's genesis superimposed other challenges on its interpretation. Though those who drafted it were clear that the provision was restricted to procedural matters, the Court resisted that conception, as a stingy view of section 7's possibilities clashed with the "living tree" approach to interpretation.⁴ That view also strained against the instinct that a guarantee of *fundamental* justice must include questions of substance. In the circumstances, a procedural conception of the guarantee became the "road not taken".⁵

In granting section 7 a substantive interpretation, the *Motor Vehicle Reference* ("MVR") treated the divide between procedure and substance as the locus for debate about the legitimacy of review under section 7.⁶ That debate had little resonance in Canada before 1982, but was imported from the United States when the Charter arrived. It sparked a contest, which is predictable in such matters, between those who insisted that American concerns are not ours and should be unceremoniously dismissed for that reason, and others who thought it naive to imagine that we in Canada could escape a debate that has had long-standing traction in the United States. More than any other provision, section 7 has borne the brunt of Americanized doubts about the legitimacy of review under the Charter.⁷

Despite the constraints of what was intended and what American experience cautioned, the text of section 7 enabled members of the

⁴ Justice Lamer, as he then was, explained: "If the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials ... do not stunt its growth."; *Reference re Motor Vehicle Act (British Columbia)* S. 94(2), [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 52 [hereinafter "MVR"].

⁵ Robert Frost, "The Road Not Taken" (1915).

⁶ "The substantive/procedural dichotomy ... is largely bound up in the American experience with substantive and procedural due process [and] imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution"; *id.*, at para. 17.

⁷ See K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Inc., 2001).

Court to generate divergent, highly individualized views of the guarantee. At one end of the spectrum, McIntyre J.'s reluctance to engage the substantive content of the guarantee stands to this day as a model of institutional modesty.⁸ Set against his view is the position Arbour J. advanced in a series of dissents, which essentially treated section 7 as a corrective for injustice, wherever and whenever it is found.⁹

Other interpretations of section 7 staked out a variety of positions in between. Former Chief Justice Lamer thought that substantive review could expand in some directions and contract in others. His plan for section 7 opened the administration of justice up for substantive review and shut the enterprise down in other settings.¹⁰ Though it has not prevailed over time, that view played a critical role in the evolution of the jurisprudence. Meanwhile, an arbitrary limit on liberty or security of the person is what triggers McLachlin C.J.; as her plurality opinion in *Chaoulli v. Quebec* reveals, she is not hesitant to intervene in such circumstances.¹¹ Other members of the Court, including Wilson and La Forest JJ., have also made vital contributions. Though each endorsed a definition of liberty that would protect an individual's fundamental personal choices from interference by the state,¹² section 7 balancing is a distinctive feature of La Forest J.'s legacy.¹³ In another direction,

⁸ See, e.g., *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30; *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (dissenting opinions).

⁹ See, e.g., *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429; *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571; and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 [hereinafter "CYF"]; (dissenting opinions).

¹⁰ See, e.g., *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 [the "Solicitation Reference"]; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 [hereinafter "CAS"] (concurring opinions).

¹¹ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 [hereinafter "Chaoulli"]; see also *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (dissenting opinion).

¹² On the definition of liberty, see Wilson J. in *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, and *Morgentaler*, *supra*, note 8 (concurring opinion); La Forest J. in *CAS*, *supra*, note 10; and *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, Appendix A, *id.*

¹³ See, e.g., *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309; *R. v. Beare*, [1987] S.C.J. No. 92, [1988] 2 S.C.R. 387; and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425.

L'Heureux-Dubé J. insisted that equality be read into the guarantee as an overarching qualification to its entitlements.¹⁴

Still, the best evidence of section 7's irresolution may be Bastarache J.'s decision to join the plurality opinion in *Chaoulli v. Quebec*.¹⁵ The question there was whether a section 7 claim having no connection with the administration of justice was viable. Having insisted in *Gosselin v. Quebec* that such a link was the *sine qua non* of the guarantee, he agreed that a prohibition on private health insurance was unconstitutional in *Chaoulli*.¹⁶

Judicial choices under section 7 engage core beliefs about the Charter and the Court's mandate of review. That is why any theory about section 7 is necessarily a theory about the Charter. The dilemma of review is that the courts must enforce the Charter's entitlements without committing institutional transgressions. That dilemma is magnified under section 7 by the indeterminacy of the text and the questions of legitimacy which naturally follow when abstract concepts are concretized. The Court made a critical choice in the *MVR* not to turn its back on the text's appeal to principles of fundamental justice. And it has paid a price for doing so: there, and at other key junctures, the decision to expand section 7 has provoked fierce debate about the legitimacy of review.¹⁷

From the start, the Court found strategies to mask or even avoid the dilemma of section 7. For instance, after granting the guarantee a substantive interpretation, the *MVR* promptly placed boundaries around it to ensure that review would remain selective in scope and content. In particular, the *MVR* proposed a conception of section 7 that was based on the Court's perception of what was institutionally permissible for it to do. More than 20 years later, the *MVR*'s attempt to constrain the guarantee and control the legitimacy debate must be declared a failure. Though *Chaoulli*'s "constitutionalization" of health care policy looks

¹⁴ See, e.g., *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (dissenting on the production of records); see also *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668.

¹⁵ *Supra*, note 11. There, a plurality of three, on a panel of seven judges, invalidated Quebec's prohibition on private health insurance.

¹⁶ Compare his dissenting opinion in *Gosselin*, *supra*, note 9, with his vote to join the McLachlin-Major JJ. plurality in *Chaoulli*, *supra*, note 11.

¹⁷ The Court's most controversial decisions under s. 7 are: the *Motor Vehicle Reference*, *supra*, note 4; *R. v. Morgentaler*, *supra*, note 8; *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63; and *Chaoulli v. Quebec*, *supra*, note 11.

like a dramatic shift in the interpretation of section 7, to some extent that decision simply followed the momentum of the jurisprudence.

The Court's decisions in the *MVR* and *Chaoulli v. Quebec* serve as bookends for this paper. Its goal of providing a holistic account of the guarantee begins with the saga of "MV logic" and its dominance in the jurisprudence. From there attention shifts to the interpretation of section 7's two clauses, and is followed by a discussion of the choices the Court must consider in deciding what to do with section 7. The discussion proceeds in three stages. A first section explains what *MV* logic is, and shows how its institutional conception of review was destined to fail. That part analyzes the evolution of the section 7 jurisprudence and provides the foundation for the rest of the paper; for those reasons it is longer than its counterparts.

The next section turns to the Court's interpretation of section 7's two clauses and explains the shifting methodologies it employs to give them meaning. It may be harsh to say so, but this jurisprudence is obtuse, even impenetrable. It is difficult to explain the Court's PFJ methodology when different standards apply at different times to determine which principles relate to fundamental justice, and whether those principles have been violated. The uncertainty of this body of doctrine shows that the Court has been unable to address the central dilemma of section 7 or to settle on an interpretive model for this guarantee.

Thus far, *MV* logic has been the dominant force in the evolution of the section 7 jurisprudence. That logic failed to offer a coherent theory of review and compromised the Court's interpretation of the guarantee's two clauses. By suggesting that the Court may be ready to break away from its constraints, *Chaoulli v. Quebec* places section 7 at the crossroads. That is why this is a crucial juncture in the guarantee's evolution: if the Court is not prepared to accept the limits on review suggested by the *MVR*, still it remains unclear what alternative conception should be adopted. Given the consequences for the Court's legitimacy, the wisdom of dismissing a model for section 7 that is based, in part or even in whole, on an institutional conception of the guarantee is open to serious question. In this context, the final part of the paper introduces the interpretive choices available in deciding the future of section 7. Unable to advance a proposal in the late stages of this paper, it voices skepticism that a substantive interpretation of the guarantee can be constrained by institutional boundaries, and remains troubled by the

prospect of an approach that cannot or will not articulate the limits of review.

II. *MOTOR VEHICLE* LOGIC AND THE SEARCH FOR LIMITS ON REVIEW

1. An Institutional Conception of Review

On its face, the *Motor Vehicle Reference* appears to lack transcending significance. In the main it followed *Sault Ste. Marie*, which was widely praised for endorsing the principle that criminal responsibility requires fault.¹⁸ The wrinkle in the *MVR* was that the Court extended the fault principle by exercising new-found powers under the Charter and invalidating section 94(2) of the *Motor Vehicle Act*. That provision created an absolute liability offence which offended the Court's sense of justice because it could convict *and imprison* a person "who has not really done anything wrong".¹⁹ The difference between *Sault Ste. Marie* and the *MVR* was that section 7 empowered the Court to grant a remedy for a provision it would find objectionable at common law, but be powerless to rectify.

Sound as it might have seemed on the point about criminal responsibility, the *MVR*'s substantive interpretation of section 7 claimed dramatic powers of review. The Court's conclusion defied the intent of the guarantee's drafters and in doing so dismissed the distinction between substance and procedure.²⁰ Justice Lamer's assertion that the controversy surrounding section 7's due process analogue was irrelevant struck a tone of arrogance. Aware that a substantive interpretation placed the Court's legitimacy at risk, the judges were nonetheless unwilling to let an injustice go unanswered, when the Charter could invalidate a provision that offended the fault principle. The legitimacy issue was answered by the argument that substantive review could be undertaken, *without institutional consequences*, as long as it was confined to matters within the justice system.

¹⁸ *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299.

¹⁹ *MVR*, *supra*, note 4, at para. 1.

²⁰ See M. Stephens, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter" (2002) 13 N.J.C.L. 183, and S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2(1) *International Journal of Constitutional Law* 1-55, at 16-27 (providing extensive discussion of the dynamics which surrounded the drafting of s. 7).

Justice Lamer grounded “MV logic” in section 7’s status as one of the Charter’s “Legal Rights” and in its relationship, as such, to sections 8–14. Those provisions protect certain entitlements in the criminal justice system and it made sense that section 7 should do the same; under Lamer J.’s view of text and context, the guarantee could do no less.²¹ He maintained that it was undesirable to recognize a distinction between substance and procedure, because that would “import” American concepts and terminology into a Canadian context and leave section 7’s entitlements in “a sorely emaciated state”.²² More to the point, the distinction was unnecessary as a way of limiting section 7, because the text explicitly referred to principles of fundamental *justice*.²³ He reasoned that such a reference excluded review on issues that fell within the realm of general public policy.²⁴ In the circumstances, a substantive interpretation of section 7 could not exceed the boundaries of review: policy questions falling outside the institutions of justice would not be entertained because MV logic did not allow it. At least for Lamer J. and those who agreed with him, the answer to questions about the legitimacy of review was as simple and conclusive as that.

This form of logic rested on two assumptions about the guarantee. First, a substantive interpretation was legitimate because section 7 engages the institutions of the *justice* system. In that sense, Lamer J. proposed a conception of review that was explicitly institutional: its legitimacy was based on and restricted to the legal system. Second, MV logic assumed that justice and policy are separable, as a matter of definition, and can be kept apart from each other.²⁵ The Court would

²¹ “It would be incongruous”, he said, “to interpret s. 7 more narrowly than the rights in ss. 8 to 14”; the alternative, “which is to interpret all of ss. 8 to 14 in a ‘narrow and technical’ manner for the sake of congruity, is out of the question” he added; *MVR*, *supra*, note 4, at para. 27.

²² *Id.*, at para. 25.

²³ Justice Lamer was explicit that his was an institutional concept of substantive review. Thus he stated that “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*” (emphasis added). To that he added, “[w]hether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle *within the judicial process and in our legal system, as it evolves*”; *id.*, at paras. 62, 64 (emphasis added).

²⁴ Justice Lamer’s well-known words claimed the following distinction as the basis for substantive review under s. 7: “[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 guardian of the justice system*”; *id.*, at para. 30 (emphasis added).

²⁵ Hence the assertion that MV logic “provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters”; *id.*, at para. 30.

discover in due course that an interface with policy could not be avoided by confining review to the justice system. By the same token, the Court would also learn that laws having little or nothing to do with the institutions or administration of the justice system could also be fundamentally unjust. From that perspective, *MV* logic did not convincingly explain why review would be exercised on questions arising in the administration of justice, but not elsewhere.

If judicial choices under section 7 reveal core beliefs, and a theory of the guarantee is also a theory of the Charter, the *MVR* may unwittingly be the Court's most important Charter decision. Justice Lamer endorsed substantive review against the intent of the drafters, and disingenuously dismissed the weight of American experience. In doing so, he rejected the distinction between substance and procedure, and grounded his theory of review in an even less plausible distinction between justice and policy. In the result, *MV* logic claimed that a substantive interpretation of section 7 was permissible because it selectively targeted the institutions of justice.

Commentators did not hesitate to express their skepticism. John Whyte claimed that "[w]e are now positioned for a very, very interventionist court" and added that "[f]or those who worried about judicial intervention, their worries have been vindicated".²⁶ Jamie Cameron complained that the Court's interpretation of section 7 created a no-win situation: if the Court was selective about section 7's content, it would be criticized for making value choices on subjective grounds; but if it was expansive in its interpretation of the guarantee, it would be open to criticism for being too interventionist and for exceeding its authority.²⁷ More scathing was David Frum, who criticized the judges for their breezy declaration that "they did not consider themselves bound by the intentions of the drafters", because "[t]hey were a court of *justice*, dammit, and they were going to say what was fundamentally just and what wasn't".²⁸

²⁶ Quoted in K. Makin, "Charter Ruling Worries Legal Experts" *The Globe and Mail* (24 February 1986).

²⁷ Quoted in P. Cramer, "Charter misapplied, misunderstood by judges, profs say" *The Lawyers Weekly* (27 June 1986), at 12. See also J. Cameron, "The Motor Vehicle Reference and the Relevance of American Doctrine in Charter Adjudication" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), at 69.

²⁸ "Who's Running this Country, Anyway?" *Saturday Night* (October 1988), at 63.

The next sections trace the evolution of section 7 and, in doing so, show how the Court was unwilling to release the guarantee from the constraints of *MV* logic, and unwilling, at the same time, to be bound by that logic.

2. The Elements of an Offence: *Mens Rea*

In modest terms, the *MVR* simply held that the combination of absolute liability and imprisonment is impermissible because it violates principles of fundamental justice. Yet it followed that if the Court could invalidate a law that eliminated the *mens rea*, it could also review a *Code* provision that made inadequate provision for the fault element. On the strength of that reasoning, the Court extended absolute liability's concern with the morally innocent to the *Criminal Code*'s second degree felony murder provision. In due course, that brought it to the realization that the concept of fault did not respect the *MVR*'s fail-safe distinction between justice and policy.

The weapons subsection of the *Code*'s second degree felony murder provision created constructive liability when death occurred in the course of named felonies, regardless whether the offender or an accomplice intended or reasonably foresaw that consequence. In striking it down in *R. v. Vaillancourt*, Lamer J. simply applied *MV* logic.²⁹ According to the *MVR*, it is fundamentally unjust to punish a person who is not at fault. Translated to the offence of felony murder, the question was whether there was fault in causing death and not in simply deciding to commit a *felony*. Though *Vaillancourt* invalidated the provision because it did not even require objective *mens rea* on the *actus reus* element of death, Lamer J. did not hesitate to voice his preference for a subjective standard. "[A]s a general rule", he declared, "the principles of fundamental justice require proof of a subjective *mens rea*, in order to avoid punishing the 'morally innocent'".³⁰ How he described the Court's mandate under the Charter was also telling. While Parliament "retains the power to define the elements of a crime", he said, the courts have the jurisdiction and "*more important, the duty ... to*

²⁹ *R. v. Vaillancourt*, *supra*, note 8. At the time, s. 213(d) made it culpable homicide, punishable as second degree murder, for a person to cause a death in the course of committing certain specified felonies, when a person used a weapon or had it on his person, and death ensued as a consequence. *Criminal Code*, R.S.C. 1970, c. C-34, s. 213(d).

³⁰ *Id.*, at para. 27.

review that definition to ensure that it is in accordance with the principles of fundamental justice”.³¹

In formal terms the *MVR* was about absolute liability. Yet it prompted the Court to express a “generally held revulsion against punishment of the morally innocent”.³² In explaining why it was problematic to constitutionalize that principle, the dissent in *Vaillancourt* struck at the heart of *MV* logic. According to MacIntyre J., defining criminal offences and assigning penalties are a matter of policy which rests with Parliament. He acknowledged that some might consider it “illogical to characterize an unintentional killing as murder”, but found no offence to the principles of fundamental justice when serious criminal conduct is classified as murder.³³ Penalizing a felony which results in death as murder may be harsh, and it may also be harsh to label such felons as murderers. Those were policy choices and the fact that Parliament was hard-nosed on that issue did not render the provision unconstitutional.

To the extent *Vaillancourt* hedged the point, *R. v. Martineau* confirmed that section 7 entrenched a principle of symmetry between the *actus reus* and *mens rea*.³⁴ *Martineau* also indicated that subjective *mens rea* was a constitutional minimum for murder and for other offences. Though the Court invalidated a second felony murder provision, *Martineau* was therefore a bold decision for other reasons as well.³⁵ Once again, the majority opinion by Lamer J. confirmed the Court’s mandate of review under section 7 in sweeping terms. His declaration that Parliament had “directed” the Court to “review its definitions of the elements of a crime for compliance with the *Charter*”, and that the judges would be “remiss not to heed this command of Parliament”, was extraordinary.³⁶ This he referred to nonetheless as an “unassailable proposition”.³⁷

³¹ *Id.*, at para. 26 (emphasis added).

³² *MVR*, *supra*, note 4, at para. 71 (quoting Dickson J. in *Sault Ste. Marie*).

³³ *Vaillancourt*, *supra*, note 8, at para. 51 (dissenting opinion).

³⁴ [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633. At stake in this case was s. 213(a) of the *Code*, which made second degree murder available as a charge when a person committed any one of certain specified felonies, intended to cause bodily harm, and the act resulted in death. *Criminal Code*, R.S.C. 1970, c. C-34, s. 213(a).

³⁵ Not only did the Court invalidate s. 213(a) in this case, it held that s. 212(c) of the *Code* was also unconstitutional; *id.*, at para. 14.

³⁶ *Id.*, at para. 7.

³⁷ *Id.*

Moral innocence led to a concept of moral blame, or relative moral blame, through the symmetry principle. In stating that the constitutional minimum for second degree murder is subjective *mens rea*, Lamer J. suggested that symmetry might demand subjective fault throughout the criminal law. He stopped short of declaring it the default requirement of criminal responsibility, but emphasized that subject foresight of death follows from the “*general principle* that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state *in respect of that result*”.³⁸ Specifically, he found that a second degree murder provision that does not symmetrically require *mens rea* for each element of the offence is fundamentally unjust, because such a provision imposes a punishment that is disproportionate to the accused’s moral blame.³⁹ Justice Lamer emphasized the stigma that attaches to a murder conviction as an additional aspect of its unconstitutionality. The suggestion that undue stigma will compromise criminal offences figured in the analysis of *Vaillancourt* and *Martineau*, before being turned against the idea of subjective *mens rea* as a constitutional minimum, in *R. v. DeSousa* and *R. v. Creighton*.

Following the lead of McIntyre J. in *Vaillancourt*, L’Heureux-Dubé J. wrote a dissent in *Martineau* which made further inroads on *MV* logic. She demonstrated that a conviction required a high degree of moral blame: those who satisfied the provision’s requirements were not morally innocent and are blameworthy in fact at several levels.⁴⁰ She also explained that the objectives of the provision are a matter of criminal law *policy*, and not a question of abstract justice that is within the exclusive prerogative of the judiciary.⁴¹ Implicitly, in commenting

³⁸ *Id.*, at para. 11 (emphasis added).

³⁹ In particular, he stated that “[t]he effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender”, *id.*; he also declared that “a special mental element with respect to death is necessary before a culpable homicide can be treated as murder” and that “special mental element gives rise to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction”, *id.*, at para. 12.

⁴⁰ *Id.*, at para. 56 (detailing five respects in which a person must be found blameworthy before a conviction can be entered under this section).

⁴¹ “Policy considerations in Canada as well as in other jurisdictions have inspired legislation that considers objective foreseeability sufficient as the minimum *mens rea* requirement for murder Striking down legislation simply because some other scheme may be preferable would be an unwarranted intrusion into Parliament’s prerogative.... The *Charter* does not infuse the courts with the power to declare legislation to be of no force or effect on the basis that they believe the statute to be undesirable *as a matter of criminal law policy*”; *id.*, at paras. 94, 96 (emphasis added).

on the majority opinion's refusal to hold an accused responsible for consequences he did not intend, she foresaw the next step in the evolution of the jurisprudence.

Following *Martineau*, the Court was poised to overhaul the *Criminal Code*'s concept of blame. But when next asked to extend the principle of moral innocence, it blinked. Rather than impose symmetry between the wrongful act and the accused's subjective fault across the spectrum, *R. v. DeSousa*⁴² and *R. v. Creighton*⁴³ decided that the constitutionalization of *mens rea* would effectively begin and end with felony murder.

The offence at stake in *DeSousa* bore strong resemblance, structurally, to unlawful act manslaughter.⁴⁴ In the setting of section 269 of the *Code*, the question was whether section 7 of the Charter required a symmetrical and subjective fault element in relation to the prohibited consequence of causing bodily harm. Justice Sopinka stressed the element of personal fault, but rejected the suggestion that the Charter requires subjective *mens rea* for all criminal offences which attach more serious penalties when unlawful conduct produces prohibited consequences. Section 269 did not violate section 7 because the guarantee does not require subjective foresight of bodily harm: provided there is "a sufficiently blameworthy element in the *actus reus* to which a culpable mental state is attached", he said, there is no further requirement that the intention must extend to all aspects of an unlawful act, including its consequences.⁴⁵

Though it was concerned with the offence of unlawfully causing bodily harm, *DeSousa* became a tipping point for the constitutionalization of *mens rea*. Justice Sopinka observed that to adopt symmetry for all consequences would "substantially restructure current notions of criminal responsibility".⁴⁶ Not only was the Court unprepared to invalidate a variety of offences, many of which were listed in *DeSousa*, the judges did not accept that a person who causes unforeseen consequences through unlawful action is morally innocent. Despite the

⁴² [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944.

⁴³ [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3.

⁴⁴ Both are predicate offence provisions: a conviction under s. 269 requires an initial unlawful act followed by a consequence of bodily harm, *Criminal Code*, R.S.C. 1985, c. C-46, s. 269; a conviction for unlawful act manslaughter requires an initial unlawful act followed by a consequence of death. *Criminal Code*, R.S.C. 1985, c. C-46, s. 222(5)(a).

⁴⁵ *DeSousa*, *supra*, note 42, at para. 33 (emphasis added).

⁴⁶ *Id.*, at para. 38.

“constitutional aversion” against it a defendant cannot be characterized as morally innocent “simply because a particular consequence of an unlawful act was unforeseen by that actor”.⁴⁷ In effect, Sopinka J. brought the concept of a minimum *mens rea* to a standstill with the remark that “[n]either basic principles of criminal law, nor the dictates of fundamental justice require, as necessity, intention in relation to the consequences of an otherwise blameworthy act”.⁴⁸ *DeSousa* essentially held that a lesser and non-symmetrical degree of fault would satisfy section 7’s standard of fundamental justice.⁴⁹

For the concept of a minimum *mens rea* to lose all momentum it remained only for *R. v. Creighton* to apply *DeSousa* to unlawful act manslaughter.⁵⁰ The Court was closely divided in *Creighton*, as it had been in *R. v. Tutton*, which raised similar issues though not under the Charter.⁵¹ Yet by the time *Creighton* was decided, no member of the Court supported subjective fault for manslaughter. In dissent, Lamer C.J. agreed that manslaughter required no more than objective foresight, but concluded that foresight of *death* was needed to ground a conviction. Justice McLachlin was able to attain majority support for the view that objective foresight of *bodily harm* would suffice for purposes of the Charter.

It is telling that McLachlin J. rejected symmetry as a principle of fundamental justice. In her view, a rule which has exceptions cannot be a principle of fundamental justice under section 7; to qualify as such, she said, a rule must have *universal application*.⁵² That standard for determining principles of fundamental justice, it bears noting, is difficult

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See D. Stuart, “The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumphant Pragmatism and Law Enforcement Expediency” (1993) 15 C.R. (4th) 88, at 97 (commenting on *DeSousa* and observing that the Supreme Court “appears to have pragmatically decided to call a halt to the full review of fault requirements earlier envisaged by Chief Justice Lamer”).

⁵⁰ *Creighton*, *supra*, note 43; see also *R. v. Hundal*, [1993] S.C.J. No. 29, [1993] 1 S.C.R. 867 (also rejecting subjective *mens rea*).

⁵¹ [1989] S.C.J. No. 60, [1989] 1 S.C.R. 1392. The issue in *Tutton* was whether criminal negligence was based on a subjective or objective standard of fault; the Court divided 3-3 and was unable, as a result, to decide that question.

⁵² *Creighton*, *supra*, note 43, at para. 97. As Simon France noted, McLachlin J.’s argument that a principle of fundamental justice cannot embrace exceptions “is rather puzzling” as it is equally true of most criminal law principles, and suggests that “constitutional review of aspects of the criminal law will always be disappointing”. “Gains and Lost Opportunities in Canadian Constitutional *Mens Rea*” (1994-1995) 20 Queen’s L.J. 533, at 549.

to meet. In addition, she explained that stigma and punishment would only support a constitutional minimum in exceptional cases where the consequences of being convicted are disproportionate to the accused's blameworthiness. The felony murder rule was an example of disproportionality, but unlawful act manslaughter was not.⁵³ And nor, it hardly needed to be added, were any number of crimes which punish offenders for the consequences they have caused.

The constitutionalization of *mens rea* effectively ended with *Creighton* and its companion cases.⁵⁴ When it did, it was not because the Court was able to draw a sure-footed distinction between offences that violated fundamental justice and others which did not. The problem was that the *MVR*, with its principle of moral innocence and concept of a minimum *mens rea*, could not preserve the boundary between justice and policy. The defeat of that distinction also meant that *MV* logic failed to articulate a workable theory of review in the forum it was designed to address: the justice system. Disappointed commentators saw wholesale retreat, if not an about-face, in the post-*Martineau* decisions.⁵⁵ Despite expansive statements in *Vaillancourt* and *Martineau* about the Court's mandate under section 7, the constitutionalization of *mens rea* achieved few changes and was no more than a modest success. Still, retreat in this context did not mean that the Court would be passive in other areas of the criminal law.

3. Unfair Crimes

The Supreme Court's blockbuster decision in *R. v. Morgentaler* was sandwiched between the *MVR* and *Vaillancourt*, on one side, and *Martineau*, on the other.⁵⁶ The *MVR*'s principle of moral innocence was not at stake in *Morgentaler*, and nor was *mens rea*. Not only did it lack

⁵³ *Id.*, at para. 83: "The most important feature of the stigma of manslaughter is the stigma which is not attached to it"; and, at para. 86: "[T]he offence of manslaughter stands in sharp contrast to the offence of murder" because "[m]urder entails a mandatory life sentence; manslaughter carries with it no minimum sentence".

⁵⁴ See also *R. v. Gosset*, [1993] S.C.J. No. 88, [1993] 3 S.C.R. 76; *R. v. Naglik*, [1993] S.C.J. No. 92, [1993] 3 S.C.R. 122; *R. v. Finlay*, [1993] S.C.J. No. 89, [1993] 3 S.C.R. 103.

⁵⁵ As Patrick Healy observed: "The trend of the cases shows a court poised to lower the standard of fault in criminal cases on grounds of policy, and to hold that such policy decisions not only respect but promote principle of fundamental justice" (emphasis added). "The *Creighton* Quartet: Enigma Variations in a Lower Key" (1993) 23 C.R. (4th) 265, at 279; see also D. Stuart, "Continuing Inconsistency But Also Now Insensitivity That Won't Work" (1993) 23 C.R. (4th) 240.

⁵⁶ [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.

connection with that jurisprudence, the challenge to the *Code*'s prohibition placed the Court squarely in the middle of contested social, moral, philosophical and religious views about the merits of abortion. Though it did not arise under the section 15 equality guarantee, the case implicated women's rights, and did so against the backdrop of the Court's earlier, pre-Charter decision. There, the Court had been criticized for denying relief from Parliament's regulation of therapeutic abortions.⁵⁷ The decision to invalidate the *Criminal Code*'s abortion scheme in *Morgentaler* was extraordinary: the Court intervened on the side of women's rights and showed that it was not afraid to exercise its powers of review under the Charter.

As the Canadian Supreme Court's abortion decision, *Morgentaler* is sometimes thought of as a case that is issue-specific and result-oriented; in this, it provided a point of comparison with *Roe v. Wade*.⁵⁸ Beyond that, it should be seen as a milestone in the development of the Court's section 7 methodology. Justice Wilson's definition of liberty constitutes one of *Morgentaler*'s contributions to the doctrine; the other is the concept of a law that is "manifestly unfair", and its use as a standard of constitutionality under section 7.

Morgentaler was a high stakes case for the Court. The women's movement was politically and legally active at the time, and establishing the constitutional right to an abortion was a top priority. Institutionally, it was risky for the Court to invalidate Parliament's abortion law. In the absence of a majority opinion, attention gravitated to the reasons of then Chief Justice Dickson, who found a violation of fundamental justice without considering whether the Charter guarantees the right to an abortion.⁵⁹ That result was enabled by the conclusion that Parliament's scheme, which prohibited abortion and then created a therapeutic exception, violated *procedural* principles of fundamental justice.

As seen above, the *MVR*'s conclusion that section 7 has substantive content rested on the view that the substance-procedure distinction was irrelevant. Chief Justice Dickson revived it in *Morgentaler* for strategic reasons: a decision invalidating the *Code* provision was less confrontational, *vis-à-vis* Parliament, if based on procedural grounds

⁵⁷ See *R. v. Morgentaler*, [1975] S.C.J. No. 48, [1976] 1 S.C.R. 616.

⁵⁸ 410 U.S. 113 (1973).

⁵⁹ The case was decided by three opinions: Dickson C.J., Lamer J. concurring; Beetz J., Estey J. concurring; and Wilson J. concurring, McIntyre J. dissented and La Forest J. concurred in his reasons, *supra*, note 56.

than if grounded in a substantive right to an abortion.⁶⁰ The problem was that the Chief Justice's complaints about Parliament's exceptions for therapeutic abortions were more substantive than procedural in nature. For instance, vagueness is a substantive flaw which arises when a law fails to articulate its content with sufficient precision to satisfy rule of law considerations.⁶¹ Chief Justice Dickson also found that therapeutic abortions under the *Code* were compromised by delays which prevented women from gaining timely access to the procedure. Yet it is difficult to see how delay can be a constitutional violation if there is no right of access to the procedure in the first place.⁶²

Having dodged the substantive issue, the Chief Justice struggled to place the analysis on a footing that was truly procedural. That is the context of his conclusion that the law was unconstitutional because it was "manifestly unfair".⁶³ He thought the scheme was unfair because the conditions under which the procedure was available to Canadian women were so strict that the concept of therapeutic abortions, as an exception to the general prohibition, was illusory and manifestly unfair.⁶⁴ Justice Beetz, who also found it unconstitutional, invoked the same terminology in stating that some of the scheme's requirements "are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure".⁶⁵ Others he found manifestly unfair because they were not necessary to ensure that those objectives were met.

⁶⁰ Thus, he explained that while s. 7 "does impose upon courts the duty to review the substance of legislation ... it is [not] necessary for the Court to tread the fine line between substantive review and the adjudication of public policy", because "it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice"; *id.*, at para. 15.

⁶¹ *Id.*, at para. 47 (concluding that the absence of any clear standard to define "health" for purposes of a therapeutic abortion is a serious *procedural* flaw) (emphasis added).

⁶² As McIntyre J. explained, it is difficult to see how any of the *Code*'s therapeutic abortion criteria could violate security of the person unless a woman has a constitutionally protected right to an abortion; *id.*, at para. 191. Justice Wilson, who did support such a right, agreed that the Court had to tackle the primary issue first: "A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is *purely academic* if such requirements cannot as a constitutional matter be imposed at all"; *id.*, at para. 221 (emphasis added).

⁶³ *Id.*, at para. 52 (concluding that "[i]n the present case, the structure – the system regulating access to therapeutic abortions – is manifestly unfair").

⁶⁴ "One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory"; *id.*, at para. 48.

⁶⁵ *Id.*, at para. 132.

Though its impact on abortion policy was immediate, *Morgentaler* had broad implications for the section 7 jurisprudence. It should be seen as a first and critical step away from *MV* logic and the constraints it sought to impose on review under section 7. It is significant, for instance, that Wilson J. flatly refused to accept the *MVR*'s methodology. Her opinion placed upward pressure on section 7's entitlements by expanding liberty of the person to embrace a right to make fundamental personal choices, including the right to have an abortion, free from state interference.⁶⁶ Against the *MVR*'s admonitions, she cited American jurisprudence to support that definition, and then modelled a substantive right to abortion under the Charter on U.S. authority.⁶⁷ Over time, her conception of liberty would have a strong influence on the section 7 jurisprudence.

In addition, *Morgentaler*'s concept of manifest unfairness introduced the idea that it is permissible for the Court to invalidate laws that are considered fundamentally unfair. Chief Justice Dickson's reliance on the concept is deeply troubling, because manifest unfairness does not offer a methodology or analytical process for determining the content of section 7's principles of fundamental justice. Its purpose, instead, is to state a conclusion. It is without content or principle and was, for that reason, a dangerous concept to introduce into the jurisprudence.

Morgentaler was followed, a few years later, by *Rodriguez v. British Columbia (Attorney General)*, which considered whether the *Code*'s criminalization of assisted suicide violated the sections 7 or 15 Charter rights of individuals who could not, by reason of disability or physical deterioration, commit that act without third-party assistance.⁶⁸ The decision's role in the evolution of the Court's PFJ methodology is considered in the next section of the paper. The discussion here focuses on the connection between *Morgentaler*'s concept of manifest unfairness and the principle of arbitrariness that McLachlin J. invoked in *Rodriguez* to invalidate section 241(b) of the *Code*.

⁶⁶ *Id.*, at para. 230 (maintaining that s. 7's liberty, "properly construed", grants the individual "a degree of autonomy in making decisions of fundamental personal importance").

⁶⁷ *Id.*, at para. 240 (citing *Roe v. Wade* and concluding that "the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter*"); see also at paras. 259-60 (discussing *Roe*'s trimester framework).

⁶⁸ [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519.

From a conceptual and a doctrinal perspective, her opinion bears a strong resemblance to Dickson C.J.'s analysis in *Morgentaler*. In fact, she stated that the reasoning in *Morgentaler* was "dispositive" of the section 7 issues at stake in *Rodriguez*.⁶⁹ She maintained that the provision was arbitrary because Parliament's reasons for criminalizing assisted suicide bore no relation to the circumstances of Sue Rodriguez. It followed that the *Code*'s prohibition on assisted suicide treated her "unfairly".⁷⁰ That was sufficient, in McLachlin J.'s view, to ground the conclusion that section 241(b)'s prohibition violated section 7 of the Charter and could not be saved by section 1. In defending that view, she denied that she was second-guessing Parliament's decision on a delicate issue of policy: "[t]he only question", she said, "is whether Parliament, having chosen to act in this sensitive area touching the autonomy of people over their bodies, has done so in a way that is *fundamentally fair to all*".⁷¹

Albeit a dissent, McLachlin J.'s opinion in *Rodriguez* should nonetheless be noted in the evolution of section 7. Following *Morgentaler*'s lead, she introduced another doctrinal tool to define the principles of fundamental justice: the concept of arbitrariness. In function and purpose, it differed little from *Morgentaler*'s principle of manifest unfairness. Each offered the Court a basis for disagreeing with the content of legislation and invalidating it as a result. Both concepts collapsed the distinction between justice and policy, and in doing so, ignored *MV* logic and its search for principled limits on review. Each lacked criteria and both presented an unlimited potential for review as a result. That potential would not be acted on again until a plurality held in *Chaoulli v. Quebec* that a prohibition on access to private health insurance violated section 7 because it was arbitrary.

4. Lingering Doubts

In the *MVR*, then Justice Lamer announced that "[a]djudication under the *Charter* must be approached free of *any lingering doubts as to its legitimacy*".⁷² It was a brave statement and a declaration that, to some,

⁶⁹ *Id.*, at para. 198.

⁷⁰ *Id.*, at para. 206.

⁷¹ *Id.*, at para. 225 (emphasis added).

⁷² *MVR*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 15 (emphasis added).

might have looked careless. Against that statement, it is ironic that Lamer J. appeared to harbour lingering doubts of his own. His concurrence in the *Solicitation Reference* signalled those doubts by urging rigid adherence to the contours of *MV* logic.⁷³ There, Lamer J. wrote separately and at length in an attempt to thwart efforts to enlarge section 7 beyond a mandate that was strictly focused on the justice system.

After the *MVR*, the Court was invited to expand section 7 in a variety of directions. It responded willingly when called upon to adopt principles of fundamental justice that bore a relation to the Charter's other legal rights. Those elements of the jurisprudence, which are referred to in this paper as the "basic tenets" branch of PFJ methodology, are addressed in the next part. Meanwhile, the *MVR*'s conclusion that imprisonment results in a *prima facie* breach of liberty shifted the analysis to section 7's second clause, where much of the criminal law was automatically subject to principles of fundamental justice. The *Solicitation Reference* arose under the *Criminal Code* but showed how section 7's entitlements could be defined to enhance the guarantee's substantive content.⁷⁴ That was anathema to Lamer J., who regarded an expansive view of liberty or security of the person as a threat to the institutional conception on which the legitimacy of review depended. Unlike the second part of section 7, the entitlements clause contains no language that targets the institutions of justice. To the contrary, liberty and security of the person are unencumbered by any textual indicia of definitional limitation. To hold the Court in a pattern of strict compliance with *MV* logic, it was necessary to read section 7's entitlements restrictively.

The issue in the *Solicitation Reference* was whether the *Criminal Code*'s solicitation provisions were unconstitutional under section 2(b), section 2(d) or section 7 of the Charter. On the entitlement issue, the question under section 7 was whether the provision infringed a prostitute's liberty to pursue a profession of choice or her security of interest in procuring the basic necessities of life. To Lamer J., the sheer prospect of section 7 being open to an interpretation that included economic content demanded a quick and decisive response. Thus he

⁷³ [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123.

⁷⁴ In declining to give any other content to liberty or to consider the meaning of security of the person, Lamer J. had specifically and deliberately reserved the point in the *MVR*; *supra*, note 72, at para. 22.

implored the Court to limit liberty of the person to state interferences with an individual's physical freedom.⁷⁵ In effect, Lamer J. proposed to read the institutional content of the PFJ clause, which already qualified liberty and security of the person, back into section 7's concept of entitlement. That would limit both parts of the guarantee to matters arising in the administration of justice.⁷⁶

At first impression, this approach to the entitlements clause seems strained and unnecessary. Yet the context is one in which Lamer J. had promised, in the *MVR*, that the Court would not enter the realm of public policy through section 7. In the circumstances, it is not surprising that he so candidly expressed his fear that unless the courts adhered to *MV* logic, they would intrude on that domain.⁷⁷ Likewise, he had insisted that the Court's interpretation would not provoke concerns about the legitimacy of review, because the Charter was structurally and textually different from its U.S. counterpart. Ironically, the concerns that he readily dismissed in the *MVR* required full exposure in the *Solicitation Reference*, and his apprehension is palpable in the care he took to outline the dangers of U.S. due process jurisprudence.⁷⁸ To keep the *MVR*'s promises the Court would have to be especially vigilant about excluding economic entitlements from the Charter.

⁷⁵ Following lengthy discussion, he summarized his position in these words: "s. 7 is implicated when the state, by resorting to the justice system, restricts an individual's physical liberty in any circumstances"; *Solicitation Reference*, *supra*, note 73, at para. 68 (emphasis in original); he added that the guarantee is also implicated when the state "restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity"; *id.*

⁷⁶ Specifically, he indicated that "the principles of fundamental justice can provide an invaluable key to determining the nature of the life, the liberty and the security of the person referred to in s. 7", *id.*, at para. 63; then he added that "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration"; *id.*

⁷⁷ Specifically, he stated that "the confinement of individuals against their will, or the restriction of control over their own minds and bodies, are *precisely the kinds of activities that fall within the domain of the judiciary* as guardian of the justice system". In contrast, he added, "once we move beyond the 'judicial domain', we are into the realm of general public policy, where the principles of fundamental justice ... are *significantly irrelevant*. ... The courts must not, *because of the nature of the institution*, be involved in the realm of pure public policy"; *id.*, at para. 66 (emphasis added).

⁷⁸ *Id.*, at paras. 51-60 (culminating in a rejection of the American line of cases, on grounds that they have a specific historical context, that this context incorporated laissez-faire values that do not apply to the Charter, and that there are significant differences between the American and Canadian texts).

It was apparent from his reasons in the *Solicitation Reference* that Lamer J. thought *MV* logic was at risk of being overtaken by a conception of section 7 that would threaten the Court's legitimacy.⁷⁹ In the circumstances, it was essential for him to stall any momentum in favour of an expansive interpretation of the entitlements clause. The *MVR*'s theory of review depended on both clauses receiving an interpretation that was consistent with that view of the guarantee. Thus he stressed the necessity of an "exclusionary approach" to section 7's entitlements; only in that way could the court build a doctrinal Maginot line to prevent dangerous conceptions of entitlement from seeping or stealing into the Charter. Other colleagues neither agreed nor disagreed, and seemed content — at that point in time — for Lamer J. to conduct a solo mission to constrain the scope of section 7.⁸⁰

5. Elements of the Offence: Defences and the *Actus Reus*

The Court had abandoned the constitutionalization of *mens rea* but was not finished with the substantive criminal law. When it took its next step, the drastic consequences which followed discouraged further developments in this area. In *R. v. Daviault* a majority held that the accused is constitutionally entitled to rely on a defence of intoxication.⁸¹ Excusing an individual who has committed a crime while drunk is difficult in the best of circumstances; the aggravating circumstances of this case made the decision a public relations disaster for the Court.

⁷⁹ Cases in which "economic" claims were advanced include *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at para. 150 (*per* Dickson C.J. rejecting a claim that Sunday closing laws violate s. 7, on the ground that "'liberty' in s. 7 of the Charter is not synonymous with unconstrained freedom" and stating, "I cannot accept that it extends to an unconstrained right to transact business whenever one wishes"); and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at paras. 94-95 (rejecting a claim that an advertising law violated a corporation's s. 7 rights, because "a corporation cannot avail itself of the protection offered by s. 7 of the Charter" and "economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee"); see also *Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566, 30 B.C.L.R. (2d) 1 (C.A.) (holding that s. 7 is not confined to freedom from bodily restraint and, without extending to property or pure economic rights, could include the right to choose one's occupation).

⁸⁰ For instance, Dickson C.J. noted that the possibility of imprisonment satisfied the entitlement part of the s. 7 liberty analysis, and otherwise found it unnecessary to consider whether s. 7's guarantee of liberty was violated in another, "economic" way; *Solicitation Reference*, *supra*, note 73, at para. 14. Similarly, Wilson J. found that imprisonment deprives a person of liberty and that it was neither appropriate nor necessary to characterize the legislation as raising a question of "economic" liberty; *id.*, at para. 139.

⁸¹ [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63.

Daviault was a chronic alcoholic who sexually assaulted an elderly disabled woman while in a state of drunkenness severe enough to cause his own death.

Against a widely held perception that *Daviault* showed appalling insensitivity to violence against women and a Court that was “out of touch”, Peter Russell predicted that “[t]here’s going to be more of a backlash” against the judges.⁸² Carl Baar remarked that “[t]he key issue ... is the legitimacy of the court”, and added that “[l]egitimacy requires a ‘reservoir of support’ so that when something controversial happens, the institution can withstand the pressures and criticisms”.⁸³ Though that reservoir of support may have been present in some quarters, the negative response to *Daviault* prompted a legislative reaction: Parliament enacted an amendment to the *Criminal Code* which effectively negated the Court’s decision.⁸⁴

Many could not look past *Daviault*’s facts to the principle at stake. The contest was between the judges who thought that intoxication at certain levels negated the requisite *mens rea* of the offence, and others who were willing to substitute self-induced intoxication for the mental element required for sexual assault.⁸⁵ In concluding that a defence should be available, Cory J.’s majority opinion held that substituting intoxication for the *mens rea* of sexual assault eliminated the minimum mental element and was “so drastic and so contrary to the principles of fundamental justice” as to be unjustifiable under section 1.⁸⁶

In fairness to the judges who signed the majority opinion, *Daviault* applied *MV* logic to a question that had divided the Court for years. Former Chief Justice Dickson had written an influential dissent in *R. v. Leary* which maintained that the defence should be available to those who commit offences while under the influence of alcohol.⁸⁷ His position gained new momentum in *R. v. Bernard* with the claim that the

⁸² R.S.C. 1985, c. C-46, s. 33.1(1), as am. by *An Act to Amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, s. 1.

⁸³ Quoted in Sean Fine, “Has the Highest Court Lost Touch With Reality? When Protecting the Rights of the Accused May Not Serve the Public Good” *The Globe & Mail* (8 October 1994), at D2. Note, however, that the Court’s two woman judges, L’Heureux-Dubé and McLachlin JJ., joined the majority opinion.

⁸⁴ *Id.*

⁸⁵ The judges in the majority who agreed that a defence should be available on these facts included Lamer C.J., together with La Forest, L’Heureux-Dubé, Cory, McLachlin and Iacobucci JJ.; those who supported the concept of substituted *mens rea* included Sopinka, Gonthier and Major JJ.

⁸⁶ *Daviault*, *supra*, note 81, at para. 47.

⁸⁷ [1977] S.C.J. No. 39, [1978] 1 S.C.R. 29.

Charter's arrival altered the status of the defence.⁸⁸ There, the Court was closely divided in a case where Wilson J. wrote separately to offer a compromise between otherwise unyielding positions.⁸⁹ Justice Cory followed her proposal in *Daviault* and introduced a defence of drunkenness *akin to automatism or insanity*.⁹⁰ Having made the analogy to automatism, he imposed the onus on the accused to establish the defence on the balance of probabilities.⁹¹ Finally, he emphasized that the defence would only be available in a small number of exceptional cases of extreme intoxication.⁹² Despite the care he took to place limits on the defence, the Court was condemned for a decision which was widely regarded as unforgivable.

It appears that the Court emerged from *Daviault*'s highwater mark somewhat chastened by the experience. Since then, it has refused to entertain the Charter claim in newsworthy cases such as *R. v. Latimer*,⁹³ *R. v. Malmo-Levine*,⁹⁴ and *Canadian Foundation for Children, Youth and the Law v. Canada*.⁹⁵ The exception to the Court's retreat from the constitutionalization of the substantive criminal law is *R. v. Ruzic*.⁹⁶ There, the Court invalidated elements of section 17 of the *Code*, which defines the defence of duress, but did so quietly and in a way that made the statutory definition more compatible with the common law test.⁹⁷

Latimer did not raise an issue of moral innocence and did not fit the pattern of *MV* logic as a result. Robert Latimer was the Saskatchewan farmer who ended the life of his severely disabled daughter and then pleaded the defence of necessity in answer to his murder charge. Though his circumstances did not satisfy the criteria for the defence, his challenge to the mandatory minimum sentence of 10 years

⁸⁸ [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833.

⁸⁹ Rather than allow or deny it for all general intent offences, she proposed that the defence be available at the level of "extreme intoxication involving an absence of awareness akin to a state of insanity or automatism"; *id.*, at para. 90.

⁹⁰ *Daviault*, *supra*, note 81, at para. 59.

⁹¹ *Id.*, at paras. 63-65.

⁹² For instance, he stated that "[i]t is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful"; *id.*, at para. 60.

⁹³ [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3.

⁹⁴ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571.

⁹⁵ [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 [hereinafter "*CYF*"].

⁹⁶ [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687.

⁹⁷ See *R. v. Hibbert*, [1995] S.C.J. No. 63, [1995] 2 S.C.R. 973.

imprisonment was more plausible.⁹⁸ Still, the Court unsympathetically dismissed his case in an opinion that anonymously and unanimously deflected the question of sentence to the royal prerogative of mercy.⁹⁹

Subsequently, the Court refused in *CYF* to invalidate section 43 of the *Code*, which provides a “reasonable force” defence to those who would otherwise be answerable for assaulting children.¹⁰⁰ Under section 7, the Court was not asked to constitutionalize a defence that would reduce criminal responsibility; the question instead was whether it should eliminate a defence and thereby equalize children as victims of assault. In other words, the challenge sought to widen the scope of criminal responsibility. Though the Court was divided, a majority refused to constitutionalize a child’s right to be free from corporal punishment.¹⁰¹ It would have been impossible to strike the provision down without interfering in family life and the parental prerogative to impose reasonable punishment on their children. Rather than invite controversy for doing so, McLachlin C.J.’s reasons adopted the unusual but increasingly familiar strategy of re-interpreting the provision aggressively to cure elements of residual unconstitutionality.¹⁰²

Finally, the issue in *R. v. Malmo-Levine* was whether the Court would follow *MV* logic and find a constitutional minimum for the *actus reus*.¹⁰³ The issue there was Canada’s marijuana laws and, more specifically, whether it is permissible for Parliament to criminalize conduct that, it was claimed, does not cause harm. In those

⁹⁸ *Latimer, supra*, note 93, at para. 42 (concluding that there was no air of reality to Latimer’s claim on any of necessity’s three requirements); and at para. 87 (concluding that the mandatory minimum was not disproportionate in the circumstances of the case).

⁹⁹ *Id.*, at paras. 89-90. It is as though the Court was divided on this question and agreed to a compromise which upheld the sentence as a matter of law but issued suggestive messages about the merits of executive intervention through the prerogative of mercy, *id.*

¹⁰⁰ *CYF, supra*, note 95. Section 43 reads: *Correction of child by force*: 43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

¹⁰¹ *CYF, id.* Chief Justice McLachlin wrote for six members of the Court who rejected the claim under ss. 7 and 15 of the Charter; Binnie J.’s partial dissent found the s. 15 claim valid against teachers, but not against parents; Deschamps J. also dissented and would have struck s. 43 down under s. 15 of the Charter; finally, Arbour J. dissented but would have invalidated the provision as a violation of s. 7 of the Charter.

¹⁰² To avoid invalidating the provision on vagueness grounds, she read criteria into the provision to define a risk zone for the criminal sanction; *id.*, at para. 44 (explaining and identifying the boundaries of corrective force that is “reasonable in the circumstances”).

¹⁰³ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571.

circumstances, the connection between *MV* logic, the *actus reus* and the harm principle was this: once the *MVR* created a constitutional minimum for *mens rea* it followed that there must be a minimum for the *actus reus* as well; that minimum would prohibit Parliament from punishing conduct that does not cause harm.

Malmo-Levine confronted the Court with its own logic and asked that the *actus reus* be treated the same way, for purposes of section 7 and the principle of constitutional minimums, as the *mens rea*. Despite being caught by it, the Court refused to act on or extend the logic of the *MVR*. Perhaps it seemed perilous to invalidate marijuana laws at a time when the decriminalization of simple possession was under active debate, publicly and in Parliament. Beyond that, the suggestion that the legislature's power to criminalize conduct might be subject to a constitutional threshold of harm was more radical. Denying Parliament the authority to declare certain conduct criminal cuts more deeply into the realm of policy than a constitutional requirement of fault.

Justice Arbour's dissent began with the proposition, which was taken directly from the *MVR*, that "a 'person who has not really done anything wrong' is a person whose conduct caused little or no reasoned risk of harm or whose harmful conduct was not his or her fault".¹⁰⁴ This led to the proposition that "[i]t is a fundamental substantive principle of criminal law that there should be no criminal responsibility without an act or omission accompanied by some sort of fault".¹⁰⁵ At that point she equated the guilty mind and the guilty act in the principle that stigma and punishment are proportionate to the moral blameworthiness of the offender "only if there is a sufficiently blameworthy element in the *actus reus* itself".¹⁰⁶ Thus she concluded that principles of fundamental justice require that "whenever the state resorts to imprisonment, a minimum of harm to others must be an essential part of the offence". Absent that minimum, she said that the offence must be declared unconstitutional.¹⁰⁷

As a matter of doctrine and precedent, as well as in principle, Arbour J.'s dissent was compelling. Her view did not prevail, in part, because the Court had too many times been betrayed by *MV* logic. At first, the principle of moral innocence led to a constitutional minimum for *mens rea* that seemed to fall within the domain of the judiciary, as

¹⁰⁴ *Id.*, at para. 190.

¹⁰⁵ *Id.*, at para. 227 (emphasis added).

¹⁰⁶ *Id.*, at para. 230 (emphasis added).

¹⁰⁷ *Id.*, at para. 244.

guardian of the justice system. But as the Court discovered in *DeSousa*, *Creighton* and other cases, that principle posed problems and a correction was necessary. As revised, Parliament's definition of fault would only be vulnerable in instances of serious disproportionality between the accused's blameworthiness and the stigma and punishment he would suffer. Then, when *MV* logic was extended to the defence of intoxication the Court paid dearly for it. By the time of *Malmo-Levine*, that conception of section 7 had limited credibility as a theory of substantive review. Since then, the Court has endorsed a version of the harm principle, *but not as a Charter principle*.¹⁰⁸ Once the constitutionalization of the substantive criminal law ground virtually to a halt, the Court became more receptive to a conception of section 7 that fell outside the terms of the *MVR*.

6. Beyond Criminal Justice

For years, the Court refrained from endorsing or rejecting a view of section 7 that restricted its scope to the institutions of justice and to the criminal justice system, in particular. Though *Wilson J.* laid the foundation for a broader view of the guarantee, and of liberty of the person, section 7's presence outside the criminal justice system was modest.¹⁰⁹ The Court began to break away from that view of section 7 in *B. (R.) v. Children's Aid Society*.¹¹⁰

CAS concerned non-criminal proceedings to remove a minor temporarily from parents who refused, for religious reasons, to allow blood transfusions which were medically necessary. On the face of it, the central issue was whether wardship proceedings met the fundamental justice clause's conception of a fair procedure. The Court had little difficulty agreeing that the proceedings did not violate the Charter rights of the minor's parents. More problematic was the

¹⁰⁸ See, e.g., *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728 (reading a requirement of harm into the *Criminal Code*'s definition of indecency, in the context of consensual sexual activities at group sex clubs).

¹⁰⁹ Despite the importance of *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, s. 7 had little impact on immigration law; see, e.g., *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711. And whether regarded as falling within criminal justice or not, the extradition cases failed as well; see *Reference re Ng Extradition*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 and *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779.

¹¹⁰ [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 [hereinafter "*CAS*"].

question of entitlement under section 7, and whether the guarantee protected parental liberty in the circumstances. Justice La Forest's affirmative answer placed his conception of section 7 directly in conflict with that of the Chief Justice. For that reason, the latter's concurring opinion might be described as Lamer C.J.'s "last stand". In many ways, his response reprised the views he had expressed in the *Solicitation Reference*. Meanwhile, La Forest J. also provoked Iacobucci and Major JJ. to write that section 7 does not protect the rights of parents when a child's survival is at stake.¹¹¹

Justice La Forest acknowledged the existence of competing definitions of liberty and noted that the term had not been authoritatively defined by the Court. In the circumstances, he declared himself free to reject a definition of "mere freedom from physical restraint" and to proclaim that "the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance".¹¹² Justice La Forest's conception drew on Wilson J.'s opinions in *Jones* and *Morgentaler*, as well as on American precedent from the problematic *Lochner* era which survived the doctrinal purge after the court crisis of 1937.¹¹³

Meanwhile, Lamer C.J. strenuously maintained, as he had in the *Solicitation Reference*, that liberty of the person must be limited to encounters with the administration of justice which place an individual's physical freedom at risk.¹¹⁴ He insisted, in advancing that argument, that no other interpretation of section 7 made sense. Chief Justice Lamer backed that view up with an analysis of the guarantee and its relationship to the legal rights, as well as to other guarantees, such as section 2(a). More explicitly than in the *Solicitation Reference*, he maintained that the connection between section 7's two clauses meant

¹¹¹ *Id.*, at paras. 212-14 (holding that "the right to liberty embedded in s. 7 does not include a parent's right to deny a child medical treatment that has been adjudged necessary by a medical professional", and that "[t]here is simply no room within s. 7 for parents to override the child's right to life and security of the person").

¹¹² *Id.*, at para. 80.

¹¹³ *Id.*, at 364-65 S.C.R. See S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2(1) International Journal of Constitutional Law 1-55.

¹¹⁴ In *CAS* he introduced a theory of the person, as a corporeal entity, as the connection or linkage between s. 7's entitlements. As he explained, "the connection is found in the person himself or herself, as a corporeal entity, as opposed to the person's spirit, aspirations, conscience, beliefs, personality or, more generally, the expression or realization of what makes up the person's non-corporeal entity. The right to liberty, in this context, must therefore be set up against imprisonment, detention or any form of control or constraint on freedom of movement"; *id.*, at para. 33.

that the guarantee's entitlements had to be limited to the institutional processes of the justice system. The Chief Justice's position was that "[t]he liberty in question must therefore be one that may be limited through the operation of some mechanism that involves and actively engages the principles of fundamental justice".¹¹⁵ To rationalize that view he explained that, "[a]part from a situation in which the state engages the justice system", it was difficult to see how those principles could have application.¹¹⁶

The most revealing parts of his opinion expose his fears about the consequences of releasing the guarantee from the constraints of *MV* logic. He alleged that the concept of liberty proposed by Wilson J. and endorsed by La Forest J. "would not only be contrary to the structure of the *Charter* and of the provision itself, but would also be contrary to the scheme, the context and the manifest purpose of section 7".¹¹⁷ For him, the most serious problem was the absence of limits on the guarantee's scope and the lack of any principled way to set limits.¹¹⁸ He fretted that La Forest J.'s definition would confer constitutional protection on "all eccentricities expressed by members of our society" and "would inevitably lead to a situation where we would have government by judges".¹¹⁹ Ironically, these are the arguments he dismissed when he gave section 7 a substantive interpretation in the *MVR*.

In the contest to control the meaning of the entitlements clause, La Forest J.'s opinion in *CAS* must be regarded as a turning point. He did not win majority support for his definition of liberty, but four members of the Court supported his view of the entitlement.¹²⁰ Moreover, by rejecting a conception of entitlement based on freedom from physical liberty, La Forest J. also rejected the *MVR*'s theory of review. As a result, and

¹¹⁵ *Id.*, at para. 20.

¹¹⁶ *Id.*

¹¹⁷ *Id.*, at para. 36.

¹¹⁸ As he explained: "since most laws have the effect of limiting a freedom, the same approach could mean ... that a large proportion of the legislative provisions in force could be challenged on the ground that they infringe the liberty guaranteed by s. 7. It would then be for the courts ... to decide whether or not the freedom invoked was a fundamental freedom..., whether the limit complied with the principles of fundamental justice..., or whether the limit was reasonable and could be justified.... We must keep in mind, first, that what may be important and fundamental to one person may very well not be to another, including the judge who hears the case, and second, that by adopting this approach the judiciary would inevitably be legislating, when this is not its function. *Id.*, at para. 35.

¹¹⁹ *Id.*, at para. 36.

¹²⁰ To his vote those of L'Heureux-Dubé, Gonthier and McLachlin JJ. were added.

despite a valiant campaign, Lamer C.J. was isolated in his views from other members of the Court. Whether he was prepared to admit it or not, liberty of the person had crossed the doctrinal Maginot line — the boundary he regarded as vital to the legitimacy of review under section 7.

The Court which had fractured badly in *CAS* unanimously supported the section 7 claim in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*.¹²¹ This decision extended section 7 beyond the criminal justice system, and did so with the Chief Justice's blessing. Like *CAS*, *G. (J.)* raised a section 7 claim in the context of civil proceedings undertaken by the state to protect children from their parents. A second point of similarity was that *G. (J.)* also focused on fundamental justice and what a fair procedure required in the circumstances.

That is where the resemblance ended. *G. (J.)* held that the government's failure to provide legal representation to a parent who might lose custody of her children in a court hearing violated fundamental justice by depriving that person of the opportunity to participate effectively in the hearing.¹²² In *CAS* the Chief Justice had rejected the proposition that section 7 protects any element of parental liberty unrelated to physical restraint by the state. He avoided that obstacle in *G. (J.)* by shifting his attention to security of the person.

Chief Justice Lamer was not troubled that neither liberty nor security of the person had been extended beyond the criminal law context. Previously, he had acknowledged that section 7 could apply to civil proceedings, but only in settings where the state invoked the machinery of the justice system to deny an individual's physical liberty; civil committal to a mental institution was the example he used to illustrate the point.¹²³ Without explaining the analogy between deprivations of physical liberty and a parent's relationship with children, he simply declared that a child custody hearing engages section 7. That view was based on the conclusion that removing a child constitutes "a

¹²¹ [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46.

¹²² *Id.*, at paras. 84-85 (concluding that the parent needed to be represented by counsel for there to be a fair determination of the children's best interests, and that without the benefit of counsel she would not have been able to participate effectively at the hearing).

¹²³ *Solicitation Reference*, *supra*, note 73, at para. 66 (citing the civil processes of restraining a mentally disordered person or isolating a contagious person as two examples of s. 7 being engaged outside the criminal system); see also *CAS*, *supra*, note 110, at para. 22 (confirming that s. 7 claims under this definition will arise primarily, but not exclusively, in the criminal justice system).

serious interference with the psychological integrity of the parent” and “a gross intrusion into a private and intimate sphere”.¹²⁴ Once that question was settled, section 7’s second clause was in play because child protection proceedings directly engaged the justice system. In the end the Court held that section 7 requires the state to fund counsel in removal proceedings where an unrepresented parent would be deprived of her right to participate effectively in the hearing.

Technically, *G. (J.)* fell within the terms of *MV* logic. Despite emphasizing physical restraint as the definition of liberty, the Chief Justice adopted a different standard for security of the person. Though the two are textually distinct, his opinion raised the question whether and to what extent these entitlements should or do share common ground.¹²⁵ In any case, *G. (J.)* also fit the *MVR*’s institutional requirement of engaging the justice system: despite the absence of a criminal law context, the proceedings arose in the administration of justice. Chief Justice Lamer may have done what he could to protect his conception of section 7, but it was not enough. Once he retired it would not take the Court long to expand section 7’s definition of liberty.¹²⁶

7. Beyond the Administration of Justice

Events would vindicate Lamer C.J.’s fear that without a disciplined connection between section 7’s two clauses, an entirely different approach to the guarantee was possible. Justice Wilson had advanced a generous definition of liberty, but done so in the *MVR*’s context of criminal or regulatory law. *Children’s Aid Society* located La Forest J.’s support for a broad conception of liberty in judicial proceedings concerning a temporary wardship order. By endorsing the Wilson-La Forest definition of liberty in a setting without any connection to the administration of justice, *Godbout v. Longueuil (City)* took the next big step.¹²⁷ After an interval, *Winnipeg Child and Family Services v. K.L.W.*

¹²⁴ *G. (J.)*, *supra*, note 121, at para. 61.

¹²⁵ Note, in comparison to the Chief Justice’s view of liberty, as a purely corporeal concept, what he said about security of the person: “As an individual’s status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state’s conduct”; *id.*

¹²⁶ See *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307.

¹²⁷ [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844.

also applied a section 7 analysis in a setting outside the formal institutions of justice, without giving the matter a second thought.¹²⁸

In *Godbout v. Longueuil*, the Court unanimously concluded that a rule requiring a municipal worker to reside in the employer's city was unreasonable. While six members of the Court decided the case under the Quebec Charter, three others held that the condition violated section 7 of the Charter. That view, which was advanced by La Forest J. and supported by L'Heureux-Dubé and McLachlin JJ., was without precedent. First and foremost, the claim posed a free-standing substantive challenge to the municipality's resolution which lacked an interaction with the justice system. Oddly, the La Forest J. plurality did not regard that as a bar to the claim. Second, La Forest J. restated his definition of liberty from *CAS* and applied it to invalidate a job requirement. In doing so, he dismissed the pre-existing taboo the jurisprudence had placed on granting section 7 economic content. It is remarkable, in these circumstances, that Lamer C.J. remained silent.¹²⁹ Finally, though not discussed here, it is noteworthy that, in the absence of any identifiable principle of fundamental justice, La Forest J. invalidated the residency requirement by engaging in a balancing of interests that subsumed the section 1 analysis.¹³⁰

Rather than present it in cautious or subtle terms, La Forest J. was forthright about his conception of the guarantee. Quick to disagree with the Chief Justice's views, he stated that the guarantee must be read "in light of the values reflected in the *Charter* as a whole, and not just those embodied by the other provisions described as 'legal rights'".¹³¹ From that perspective he went on to conclude that liberty protects "the right to

¹²⁸ [2000] S.C.J. No. 48, [2000] 2 S.C.R. 519.

¹²⁹ He joined the reasons of Major J., which disposed of the appeal under the Quebec Charter, and otherwise stated his agreement with the other plurality opinion by Cory J., that "it is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the *Charter*". *Godbout*, *supra*, note 127, at para. 1.

¹³⁰ *Id.*, at para. 76 (stating that "looking to 'the principles of fundamental justice' often involves the more general endeavour of balancing the constitutional right of the individual against the countervailing interests of the state", adding that "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" and concluding that "balancing individual rights against collective interests itself reflects what may rightfully be termed a 'principle of fundamental justice'"); and at para. 91 (stating, following discussion of the residence requirement, that there is "no need to examine the issues ... under the rubric of s. 1 of the *Charter*, given that all the considerations pertinent to such an inquiry have ... already been canvassed in the discussion dealing with fundamental justice") (emphasis added).

¹³¹ *Id.*, at para. 63 (emphasis added).

an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference”.¹³² Justice La Forest added the qualification that the entitlement extends only to matters that are “fundamentally or inherently personal”, — those matters which, in his words, implicate “basic choices going to the core of what it means to enjoy dignity and independence”.¹³³ As his discussion of choosing where to live reveals, these were hardly objective criteria. He conceded that “intensely personal considerations often inform” this decision,¹³⁴ but denied that Godbout’s section 7 claim implicated any notion of a constitutional “right to employment” or “any other economic right”.¹³⁵ For La Forest J., the choice of a home’s location was a “quintessentially private decision going to the very heart of personal or individual autonomy”.¹³⁶

With that, the La Forest J. plurality effectively abandoned the twin pillars of *MV* logic, at least as conceived by Lamer C.J. The first was that a claim arising under section 7 must arise, somewhere or somehow, in the administration of justice. The second was that the institutional criterion should also inform the definition of section 7’s entitlements. After the La Forest J. concurrence in *Godbout* rejected both elements of that logic, the next step came in *Blencoe v. B.C. Human Rights Commission*, when *Godbout*’s definition of liberty was adopted by the Court.¹³⁷

K.L.W. represents a further departure from *MV* logic.¹³⁸ There, the Court was divided on the question whether fundamental justice required prior authorization, in the form of a warrant, for the non-emergency apprehension of a child. Once having cited *G. (J.)*, L’Heureux-Dubé J. and Arbour J. agreed, without discussion, that the state’s action engaged

¹³² *Id.*, at para. 66.

¹³³ *Id.*

¹³⁴ *Id.*, at para. 67.

¹³⁵ This is the distinction he drew: Godbout’s real complaint, he said, “is not simply that she was dismissed from the appellant’s employ, but rather that she was dismissed because she exercised (what she claims is) a constitutionally protected right to choose her place of residence as she sees fit”. *Id.*, at para. 61.

¹³⁶ *Id.*, at para. 66.

¹³⁷ *Blencoe*, *supra*, note 126.

¹³⁸ *Winnipeg Child and Family Services v. K.L.W.*, [2000] S.C.J. No. 48, [2000] 2 S.C.R. 519.

the parent's security interest.¹³⁹ Each then proceeded to a discussion of what principles of fundamental justice required in the circumstances; each did so without noting or commenting on the absence of any link between the section 7 claim and the administration of justice.

G. (J.) and *K.L.W.* set the stage for *Gosselin v. Quebec*, where Arbour and Bastarache JJ. defended radically different conceptions of the guarantee.¹⁴⁰ The violation of rights arose from the province's welfare scheme, which created a system of differential payments for those over and under the age of 30. It was, primarily and on its face, an equality case. The novel claim under section 7 was that Quebec's failure to extend adequate assistance to those under age 30 violated their security of the person and was fundamentally unjust for that reason. Not only did the claim lack any connection to the administration of justice, it advanced a concept of entitlement that was purely economic. *Gosselin* asked the Court to intervene in the policy realm and decide who would get which benefits and why; in doing so, the case sought additionally to impose a positive obligation on the province to equalize payments across age-differentiated classes of beneficiaries.¹⁴¹

As members of the Court in the majority watched on, Arbour and Bastarache JJ. fought a battle in dissent over the direction of section 7. Justice Arbour proposed a conception of the guarantee which was fearlessly radical. To her credit, she made the argument from, rather than against, precedent. She proposed that section 7's first clause protects free-standing substantive entitlements which ground positive obligations, on the part of the state, to guarantee minimum social and economic standards.¹⁴² Justice Arbour carefully reviewed the decisions

¹³⁹ The majority opinion by L'Heureux-Dubé J. easily found a breach of security of the person, and then turned to the question whether prior judicial authorization was constitutionally required in non-emergency situations, *id.*, paras. 85-87; similarly, Arbour J. stated that "[i]t is common ground that the removal of a child from a parent's custody by the state infringes the parent's right to security of the person", and then addressed the question whether the warrantless apprehension of the child violated principles of fundamental justice; *id.*, at para. 5.

¹⁴⁰ *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.

¹⁴¹ Chief Justice McLachlin's majority opinion upholding the program under ss. 7 and 15 was joined by Gonthier, Iacobucci, Major and Binnie JJ.; a minority comprising L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. found it unconstitutional under s. 15; Arbour and L'Heureux-Dubé JJ. alone found in addition that the program violated s. 7 of the Charter. See J. Cameron, "Positive Obligations under Sections 15 and 7 of the *Charter*: A Comment on *Gosselin v. Quebec*" (2003) 20 S.C.L.R. (2d) 65.

¹⁴² Addressing the relationship between s. 7's two clauses, she said that her position "entails reading the first clause as providing for a completely independent and self-standing right, one which can be violated even absent a breach of fundamental justice"; *Gosselin*, *supra*, note 140, at para. 341.

to establish that nothing in the existing jurisprudence precluded that conception of the guarantee; to the extent the *MVR* created certain assumptions about section 7, the case law could not foreclose an alternative that had never been considered by the Court.¹⁴³ In addition, she synthesized disparate pieces from the jurisprudence to cobble authority for the controversial elements of her conception. For instance, she maintained that a legal conception of section 7 and link to the administration of justice had been attenuated by the Court in *Blencoe* and *K.L.W.*;¹⁴⁴ she cited *G. (J.)* for the proposition that section 7 can address omissions by the state;¹⁴⁵ she also found support for the imposition of positive obligations in *G. (J.)*, as well as in *Dunmore* and *Vriend*, albeit under other provisions of the Charter.¹⁴⁶

Once finished, Arbour J. had created an alternative conception of section 7 which recognized substantive entitlements under the guarantee's first clause, and adopted a methodology which bypassed the PFJ analysis in cases where the claim did not engage the administration of justice. The lingering doubts that had pervaded the jurisprudence since the *MVR* were scarcely noted in her reasons.¹⁴⁷ Under her view, the administration of justice aspect of the guarantee would be addressed by the PFJ clause, and a parallel track would handle claims, such as Gosselin's, arising under the entitlements clause.

Given its reach and its implications both for the substantive content and institutional boundaries of section 7, it is not surprising that her conception encountered stout resistance. Though the rest of the Court, speaking through McLachlin C.J., left its options open by not choosing sides, Bastarache J. unequivocally rejected Arbour J.'s position in a dissent of his own.¹⁴⁸ The nature of the threat to Gosselin's security was a primary concern for him. There, he was adamant that "the threat to the

¹⁴³ In particular, she stated that the Court "has never ruled" that we must reject any positive claim against the state, and "has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7"; *id.*, at para. 309.

¹⁴⁴ *Id.*, at para. 318 (explaining that these decisions relax any "supposed requirement that the right claimed under s. 7 display the characteristics of a 'legal right' similar to those at stake in the administration of criminal justice").

¹⁴⁵ *Id.*, at paras. 324-25.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at paras. 330-35 (undertaking a discussion of "justiciability" and concluding that any concern over the justiciability of positive claims against the state had little bearing in the case).

¹⁴⁸ *Id.*, at paras. 75-84 (stating that it is premature to decide that s. 7 only applies in an adjudicative context and noting that such a context might be sufficient for purposes of s. 7, but not necessary).

person's right must itself emanate from the state".¹⁴⁹ He considered, "at the very least", that the claim must arise from determinative state action that "in and of itself" deprives a person of one of section 7's entitlements.¹⁵⁰ He was far from convinced that any insecurity the claimant suffered was caused by the state.

Justice Bastarache was equally emphatic that a claim under section 7 must be grounded in the administration of justice. In his view, the strong relationship between the guarantee and the role of the judiciary led to the conclusion that "some relationship to the judicial system or its administration must be engaged before section 7 may be applied".¹⁵¹ Only then, he continued, "may the process of interpreting the principle of fundamental justice or the analysis of government action be undertaken".¹⁵² He found that the welfare challenge did not meet section 7's requirements because the claimant "was not implicated in any judicial or administrative proceedings, or even in an investigation that would at some point lead to such a proceeding".¹⁵³ His reason for insisting on that constraint traced its roots to the *MVR*, the decision to grant section 7 a substantive interpretation, and the terms under which the Court took that step. As he put it in *Gosselin*, the "judicial nature of the section 7 rights" could not be ignored without bringing "the legitimacy of the entire process of *Charter* adjudication" into question.¹⁵⁴

With other judges choosing not to commit to a view of section 7, it is difficult to know whether and to what extent Arbour J.'s dissent had influence within the Court. At the least, it focused attention on some of section 7's unresolved questions. In addition, it demonstrated that another conception of the guarantee was possible — that *MV* logic need not foreclose whole categories of section 7 claims. Perhaps most of all, it is significant that Arbour J. refused to be intimidated by the doubts that had cast a long shadow over the guarantee since the *MVR*. Though it did not apply Arbour J.'s methodology in *Chaoulli*, it is an interesting question whether the McLachlin-Major JJ. plurality opinion would have

¹⁴⁹ *Id.*, at para. 218.

¹⁵⁰ *Id.*, at para. 213.

¹⁵¹ *Id.*, at para. 215.

¹⁵² *Id.*, at para. 216.

¹⁵³ *Id.*, at para. 213.

¹⁵⁴ *Id.*, at paras. 215, 336.

taken such bold steps on its own, had she not laid the groundwork in *Gosselin*.

8. Into the Realm of Public Policy

Chaoulli v. Quebec provoked strong responses, both for and against the Court's decision to invalidate a prohibition on private health insurance.¹⁵⁵ As advocates for medicare "slammed the decision as the first step in the evisceration of universal public health care", Quebec's Health Minister responded that "[t]his ruling does not ring the starting bell for a frantic, unbridled race toward the creation of a parallel, two-tier system".¹⁵⁶ It was even suggested that the decision, "while momentous in its legal and bureaucratic implications, could prove to be revolutionary as an economic turning point in Canadian history".¹⁵⁷ In some quarters, *Chaoulli* was welcome news; in others the decision was described as disappointing, shocking and deeply disturbing.¹⁵⁸

For purposes of the paper, health care policy is of less concern than *Chaoulli*'s consequences for section 7. In this case the Court divided strategically, in a way that opened the guarantee's frontiers up but left its future uncertain at the same time. Three members of the panel held that the prohibition violated the guarantee's principles of fundamental justice because it was arbitrary, and could not be saved under section 1.¹⁵⁹ Three others held that the claim did not raise issues of constitutional interpretation that could or should be resolved by judges.¹⁶⁰ With the seventh member of the panel providing the determinative vote on

¹⁵⁵ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791.

¹⁵⁶ Quoted in S. Gordon & A. Mills, "Quebec Ruling Sparks Renewed Debate Over 2-Tier System" *Toronto Star* (10 June 2005), at A01.

¹⁵⁷ *National Post* (10 June 2005), Financial Post 19.

¹⁵⁸ For instance, one view pronounced that "[y]esterday was a historic day. Now that Canada's health care taboo has been smashed by its most esteemed tribunal, it is only a matter of time before our leaders accept the fact that Canada needs a mix of private and public health systems if we are to get the care we deserve"; "Destroying medicare's myths" *National Post* (10 June 2005) A20. Meanwhile, Professor Martha Jackman and others lamented that the Court had read the Quebec and Canadian Charters in a way that recognizes health-care rights for the rich and not for everyone. "Quebec Ruling", *supra*, note 156.

¹⁵⁹ Chief Justice McLachlin and Major J. co-wrote an opinion which found the provision unconstitutional, and which was joined by Bastarache J.

¹⁶⁰ Justices Binnie and LeBel co-wrote an opinion that rejected the s. 7 claim and was joined in by Fish J.

statutory grounds, the split exposed a fault line inside the Court.¹⁶¹ On one side were judges who were prepared to invalidate legislation falling outside the *MVR*'s institutional theory of review; on the other were those who favoured a conception of section 7 that is based — in whole or in substantial part — on that conception of the guarantee.

It is ironic, in the circumstances, that the joint opinion by McLachlin C.J. and Major J. cited the *MVR* as authority for *Chaoulli*'s unprecedented exercise in review. Recalling Lamer J.'s words in that historic case, they repeated that "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate".¹⁶² In light of that duty, the McLachlin-Major plurality stated that "[t]he fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility" of review.¹⁶³ As far as they were concerned, "[t]he mere fact that this question may have policy ramifications *does not permit us to avoid answering it*".¹⁶⁴

If the *MVR*'s distinction between justice and policy had all but vanished long before *Chaoulli*, a section 7 challenge to the health care system was difficult just the same. First of all, in the absence of a link to the administration of justice, access to private health insurance was a free-standing substantive entitlement, not entirely unlike the right to welfare payments which had been rejected in *Gosselin*. Yet the plurality in *Chaoulli* was not prepared, as Arbour J. had been there, to abandon the principle that a breach of section 7 requires dual violations. Second, then, unless an identifiable principle of "justice" could be found, it was difficult to see how access to private health insurance could be brought into the terms of section 7's principles of fundamental justice.

To find a violation, the McLachlin-Major plurality opinion effectively bypassed other PFJ methodologies in favour of a standard of arbitrariness. This concept was developed by McLachlin J. in her *Rodriguez* dissent, and was applied in *R. v. Malmo-Levine*.¹⁶⁵ As noted in the discussion above, rather than identify the *substantive content* of a PFJ, "arbitrariness" allows the Court to invalidate laws which are seen

¹⁶¹ Justice Deschamps alone found the provision invalid under Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12.

¹⁶² *Chaoulli*, *supra*, note 155, at para. 107.

¹⁶³ *Id.*

¹⁶⁴ *Id.*, at para. 108 (emphasis added).

¹⁶⁵ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571.

as fundamentally unjust. It was unsound in *Rodriguez* for that reason, and *Chaoulli* was no different. The concept's application in the health care case is reflected in the way the joint opinion posed the question, as being "whether the measure is arbitrary in the sense of bearing no real relation to the goal *and hence being manifestly unfair*".¹⁶⁶ That characterization also served the all-important goal of forging a link between the Dickson and Beetz opinions in *Morgentaler*, and a conclusion that restrictions on health care insurance are unconstitutional.¹⁶⁷

Meanwhile, Binnie and LeBel JJ. objected in the strongest terms to a section 7 intervention. Their opinion resisted the Court's institutional competence to address a "complex fact-laden policy debate" about access to care.¹⁶⁸ It is a debate, they insisted, about social values, not constitutional law. And as far as the two were concerned, a legislative policy is not arbitrary because judges disagree with it.¹⁶⁹ From that perspective, they charged that the plurality opinion suffered from "an interventionist view of the role courts should play in trying to supply a 'fix' to the failures, *real or perceived*, of major social programs".¹⁷⁰

Justices Binnie and LeBel observed that the subject of the litigation, health insurance, was "far removed from the usual concerns of section 7".¹⁷¹ It was problematic for them that the challenge did not arise out of an adjudicative context or one involving the administration of justice. In their view it would be rare for the guarantee to apply in circumstances "entirely unrelated to adjudicative or administrative proceedings".¹⁷² Under their conception, section 7 provides relief for the breach of an *identifiable* principle of fundamental justice; it follows that the further the state's action lies from an adjudicative context, the more difficult it will be for a litigant to establish a principle of fundamental *justice*.¹⁷³

The Binnie-LeBel plurality also denounced the McLachlin-Major arbitrariness analysis and its attempt to bootstrap the result in *Chaoulli*

¹⁶⁶ *Chaoulli*, *supra*, note 155, at para. 131 (emphasis added).

¹⁶⁷ *Id.*, at paras. 132-33 (citing the opinion of Beetz J. in *Morgentaler*, as well as that of then Chief Justice Dickson).

¹⁶⁸ *Id.*, at para. 164.

¹⁶⁹ *Id.*, at para. 169 ("A legislative policy is not 'arbitrary' just because we may disagree with it").

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ *Id.*, at para. 194.

¹⁷² *Id.*, at para. 196.

¹⁷³ *Id.*, at para. 199.

from the authority of *Morgentaler*. They complained that the “manifest unfairness” Beetz J. and Dickson C.J. spoke of in *Morgentaler* had never been applied outside a criminal law context, and “certainly not in the context of the design of social programs”.¹⁷⁴ Justices Binnie and LeBel also rejected an analogy between the context and purpose of *Morgentaler*’s manifest unfairness standard and the conclusion in *Chaoulli* that a prohibition on health insurance was arbitrary.¹⁷⁵ As they put it, bluntly enough, “[w]e see no parallel”.¹⁷⁶ In this way, *Morgentaler*’s legacy was a key issue in *Chaoulli*. The McLachlin-Major opinion represented a plurality of three, and its value in shaping section 7’s future may depend, in part, on the strength of that analogy. Yet *Chaoulli*’s debate about manifest unfairness and arbitrariness reinforces the point, made earlier in the paper’s discussion of *Morgentaler* and *Rodriguez*, that neither standard offers a section 7 methodology that is conceptually or analytically defensible.

If adopted by a majority, the McLachlin-Major conception of section 7 would bring the Court frontally and unapologetically into the realm of public policy. And so, with *Chaoulli*, discussion about the legitimacy of review is back to where it started in the *MVR*: the road the Court stepped onto there has travelled a great distance, in a circle, and has returned to the beginning. After the *MVR*, Jamie Cameron predicted that “a substantive interpretation for section 7 necessarily meant that the courts would run interference on legislative programs and would do so, also necessarily, on extra-textual, subjective grounds”.¹⁷⁷ Similarly, following *Chaoulli*, Sujit Choudhry claimed that the decision not only “repeats many of the judicial mistakes closely identified with the *Lochner* court; it may in fact be worse”.¹⁷⁸ Meanwhile, Allan Hutchinson remarked that “[f]or all those who lauded the *Charter* as a harbinger of all that is good and true in the democratic scheme of things, the Supreme Court’s decision in *Chaoulli* must be considered to be the end of the line”.¹⁷⁹ And Christopher Manfredi argued that “*Chaoulli* ...

¹⁷⁴ *Id.*, at para. 180.

¹⁷⁵ *Id.*, at 905-908 S.C.R.

¹⁷⁶ *Id.*, at para. 262.

¹⁷⁷ J. Cameron, “The *Motor Vehicle Reference* and the Relevance of American Doctrine in *Charter* Adjudication” in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), at 89.

¹⁷⁸ S. Choudhry, “Worse Than *Lochner*?” in C. Flood, K. Roach & L. Sossin, eds., *Access to Care: The Legal Debate Over Private Health Insurance* 92 (Toronto: University of Toronto Press, 2005).

¹⁷⁹ “‘Condition Critical’: The Constitution and Health Care”, *id.*, at 103.

is the entirely predictable consequence of a process in which the Court has progressively liberated itself from the ideas that there are fixed limits to its decision making capacity and that the *Charter* has any meaning independent of what judges give it through ‘broad and purposive’ interpretation”.¹⁸⁰

9. Conclusion

From the moment it chose to reject the drafters’ intention of restricting section 7 to procedure, the Court was aware of the need for limits on the guarantee’s scope. At the same time, the text’s appeal to “fundamental justice” pulled the judges instinctively in the direction of a generous interpretation. *MV* logic proposed a form of substantive review which, according to Lamer J., would eliminate the risk of encroaching on policy. Yet it was mistaken to think that by focusing on the *institutions* of the justice system the Court could avoid entangling itself in policy review. Moreover, any assumption that review could be reserved for injustices arising in the institutions of the justice system, and not exercised elsewhere, was misguided. Neither the text nor the intent of its drafters supported that view of the guarantee.

Chaoulli all but abandoned *MV* logic. By decoupling fundamental justice and the administration of justice requirement, the McLachlin-Major plurality has made the search for limits more urgent than ever. The Court recognizes that section 7 has a distinctive role to play in the criminal justice system and more generally in the development of the Charter’s legal rights. Yet some judges, and perhaps a majority on the Court, are unwilling to accept an interpretation of the guarantee that is rooted, exclusively and selectively, in the institutions of the justice system.

Until the Court settles on a role for section 7 in the Charter’s scheme of rights, limits on the guarantee’s scope will remain unknown. For that step to be taken the judges must be prepared to choose between competing interpretations of the guarantee. The final part of the paper provides a preliminary discussion of that issue. Before turning to that, it is helpful to review the Court’s interpretation of section 7’s two clauses. Accordingly, the next part shows the degree to which indecision about

¹⁸⁰ C. Manfredi, “*Déjà Vu* All Over Again: *Chaoulli* and the Limits of Judicial Policymaking”, *id.*, at 140.

section 7 is reflected in the Court's approach to the "entitlements" and "principles of fundamental justice" clauses.

III. SECTION 7 METHODOLOGIES

1. Introduction

As noted at the beginning of the paper, the text of section 7 created interpretive challenges. The presence of two clauses, the abstract character of each and the suggestion of an internal limit complicated the task of defining the guarantee's content. The decision to grant section 7 a substantive interpretation and to rely on a distinction between justice and policy in doing so added further layers of complexity. Once having made that choice, the Court faced competing imperatives in a variety of contexts. In this dynamic, the impulse to enforce section 7 rights was set against ever-present doubts about the legitimacy of review. It was wishful thinking for the judges to imagine that those doubts could be quelled by assertions of the Court's duty and mandate of review under the Charter.

This section shows how the Court's inability to choose a substantive and institutional role for section 7 has infused its interpretations of both clauses. The consequences are structural as well as doctrinal in nature. It is not only the content of the analysis but also its function that has been affected. This is true of both clauses but is particularly manifested in the development of the Court's PFJ "methodologies".

Whether by design or not, the *MVR*'s focus on the second clause set the pattern for the jurisprudence. In *Chaoulli v. Quebec*, Binnie and LeBel JJ. literally underlined the point by declaring that, "[t]he real control over the scope and operation of s. 7 is to be found in the requirement that the applicant identify a violation of a principle of fundamental justice".¹⁸¹ By treating that requirement as determinative, the Court avoided the unwelcome task of restricting liberty and security of the person. At the same time, doing so served to deflect elements of the entitlement analysis to the second clause. As a result, the nature of the claim is considered twice under section 7: once in defining liberty

¹⁸¹ *Chaoulli*, *supra*, note 155, at para. 199 (underlining omitted).

and security of the person, and a second time, in deciding whether the claim engages the guarantee's principles of fundamental justice.

Meanwhile, the PFJ analysis also assumes the role section 1 was intended to play in determining whether a limit is reasonable. Because the guarantee's second clause bears the brunt of the workload, divergent functions are collapsed into and addressed under the rubric of fundamental justice. Not surprisingly, the result is an array of methodologies which overlap, intersect, and more generally obscure the clarity and cohesion of the jurisprudence.

2. The Entitlements Clause

As concepts, liberty and security of the person are boundless. For that reason, it was not obvious how the Court could place "principled" limits on their scope. As it happened, relegating section 7's first clause to a minor role spared the Court from having to impose artificial restrictions on these entitlements. The turning point came early, in the *MVR*, with the conclusion that the principles of fundamental justice serve as qualifiers on interests that otherwise might be impossible to contain.¹⁸² From that point on, dual violations were required to establish a breach of section 7. By the time Arbour J. proposed, in *Gosselin v. Quebec*, that they be given free-standing, substantive content, the Court was fixed in a functional view of the PFJ clause as a brake on the guarantee's entitlements.

By enhancing the role of section 7's "qualifier", the *MVR* may inadvertently have created a hierarchy between two clauses which, in textual terms, are co-equals. The Court held that the analysis shifted to the fundamental justice clause in every instance where the state threatened an individual's liberty with imprisonment. By reducing the role of section 7's first clause, the *MVR* effectively forced the guarantee's PFJ to develop a second level of entitlement analysis. The question in that context was whether the criminal law's threat of imprisonment implicated a principle of *fundamental* justice; the answer depended on whether the principle could be found in the "basic tenets"

¹⁸² *MVR*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at paras. 23-24 (stating that the principles of fundamental justice "are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person" and then adding that "[a]s a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them") (emphasis added).

of the legal system. The “basic tenets” branch of PFJ methodology is discussed in the next section; the point here is that the *MVR*’s focus on the criminal justice system and its consequences for *physical liberty* had significant consequences, not only for section 7’s concept of entitlement, but for the relationship between the two clauses, as well.

It was predictable, following the *MVR*, that the Court would be invited to broaden the concept of liberty in other directions.¹⁸³ In setting out, effectively, on a mission to prevent an Americanized approach to section 7, Lamer J. developed two defensive strategies. The first imposed an institutional definition on liberty of the person which would restrict its scope to state interferences with physical freedom that engaged the justice system. The second reverted to security of the person when it was undesirable to recognize certain liberty interests.

Justice Lamer would discover that it was difficult to place institutional constraints on a concept as fundamental and unconfined as liberty. That is why his attempt to limit the interest to freedom from physical restraint had little chance, over time, against Wilson J.’s expansive definition of the right.¹⁸⁴ Once embedded in *Morgentaler*, her definition grounded an expansion of the concept which was subsequently adopted by the Court.¹⁸⁵ Following her retirement, La Forest J. followed in her footsteps and did not hesitate, in doing so, to denounce a model of entitlement based on physical liberty. In *CAS*, he drew on Wilson J.’s opinions in *Jones* and *Morgentaler*, as well as on American case law, to endorse the proposition that section 7 protects fundamental personal choices.¹⁸⁶ In *Godbout v. Longueuil*, he solidified that view in a setting that unmoored the entitlement from its anchor in the institutions of justice.¹⁸⁷

¹⁸³ See *supra*, note 79.

¹⁸⁴ For instance, in *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at para. 74 she stated: “I believe that the framers of the Constitution in guaranteeing ‘liberty’ as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in today’s parlance, ‘his own person’ and accountable as such.”

¹⁸⁵ See *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 [hereinafter “*CAS*”]; *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307.

¹⁸⁶ *Supra*, notes 112 and 113, and accompanying text.

¹⁸⁷ *Supra*, notes 131-136, and accompanying text.

Not long after Lamer C.J. retired, *Blencoe v. British Columbia* approved the Wilson-La Forest definition, but added the caveat that “personal autonomy is not synonymous with unconstrained freedom”.¹⁸⁸ Although it seems that a definition protecting decisions of fundamental importance can only be broad, Bastarache J. stressed that the liberty interest “would encompass only those decisions that are of fundamental importance”: a “narrow sphere of inherently personal decision-making” was the way he expressed it.¹⁸⁹

Meanwhile, security of the person provided a convenient alternative when negative connotations were associated with the liberty interest. *Morgentaler* is a case in point: once Wilson J. supported a constitutional right to abortion as an element of liberty, Dickson C.J. and Beetz J. focused on the scheme’s interference with the physical and psychological security of women seeking an abortion.¹⁹⁰ *Morgentaler* created a precedent for security of the person where regulations affect bodily integrity, which was followed in *Rodriguez v. British Columbia*¹⁹¹ and *Chaoulli v. Quebec*.¹⁹² *G. (J.) v. New Brunswick* treated security of the person as a doctrinal flag of convenience for the different purpose, there, of sparing Lamer C.J. the awkwardness of defending his definition of liberty in *CAS*.¹⁹³ And once *G. (J.)* created authority for the

¹⁸⁸ *Blencoe*, *supra*, note 185, at para. 54.

¹⁸⁹ *Id.*, at para. 51.

¹⁹⁰ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at para. 22 (*per* Dickson C.J., stating that “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person”, and adding that “[i]t is not necessary ... to determine whether right extends further, to protect either interests central to personal autonomy, or interests unrelated to criminal justice”), and at para. 87 (*per* Beetz J., stating that “[i]f a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life is in danger, then the state has intervened and this intervention constitutes a violation of that man or that woman’s security of the person”).

¹⁹¹ *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at para. 136 (*per* Sopinka J., stating that *Morgentaler* “can be seen to encompass a notion of personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress” and adding that “personal autonomy, at least with respect to the right to make choices concerning one’s own body ... and basic human dignity are encompassed within security of the person”).

¹⁹² The McLachlin-Major plurality held, citing *Morgentaler*, that “[t]he jurisprudence of this Court holds that delays in obtaining medical treatment which affects patients physically and psychologically trigger the protection of s. 7 of the *Charter*”; *Chaoulli*, *supra*, note 155, at para. 118.

¹⁹³ Thus he said that his conclusion that the custody proceedings violated the parent’s security of the person “is not inconsistent” with his position in *CAS*, where the comments were limited to the issue of the scope of “liberty under s. 7 and in particular, *whether the right to liberty includes the right of parents to choose medical treatment for their child*”; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at para. 67 (emphasis added).

proposition that child custody proceedings violate a parent's security of the person, the precedent was simply applied in *K.L.W.*, despite the absence of any connection with the administration of justice.

This quick review shows that liberty and security of the person do not lend themselves to concrete definitions. That is why it was unrealistic to expect the Court to place significant limits on those entitlements.¹⁹⁴ Still, the Court's interpretations of these concepts raise concerns. It is unclear, for example, whether and to what extent liberty and security of the person protect different interests. Though Bastarache J. maintained, in *Blencoe*, that they are distinctive entitlements, the line between the two is not well articulated.¹⁹⁵ As a result, it is difficult to predict which interest is engaged and for what reason. The Court has not explained what distinguishes an entitlement which protects personal autonomy and fundamental personal choices from one which safeguards the physical and psychological integrity of the individual.¹⁹⁶ Though it has singled state-imposed stress out in defining the interest, the Court has not interpreted security in a way that convincingly separates it from liberty of the person.

A related problem is that the Court formulated these interests in broad terms and then indicated that each is subject to a reservation.¹⁹⁷ That reservation grants the Court a broad discretion to exclude claims which fall outside its perception of entitlement.¹⁹⁸ Yet a discretion so

¹⁹⁴ But see P. Bryden, "Section 7 of the *Charter* Outside the Criminal Context" (2005) 38 U.B.C. L. Rev. 507, at 510 (arguing that Canadian courts "seem to have been persuaded that the way to establish limits that are appropriate to the institutional capacities of judges engaging in constitutional review using s. 7 is to severely restrict the meaning of 'liberty' and 'security of the person'").

¹⁹⁵ *Blencoe*, *supra*, note 185, at para. 48 (stating that he prefers "to keep the interests protected by s. 7 analytically distinct to the extent possible").

¹⁹⁶ *Id.*, at paras. 49-57 (defining liberty and security of the person, respectively).

¹⁹⁷ *Id.* (limiting liberty of the person to "a narrow sphere of inherently personal decision-making" and to those decisions that are of fundamental importance; limiting security of the person to "serious state-imposed psychological stress").

¹⁹⁸ See, e.g., *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6, at para. 46 (stating that the right to operate a VLT "cannot be characterized as a fundamental life choice" because it is "purely an economic interest" and "[t]he ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*"). Yet the Court has enforced economic or quasi-economic entitlements under s. 7: see *Godbout v. Longueuil*, *supra*, note 185 (plurality opinion invalidating a residence requirement for employment) and *Chaoulli*, *supra*, note 155 (plurality opinion invalidating a provision which prohibited individuals from buying private health care insurance).

subjective in nature is problematic.¹⁹⁹ For these and other reasons, some have urged the Court to support a broader conception of entitlement.²⁰⁰ Despite these concerns, the threshold under this part of the section 7 analysis is low, and the question of breach is decided, in practice, under the second clause's concept of fundamental justice. The key limit on section 7's entitlements is structural, and is found in the requirement that an infringement of liberty or security of the person must also violate a principle of fundamental justice.

3. PFJ Methodologies

(a) Introduction

The principles of fundamental justice are section 7's workhorse because the second clause has been called on to complete various steps in the Charter analysis. As just explained, the issue of entitlement is dealt with in a preliminary way under the first clause, and then carried over to the deprivation clause, where the question is whether the interest can be characterized as a principle of *fundamental* justice. Though the text of the Charter commits this issue to section 1, section 7's PFJ analysis also considers the question of justification. Early in the guarantee's interpretation, the Court concluded that deprivations of fundamental justice could only be saved in exceptional circumstances under section 1.²⁰¹ As a result, the balancing of interests reverted to section 7, where it is expressed in the language of fundamental justice. By assigning the *prima facie* issue of entitlement a minor part and according section 1 a *de minimus* role, the Court forced the PFJ clause to bear the burden of the analysis virtually alone. Consequently, the clause has responsibilities

¹⁹⁹ As Alan Young observes, a category of fundamental personal decisions does not help, because "dividing personal decisions into fundamental and non-fundamental is a value-laden exercise beyond the purview of judicial understanding" and, as well, because "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 kind of fundamental decision". "Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches" (2002) 16 S.C.L.R. (2d) 121, at 134.

²⁰⁰ Bryden, *supra*, note 194, at 519 (arguing that the jurisprudence has "not been particularly clear on how 'fundamental personal choices' are to be identified or, more basically, why the meaning of 'liberty' in s. 7 should be restricted in this way"); at 522-23 (criticizing the high threshold the Court has set for security of the person); and at 536 (concluding that the jurisprudence has been too restrictive in defining the scope of s. 7's entitlements).

²⁰¹ MVR, *supra*, note 182, at para. 83.

which overlap, collapse and combine the issues of entitlement and justification.

This feature of section 7 doctrine is reflected in the methodologies the Court has developed to interpret the PFJ clause; the key ones, for purposes of this paper, include “basic tenets” analysis, section 7 balancing, unfairness standards and the *Rodriguez* test. In functional terms, some of these concepts address a “secondary” question of entitlement, and others serve as a substitute for the section 1 analysis. For instance, by asking whether the interest in question engages a principle of *fundamental* justice, the basic tenets inquiry performs a secondary analysis of the entitlement issue. The *Rodriguez* test also provides a second level analysis of the right at stake, but does so through the application of a three-part test.²⁰² Meanwhile, standards such as manifest unfairness and arbitrariness skip that step and move directly to a form of justification analysis.²⁰³ Finally, though section 7 balancing addresses both issues, in most cases it too displaces section 1’s role.²⁰⁴

With the exception of the *Rodriguez* test, these methodologies have co-existed, uneasily, from the early years of the section 7 jurisprudence. Because the guarantee’s second clause serves a default function for a variety of questions which the Court has been unwilling or unable to address under other parts of the Charter, the PFJ clause has become a morass of overlapping doctrines and methodologies. The discussion which follows does not undertake to make these methodologies comprehensible. Instead, it merely shows how they collide and ricochet against each other as the Court reacts to the challenge of compressing the entire Charter analysis into the principles of fundamental justice.

²⁰² *Rodriguez, supra*, note 191, at para. 141 (stating that a mere common law rule does not suffice to constitute a PFJ unless the principle in question is a “legal” principle, that there is some consensus that the principle is vital or fundamental to our “societal” notion of justice, and that the principle is capable of being identified with some precision and applied in a manner which yields understandable results).

²⁰³ For manifest unfairness see *Morgentaler, supra*, note 190; for cases discussing arbitrariness see *Rodriguez, id.*; *Malmo-Levine, supra*, note 165; and *Chaoulli, supra*, note 155.

²⁰⁴ Key examples of s. 7 balancing include *R. v. Lyons* [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309; *R. v. Beare* [1987] S.C.J. No. 92, [1988] 2 S.C.R. 387; *Thomson Newspapers v. Canada*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425; *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143; and *Godbout v. Longueuil* (plurality opinion), *supra*, note 185.

(b) *Basic Tenets Methodology*

To the extent the Court's section 7 jurisprudence has any organizing principle, it is the proposition that the PFJ are found in the basic tenets of the legal system as distinguished, under *MV* logic, from the realm of general public policy.²⁰⁵ The *MVR* stated that those principles "cannot be given any exhaustive content or simple enumerative definition", but "will take on concrete meaning as the courts address alleged violations of s. 7".²⁰⁶ That meaning would depend, the Court said, on an analysis of the "nature, sources, *rationale* and essential role" of the principle "within the judicial process and in our legal system, as it evolves".²⁰⁷

Tenets embedded in the values and principles of the justice system represent entitlements not guaranteed by the Charter's legal rights which are nonetheless deserving of constitutional protection. The basic tenets which have been recognized thus far as principles of fundamental justice are a mix of substantive and procedural. First and foremost among the substantive interests recognized as a PFJ under section 7 is the *MVR*'s principle of moral innocence. Though its impact on the substantive criminal law fell short of expectations, the principle set the standard for this branch of PFJ analysis. Other principles of fundamental justice which have been identified through this process include the right of full answer and defence,²⁰⁸ party autonomy²⁰⁹ and the right to silence.²¹⁰

The doctrinal contours of this branch of section 7's principles of fundamental justice are less vital to this paper than its function and relationship with other methodologies. In that regard, it is important to note that each of the PFJ protected by section 7 through this process is in the nature of a right. Each can be articulated at a level of abstraction that makes it viable as a *principle* of fundamental justice. Moreover, asking whether the primary liberty or security interest engages a

²⁰⁵ *MVR*, *supra*, note 182, at para. 30 (stating that "the principles of fundamental justice are to be found in the basic tenets of our legal system").

²⁰⁶ *Id.*, at para. 65.

²⁰⁷ *Id.*, at para. 64 (emphasis in original).

²⁰⁸ See *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326; *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577; *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411; and *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668.

²⁰⁹ *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933.

²¹⁰ *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151. Vagueness is an example of a PFJ which is more in the nature of a prohibition on the state than a right that is held and claimed by an individual; the leading case is *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606.

principle of *fundamental* justice confirms that this methodology adds a second layer to the question of entitlement. It is a further requirement that the basic tenets must have pedigree in the common law judicial tradition. To summarize, the claim must present a *principle* that the Court recognizes as *fundamental* in the institutions of the *justice* system.

The *MVR*'s principle of moral innocence illustrates the methodology. Moral innocence is the abstract principle which led to a requirement of fault, under section 7, as an element of the offence. The idea of fault, in turn, supported a concept of minimum *mens rea*, which was based on the principle of symmetry. The doctrinal apparatus of moral innocence included stigma and punishment as the key variables in determining whether the penal consequences were proportional to the accused's moral blame. Even though the Court backed away from symmetry and the concept of a minimum *mens rea*, the example shows how this principle was constitutionalized under section 7.

On the procedural side, one of the abstract entitlements recognized by the Court is the defendant's right of full answer and defence. In *R. v. Stinchcombe*, the Court held that this principle was a fundamental element of the adversarial system and of the criminal justice system as a result.²¹¹ Crown disclosure is a PFJ that is subject to limits nonetheless. Initially qualified by relevance and privilege, full answer and defence would subsequently be balanced against the rights of crime victims on the question of third party production and access to sensitive counselling and therapeutic records.²¹² In this way, rights which are recognized as principles of fundamental justice are not absolute, but are subject to limits which are determined in the process of defining the scope of the entitlement.

Full answer and defence are two entitlements which entered section 7 through the *MVR*'s basic tenets methodology. Both had a foundation in the underlying values of common law tradition, and both stated an abstract principle which then assumed a doctrinal form that defined the concept for purposes of section 7 and the PFJ analysis. To summarize,

²¹¹ *R. v. Stinchcombe*, *supra*, note 208. There, Sopinka J. explained that "[t]he right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted"; *id.*, at para. 17.

²¹² *Id.*, at para. 17 (stating that the prosecutor retains a discretion not to disclose irrelevant material, to withhold the identity of individuals in order to protect them from harassment or injury, or to enforce the privilege relating to informers, and that the timing of disclosure is also subject to discretion); see also *R. v. Mills*, *supra*, note 208 (upholding *Criminal Code* provisions that regulate and limit defence access to third party counselling and therapy records).

this methodology, in the main, was designed to recognize and protect values that are rooted in the common law judicial tradition. As such, it is tied to and limited by the underlying assumptions of *MV* logic. Its focus on the values and operations of the *judicial* process forced the Court to generate additional methodologies to accommodate other kinds of claims. That is why section 7 balancing and fairness doctrines emerged in response to issues which did not fit the “basic tenets” model.

(c) *Section 7 Balancing*

By now, balancing has become a routine element in the PFJ analysis. As a way of setting internal limits, this methodology is confusing: not only does it pre-empt the section 1 analysis, section 7 balancing assumes different forms and serves different purposes. It is part of the internal limits analysis in some cases but not others, and members of the Court do not agree whether and when section 7 balancing is appropriate. Suffice to say that this methodology raises complex issues which cannot be fully discussed within the framework of this paper.²¹³ In the circumstances, the limited purpose of this section is to explain how it fits with the other PFJ methodologies.

As noted in the Introduction, La Forest J. was balancing’s key proponent. He found authority for an internal balancing of interests in the *MVR*’s reference to the basic tenets and process of the judicial process, and to *the other components of our legal system*.²¹⁴ In his view, those components include the underlying policies and rationales of any legislation which interferes with liberty or security interests. He reasoned that, to determine whether a principle of fundamental justice has been violated, those policies must be balanced against the entitlement. Unlike the basic tenets approach, balancing does not articulate a *principle* of fundamental justice; instead, the analysis weighs a legislative policy and its rationales against the individual right at stake.

²¹³ The leading article is T. Singleton, “The Principles of Fundamental Justice, Societal Interests and Section 1 of the *Charter*” (1995) 74 Can. Bar Rev. 446.

²¹⁴ *MVR*, *supra*, note 182, at para. 62 (emphasis added).

Balancing received encouragement in a few early cases before being advanced, more openly, in *Thomson Newspapers*.²¹⁵ Justice La Forest stated that the analysis seeks “a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice”.²¹⁶ From there the Court extended and applied section 7 balancing in *Canada (Minister of Employment and Immigration) v. Chiarelli*.²¹⁷ Justice Sopinka approved La Forest J.’s *Thomson* methodology in an immigration context, and stated, in particular, that “in assessing whether a procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual”.²¹⁸ Justice Sopinka also drew an analogy to the Court’s extradition decision in *Kindler v. Canada*, and found that to determine whether deportation *per se* violates section 7 the Court “must look to the principles and policies underlying immigration law”.²¹⁹ Once he articulated the most fundamental principle, that “non-citizens do not have an unqualified right to enter or remain in the country”, it followed that Parliament had made a “legitimate non-arbitrary choice” that it was “not in the public interest to allow a non-citizen to stay in the country”.²²⁰

Justice McLachlin took La Forest J.’s balancing the next step in *Cunningham v. Canada*, before having second thoughts in *Rodriguez* about the role societal interests play in setting internal limits on the scope of section 7.²²¹ In *Cunningham* she stated that section 7’s PFJ are concerned “not only with the interest of the person who claims his liberty has been limited, but with the protection of society”, and added that “[f]undamental justice requires that a *fair balance be struck*

²¹⁵ *Thomson Newspapers v. Canada*, *supra*, note 204. The earlier cases include *R. v. Lyons*, *supra*, note 204 (holding that Parliament’s “dangerous offender” procedure does not offend PFJ because it accords with the fundamental purpose of the criminal law and of sentencing, which is the protection of the public); and *R. v. Beare*, *supra*, note 204 (concluding that custodial fingerprinting does not violate PFJ when weighed against the principles and policies that have animated legislative and judicial practice in the field).

²¹⁶ *Id.*, at para. 176.

²¹⁷ [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711.

²¹⁸ *Id.*, at para. 47.

²¹⁹ *Id.*, at para. 24. *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779.

²²⁰ *Chiarelli, id.*, at para. 27.

²²¹ *Supra*, note 204.

between these interests”.²²² Then her dissent in *Rodriguez* proposed an exception to balancing where the state has acted arbitrarily. In that setting she maintained that societal interests have “no place” in the PFJ analysis because the state will “always” bear the burden of justifying an arbitrary legislative scheme.²²³ Although her denunciation of section 7 balancing relied on Lamer J.’s opinion in *R. v. Swain*, Sopinka J.’s view was more consistent with the direction in which the jurisprudence was moving.²²⁴ He maintained that the issue in *Rodriguez* was whether “the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state’s interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition”.²²⁵ Justice Sopinka explicitly rejected McLachlin J.’s attempt to declare the law arbitrary “without considering the state interest and the societal concerns which it reflects”.²²⁶

On the face of it, the basic tenets inquiry and balancing look like rather different approaches. The purpose of the first is to identify a secondary entitlement which can be characterized as a principle of fundamental stature in the justice system. Meanwhile, the style of balancing that emerged simply tests the constitutionality of legislative policies against the individual’s right to liberty or security of the person. In the absence of an analysis of secondary entitlement, the balance invariably favours societal interests over the interest at stake.²²⁷ Still, it is worth noting that both methodologies practice balancing of a kind. Though La Forest J.’s style of balancing is contextual or situational in nature, the basic tenets approach balances values, once a PFJ is identified, to define the scope of the principle.²²⁸

²²² *Id.*, at para. 17 (in the context of changes to the *Parole Act* and its conditions for release on mandatory supervision) (emphasis added).

²²³ *Rodriguez*, *supra*, note 191, at paras. 207-208.

²²⁴ *Id.* (quoting *Swain* for the view that “[i]t is not appropriate for the state to thwart the exercise of the accused’s right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused’s s. 7 rights; *R. v. Swain*, *supra*, note 209, at para. 46).

²²⁵ *Rodriguez*, *id.*, at para. 148.

²²⁶ *Id.*, at para. 147.

²²⁷ The plurality opinion in *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 is a notable exception.

²²⁸ See Young, *supra*, note 199, at 135 (stating that “the balancing approach to section 7 was designed to obviate the need to find elusive and specific principles of fundamental justice”, but that “[i]n 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”).

Three other decisions demonstrate how internal balancing became such a confusing concept. In *Godbout v. Longueuil*, the La Forest plurality moved directly from its definition of liberty under the first clause to a balancing of interests.²²⁹ Without a link to the administration of justice, it is difficult to see how choosing one's home could be expressed as a PFJ. Justice La Forest ducked the issue by stating that balancing is a principle of fundamental justice in its own right. As he explained, "the notion of balancing individual rights against collective interest *itself reflects what may rightfully termed a 'principle of fundamental justice'*".²³⁰ He added that "it is clear that deciding whether the infringement of a s. 7 right is fundamental just may, *in certain cases*, require that the right at issue be weighed against the interests pursued by the state in causing that infringement".²³¹ When all was said and done, the circumstances in which a violation of fundamental justice would be determined by a situational balancing of interests remained unclear. Once having tested the claimant's right of liberty against the city's public interests in imposing a residence requirement on employees, he held in that case that the fundamental justice clause had considered all the issues that would have arisen under section 1.²³² Analysis under that provision was redundant as a result.

R. v. Mills presented a conflict between the accused's right of full answer and defence and a crime victim's rights of equality and privacy.²³³ Justices McLachlin and Iacobucci co-wrote an opinion which rationalized section 7 balancing by attempting to distinguish it from balancing under section 1. The key point, they said, is that section 7 is concerned with "the delineation of the boundaries of the right in question", and section 1 is concerned with "whether the violation of these boundaries may be justified".²³⁴ That is why, they went on to explain, "the nature of the issues and interests to be balanced is not the same under the two sections".²³⁵ The distinction suggested that section 7 balancing is aimed at the scope of entitlement rather than the justification analysis, which should take place under section 1. This

²²⁹ *Supra*, note 227.

²³⁰ *Id.*, at para. 76 (emphasis added).

²³¹ *Id.*, at para. 78 (emphasis added).

²³² *Id.*, at para. 91.

²³³ *Supra*, note 208.

²³⁴ *Id.*, at para. 66.

²³⁵ *Id.*, at para. 67.

account failed to explain the anomaly that, despite the different functions of balancing in these two provisions, section 1 plays little or no role in section 7 cases.

The joint opinion by Gonthier and Binnie JJ. returned to this point in *Malmo-Levine*. There, they rejected the proposition that “courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure ‘strikes the right balance’ between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice”.²³⁶ Rather, they acknowledged that the problem with a “general undertaking to balance individual and societal interest, *independent of any identified principle of fundamental justice*”, is that it would “entirely collapse the s. 1 inquiry into s. 7”.²³⁷ Justices Gonthier and Binnie claimed that section 7’s function is discrete because an internal balancing of individual and societal interests “is *only relevant* when elucidating a particular principle of fundamental justice”.²³⁸ There, the task of delineating section 7’s PFJ “must inevitably take into account the social nature of our collective existence”; to that limited extent, they insisted, societal values play a role in defining the boundaries of the guarantee’s rights and principles.²³⁹ Unfortunately, *Malmo-Levine*’s attempt to clarify it left the purpose and application of internal balancing as obtuse as ever.

This review has been brief but may suffice, nonetheless, to show that section 7 balancing has little redeeming value. It is not based on any conception of the guarantee, does not apply an identifiable methodology and is lacking in guiding principles. The Court claims that internal balancing should be done in some cases but not others, without explaining in concrete terms how that works; it also states that balancing under the guarantee is different from the section 1 exercise, as if section 1 actually plays a role in these cases. Yet the section 1 balancing that is requisite in all Charter cases is no more than a formality in those cases which find a breach of fundamental justice. It is a further problem that internal balancing under section 7 does not grant the entitlement an adequate role in the weighing of interests. But nor does it consider societal interests in a disciplined manner; unlike its section 1 counterpart, the justificatory analysis under section 7 lacks structure and

²³⁶ *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 96.

²³⁷ *Id.* (emphasis in original).

²³⁸ *Id.*, at para. 98 (emphasis added).

²³⁹ *Id.*, at para. 99.

rigour. To reform this methodology would require the Court to reconceptualize the fundamental justice clause and to redefine the relationship between sections 7 and 1. Suggesting how that might be done is beyond the scope of this paper.

(d) *Unfairness Standards and the Rodriguez Test*

In *R. v. Morgentaler* the Court invalidated Parliament's abortion law because it was manifestly unfair. As a standard of constitutionality, this concept lacks content and a methodology. Even so, it reappeared in McLachlin J.'s *Rodriguez* dissent in the form of a Charter prohibition against arbitrary laws. Thereafter, arbitrariness featured prominently in the McLachlin-Major opinion in *Chaoulli* that Quebec's prohibition on private health insurance was unconstitutional. Like manifest unfairness, arbitrariness — as a principle of fundamental justice — also lacks content and a methodology. In function and effect, both propose a “fairness standard” which allows the Court to invalidate laws simply because they are considered unfair.

Justice McLachlin's reliance on arbitrariness in *Rodriguez* prompted Sopinka J. to respond with a three-part test.²⁴⁰ The purpose of the test in that setting was to determine whether a right to die could be characterized as a *principle of fundamental justice*. In functional terms there can be little doubt that this test addresses the question of secondary entitlement. Thereafter, the Court employed it, albeit in various formulations, in *Malmo-Levine* and *CYF*, before Binnie and LeBel JJ. invoked it against the claim of access to private health insurance in *Chaoulli*.²⁴¹

Experience has shown that when the test applies, the claim will fail.²⁴² That is because, in a roundabout way, its criteria are designed to

²⁴⁰ To repeat, a principle will not be considered a PFJ under this standard unless it states a legal principle, there is some consensus that the principle is vital or fundamental to our societal notion of justice, and the principle is capable of being identified with some precision and applied in a manner which yields understandable results; *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at para. 141.

²⁴¹ See *Malmo-Levine*, *supra*, note 236, at para. 113 (restating the *Rodriguez* test using different language); *CYF*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 8 and following (restating the same test in altered terms once again); and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at paras. 208-209 (again modifying the language of the test). I am grateful to Adrienne Moore, LL.B. 2006, for her insightful analysis of this test.

²⁴² See, e.g., *Rodriguez*, *supra*, note 240, *Malmo-Levine*, *id.*, *CYF*, *id.*, and *Chaoulli*, *id.* (dissenting opinion).

reinforce the assumptions of *MV* logic. The requirement of a *legal* principle confirms the *MVR*'s concept of an *institutional* theory of review and requirement of a link to the legal system. The consensus element ensures that the interest in question has sufficient pedigree to be described as a *principle*. Finally, making precision and manageability a part of the test addresses the *MVR*'s concern with limits. In effect, *Rodriguez* proposed a structure to determine principles of fundamental justice which would protect the Court from entanglement in general public policy. In that regard, it is telling that it applied in cases which raised issues of burning social importance: the right to die, a parent's prerogative of corporal punishment, marijuana laws and the prospect of a two-tier health system. Members of the Court who were determined to prevent the institution from intruding into areas of democratic policy relied on the *Rodriguez* test in these cases to deny the entitlement recognition as one of section 7's PFJ. Others who saw an injustice which demanded a remedy chose a different methodology which bypassed *Rodriguez* in favour of an arbitrariness analysis. The advantage of arbitrariness is that it facilitates a conclusion of invalidity.

As mentioned earlier, the concept of arbitrariness eliminates the secondary entitlement step which is found in other PFJ methodologies. Once a provision is characterized as arbitrary, its unconstitutionality becomes a foregone conclusion. Even so, there is an appearance of analysis. Thus McLachlin J. found the *Criminal Code*'s prohibition on assisted suicide invalid because it bore no relation to the circumstances of Sue Rodriguez and was arbitrary, as a result, when applied to her.²⁴³ Subsequently, LeBel J. combined proportionality and balancing to conclude, in *Malmo-Levine*, that Parliament's marijuana possession laws were "disproportionate to the societal problems at issue" and "arbitrary and in breach of s. 7" as a result.²⁴⁴ In functional terms, this methodology appropriates parts of the section 1 analysis, such as the rational relation test and the concept of proportionality, and applies them in a rigid, almost absolutist way. The result is a condemnation that

²⁴³ *Rodriguez*, *supra*, note 240, at para. 207 (stating that "[t]he principles of fundamental justice require that each person, considered individually, be treated fairly by the law", and that it "does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is possible that other people, at some time, may suffer, not what she seeks, but an act of killing").

²⁴⁴ *Malmo-Levine*, *supra*, note 236, at para. 280 (dissenting opinion).

the law is arbitrary and therefore violates fundamental justice.²⁴⁵ Once found arbitrary under section 7, such a law cannot meet the rational connection test of *Oakes*.²⁴⁶

While the McLachlin-Major plurality in *Chaoulli* jumped from security of the person to the discussion of arbitrariness, Binnie and LeBel JJ. applied the *Rodriguez* test and concluded that the aim of health care to a reasonable standard in a reasonable time is not a legal principle, that there is no societal consensus about what it means or how to achieve it, and that it cannot be identified with precision.²⁴⁷ With the Chief Justice and Major J. all but bypassing that standard, the point to note is that arbitrariness and the *Rodriguez* test work at cross-purposes. Each addresses a different element of the analysis: the three-part inquiry tests the entitlement and its claim as a principle of fundamental justice; an arbitrariness approach does not bother with that issue because its purpose is to rationalize a conclusion that the interference with liberty or security of the person is unconstitutional. To add to the confusion, Binnie and LeBel JJ. also conducted an arbitrariness analysis in *Chaoulli*, despite finding that the claim did not satisfy the requirements of the *Rodriguez* test.²⁴⁸ They went on to demonstrate that the McLachlin-Major opinion had altered the concept of arbitrariness so that the standard was difficult, and even impossible, to satisfy.²⁴⁹

It is putting it generously to say that the result is incoherence when the *Rodriguez* test is juxtaposed with arbitrariness. Moreover, while the McLachlin-Major opinion ignored the three-part *Rodriguez* test in *Chaoulli*, on the ground that arbitrariness is accepted as a PFJ, Binnie and LeBel JJ. applied the *Rodriguez* test. Having done so, they moved to the concept of arbitrariness and introduced yet another doctrinal standard: a new three-part test of arbitrariness.²⁵⁰ Frankly, it is difficult to make sense of this madness. Far from settling down, the Court's PFJ

²⁴⁵ *Chaoulli*, *supra*, note 241, at para. 131 (stating that “[t]he question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair”).

²⁴⁶ *Id.*, at para. 155.

²⁴⁷ *Id.*, at para. 209.

²⁴⁸ *Id.*

²⁴⁹ *Id.*, at para. 234.

²⁵⁰ *Id.*, at para. 235. (proposing three steps: (i) what is the “state interest” to be protected? (ii) What is the relationship between the “state interest” thus identified and the prohibition? And (iii) has it been established that the prohibition bears no relation to, or is inconsistent with, the state interest?).

methodologies have become less stable and increasingly bizarre with time.

(e) *Conclusion*

Cumulatively, the PFJ methodologies include a basic tenets approach, numerous forms of internal balancing, fairness standards which include manifest unfairness and competing conceptions of what arbitrariness is, and the *Rodriguez* test, as modified on a case-to-case basis. The result is doctrinal chaos. These methodologies address different elements of the analysis and, for that reason, are often at cross-purposes with each other. Yet competing methodologies face-off in the same case, with little or no awareness on the Court's part that, in function, different tests actually address different parts of the analysis. This section of the paper does not undertake to suggest a solution. Its purpose, instead, has been to show the doctrinal consequences of the ongoing conceptual confusion which surrounds the interpretation of section 7. The problems which afflict the jurisprudence at present can only be magnified, compounded and aggravated if section 7 expands in the direction suggested by the McLachlin-Major plurality in *Chaoulli*.

IV. THE ROAD NOT TAKEN²⁵¹

The paper is already long and its examination of the jurisprudence, from the *MVR* to *Chaoulli*, has been complex. It is late, for present purposes then, to introduce a lengthy discussion proposing a direction for the future. Some observations can nonetheless be made in closing.

Section 7 may be the Charter's problem child, in part, because it is more demanding than the other guarantees. On the face of it, the text of this provision is effectively free of content: it can accommodate as much or as little as the judges choose for it. A ready-made conception was provided by the drafters, who intended it to be limited in scope to matters of procedure. Once having sidelined that view of the guarantee, the Court had the opportunity — and the burden — to decide what interpretation section 7 should be given. The paper shows how demanding a task that has been. Without a conception of the guarantee,

²⁵¹ I shall be telling this with a sigh Somewhere ages and ages hence: Two roads diverged in a wood, and I—I took the one less traveled by, And that has made all the difference.

the Court has been unable to make sense of its two clauses, or to define their relationship to each other and to other parts of the Charter, such as section 1 and the other legal rights.

Unwilling to be bound by *MV* logic, the Court is paradoxically unwilling to let it go. Despite being aware of the dangers of entering into the “policy realm”, the judges have been unable to stand by, passively, in the face of perceived injustices which call out for a remedy. Fearful that social and economic entitlements could lead to a jurisprudential black hole, the Court has nonetheless enforced those interests in highly selective circumstances. Cognizant that limits on the substantive content of section 7 are imperative, the Court has failed to articulate a definition of the guarantee that places boundaries on its central concepts.

Section 7 is a guarantee which lacks an identity and, for that reason, it is a guarantee that is remarkably fluid. At this moment, few roadblocks stand in the way of an interpretation that would define its entitlements inclusively, and extend the scope of review into the policy domain. The guarantee can serve the demands of fundamental justice, on questions of socio-economic policy as well as in the administration of justice, if that is the role the Court chooses. At the same time, it should be remembered that section 7’s fluidity can run in more than one direction. It may not be too late to see it, in far more modest terms, as a guarantee that has little or no substantive content, and is designed to enforce norms of procedural fairness, in the administration of justice. What the future holds for section 7 is up to the Supreme Court of Canada and it is a matter of choice. Not choosing may be the one option that is not open to the Court; as the paper has shown, in the absence of a conception of the guarantee the section 7 jurisprudence and methodologies make little sense and are non-functional. It is unacceptable, on any view, for the status quo to continue.

Whichever form it takes, section 7 must be based on a conception of entitlement and the guarantee’s role in the scheme of the Charter. In choosing, there are three variables for the Court to consider. The first is a theory of entitlement which explains what section 7’s purposes are and how the interests it protects fit within the larger scheme, structural as well as substantive, of the Charter. The second variable is institutional in nature. The paper has shown that the abstract character of section 7’s entitlements poses serious definitional challenges. Specifically, it is difficult for the Court to concretize conceptions like liberty and security of the person, not to mention fundamental justice, without flagging the

legitimacy question. Definitions which are inclusive raise legitimacy concerns when the entitlements at stake are effectively limitless in scope. But definitions which are selective in interpreting such concepts are unavoidably subjective, which is a hallmark of judicial activism and problematic for that reason. The question for the Court is whether section 7 can be given a substantive interpretation that avoids these defects of legitimacy. To answer it, the Court must define section 7's concepts in a way that identifies and limits the scope of entitlement and, in doing so, enforces the guarantee without committing institutional transgressions. At present, it is not readily apparent how that challenge can be safely negotiated. In addition, the third variable is methodology, and this point is an important one: one of the paper's central objectives has been to demonstrate how the Court's section 7's methodology has suffered in the absence of a conception of the right. The entitlement and deprivation clauses must be interpreted in a way that supports and applies a conception of the guarantee.

Interpretive choices at the opposite ends of the spectrum demonstrate the interaction between variables. An inclusive conception of the guarantee, along the lines *Arbour J.* had begun to develop, would privilege the entitlement, almost exclusively, at the expense of institutional boundaries and the need for limits. At the other end, a conception which contemplates little or no role for substantive review reveals a strong preference for institutional modesty, at the expense of section 7's rights. Other solutions, which seek a compromise between these variables and have been discussed in the course of the paper, are also problematic: they lack a conception of the guarantee and are based on unsound methodologies. Section 7 balancing and fairness standards are two such examples. They illustrate that choosing an interpretive model for section 7 rests on a calculation of the two key variables: a theory of entitlement and conception of institutional limits on review. Whether and how a methodology can be constructed around different conceptions of section 7 is another variable which must factor in the calculation.

The sole conception of section 7 which appears to be blocked in the jurisprudence, at present, is the one its drafters intended for it. Thus the post-*MVR* jurisprudence is based on the assumption that section 7 can, should and must be given a substantive interpretation. It is not the time or place, in the late stages of this paper, to develop an argument for the "road not taken", except to say this. *MV* logic does not work, and theories of review which would extend section 7's reach into the policy

domain, unrelated to the legal system, are institutionally risky. *Chaoulli* has brought the Court full circle to where it started, in the *MVR*, on the legitimacy debate. For that reason, the Court has the opportunity — as well as the burden and responsibility — to look at section 7 afresh and consider whether the road not taken would have made all the difference. In doing so the Court should ask itself whether that road can still be taken.

Appendix

Master Case List

1. *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*
[1985] S.C.J. No. 73, [1985] 2 S.C.R. 486.
2. *R. v. Jones*
[1986] S.C.J. No. 56, [1986] 2 S.C.R. 284.
3. *R. v. Vaillancourt*
[1987] S.C.J. No. 83, [1987] 2 S.C.R. 636.
4. *R. v. Lyons*
[1987] S.C.J. No. 62, [1987] 2 S.C.R. 309.
5. *R. v. Morgentaler*
[1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.
6. *R. v. Beare*
[1987] S.C.J. No. 92, [1988] 2 S.C.R. 387.
7. *Irwin Toy Ltd. v. Quebec (Attorney General)*
[1989] S.C.J. No. 36, [1989] S.C.R. 927.
8. *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*
[1990] S.C.J. No. 23, [1990] 1 S.C.R. 425.
9. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*
[1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123.
10. *R. v. Hebert*
[1990] S.C.J. No. 64, [1990] 2 S.C.R. 151.
11. *R. v. Martineau*
[1990] S.C.J. No. 84, [1990] 2 S.C.R. 633.

12. *R. v. Swain*

[1991] S.C.J. No. 32, [1991] 1 S.C.R. 933.

13. *R. v. Stinchcombe*

[1991] S.C.J. No. 83, [1991] 3 S.C.R. 326.

14. *Canada (Minister of Employment and Immigration) v. Chiarelli*

[1992] S.C.J. No. 27, [1992] 1 S.C.R. 711.

15. *R. v. DeSousa*

[1992] S.C.J. No. 77, [1992] 2 S.C.R. 944.

16. *R. v. Morales*

[1992] S.C.J. No. 98, [1992] 3 S.C.R. 711.

17. *R. v. Hundal*

[1993] S.C.J. No. 29, [1993] 1 S.C.R. 867.

18. *Cunningham v. Canada*

[1993] S.C.J. No. 47, [1993] 2 S.C.R. 143.

19. *R. v. Creighton*

[1993] S.C.J. No. 91, [1993] 3 S.C.R. 3.

20. *Rodriguez v. British Columbia (Attorney General)*

[1993] S.C.J. No. 94, [1993] 3 S.C.R. 519.

21. *R. v. Daviault*

[1994] S.C.J. No. 77, [1994] 3 S.C.R. 63.

22. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*

[1994] S.C.J. No. 24, [1995] 1 S.C.R. 315.

23. *Godbout v. Longueuil (City)*

[1997] S.C.J. No. 95, [1997] 3 S.C.R. 844.

24. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*

[1999] S.C.J. No. 47, [1999] 3 S.C.R. 46.

25. *R. v. Mills*

[1999] S.C.J. No. 68, [1999] 3 S.C.R. 668.

26. *Blencoe v. British Columbia (Human Rights Commission)*

[2000] S.C.J. No. 43, [2000] 2 S.C.R. 307.

27. *Winnipeg Child and Family Services v. K.L.W.*

[2000] S.C.J. No. 48, [2000] 2 S.C.R. 519.

28. *United States v. Burns*

[2001] S.C.J. No. 8, [2001] 1 S.C.R. 283.

29. *Suresh v. Canada (Minister of Citizenship and Immigration)*

[2002] S.C.J. No. 3, [2002] 1 S.C.R. 3.

30. *Gosselin v. Quebec (Attorney General)*

[2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, 2002 SCC 84.

31. *Siemens v. Manitoba (Attorney General)*

[2002] S.C.J. No. 69, [2003] 1 S.C.R. 6.

32. *R. v. Malmö-Levine*

[2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, 2003 SCC 74.

33. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*

[2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, 2004 SCC 4.

34. *Chaoulli v. Quebec (Attorney General)*

[2005] S.C.J. No. 33, [2005] 1 S.C.R. 791.