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# Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law

Alan N. Young\*

## I. INTRODUCTION

Otto Von Bismarck, the “Iron Chancellor” of the 19th-century German state, is credited with making the oft-quoted statement that “there are two things you don’t want to see being made — sausages and legislation.” Despite obvious improvements in the electoral and legislative processes in the past century, the Iron Chancellor’s pithy denigration of lawmaking is still asserted in modern times. Our contemporary legislative process aspires to democratic ideals but often breaks down from the pressures of political compromise and the influence of powerful interest groups. Some idealists believe that criminal law is built on a “consensus” model of community support, but there seem to be more people who subscribe to a “conflict” model in which the enactment of criminal law is often an unprincipled political response to the needs of the powerful.<sup>1</sup>

If sausage-making and lawmaking is inherently messy and flawed, does this by default give the judiciary the authority to counter defects in the legislative process by invalidating hastily drafted criminal laws which do not appear to effectively serve the public interest? Does substantive review of criminal law to ensure compliance with the principles of fundamental justice under section 7, and compliance with the presumption of innocence under section 11(d) of the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> arm the judiciary with justifiable authority to place tangible limits on the criminal law power of Parliament?

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<sup>1</sup> For an outline of the various schools of thought currently in vogue in criminological studies, see F. Schmalleger & R. Volk, *Canadian Criminology Today: Theories and Application* (Toronto: Prentice Hall, 2005), at 14-18; G. Vold, B. Thomas & J. Snipes, *Theoretical Criminology*, 5th ed. (Oxford: Oxford University Press, 2002), at 228-54.

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter “the Charter”].

The conventional wisdom that courts cannot second-guess the policy choices made by a legislature rings hollow in a day and age when resort to criminal law as a response to a perceived social problem has become routine and perfunctory. The sausage-making factory of criminal law appears boundless and in need of some institutional constraints. Bismarck's insult made me wonder whether a court would sit idly by if a ridiculous criminal law such as prohibiting the possession and sale of sausages were to be enacted. There is a perceived social problem underlying the prohibition — obesity and gastro-intestinal disorders are on the rise and surely a good sausage contributes to the problem. The prohibitory policy adopted in relation to intoxicant use, despite its obvious failure, shows that there is some legislative precedent for resorting to criminal law to punish bad consumption choices. Faced with a law of this nature, would a court restrict itself to formal questions like "is the definition of sausage unduly vague?" or "is it a constitutional requirement that the accused know he/she is selling a sausage?", or would the court find some mechanism to invalidate the law on the basis that it is an ineffective and irrational response to the social and health problems associated with a bad diet?

At a rudimentary level, the legislative and policy decision to criminalize conduct should be based on three deceptively simple questions: (1) Is the conduct harmful? (2) Does the nature and magnitude of the harm warrant the intervention of criminal law? (3) Can the criminal law effectively combat the harm without undue erosion of liberty and privacy? There are many different formulations of these questions, and an endless debate on the proper definition of harm, but, at a minimum, as Paul Roberts has noted:

. . . the advocate of any particular criminal prohibition needs to supply a good reason, not just for generalized state interference in the lives of individuals, but for that special form of state regulation represented by criminal sanctions: that is, hard treatment (with serious implications for personal autonomy) administered through procedures specially designed to communicate the sting of blame or "censure".<sup>3</sup>

If a court were to engage in substantive review of the merits of criminal law then presumably it would be addressing questions of this nature. Despite the supposed taboo nature of this inquiry, the courts do address

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<sup>3</sup> Paul Roberts, "Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform" (2001) 5 Buff. Crim. L. Rev. 173, at 217, in Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent" (2007) 75 Geo. Wash. L. Rev. 165, at 183.

these questions under the guise of statutory interpretation, and even modest interpretation can serve to amend, revise and alter legislative policy choices.<sup>4</sup> However, statutory interpretation leaves the criminal law somewhat intact whereas constitutional invalidation acts as a complete denial of legislative policy choices, and for this reason the popular sentiment is that the courts stray too far into the legislative domain if they invalidate criminal law solely on the basis of a negative assessment of the law's merits.

This paper has two modest objectives. The primary purpose is to chronicle and assess the operation of the principles of fundamental justice, and the presumption of innocence, in setting minimum standards for the enactment of criminal law. To that end, 106 appellate decisions were reviewed<sup>5</sup> to determine if the developing jurisprudence under section 7 of the Charter has been informed by a clear and coherent theory of criminal law. The secondary purpose is to provide a practical justification for expanding substantive review to include a more vigorous assessment of the merits of the criminal law. The debate over the scope of substantive review is thorny and this paper will not wade too deeply into the debate. The support for substantive review presented in this paper arises primarily from the belief that the legislative process with respect to criminal law is uniquely flawed. Professor William Stuntz's provocative and persuasive article, "The Pathological Politics of Criminal Law",<sup>6</sup> provides a comprehensive analysis of the unique flaws, and much of the inspiration for my assertion of expanded substantive review is drawn from his work. A snapshot of his analysis is contained in the following passage:

One of the bedrock principles of criminal law is that legislatures, not courts, should be the primary definers of crime. The usual reason given is that judicial crime creation carries too big a risk of non-majoritarian crimes, which in turn creates too much of a risk that ordinary people won't know what behavior can get them into trouble. The image is of

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<sup>4</sup> Two dramatic examples in which statutory interpretation has resulted in a significant alteration of the elements of the crime are: *R. v. Sharpe*, [2001] S.C.J. No. 3, 150 C.C.C. (3d) 321 (S.C.C.) (child pornography) and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 180 C.C.C. (3d) 353 (S.C.C.) (correction of child by force).

<sup>5</sup> I reviewed 106 appellate decisions in seven categories (*mens rea*, presumption of innocence, harm principle, consent, arbitrariness (overbreadth), vagueness and defences). In addition to Supreme Court of Canada cases, I reviewed appellate decisions if they have not been overtaken by a Supreme Court decision (*e.g.*, from 1982-85 there were numerous appellate decisions on the reverse onus for the offence of possession for the purpose — as the Supreme Court in *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) dealt with this issue, these appellate decisions were not included in the survey).

<sup>6</sup> W. Stuntz, "The Pathological Politics of Criminal Law" (2001) 100 Mich. L. Rev. 505.

legislatures that faithfully represent popular norms, and hence accurately define the universe of serious norm-breakers, while prudish old judges seek to impose their unrepresentative values on an unfortunate population. . . . It turns out that both the argument and the image are backward. It is *legislators* who are likely to criminalize conduct ordinary people might innocently engage in — not in order to punish that conduct, but in order to take symbolic stands or make punishment of other conduct easier. Court's lawmaking tendencies are more balanced, less tilted in favor of broader liability. The places in criminal law where liability has been expanded are almost all the product of legislation. The few places where liability has contracted find their source in judicial opinions.<sup>7</sup>

The establishment by the judiciary of minimum standards for valid criminal law can only be achieved if supported by a clear and consistent theoretical vision of the role of criminal law in modern society. Presumably, the courts would have a better-developed theoretical perspective than would the average politician, and this expertise provides the courts with some justification for reviewing the substantive content of criminal law. In fairness to the courts, it must be recognized that there is no theoretical consensus on the role of criminal law. Professor George Fletcher has convincingly argued for a “polycentric” theory of the nature of criminal law in which no single principle can possibly provide an adequate account of the content of criminal law.<sup>8</sup> Both scholars and lawmakers must “resist the temptation to reduce the criminal law to a single formula for determining when conduct ought to be treated as criminal.”<sup>9</sup> Criminal law has not been built on a monolithic theory. In fact, “what counts as crime at one place and time, culture, or location may not be considered criminal at another time, in another culture, or even across the street.”<sup>10</sup> Despite the protean nature of criminal law and criminal law theory, it is submitted that the morality of aspiration obligates the judiciary to set limits to criminalization under the umbrella of the principles of fundamental justice, and this task is next to impossible without some rudimentary theoretical framework or orientation.

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<sup>7</sup> W. Stuntz, “The Pathological Politics of Criminal Law” (2001) 100 Mich. L. Rev. 505, at 576; for a similar article, see, A.J. Ashworth, “Is the Criminal Law a Lost Cause?” (2000) 116 Law Q. Rev.

<sup>8</sup> Douglas Husak, “Crimes Outside the Core” (2004) 39 Tulsa L. Rev. 755, at 757.

<sup>9</sup> George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), at xxii.

<sup>10</sup> Mark M. Lanier & Stuart Henry, “Crime in Context: The Scope of the Problem” in Stuart Henry & Mark M. Lanier, eds., *What Is Crime? Controversies over the Nature of Crime and What to Do about It* (Lanham, Maryland: Rowman & Littlefield Publishers Inc., 2001), at 7.

In the excitement of the early days of the Charter, the Supreme Court in 1985 appeared to send a signal that substantive review of the criminal law would be vigorous and exacting. Without qualification, the Court expressed a broad and general limit on the content of the criminal law. Justice Lamer (as he then was) stated:

A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter of Rights and Freedoms* . . . .<sup>11</sup>

This statement suggested that the principles of fundamental justice would not simply engage the issue of a minimum standard of *mens rea* or fault. The invocation of the word “wrong” seemed to imply that a court could strike down an offence that did not contain sufficient elements to constitute a moral or legal wrong warranting the criminal sanction. To fuel the fire that judicial review could extend to the review of the supposed political question of the wrongfulness of the act, Lamer J. noted that fundamental justice was not restricted to procedural concerns and natural justice, and that “[t]he task of the Court is not to choose between substantive content or procedural content *per se* but to secure for persons ‘the full benefit of the Charter’s protection’ . . . while avoiding adjudication of the merits of public policy”.<sup>12</sup> A few years later, Lamer J. dropped the admonishment of avoiding review of merits and simply stated that “while Parliament retains the power to define the elements of a crime, the courts now have the jurisdiction and, more important, the duty, when called upon to do so, to review that definition to ensure that it is in accordance with the principles of fundamental justice.”<sup>13</sup>

As might be expected, the Supreme Court’s approach to substantive review has been fraught with ambiguity. In the same breath, the Court says that the Charter has not enabled the courts to “decide upon the appropriateness of policies underlying legislative enactments . . . however, the courts are empowered, indeed required, to measure the *content* of legislation against the guarantees of the Constitution”

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<sup>11</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 492 (S.C.C.) [hereinafter “*Motor Vehicle Reference*”].

<sup>12</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 499 (S.C.C.).

<sup>13</sup> *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 652 (S.C.C.).

(emphasis added).<sup>14</sup> In light of the mixed messages emanating from the Court on the limits of substantive review, this paper will not attempt to define the nature, scope and history of the concept of substantive review, but rather will simply attempt to ascertain whether the judicial implementation of section 7 has explicitly or implicitly set definable limits on the content of a valid criminal enactment. In Part I of the paper, I explore the open-ended structure of the terms and conditions of section 7 to demonstrate that there are no obvious impediments or obstacles in the provision, or the emerging jurisprudence, to prevent the construction and development of minimum standards for the enactment of constitutionally valid criminal law. In this Part, I will also provide a practical justification for wide-ranging substantive review. In Part II of the paper, I will outline the nature and scope of minimum constitutional standards which have emerged in the past 25 years, and will demonstrate that the courts have not warmly embraced Lamer J.'s invitation to set minimum standards relating to the "wrongfulness" of the criminal offence.

In any discussion of limits on criminalization, one should pay homage to division of powers cases under the BNA Act<sup>15</sup> However, this paper will not discuss this aspect of limitations primarily because the BNA Act jurisprudence adds very little to the goal of setting minimum standards. For the most part, the division of powers requirements for proper exercise of the criminal law power amount to little more than a formal requirement of a blanket prohibition accompanied by a punishment. Nonetheless, the inspiration for this paper can be found in a 1948 division of powers case in which the Supreme Court invalidated a criminal prohibition on the sale of margarine on the basis that the scientific evidence supporting the harms of margarine consumption had been refuted and it appeared that the prohibition simply served the purpose of protecting the dairy industry.<sup>16</sup> If judicial review can lead to invalidation of a law when the passage of time demonstrates that the law serves no valid purpose, then it stands to reason that invalidation should be allowed if one can demonstrate that the law was ill-conceived from its inception.

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<sup>14</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 496 (S.C.C.).

<sup>15</sup> *British North America Act*, 30 & 31 Vict., c. 3 (now *Constitution Act*, 1867).

<sup>16</sup> *Reference re Validity of section 5(a) of the Dairy Industry Act (Canada)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1, [1949] 1 D.L.R. 433 (S.C.C.) [hereinafter "*Margarine Reference*"].

## II. AN OPEN INVITATION TO SUBSTANTIVE REVIEW

### 1. Justifying Substantive Review

Judicial review of the constitutionality of legislation has spawned an endless debate about the justifiability of allowing a non-elected institution, the judiciary, to oversee the development of public policy. Not only have concerns been raised about the institutional and political ramifications of blurring the legislative and judicial branches of government, but many concerns have been raised about judicial capacity for setting public policy and implementing rules. The concerns commonly revolve around one or more of the following assertions:

- (1) Courts do not set their decision-making agenda. The issues raised for their consideration are restricted by the fortuities of litigation. The litigants are responsible for setting the agenda, and the issues raised may be distorted by the motives and resources of the litigants.
- (2) Adjudication is focused and incremental judges are called upon to decide legal entitlement by determining which party has a legal right and which party has a legal duty. This process is distinct from that of a legislative planner who must ask “what are the alternatives?” The responsibility to resolve the particular dispute handicaps the court in gaining a perspective on the broad contextual setting of the issues.
- (3) Judges are generalists and they lack sufficient specialized expertise to master the intricacies of various policy problems.
- (4) The fact-finding process of adjudication makes it ill-suited for ascertaining relevant social facts. The evidentiary rules of admissibility place artificial constraints on a judge’s ability to receive information that may be vital for the development of policy yet irrelevant for the disposition of the particular case.
- (5) Courts lack the power to enforce compliance with their decrees. In addition, the adjudicative process is not equipped for the monitoring of the policy implications of any decision.<sup>17</sup>

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<sup>17</sup> For a fuller discussion of judicial incapacity, see D. Horowitz, *Courts and Social Policy* (Washington: Brookings Institution, 1977); M. Cappelletti, “The Law-Making Power of the Judge and Its Limits: A Comparative Analysis” (1981) 8 Monash U.L. Rev. 15.



As Professor Hogg has said: “[t]he anti-majoritarian objection to judicial review and the debate it sparks is primarily an academic one”,<sup>18</sup> and it is beyond the scope of this paper to outline and evaluate the various objections which have been raised in academic circles. In many ways, the Supreme Court has indicated that it has no interest in engaging the academic debate which continues to rage on. In the *Motor Vehicle Reference*, the Crown argued for a narrow interpretation of the principles of fundamental justice on the basis that “the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.”<sup>19</sup> Justice Lamer (as he then was) quickly dismissed this argument:

This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility.<sup>20</sup>

Like the Supreme Court, this paper will not address the academic debate, but, instead, will focus on a few practical reasons why judicial review should extend to a vigorous substantive review of criminal law even if this requires some judicial assessment of the merits of the law. First, it should be acknowledged that this form of review is already taking place whether or not the court explicitly recognizes its intrusion into the political realm. As Peter Russell has noted:

[Judges] may mask their non-legal ideas or assumptions and make their opinion appear as if it were a purely legal deduction ... Judges who conceal their political, social or economic reasoning may be pursuing a fairly cunning political strategy designed to reduce the political exposure of their court.<sup>21</sup>

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<sup>18</sup> Peter W. Hogg, “Charter Dialogue Revisited — or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1, at 8.

<sup>19</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 497 (S.C.C.).

<sup>20</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 497 (S.C.C.).

<sup>21</sup> P. Russell, “Comment” in A.M. Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976), at 85-86.

In 2006, a badly divided Supreme Court assessed and reviewed the merits of public healthcare and concluded that serious deficiencies in the public system required the constitutional invalidation of a prohibition on obtaining insurance for private health care.<sup>22</sup> The Court recognized that its review was an intrusion into a purely political consideration, *i.e.*, the merits of an exclusive and universal healthcare system and the efficient allocation of resources to administer this system, but this did not stop the Court. McLachlin C.J.C. noted that “it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate”<sup>23</sup> and “[t]he fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility”<sup>24</sup> of review. Substantive review is not beyond the authority of the Court, and “[t]he mere fact that this question may have policy ramifications does not permit us to avoid answering it.”<sup>25</sup>

I recognize that an ongoing practice of substantive review in a few cases does not provide a compelling justification for the practice, but one may reasonably conclude that if the Supreme Court is willing to review a purely political question, such as the merits of universal healthcare, then surely there should be less concern or objection when a court decides to review the merits of a criminal prohibition. There is no question that a court has much greater expertise than a legislature when it comes to the issue of criminal responsibility. Even though criminal lawmaking is fundamentally different from ascriptions of liability, it is sometimes forgotten from a historical perspective that the judiciary has exercised an overt lawmaking power — at common law the courts readily created crimes in their role as “*custos morum* [guardians of morality] of all the King’s subjects”.<sup>26</sup>

In 1955, the authority of the court to create new common law crimes was abolished as judge-made crime posed insurmountable problems in terms of vagueness and retroactivity. In addition, a common law crime was created without the benefit of input and consultation other than the parties and the inferences to be drawn from the situation before the court.

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<sup>22</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 [hereinafter “*Chaoulli*”].

<sup>23</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35, at para. 107 (S.C.C.).

<sup>24</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35, at para. 107 (S.C.C.).

<sup>25</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35, at para. 108 (S.C.C.).

<sup>26</sup> *R. v. Sedley* (1663), 1 Sid. 168, 82 E.R. 1036, Curll, v. 17 (1727) 155.

This can be a dangerous practice as it undercuts the primary distinction between tort and crime in that a crime is considered a public wrong “because through [it] the commonwealth and not just a single individual is exposed to danger”.<sup>27</sup> Danger to the commonwealth can only be ascertained with the type of consultative process which is part and parcel of the legislative process. Nonetheless, many of our current offences are just codifications of judge-made law and the fact that the judiciary had the power and authority for centuries to create crime defuses some of the objections relating to substantive review which are based on judicial incompetency or inexperience.

In theory, legislative power to create crime is institutionally superior to lawmaking at common law because of the ability of the legislature to transcend the crisis of one case and through extensive consultation arrive at a rational and principled decision regarding the fundamental question of whether certain conduct warrants criminalization. A healthy dose of skepticism would suggest that on occasion the legislative process will not be a principled and consultative response to a social problem. The failure of the legislative branch to live up to its democratic ideals can manifest itself in a number of different ways:

Aspects of Canadian politics vulnerable to criticism on democratic grounds are legion, and include the minimal diversity in Parliament (particularly, the lack of women, Aboriginal peoples, and minorities); the limited role of backbenchers; the appointment process and powers of the Senate; unfixed elections and the legitimacy of the plurality voting system (“first past the post”); hard-line party politics and the infrequency of free votes in Parliament; infrequent use of referenda; and the lack of policy expertise in Parliament.<sup>28</sup>

One need only look to the 1980s reform of our gambling laws to quickly see how the enactment of criminal law is not always a principled and rational approach to addressing a social problem.<sup>29</sup> The short history

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<sup>27</sup> Immanuel Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, trans. by John Ladd (Indianapolis: Bobbs-Merrill, 1965), at 35-36, as quoted in Jean Hampton, “Retribution and the Liberal State” (1994) 5 J. Contemp. Legal Issues 117, at 122.

<sup>28</sup> Carissima Mathen, “Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on ‘Charter Dialogue Revisited’” (2007) 45 Osgoode Hall L.J. 125, at 142.

<sup>29</sup> See, e.g., J. Osborne & C. Campbell, “Recent Amendments to Canadian Lottery and Gaming Laws: The Transfer of Power from Federal to Provincial Governments” in C. Campbell & J. Lowman, eds., *Gambling in Canada: Golden Goose or Trojan Horse?: A Report from the First National Symposium on Lotteries and Gambling, May 1988* (Burnaby, B.C.: School of Criminology, Simon Fraser University, 1989); P. Monahan & A.G. Goldlist, “Roll Again: New Developments Concerning Gaming” (1999) 42 Crim. L.Q. 182.

of casinos and video lottery terminals in Canada is rather disconcerting. Historically, gambling was considered an immoral activity which warranted criminalization because for some it could lead to poverty, family breakdown and the rendering of the subject a ward of the state. In the early 20th century, small incremental legislative exceptions were developed primarily relating to lotteries, charitable gaming and horse racing, but a solid core of criminal offences remained in the Code. In 1985-86, the federal government was short on cash for the Calgary Winter Olympics and a deal was struck with the provinces whereby the federal government would receive \$100 million in exchange for an amendment to the *Criminal Code*<sup>30</sup> giving the provinces exclusive jurisdiction to conduct and manage a wide range of gambling operations. Now there are over 60 casinos in Canada and the industry generates billions of dollars for provincial coffers. For purely economic reasons, gambling was transformed from an immoral crime to an activity promoted by government officials to increase state revenues. Without a doubt, this contract to amend the *Criminal Code* both metaphorically and literally demonstrates that the enactment of criminal law is often corrupted by the pursuits of private interests.

If the legislative process is demonstrably flawed with respect to enactment of a particular criminal law, there seems to be no reason for deference and timidity when a court is asked to review the contents of this law. There may be insurmountable evidentiary problems in demonstrating the existence of a flawed legislative process, but if there is evidence to show an absence of a reasonable basis for enacting the prohibition then the judiciary should not be reluctant to enter the legislative domain. Unfortunately, with respect to criminal law, there will always be a haunting suspicion that the legislative process may be flawed in light of the visceral response which often accompanies discussion of wrongdoing. The highly emotive content of criminal wrongdoing has paved the way for continuous “domain expansion”<sup>31</sup> by the state. As the Law Commission of Canada has recently noted:

In Canada discussions of crime and what to do about it have become commonplace. In recent years newspaper articles, community-level discussions, and policy making have all acted as venues through which to express a desire for harsher criminal sanctions — a “lock ‘em up and throw away the key” approach to crime. “Such ‘lawandorder’

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<sup>30</sup> R.S.C. 1985, c. C-46.

<sup>31</sup> Joel Best, *Random Violence: How We Talk about New Crimes and New Victims* (Berkeley, CA: University of California Press, 1999), at 61-62.

talk . . . has become a dominant and daily feature of public culture as we embark on this new millennium. In our latter-day 'risk society', security is purportedly in short supply and menacing outsiders imperil us from all sides". . . . As Garland . . . argues, "the background affect of policy is now more frequently a collective anger and a righteous demand for retribution rather than a commitment to a just, socially engineered solution. The emotional temperature of policy-making has shifted from cool to hot".<sup>32</sup>

Further suspicion is cast upon the integrity of criminal lawmaking by the abrupt *volte-face* in North American criminal justice policy in the past 40 years. Starting with the Wolfendon Report and Hart-Devlin debate in the late 1950s,<sup>33</sup> and continuing in the 1960s with a strong academic movement to condemn the legislative practice of overcriminalization,<sup>34</sup> there was an emerging consensus that criminal law was not an appropriate and effective public policy response to every social problem. It became clear in the 1970s that criminal law was a "blunt instrument"<sup>35</sup> to be used with caution and restraint. In Canada, the notion of criminal law restraint found expression in the 1969 Ouimet Report.<sup>36</sup> In 1976, the Law Reform Commission of Canada published *Our Criminal Law*, and in 1982 the Government of Canada itself published *The Criminal Law in Canadian Society*. Both texts sing the same song:

The basic theme, however, is important, in stressing that the criminal law ought to be reserved for reacting to conduct that is seriously harmful. The harm may be caused or threatened to the physical safety or integrity of individuals, or through interference with their property. It may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values — those values or interests necessary for social life to be

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<sup>32</sup> Nathalie Des Rosiers & Steven Bittle, "Introduction" in Law Commission of Canada, ed., *What Is a Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press, 2004), at xi.

<sup>33</sup> See *Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO, 1957); Lord P. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); H.L.A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963).

<sup>34</sup> Sanford H. Kadish, "The Crisis of Overcriminalization" (1967) 374 *The Annals of the American Academy of Political and Social Science* 157 and Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968).

<sup>35</sup> Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: The Commission, 1976), at 27.

<sup>36</sup> Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969), at 12.

carried on, or for the maintenance of the kind of society cherished by Canadians. Since many acts may be “harmful”, and since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less coercive or less intrusive means do not work or are inappropriate.<sup>37</sup>

For many reasons which remain unclear, the tide changed in the 1980s with a return to knee-jerk criminalization and increased punitiveness. In 2004, the following description of the shift in policy in the United States and Britain reflects the state of affairs in Canada:

American and British attitudes toward crime are currently undergoing a profound transformation, the effects of which are manifest in the insistence of the public on exacting retribution from the criminal, and on being protected *at any cost*. These “righteous demands for retribution”, these requests for absolute security, are matched by a governmental emphasis on prevention as the new overarching aim of the criminal justice system, and one that is deemed to justify all manners of interference with the private lives of offenders.<sup>38</sup>

In both Canada and the United States “crime and punishment have become a cultural obsession of modernity”.<sup>39</sup> The integrity of the lawmaking process has been called into question because “criminal law has become highly politicized”<sup>40</sup> and “the single most visible development in the substantive criminal law is that the sheer number of criminal offences has grown exponentially”.<sup>41</sup> The wisdom of restraint has been forgotten and because “the criminal law has undergone enormous transformation in the [past] twenty-five years . . . it is important to appreciate the urgent need for limitations on the scope of the criminal sanction”.<sup>42</sup>

A simple explanation for the recent growth in criminal law would be a consistent and substantial increase in the severity and frequency of crime,

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<sup>37</sup> Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Govt. of Canada, 1982); Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: The Commission, 1976).

<sup>38</sup> Véronique Voruz, “Recent Perspectives on Penal Punitiveness” in Bruce A. Arrigo, ed., *Psychological Jurisprudence: Critical Explorations in Law, Crime, and Society* (Albany: State University of New York Press, 2004), at 157.

<sup>39</sup> L. Snider, “Abusing Corporate Power: The Death of a Concept”, in S. Boyd, D. Chunn & R. Menzies, eds., *[Ab]Using Power: The Canadian Experience* (Halifax: Fernwood Publishing, 2001).

<sup>40</sup> Douglas A. Berman, “The Model Penal Code Second: Might ‘Film Schools’ Be in Need of a Remake?” (2003) 1 Ohio St. J. Crim. L. 163, at 164-65.

<sup>41</sup> Douglas Husak, “Crimes Outside the Core” (2004) 39 Tulsa L. Rev. 755, at 768.

<sup>42</sup> W. Stuntz, “The Pathological Politics of Criminal Law” (2001) 100 Mich. L. Rev. 505, at 767.

but the fact is that crime rates have been dropping in North America since the crime explosion from 1962-80 (ironically the time period in which the notion of criminal law restraint had gained ascendancy).<sup>43</sup> There have been no significant crime waves to warrant the sudden return to overcriminalization, yet there has been a perception that urban society has been hit by a tidal wave of crime. As has been pointed out by Professor Joel Best:

... criminologists usually doubt claims about crime waves. Crime waves, they say, are really waves in media attention: they occur because the media, for whatever reason, fix upon some sort of crime, and publicize it. Crimes that might ordinarily receive little notice suddenly become the subject of editorials, feature articles, op-ed pieces, columns, editorial cartoons, talk-show commentary, and late-show monologues — the full treatment used to focus attention on social problems. In this view, crime waves really are just waves of crime news.

Crime waves seem to have been a nineteenth-century invention. For many reasons — including rising literacy, urbanization, faster communication, and, especially, improvements in printing technology — it was in the nineteenth century that newspapers assumed their essential modern form, emphasizing reports or current — and especially sensational — events.<sup>44</sup>

If a newspaper could manufacture a crime wave in the 19th century, the digital revolution of contemporary times can easily create a moral panic. Moral panics are largely orchestrated by the media's construction of crime,<sup>45</sup> and the resulting clamour from a frightened public often leads to a hastily drafted and ill-conceived legislative response. The concept of moral panic originated among British sociologists of deviance<sup>46</sup> and has in recent years been employed in American academic circles to explain

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<sup>43</sup> For a brief review of the statistical data on increasing and decreasing crime rates, see A. Young, *Justice Defiled: Perverts, Potheads, Serial Killers and Lawyers* (Toronto: Key Porter Books, 2003), at 171-85.

<sup>44</sup> Joel Best, *Random Violence: How We Talk about New Crimes and New Victims* (Berkeley, CA: University of California Press, 1999), at 34.

<sup>45</sup> See discussion in R. Surette, *Media, Crime and Criminal Justice: Images, Realities and Policies*, 3d ed. (Belmont, CA: Thomson Wadsworth, 2007); see also R. Cairns Way, "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism" (1994) 39 McGill L.J. 379; Sarah Eschholz, "The Media and Fear of Crime: A Survey of the Research" (1997) 9 U. Fla. J. L. & Pub. Pol'y 37; Daniel Romer, Kathleen Hall Jamieson & Sean Aday, "Television News and the Cultivation of Fear of Crime" (2003) 53 Journal of Communication 88.

<sup>46</sup> S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (New York: St. Martin's Press, 1980); S. Hall et al., *Policing the Crisis: Mugging, the State, and Law and Order* (London: Macmillan Press, 1978); P. Jenkins, *Intimate Enemies: Moral Panic in Contemporary Great Britain* (Hawthorne, NY: Aldine de Gruyter, 1992).

the creation, or strengthening, of criminal laws relating to stalking, gang violence, freeway violence and other crimes.<sup>47</sup> Moral panic theory has also been used to explain the origins of Canadian drug policy.<sup>48</sup> Even the RCMP has acknowledged the dangers of media magnification and last year released a report criticizing the Canadian media for instilling an unnatural fear of rising crime.<sup>49</sup>

There is good reason to believe that the recent exponential growth in criminal law can be explained, in part, by moral panic theory due to media magnification. As moral panics arise from the rapid spread of misinformation and hyperbole, they are a dangerous foundation from which to launch a new criminal justice policy initiative. It has been argued that recent legislative initiatives in Canada relating to gangs and terrorists were triggered by moral panics,<sup>50</sup> and it is not surprising that this legislation has been met with a series of constitutional challenges.<sup>51</sup>

<sup>47</sup> On freeway violence, J. Best, "Road Warriors on Hair Trigger Highways: Cultural Resources and the Media's Construction of the 1987 Freeway Shootings Problem" (1991) 61 *Sociological Inquiry* 327; On stalking, K. Lowney & J. Best, "Stalking Strangers and Lovers: Changing Media Typifications of a New Crime Problem" in J. Best, ed., *Images of Issues: Typifying Contemporary Social Problems* (Hawthorne, NY: Aldine de Gruyter, 1995); On hate crimes, J. Jacobs & J. Henry, "The Social Construction of a Hate Crime Epidemic" (1996) 86 *J. of Crim. Law & Criminology* 366; On gang-related crime, P. Jackson, "Moral Panic and the Response to Gangs in California" in S. Cummings & D. Monti, *Gangs The Origins and Impact of Contemporary Youth Gangs in the United States* (Albany: State University of New York Press, 1993).

<sup>48</sup> P.J. Giffen, Shirley Endicott & Sylvia Lambert, *Panic and Indifference: The Politics of Canada's Drug Laws: A Study in the Sociology of Law* (Ottawa: Canadian Centre on Substance Abuse, 1991) and R. Solomon & M. Green, "The First Century: The History of Non-Medical Opiate Use and Control Politics in Canada, 1870-1970" in Judith C. Blackwell & Patricia G. Erikson, eds., *Illicit Drugs in Canada: A Risky Business* (Scarborough, ON: Nelson Canada, 1988), at 88-116.

<sup>49</sup> Chad Skelton, "Crime stories frighten public: RCMP" *Vancouver Sun* (July 31, 2006), online: *Vancouver Sun* <<http://www.canada.com/vancouver/vancouversun/news/story.html?id=7d3587eb-a1dc-46cb-a4c5-8a17664d95e9>>.

<sup>50</sup> Kent W. Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44 *Crim. L.Q.* 1; Don Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Man. L.J.* 89; Don Stuart, "The Dangers of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 Should Be Withdrawn" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); Don Stuart, "The Anti-terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System" (2003) 14 *N.J.C.L.* 153; "Debate Guillotined" *National Post* (November 28, 2001) A19; Joe Hueglin, "Rushing Bill C-36 is abuse of power" *Kitchener-Waterloo Record* (November 30, 2001) A18; James Travers, "Bill C-36 demands scrutiny" *Kitchener-Waterloo Record* (November 22, 2001) A17; Susan Delacourt, "Haste explained" *Leader Post* (November 30, 2001) B7; and see also Law Commission of Canada, ed., *What Is a Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press, 2004), for a general discussion.

<sup>51</sup> *R. v. Khawaja*, [2006] O.J. No. 4245, 214 C.C.C. (3d) 399 (Ont. S.C.J.); *R. v. Lindsay*, [2004] O.J. No. 845, 182 C.C.C. (3d) 301 (Ont. S.C.J.); *R. v. Accused No. 1*, [2005] B.C.J. No. 2702,



Both the anti-biker and anti-terrorism provisions have been challenged under section 7 on the basis of vagueness and overbreadth — problems relating to the proper definition of the targeted conduct. In addition, the ambitious complexity of the new laws has presented serious difficulties for the successful prosecution of these offences.<sup>52</sup> Moral panics often lead to poorly defined legislative responses in part due to haste and in part due to hysteria. Similarly, in the past few years in Ontario, there was growing concern, or panic, over dangers presented by fighting dogs such as the pit-bull. The legislative response of a ban on breeding was quickly challenged, with some success, on the basis of vagueness and overbreadth.<sup>53</sup>

Presumably, most criminal law is enacted after a principled consideration of the relevant issues, but there is abundant evidence to suggest that this is not always the case. There is, and should be, a presumption of regularity with respect to legislative enactments, but I fail to see any reason why the government cannot be called upon to justify its policy choice to prohibit and punish when a reasonable basis has been established to call into question the merits of the law. Presumably, the government should be in possession of information demonstrating that it has not merely responded to a moral panic and that it has rationally responded to a documented social problem of some magnitude.

With the 2006 election of Stephen Harper and the Conservative Party came many promises of enacting mandatory minimum sentences for a variety of existing and proposed crimes.<sup>54</sup> Minimum sentences had been used sparingly in Canada (*e.g.*, first degree murder, use of firearm, repeat impaired driving) and the value of this inflexible sentencing approach has been criticized, and condemned, by many social scientists

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2005 BCSC 1727 (B.C.S.C.), *revd by R. v. Terezakis*, [2007] B.C.J. No. 1592 (B.C.C.A.); *R. v. Smith*, [2006] S.J. No. 184, 2006 SKQB 132 (Sask. Q.B.).

<sup>52</sup> Don Stuart, "The Dangers of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 Should Be Withdrawn" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001), at 207; "Biker's conviction raises questions about anti-gang legislation" *National Post* (May 7, 2007) A4; Chris Purdy, "Edmonton's \$36M gang trial implodes" *Calgary Herald* (February 28, 2004) A13; Chris Purdy, "Huge gang trials a giant bust: \$36M wasted as prosecutors, police buried by paperwork" *Edmonton Journal* (February 28, 2004) A1/Front.

<sup>53</sup> *Cochrane v. Ontario (Attorney General)*, [2007] O.J. No. 1090 (Ont. S.C.J.).

<sup>54</sup> Mandatory minimum sentences have been proposed for gun crimes, marijuana grow-ops, drug trafficking and crimes committed by parolees. See M. Rabson, "Harper to Get Tough on Crime" *Leader Post* (April 20, 2006) A12; J. Tibbetts, "Tories Deliver on Mandatory Sentences" *National Post* (May 4, 2006) A8; J. Tibbetts, "Conservatives Set to Roll Out Tough New Crime Bills" *Calgary Herald* (May 4, 2006) A8.

for its illusory deterrent effects.<sup>55</sup> Critics of the Harper proposals have claimed that the proposals will cost anywhere from \$5 billion to \$11.5 billion over the next 10 years.<sup>56</sup> In supporting the notion of an expanded form of substantive review of the merits of criminal law, I am not suggesting that the courts should be empowered to invalidate legislation on the basis that it would be difficult or costly to implement. Allocation of scarce resources is a paradigmatic political question and is well beyond the expertise of the courts.<sup>57</sup>

On the other hand, the merits of criminal law often engage questions which are clearly within the scope of the competence of the courts. In proposing the wide-ranging use of mandatory minimum sentences, public officials have made the claim that these sentences will have a significant deterrent impact on the incidence of crime. A reporter from the *Ottawa Citizen* made a request from the office of the Minister of Justice of Canada for the studies being relied upon to support this claim. The reporter was provided with five studies and upon a careful review, the reporter concluded that the studies were “old”, “misleading”, “methodologically flawed”, “underwhelming” and “proves exactly the opposite”.<sup>58</sup> Admittedly, criminological data can be conflicting and ambiguous, but when there is evidence that the government is relying upon faulty data concerning penal policy, there does not seem to be any reason why a court would not be competent to review this data even if the review appears to be calling into question the merits of the state policy.

Substantive review of the merits of criminal legislation is generally frowned upon because it is seen as an invasion of the legislative domain by non-elected officials who will simply be reviewing the law on the basis of their personal opinion or perspective on criminal justice. As the Supreme Court of Canada has recognized: “[t]he principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of

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<sup>55</sup> See, e.g., the series of articles in Elizabeth Sheehy, ed., “Mandatory Minimum Sentences: Law and Policy” (2001) 39 Osgoode Hall L.J. 261.

<sup>56</sup> Dan Gardner, “Justice plan missing one detail — the cost: Billions would be needed to put more people in jail and keep them there longer” *The Ottawa Citizen* (January 5, 2006) A4.

<sup>57</sup> *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.).

<sup>58</sup> Dan Gardner, “Tories have ‘faith’ in get-tough gun sentences, but no evidence they’ll work: Costly mandatory penalties sound good, but ministers misrepresent the studies they cite” *The Ottawa Citizen* (May 11, 2006) A1/Front.

fundamental justice in the eye of the beholder only.”<sup>59</sup> This is a powerful claim but it is largely an academic objection with little practical impact. The unique structure of the Charter of Rights reduces, if not eliminates, the risk of a judicial autocracy in terms of criminal justice policy.

The notwithstanding clause, “the puzzle at the centre of the Charter”,<sup>60</sup> significantly reduces the risk that substantive review could ever defeat the will of the people as supposedly reflected in the acts of Parliamentarians. It is thought that the notwithstanding clause cannot be routinely invoked to maintain Parliamentary supremacy because it would be an act of political suicide for the political party compelled to invoke the clause. I think this reservation is vastly overstated in the context of criminal law. If a court were to conclude that Parliament did not have a reasonable basis for enacting a criminal law, in all likelihood this finding of arbitrary and unprincipled lawmaking could be attributed to some form of moral panic and political posturing. If the political climate is one of moral panic then an invocation of the notwithstanding clause would not be political suicide as it would likely be seen as political heroism by the majority of voters.

A more vigorous form of substantive review of the merits of criminal legislation is also consistent with the “dialogue” theory of constitutional adjudication. This theory was originally conceived of by scholars<sup>61</sup> but it has been referred to in at least 10 decisions of the Supreme Court of Canada.<sup>62</sup> The Court has said:

As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some. . . .

To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (*or even overarching laws under s. 33 of the Charter*). This dialogue between

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<sup>59</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 590 (S.C.C.) [hereinafter “*Rodriguez*”].

<sup>60</sup> Michael Healey, “The Charter: Canada’s Comedy of Rights” *The Walrus* (June 2007) 53.

<sup>61</sup> Peter W. Hogg & Alison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75.

<sup>62</sup> Richard Haigh & Michael Sobkin, “Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts” (2007) 45 Osgoode Hall L.J. 67, at 71.

and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.<sup>63</sup>

(emphasis added)

The notion of a continuing dialogue between court and lawmaker could include the idea of a lawmaking partnership with ultimate authority provided to the lawmaker in the event of irreconcilable differences. The role of the judiciary in this lawmaking partnership would be restricted to substantive review but this expanded role does not unduly upset the balance of power and would surely lead to greater political accountability.

The law relating to the defence of extreme intoxication is one example of both the best and worst of a dialogue among partners. In the *Daviault* case,<sup>64</sup> the Supreme Court of Canada was asked to revisit the common law rule which prevented raising intoxication as a defence to general intent crimes (primarily assault-related crimes). The Court ruled that the principles of fundamental justice required that all acts be voluntary and therefore, even for acts of assault, extreme intoxication “akin to automatism or insanity” must be an available defence. A media outcry ensued in which headlines read “drunks who rape and go free; top court ruling means law should be changed”,<sup>65</sup> and Parliament swiftly responded by enacting section 33.1 of the *Criminal Code*,<sup>66</sup> which effectively reversed the decision.

It remains unclear whether this legislative response was enacted in a moral panic or whether it was a principled decision based upon the government’s efforts to collect expert evidence to determine if “extreme intoxication akin to automatism” was a scientifically sound and recognized phenomenon.<sup>67</sup> Nonetheless, the scientific evidence was collected and Parliament had the final word through legislative enactment. On one hand, a coherent dialogue and lawmaking partnership was fostered by the Court in setting a minimum standard for the *actus reus* and related defences, and Parliament responding by concluding that this minimum standard did not apply in these circumstances because automatism due to heavy drinking was not a recognized pharmacological phenomenon.

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<sup>63</sup> *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at paras. 138-39 (S.C.C.).

<sup>64</sup> *R. v. Daviault*, [1994] S.C.J. No. 77, 93 C.C.C. (3d) 21 (S.C.C.).

<sup>65</sup> *The Gazette* (October 4, 1994) B2 and see also Bob Stall, “Get away with it: Absurd ruling by Supreme Court allows accused to use extreme drunkenness as defence in vicious crimes” *The Province* (October 4, 1994) A14.

<sup>66</sup> R.S.C. 1985, c. C-46.

<sup>67</sup> Kelly Smith, “Section 33.1: Denial of the *Daviault* Defence Should Be Held Constitutional” (2000) 28 C.R. (5th) 350; House of Commons Standing Committee on Justice and Legal Affairs, *Bill C-72, An Act to Amend the Criminal Code*, 35th Parl., 1st Sess. (June 13, 1995) at .0934.

On the other hand, the dysfunctional<sup>68</sup> nature of the dialogue theory is represented by Parliament's cavalier approach to establishing its supremacy. Presumably, Parliament should have invoked the notwithstanding clause to overturn a decision based upon constitutional principles, and as a practical matter, this act of defiance would not be political suicide in the political climate. In fact, there was another mechanism available to maintain an open dialogue with the courts when substantive review interferes with legislative policy. Upon the collection of the relevant scientific evidence, it would have been open to the Attorney General of Canada to make a formal reference to the Supreme Court of Canada to determine whether the enactment of section 33.1 could be upheld as a reasonable limitation in light of newly acquired evidence to support the rationality of the legislative policy to deny the defence of intoxication for crimes against the person. The failure of the government to proceed in this fashion shows a level of distrust which does not bode well for a healthy and fruitful dialogue.

Nonetheless, while the metaphoric portrayal of lawmaking as dialogue is a sensible concept it must be recognized that "[d]ialogue is . . . the consequence of a decision striking down legislation, not an independent reason for striking it down."<sup>69</sup> The notion of dialogue, and the existence of the notwithstanding option, only provides a comfort zone for substantive review of the content of criminal law, and this form of extended review must fit within the text of the Charter and its evolving doctrine. The American-conceived concept of substantive review never fit well within the text of the Fifth Amendment<sup>70</sup> due process clause, but the open-ended and ambiguous formulation of section 7 of the Charter provides a more suitable anchor for substantive review.

## 2. Section 7 — A World of Infinite Possibility

If substantive review can be justified on the basis of legislative dysfunctionality, the constitutional anchor for this practice clearly resides in the open-ended generality of section 7. In the American setting, Sanford Kadish has characterized the Fifth Amendment<sup>71</sup> due process

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<sup>68</sup> See *R. v. Hall*, [2002] S.C.J. No. 65, 167 C.C.C. (3d) 449, at para. 127 (S.C.C.) for an example of when "constitutional dialogue can break down".

<sup>69</sup> Richard Haigh & Michael Sobkin, "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts" (2007) 45 Osgoode Hall L.J. 67, at 79.

<sup>70</sup> U.S. Const. amend. V.

<sup>71</sup> U.S. Const. amend. V.

clause “in its substantive persona” as a “protean pinch hitter of last resort”,<sup>72</sup> and this characterization equally applies to our Fifth Amendment counterpart. Textual arguments and arguments over the intent of the drafters could be raised to narrow the scope of fundamental justice, but these arguments have been largely disregarded by both the Supreme Court of Canada and academic commentators.<sup>73</sup> Much ink has been spilt to show how the current approach to section 7 has transformed the right into one of boundless possibility,<sup>74</sup> and this paper will not replicate these useful commentaries. Rather, this part of the paper will simply provide a brief overview of the way in which section 7 has been transformed into a “protean pinch hitter”.

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

Specifically, this paper concerns the operation of these fundamental principles in the context of criminal law and as criminal law by definition will always entail a deprivation of liberty, any criminal provision has to operate in a manner which is consistent with principles of fundamental justice. Criminal law attracts constitutional review under section 7 not only because of its liberty-depriving potential. The Supreme Court has also ruled that state-imposed psychological stress or trauma occasioned by invocation of the criminal law will violate the security interest protected

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<sup>72</sup> Sanford H. Kadish, “Fifty Years of Criminal Law: An Opinionated Review” (1999) 87 Cal. L. Rev. 943, at 943.

<sup>73</sup> K. Michael Stephens, “Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the *Canadian Charter of Rights and Freedoms*” (2002) 13 N.J.C.L. 183; Kathleen McManus, “The Sleeping Giant of Rights: Section 7 and Substantive Review” (1995) 3 Dal. J. Leg. Stud. 35; and Luc Tremblay, “Section 7 of the Charter: Substantive Due Process?” (1984) 18 U.B.C. L. Rev. 201.

<sup>74</sup> Jamie Cameron, “From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7” (2006) 34 S.C.L.R. (2d) 105 and Alan Young, “Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches” (2002) 16 S.C.L.R. (2d) 121.

by section 7.<sup>75</sup> However, there has been little reason to evaluate the constitutionality of criminal law in terms of its impact on security since the easiest route for fundamental justice review of criminal law lies in the fact that all crime is potentially punished by imprisonment.

Although the application of section 7 remains unclear when dealing with imprisonment in default of fine payment,<sup>76</sup> it has become clear that the imposition of a large fine alone does not implicate the liberty or security interest of the individual.<sup>77</sup> Accordingly, it is conceivable that a court could rectify the problem of an overreaching and weakly justified criminal law by invalidating the option of imprisonment, thereby removing both the deprivation of liberty or security, and the corresponding need for an exacting fundamental justice review. Admittedly, a crime punishable by fine alone does not address the problem of continuing stigma by virtue of the criminal record, but it must be recognized that depenalization may be an appropriate and effective remedy that has yet to be considered even though its remedial scope does not intrude as significantly into the legislative realm as offence invalidation.

In fact, in the early part of this decade the Government of Canada introduced a “decriminalization” measure to address the claim that the offence of marijuana possession did not warrant imposition of the criminal law.<sup>78</sup> A closer examination of the proposed legislation shows that it was not a decriminalization measure but a depenalization measure in which possession would simply attract fines under the *Contraventions Act*.<sup>79</sup> Although the legislative proposal died on the order paper, it did represent a halfway house resolution of the problem of overcriminalization. Legislatures and courts should stop thinking of judicial review of criminal law as a zero-sum game of validity or invalidity and recognize that a potential solution to weakly grounded criminal offences is to remove the ultimate sanction of imprisonment. With this in mind, Parliament could create new offences without fear of substantive invalidation and the courts could mitigate the horror of overcriminalization by ensuring that imprisonment is not imposed on a routine basis for everyone who fits

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<sup>75</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.); *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.) [hereinafter “*B. (R.)*”].

<sup>76</sup> *R. v. Pontes*, [1995] S.C.J. No. 70, 100 C.C.C. (3d) 353 (S.C.C.); but also see *London (City) v. Polewsky*, [2005] O.J. No. 4500, 202 C.C.C. (3d) 257 (Ont. C.A.).

<sup>77</sup> *R. v. 1260448 Ontario Inc.*, [2003] O.J. No. 4306, 180 C.C.C. (3d) 254 (Ont. C.A.).

<sup>78</sup> See Bill C-38, *An Act to Amend the Contraventions Act and the Controlled Drugs and Substances Act*, 37th Parl., 2nd Sess., 2003.

<sup>79</sup> S.C. 1992, c. 47.

within this legislative designation of criminality. To date there has been no recognition by the judiciary of the constitutional possibility of downscaling Parliament's choice of punishment for crimes on the margins of wrongdoing, and all evaluations of sentencing choices have been conducted as part of the gross disproportionality assessment for cruel and unusual punishment under section 12 of the Charter.

With every crime currently attracting the possibility of imprisonment, it is incumbent on the courts to subject every criminal offence to fundamental justice review. The breadth of the undertaking underscores how important it is for the courts to articulate legal principles in a coherent, clear and concise manner if they are to be elevated into principles of fundamental justice. What has been missing in the first 25 years of the Charter is a coherent statement of the nature and form of fundamental principles of justice. The Court is only able to advise us of the following:

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

. . . . .

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

We should not be surprised that many of the principles of fundamental justice are procedural in nature. Our common law has been a law of remedies and procedures. . . . This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which "future growth will be based on historical roots"[.]<sup>80</sup>

The search for specific principles of fundamental justice which arise out of the "basic tenets of the legal system" has proved to be a difficult exercise. It may appear helpful for the Court to remind us that section 7 must be construed having regard to those interests and "against the applicable principles and policies that have animated legislative and judicial practice in the field",<sup>81</sup> yet problems remain in identifying

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<sup>80</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 503.

<sup>81</sup> *R. v. Beare*, [1987] S.C.J. No. 92, [1988] 2 S.C.R. 387, at 402-403 (S.C.C.).



principles which deserve the label of “fundamental”. Seven years after the *Motor Vehicle Reference*,<sup>82</sup> the Court had another opportunity to illuminate the principles of fundamental justice. In *Rodriguez*,<sup>83</sup> the Court addressed the question of whether the criminal prohibition on assisted suicide violated section 7 because it prevented disabled people from ending their lives as a release from chronic pain and suffering. The Court rejected the argument that respect for human dignity is a principle of fundamental justice on the basis that “dignity” is too vague a prescription to constitute a principle of fundamental justice. As for the exercise of discerning these principles, the Court stated:

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.<sup>84</sup>

Without identifying a specific principle of fundamental justice, the Court upheld the prohibition on assisted suicide on the basis that the state had two overriding interests: the existence of a perceived consensus in favour of an absolute prohibition and the goal of preventing abuse and exploitation of vulnerable individuals. At the most basic level of analysis, all that happened in this case was a balancing of Rodriguez’s interest against the societal interests represented by the law. There did not appear to be a clearly stated principle of fundamental justice being debated.

Two years later, the Court resolved another difficult and sensitive rights claim with a similar balancing act. In *B. (R.)*,<sup>85</sup> the Court addressed

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<sup>82</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

<sup>83</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

<sup>84</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 590-91 (S.C.C.).

<sup>85</sup> *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

the issue of whether it was violative of section 7 for the state to provide a blood transfusion to a child over the religious objections of parents who believe that the transfusion of blood is a sacrilege. Although the Court was badly divided on the threshold issue of “liberty and security”, a majority of the Court concluded that the legislation providing for the compelled transfusion was constitutional because the fundamental rights of the parents were overridden by the state’s right to protect the life and health of children, and because this objective had been pursued in a manner consistent with fair process.

In 1993, the Supreme Court of Canada introduced this balancing approach to section 7<sup>86</sup> and within two years the Court was saying that “[f]undamental justice in our Canadian legal tradition . . . is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens.”<sup>87</sup> In fact, numerous pronouncements from the Court on the meaning of fundamental justice indicate that the search for specific principles has been overtaken by the allure of balancing:

The principles of fundamental justice are to be found in “the basic tenets of our legal system” . . . “They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system” . . . The relevant principles of fundamental justice are determined by a contextual approach that “takes into account the nature of the decision to be made” . . . The approach is essentially one of balancing. As we said in *Burns*, “[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance.”<sup>88</sup>

Balancing of state and individual interests under the fundamental justice review was doomed to failure in light of the fact that this balancing completely overlapped with the balancing to be done under section 1 of the Charter once a violation of any Charter right had been demonstrated.<sup>89</sup> In 2004, the Supreme Court finally laid to rest the overt public policy balancing which had left section 7 with an ill-defined and indeterminate scope of operation. In the *Demers* case,<sup>90</sup> the Supreme Court of Canada

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<sup>86</sup> *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.).

<sup>87</sup> *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, at 583 (S.C.C.).

<sup>88</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, at para. 45 (S.C.C.).

<sup>89</sup> Alan Young, “Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches” (2002) 16 S.C.L.R. (2d) 121, at 132-40.

<sup>90</sup> *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257 (S.C.C.).

invalidated provisions which effectively prevented an accused who is permanently unfit to stand trial from ever being absolutely discharged. The Court concluded that the provisions suffered from constitutional overbreadth as Parliament did not have the right and authority to permanently keep a mentally disordered offender within the social control mechanisms of the criminal process when there was no reasonable possibility that a trial would ever take place. Beyond overbreadth, it was argued that, on balance, the individual's liberty and security interest outweighed Parliament's goal of public protection. This balancing act was rejected by the Court:

In making this argument, the respondent misconceives the role played by "balancing" in the structure of s. 7 of the *Charter*. It effectively argues that it is a principle of fundamental justice that the correct balance be struck between individual and societal interests. However, as a majority of this Court made clear in the case of *Malmo-Levine* . . . the "balancing of interests" referred to by McLachlin J. in *Cunningham* is to be taken into consideration by courts only when they are deriving or construing the content and scope of the principles of fundamental justice themselves. It is not in and of itself a freestanding principle of fundamental justice which must be respected if a deprivation of life, liberty and security of the person is to be upheld.<sup>91</sup>

Both the original and the new formulations of the balancing act are confusing and incoherent,<sup>92</sup> but the new formulation defies application. It is not at all clear what type of balancing would be undertaken in "deriving or construing the content and scope of the principles of fundamental justice themselves". Qualifying the generality of a fundamental principle by reference to state interests denudes the principle of its essence and transforms the principle into a policy. This type of balancing could easily lead a court to engage in a more vigorous and extensive form of substantive judicial review, but this form of review would be indeterminate and would not serve the rule of law. Despite the difficulties in "discerning" the "basic tenets" which constitute free-standing principles of fundamental justice, the principled approach to section 7 will ultimately be more transparent and will facilitate a more meaningful dialogue between legislature and judiciary.

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<sup>91</sup> *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257, at para. 45 (S.C.C.).

<sup>92</sup> Jamie Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105 and Alan Young, "Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches" (2002) 16 S.C.L.R. (2d) 121.

In order to elevate a principle into a constitutional principle of fundamental justice, it is necessary that the asserted principle satisfies three criteria: (1) “It must be a legal principle”; (2) There must be a “consensus that the . . . principle is ‘vital or fundamental to our societal notion of justice’”; and (3) It must be “capable of being identified with some degree of precision”.<sup>93</sup> The criteria provide a more transparent framework of analysis than would state/citizen balancing, but it must not be thought that the criteria are so exacting that they would prevent the courts from undertaking vigorous and expansive judicial review. Nonetheless, the Supreme Court of Canada does not seem prepared to use “basic tenets” review to increase the scope of substantive review. In 2003, the Court concluded that the “harm principle” was not a principle of fundamental justice because it was not a legal principle and it could not be defined with precision.<sup>94</sup> As a result, Parliament is not constitutionally required to ensure that all criminal offences being enacted are based upon conduct harmful to others or to society at large. In 2004, the Court concluded that the “best interests of the child” was a legal principle but that it was not supported by the type of societal consensus needed to elevate a principle to one of fundamental justice.<sup>95</sup> As a result, the Court upheld the defence of reasonable use of corrective force as a legal justification for the parental punishment of spanking.

One can immediately discern confusion and inconsistency. How can one distinguish between a legal and political principle? The “best interests of the child” has found expression in family law legislation and international conventions, while the “harm principle” has an impressive historical pedigree and has found expression in Blackstone, Beccaria, Bentham, Canadian government publications and statements of official policy.<sup>96</sup> What informed the Court’s conclusion that the “best interests of the child” has not achieved societal consensus? This seems counter-intuitive. The Court’s suggestion that no consensus exists because our system will incarcerate parents to the detriment of their children is of no moment because qualifications or exceptions to a principle do not undercut

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<sup>93</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 180 C.C.C. (3d) 353, at paras. 8, 10-11 (S.C.C.) [hereinafter “*Children*”].

<sup>94</sup> *R. v. Clay*, [2003] S.C.J. No. 80, 179 C.C.C. (3d) 540 (S.C.C.) and *R. v. Malm-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417 (S.C.C.).

<sup>95</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 180 C.C.C. (3d) 353 (S.C.C.).

<sup>96</sup> *R. v. Malm-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at paras. 107-16 (S.C.C.).

the consensus underlying the principle. Qualifications will always exist as principles are stated at the highest level of generality.

Whether a court is searching for “basic tenets”, or is balancing state versus individual interest, there is no escaping the fact that this is an overtly political exercise which will invariably intrude upon policy choices made by elected officials. A court may take a constrained or narrow view of the basic tenets and avoid the inevitability of substantive review, but the opportunity is always present. There is no escaping the fact that the principles of fundamental justice truly “reside in the eye of the beholder” and thus the only question is when will the judge as beholder feel compelled to impose his or her vision on the legislative will of Parliament?

It appears that the mechanism for triggering judicial interest in substantive review lies in the characterization of the section 7 liberty interest as one which involves a “fundamental personal decision”. The primacy of fundamental personal decisions crystallized in the overlooked decision of the Court in *Godbout*<sup>97</sup> in 1997. The Court confronted a fundamental justice claim in a non-criminal context. As a condition of employment for a municipality, the employee was required to reside within its boundaries. The Court invalidated the regulation on the basis that it unjustifiably interfered with the “irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference”.<sup>98</sup> Prior to *Godbout*, the Court had already identified that “liberty” under section 7 extends beyond physical restrictions on freedom to encompass matters which are “inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence”.<sup>99</sup> The Court concluded that,

if deprivations of the rights to life, liberty and security of the person are to survive Charter scrutiny, they must be “fundamentally just” not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally.<sup>100</sup>

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<sup>97</sup> *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577 (S.C.C.) [hereinafter “*Godbout*”].

<sup>98</sup> *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, at para. 66 (S.C.C.).

<sup>99</sup> *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, at para. 66 (S.C.C.).

<sup>100</sup> *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, at para. 74 (S.C.C.).

Freedom to choose one's place of residency could be "subordinated to substantial and compelling collective interests"<sup>101</sup> but, in this case, the Court rejected a number of different state-sponsored justifications for the residency restriction.

*Godbout* suggests that the Court will undertake exacting constitutional scrutiny when the law interferes with the right to decisions of "fundamental personal importance", and the Court has been confronted with many cases which engage personal decisions of this nature. For example, in *Morgentaler*,<sup>102</sup> the Court was faced with the right of a woman to decide what would be best for her and her unborn child. In *B. (R.)*,<sup>103</sup> the Court was faced with the right of parents to choose a medical intervention which was consistent with their religious beliefs, and in *Rodriguez*<sup>104</sup> the issue concerned the right of a disabled person to end her life just as a non-disabled person can do so. While all of these cases engaged fundamental, personal decision, invalidation only took place in the *Morgentaler* case, and this invalidation was based primarily on procedural concerns and not upon any substantive principle of justice. In the other two cases, the Court balanced competing interests and found a state interest to override the decision of "fundamental personal importance".

It is obvious that the Charter will be trivialized if its guarantees apply to personal decisions which are picayune and petty; however, creating the category of "fundamental personal decision" does not really help in the analysis. First, dividing personal decisions into fundamental and non-fundamental is a value-laden exercise beyond the purview of judicial understanding. Second, designating a decision as fundamental does not assist because the Court does not provide any specific or unique methodology for analyzing the constitutionality of state interference with this type of fundamental decision. The *B. (R.)*<sup>105</sup> and *Rodriguez*<sup>106</sup> cases both show that the designation of a decision as fundamental does not necessarily lead to the conclusion that state interference is unconstitutional.

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<sup>101</sup> *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577, at para. 76 (S.C.C.).

<sup>102</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] S.C.R. 30 (S.C.C.).

<sup>103</sup> *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

<sup>104</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

<sup>105</sup> *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

<sup>106</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

Nonetheless, it is not surprising that the two strongest examples of vigorous substantive review, *Morgentaler*<sup>107</sup> and *Chaoulli*,<sup>108</sup> both involve fundamental personal decisions about choice of medical treatment. Almost everyone will need medical intervention at some point in their lives and it did not require a great leap of faith or rationality for the Court to embrace the idea that choice of treatment is a fundamental decision which cannot be overridden in the absence of “substantial and compelling collective interests”. Thus, outside of a few core values which have received universal recognition, such as choosing the path of one’s course of medical treatment, it is still a highly subjective exercise to characterize decisions being made at the periphery as being fundamental or trivial.

The Supreme Court of Canada characterized the decision to smoke marijuana for recreational purposes as a “lifestyle [choice]”<sup>109</sup> but when the substance is used for medicinal purposes, the decision is elevated to a fundamental choice going to the “core” of dignity and independence.<sup>110</sup> In fact, the Ontario Court of Appeal ruled that Parliament would lose the constitutional authority to criminalize the use of marijuana, unless it constructed a meaningful and effective regime for exempting medical users from the reach of the criminal law.<sup>111</sup> Not only did protection of a fundamental personal decision require Parliament to change its drug policy and enact exceptions to its blanket prohibition, but the courts have continued to assess and review the merits of the government’s medical marijuana program to ensure that its operation is effective and does not arbitrarily restrict a patient’s right to choose as a treatment option an illicit and unapproved medicine.<sup>112</sup>

Once the liberty interest is characterized as involving a fundamental personal decision, it appears that the courts will routinely intrude upon the legislative and policy domains. In this context, the “protean pinch hitter” that is section 7 of the Charter does appear boundless. For example, in the medical marijuana context, the government was first compelled to

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<sup>107</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] S.C.R. 30 (S.C.C.).

<sup>108</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.).

<sup>109</sup> *R. v. Malm-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at para. 86 (S.C.C.).

<sup>110</sup> *R. v. Parker*, [2000] O.J. No. 2787, 146 C.C.C. (3d) 193 (Ont. C.A.) and *Hitzig v. Canada*, [2003] O.J. No. 3873, 177 C.C.C. (3d) 449 (Ont. C.A.).

<sup>111</sup> *R. v. Parker*, [2000] O.J. No. 2787, 146 C.C.C. (3d) 193 (Ont. C.A.).

<sup>112</sup> *Hitzig v. Canada*, [2003] O.J. No. 3873, 177 C.C.C. (3d) 449 (Ont. C.A.); *R. v. Krieger*, [2002] A.J. No. 44 (Alta. C.A.); *Wakeford v. Canada*, [2002] O.J. No. 85, 162 C.C.C. (3d) 51 (Ont. C.A.).

enact an entirely new regulatory regime, and upon further judicial review, it was compelled to find a legal source of marijuana for the hundreds of people who had enrolled in the program.<sup>113</sup> Consequently the government spent millions to contract for a supply of marijuana currently being grown in an underground mineshaft in Flin Flon, Manitoba.<sup>114</sup> It is interesting to note that while the Charter does not contain a free-standing right to health care, as is found in the Italian, Venezuelan and South African Constitutions,<sup>115</sup> substantive review under section 7 has compelled the government to grow marijuana for medicine and to facilitate access to private health care. There is no question that a court can, and will, review the merits of public policy, but it remains unclear when a court will feel compelled to do so. The question now to be addressed is to what extent have the courts used substantive review to constrain criminal justice policy within a set of constitutional minimum standards for the enactment of valid criminal law?

### III. THE CURRENT LANDSCAPE AND BEYOND

#### 1. Constitutional Limits on the Content of Criminal Law

Constitutional norms are always expressed at a high level of generality and it is incumbent upon the courts to articulate operational principles to guide decision-makers who implement the constitutional norms in concrete settings. Operational principles are also formulated at a high level of generality and at times they have little substantive content, and primarily serve to express a sentiment or aspiration. The principle of fundamental justice is one of those empty, but powerful, principles, and with no substantive content to guide the courts, most of the work done in the past 25 years with respect to fundamental justice and criminal law has just replicated, and at times strengthened, the basic principles of liability which the courts had been developing at common law.

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<sup>113</sup> *Hitzig v. R.*, [2003] O.J. No. 3873, 177 C.C.C. (3d) 449 (Ont. C.A.); *R. v. Krieger*, [2002] A.J. No. 44 (Alta. C.A.); *Wakeford v. Canada*, [2002] O.J. No. 85, 162 C.C.C. (3d) 51 (Ont. C.A.).

<sup>114</sup> *Regulations Amending the Marihuana Medical Access Regulations*, SOR/2003-387; Health Canada, *Policy on Supply of Marihuana Seeds and Dried Marihuana for Medical Purposes* (December 3, 2003).

<sup>115</sup> B. Toebes, *The Right to Health as a Human Right in International Law* (Atwerpen: Intersentia, 1999), at 209; M. Torres, "The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela" (2002) 3 *Chicago J. of Int'l L.* 105; B. Toebes, "Towards an Improved Understanding of the International Human Right to Health" (1999) 21 *Hum. Rts. Q.* 661.



Since the grand opening of substantive review in 1985, there have been two types of constitutional claims brought to challenge the content of criminal law. The first relates to rule of law principles which set certain formal requirements for the legislative description or definition of the offence. The second set of claims relate to liability principles which set minimum standards for the degree of fault needed to accompany the wrongdoing. Over the course of 25 years and dozens of appellate decisions reviewing the content of criminal law, there is no question that substantive review has produced a number of discernible principles which constrain the reach of criminal law. Most of these principles are stated at such a high level of generality that they are inherently manipulable. As such, the boundaries for the proper content of criminal law are constantly shifting from case to case and it remains unclear whether the constitutionalization of criminal law has been largely *ad hoc* or principled.

(a) *The Rule of Law and the Actus Reus*

Considering that it is referred to in the preamble to the Charter, it is not surprising that the rule of law has been characterized as a principle of fundamental justice.<sup>116</sup> The rule of law has many different formulations but it is essentially a safeguard against arbitrary lawmaking. The principle has little to do with the substantive content of the law and a lot to do with the formal content. The principle demands that laws be clear and accessible so that law can serve its primary purpose of providing behavioural guidance. As Joseph Raz has noted, the rule of law does not dictate whether a law will be good or bad, but rather has instrumental value to ensure that the law is effective:

. . . the rule of law is not merely a moral virtue — it is a necessary condition for the law to be serving directly any good purpose at all. Of course, conformity to the rule of law also enables the law to serve bad purposes. That does not mean that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic of knives. At most it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good-making characteristic of knives. A good knife, is among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important

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<sup>116</sup> 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 (S.C.C.) [hereinafter “Prostitution Reference”].

inherent value. It is the essence of law to guide behaviour through rules and courts in charge of their application.<sup>117</sup>

The characteristics for enacting “sharp” laws which respect the rule of law have been defined in many different ways. Raz includes eight principles to define the characteristics:

1) All laws should be prospective, open and clear; 2) Laws should be relatively stable; 3) The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; 4) The independence of the judiciary must be respected; 5) The principles of natural justice must be observed; 6) The Courts should have review powers over the implementation of the other principles; 7) The Courts should be easily accessible; 8) The discretion of the crime-preventing agencies should not be allowed to pervert the law.<sup>118</sup>

In a similarly ambitious formulation of the demands of the rule of law, Lon Fuller sketches the contours of the principle in his narrative of eight reasons why the lawmaking endeavours of his fictional ruler, Rex, were destined to fail:

1) A failure to achieve rules at all, so that every issue must be decided on an ad hoc basis; 2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; 3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; 4) a failure to make rules understandable; 5) the enactment of contradictory rules or 6) rules that require conduct beyond the powers of the affected parties; 7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, 8) a failure of congruence between the rules as announced and their actual administration.<sup>119</sup>

Canadian courts have not adopted all of these wide-ranging descriptions of the operation of the rule of law. Some of the principles articulated by Raz and Fuller find expression in section 7 fundamental justice, while some find expression in common law principles of liability and others are simply not part of our constitutional landscape. Our current legal landscape is dominated by one primary rule of law concern: that

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<sup>117</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), at 225.

<sup>118</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), at 214-18.

<sup>119</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), at 38-39.

laws clearly describe the prohibited zone of wrongdoing. To that end, our courts have focused on the vagueness of the offence definition, and overbreadth of the law's reach — these two related concerns form the basis of the minimum standard for the formal content of law demanded by principles of fundamental justice.

The claim that a law is unconstitutionally vague requires a showing that the impugned law “permits a ‘standardless sweep’ allowing law enforcement officials to pursue their personal predilections”.<sup>120</sup> Beyond ensuring “that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards”,<sup>121</sup> the rule of law requires the law to have sufficient clarity “in order that persons be given fair notice of what to avoid”.<sup>122</sup> In assessing the vagueness of the law, courts are not restricted to the “bare words of the statutory provision, but, rather, to the provision as interpreted and applied in judicial decisions”.<sup>123</sup>

Despite its widespread application in many cases, the doctrinal development of the vagueness doctrine completely undercuts its utility as a meaningful constraint on the content of criminal law. Although the rationale for the principle focuses on the comprehension and assimilation of legal rules by citizens and law enforcement officials, the courts continuously ask the question of whether the courts can give “sensible meaning”<sup>124</sup> to the vague terms of the prohibition. This misplaced focus on judicial competency and understanding leads to absurd results which bear no relationship to the ultimate question of whether the law is “sharp” enough to guide conduct. For example, in 1987, the Ontario Court of Appeal was presented with a vagueness challenge to the now-repealed offence of “gross indecency”.<sup>125</sup> The *Criminal Code*<sup>126</sup> did not provide any further definitional guidance and the Court looked to prior judicial interpretations to determine whether the courts have given the expression “gross indecency” a sensible meaning. The Court concluded that the

<sup>120</sup> *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, at 1157 (S.C.C.).

<sup>121</sup> *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, at 1152 (S.C.C.).

<sup>122</sup> *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, at 1152 (S.C.C.).

<sup>123</sup> *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, at 1157 (S.C.C.).

<sup>124</sup> *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, at 1128, 1156-57, 1160, 1161 (S.C.C.).

<sup>125</sup> *R. v. LeBeau; R. v. Lofthouse*, [1988] O.J. No. 51, 41 C.C.C. (3d) 163 (Ont. C.A.).

<sup>126</sup> R.S.C. 1985, c. C-46.

offence was not unconstitutionally vague as the courts had given the offence sensible meaning with the test of whether the conduct in question was “a marked departure from decent conduct expected of average Canadians in the circumstances”.<sup>127</sup>

Surely, the judicial construction and elaboration of the definition of gross indecency is meaningless in terms of guiding conduct and constraining official discretion. It is actually not that different from the often-condemned form of Nazi legality which prohibited any conduct “deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling”.<sup>128</sup> There is little doubt that the vagueness doctrine sets a minimum standard for valid law, but the standard is largely symbolic or rhetorical. Vagueness challenges have been one of the most common section 7 challenges being raised in courts of law, but in 25 years there has not been a single invalidation of a criminal offence on the basis of insufficient clarity.<sup>129</sup>

Despite two bold invalidations by the Court,<sup>130</sup> the overbreadth doctrine has not fared much better than the vagueness doctrine. As with vagueness, the courts have had little difficulty outlining the test to be

<sup>127</sup> *R. v. LeBeau; R. v. Lofthouse*, [1988] O.J. No. 51, 41 C.C.C. (3d) 163, at 173 (Ont. C.A.).

<sup>128</sup> *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, at 1151 (S.C.C.); see also *Case of the Danzig Legislative Decrees* (1935), Advisory Opinion, (Ser. A/B) No. 65.

<sup>129</sup> *R. v. Demeyer*, [1986] A.J. No. 315, 27 C.C.C. (3d) 575 (Alta. C.A.); *R. v. Piercey*, [1986] N.J. No. 34, 60 Nfld. & P.E.I.R. 76 (Nfld. C.A.); *R. v. Howlett* (1987), 4 W.C.B. (2d) 44 (B.C.C.A.); *R. v. LeBeau; R. v. Lofthouse*, [1988] O.J. No. 51, 41 C.C.C. (3d) 163 (Ont. C.A.); *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 (S.C.C.); *R. v. Skinner*, [1990] S.C.J. No. 51, 56 C.C.C. (3d) 1 (S.C.C.); *R. v. Stagnitta*, [1990] S.C.J. No. 50, 56 C.C.C. (3d) 17 (S.C.C.); *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] S.C.J. No. 37, 71 C.C.C. (3d) 225 (S.C.C.); *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, 74 C.C.C. (3d) 289 (S.C.C.); *R. v. Blackplume*, [1993] A.J. No. 24, 18 W.C.B. (2d) 288 (Alta. C.A.); *R. v. Fisher*, [1994] O.J. No. 358, 88 C.C.C. (3d) 103 (Ont. C.A.); *R. v. Cribbin*, [1994] O.J. No. 477, 89 C.C.C. (3d) 67 (Ont. C.A.); *R. v. Finta*, [1994] S.C.J. No. 26, 88 C.C.C. (3d) 417 (S.C.C.); *R. v. Ratelle*, [1994] J.Q. no 539, 92 C.C.C. (3d) 176 (Que. C.A.); *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, 99 C.C.C. (3d) 97 (S.C.C.); *R. c. Lippe*, [1996] J.Q. no 2215, 111 C.C.C. (3d) 187 (Que. C.A.); *R. v. Campbell*, [1996] M.J. No. 603, 112 C.C.C. (3d) 107 (Man. C.A.); *R. v. Bernitt*, [1997] B.C.J. No. 2301, 120 C.C.C. (3d) 344 (B.C.C.A.); *R. v. Yorke*, [1998] N.S.J. No. 3, 122 C.C.C. (3d) 298 (N.S.C.A.); *R. v. Stromberg*, [1999] B.C.J. No. 80, 131 C.C.C. (3d) 546 (B.C.C.A.); *R. v. Biller*, [1999] S.J. No. 202, 135 C.C.C. (3d) 551 (Sask. C.A.); *R. v. Krushel*, [2000] O.J. No. 302, 142 C.C.C. (3d) 1 (Ont. C.A.); *R. c. Lecompte*, [2000] J.Q. no 2452, 149 C.C.C. (3d) 185 (Que. C.A.); *R. v. Venn*, [2000] O.J. No. 4647, 150 C.C.C. (3d) 178 (Ont. C.A.); *R. v. Spindloe*, [2001] S.J. No. 266, 154 C.C.C. (3d) 8 (Sask. C.A.); *R. v. DiGiuseppe*; *R. v. Cooper*, [2002] O.J. No. 86, 161 C.C.C. (3d) 424 (Ont. C.A.); *R. v. Pilarinos*, [2002] B.C.J. No. 609, 168 C.C.C. (3d) 548 (B.C.S.C.).

<sup>130</sup> *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257 (S.C.C.) and *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.).

applied to assess whether the breadth of the law extends far beyond the objectives behind the law:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is over broad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual ...

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.<sup>131</sup>

Overbreadth essentially requires the court to determine if the lawmakers have "overshot the mark"<sup>132</sup> in formulating the terms and conditions of a criminal offence.

There is significant overlap between vagueness and overbreadth, and these two principles only permit indirect review of the merits of law as they are predicated on only reviewing the means chosen to achieve legislative ends. The ends or objectives of legislation are not questioned as part of this review process. Yet it is reasonable to assume that if Parliament has confusion over the objectives being sought there is a good chance that some of this confusion will carry over to the drafting of an ill-defined and general law.

Overbreadth has enormous potential to act as a brake on hastily conceived criminal law. This potential has yet to be realized but the

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<sup>131</sup> *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 792-93 (S.C.C.).

<sup>132</sup> *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at 619, 627 (S.C.C.); *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892, at 969 (S.C.C.); *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731, at 776 (S.C.C.).

*Demers*<sup>133</sup> and *Chaoulli*<sup>134</sup> cases may signal that overbreadth will be strengthened and nourished as the courts continue to develop their conception of an “arbitrary law”. Vagueness and overbreadth are just specific manifestations of the larger constitutional vice of “arbitrariness”, and there is some indication that the courts are willing to undertake a more exacting assessment of whether a law is arbitrary. In its original formulation in *Rodriguez*,<sup>135</sup> the test for arbitrariness was as follows:

Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose.<sup>136</sup>

On its face, this test allows a court to invalidate a law which is ineffective in achieving its stated purpose, but the Supreme Court has never explicitly suggested that this is the type of substantive review contemplated by the rule of law. In *Rodriguez*,<sup>137</sup> the Court did not find the prohibition on assisted suicide to be unconstitutional and until the *Demers*<sup>138</sup> and *Chaoulli*<sup>139</sup> cases were decided, the arbitrariness doctrine seemed moribund.

Although the court was badly divided in *Chaoulli*<sup>140</sup> on the ultimate assessment of the arbitrariness of prohibiting private health care insurance, three members of the court were fairly clear in articulating the test for an arbitrary law and the need to review and assess the government’s policy choices:

It is a well-recognized principle of fundamental justice that laws should not be arbitrary. . . . The state is not entitled to arbitrarily limit its citizens’ right to life, liberty and security of the person.

A law is arbitrary where “it bears no relation to, or is inconsistent with, the objective that lies behind [it]”. To determine whether this is

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<sup>133</sup> *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257 (S.C.C.).

<sup>134</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.).

<sup>135</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

<sup>136</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 594 (S.C.C.).

<sup>137</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

<sup>138</sup> *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257 (S.C.C.).

<sup>139</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.).

<sup>140</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.).

the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect. . . .

. . . . .

The government argues that the interference with security of the person caused by denying people the right to purchase private health insurance is necessary to providing effective health care under the public health system.

. . . . .

When we look to the evidence rather than to assumptions, the connection between prohibiting private insurance and maintaining quality public health care vanishes. . . . The government contends that this is necessary in order to preserve the public health system. The evidence, however, belies that contention.<sup>141</sup>

As has been mentioned, the vigorous substantive review undertaken in *Chaoulli*<sup>142</sup> may be an exception to the more common practice of limited review in light of the medical urgency and necessity underlying the case. It may also be a signal for a willingness to undertake a more exacting review for arbitrariness. Just three years earlier, the Supreme Court showed a willingness to expand the arbitrariness review by constructing a “gross disproportionality” test for arbitrariness which requires a court to assess and balance the benefits and objectives of the law against the harms the law may cause in its implementation.<sup>143</sup> A law will be arbitrary “if the use of the criminal law were shown . . . to be grossly disproportionate in its effects on accused persons, when considered in light of the [state] objective . . . the prohibition would be contrary to fundamental justice . . . .”<sup>144</sup> It is somewhat unclear if this test was intended to supplement or replace the *Rodriguez*<sup>145</sup> test for arbitrariness, but in light of the Supreme Court reliance upon the *Rodriguez* test in *Chaoulli*, it is most likely that the gross disproportionality test is designed to supplement the traditional test. In this way, it expands upon the scope of substantive review by allowing the Court not only to assess the

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<sup>141</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35, at paras. 129-30, 135, 152 (S.C.C.).

<sup>142</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, 2005 SCC 35 (S.C.C.).

<sup>143</sup> *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417 (S.C.C.).

<sup>144</sup> *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at para. 169 (S.C.C.).

<sup>145</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.).

effectiveness of the means chosen to achieve a policy objective, but also to assess whether or not the objective was outweighed by any harmful side-effects created by the enactment of the law. This balancing is not a far cry from an outright assessment of merits of the law on a strictly utilitarian premise.

The review for arbitrariness and overbreadth may present an open invitation for substantive review when the Court is so inclined. Professor Hogg has noted that overbreadth:

. . . raises some practical and theoretical difficulties, and confers an exceedingly discretionary power of review on the Court. The doctrine requires that the terms of a law be no broader than is necessary to accomplish the purpose of the law. But the purpose of the law is a judicial construct, which can be defined widely or narrowly as the reviewing court sees fit. In [*Heywood*<sup>146</sup>] for example, Cory J. who wrote for the majority, defined the purpose of the law as being for the protection of children, while Gonthier J., who wrote for the dissenting minority, defined the purpose of the law as being for the protection of adults as well as children . . . Even if agreement could be reached on the purpose of the law, the question of whether the terms of the law are no broader than is needed to carry out the purpose raises a host of interpretive, policy and empirical questions . . . It must be recognized . . . that a judge who disapproves of a law will always be able to find that it is overbroad.<sup>147</sup>

The enormous potential for substantive review is heightened by the approved methodology of using “reasonable hypotheticals” in assessing whether a provision is arbitrary or overly broad. The Supreme Court has constantly insisted that constitutional issues not be argued in an “evidentiary vacuum” and that the challenge be fully animated by the relevant adjudicative and legislative facts.<sup>148</sup> However, the Court has also permitted challenges to laws to proceed on the basis of speculation and hypothesis relating to how the law could violate Charter rights so long as the hypotheticals are not “far-fetched”, “remote” or “marginally imaginable”.<sup>149</sup> The reasonable hypothetical methodology was first used

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<sup>146</sup> *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.).

<sup>147</sup> S. Hern, “Re-reading Fundamental Justice and the Prohibition of Marijuana” (2001) 44 *Crim. L.Q.* 486, at 501, quoting from P. Hogg, *Constitutional Law of Canada*, 4th Student Edition (Toronto: Carswell, 1966), at 862-63.

<sup>148</sup> *Danson v. Ontario (Attorney General)*, [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086 (S.C.C.); *MacKay v. Manitoba*, [1989] S.C.J. No. 88, [1989] 2 S.C.R. 357 (S.C.C.).

<sup>149</sup> *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485, at 506, 514 (S.C.C.).



in demonstrating that a mandatory minimum sentence could constitute a cruel and unusual punishment as applied to a hypothetical accused.<sup>150</sup> It has since been applied to other section 7 claims relating to full answer and defence and overbreadth (but not to vagueness challenges).<sup>151</sup>

There is little doubt that this methodology facilitates substantive review as it obviates the need for a person charged with a crime to show that the law applies in an arbitrary manner to his or her situation. It is sufficient to show that the law could apply to a hypothetical offender in a realistic situation even though there is no empirical data or other evidence to show that this situation ever has, or will ever, occur. In criticizing the Supreme Court for using reasonable hypotheticals in the assessment of an overbreadth claim, Professor Hogg has noted:

. . . the majority's analysis is based entirely on hypothetical cases involving the most innocent possible offenders. This mode of reasoning is a very powerful tool of judicial review, since there must be few laws indeed in which it would not be possible to design a hypothetical case (disregarding the realities of the police and prosecutorial discretion) that is caught by the law although it falls outside the apparent purpose of the law.<sup>152</sup>

In conclusion, rule of law principles exert an enormous gravitational pull on the construction and formulation of the *actus reus*. The rule of law requires clarity of expression and a rational connection between the objective and the means chosen to achieve the objective. A court can invalidate a law which overshoots the mark, but it does not appear that it can invalidate a law that misses the mark entirely. In the next section, I will return to the issue of an outright challenge to the asserted wrongfulness of the *actus reus*, as it is this type of challenge which directly and bluntly engages review of merits, but in completing the outline of the current landscape, I must first discuss the constitutional minimum standards which govern the principles of fault or criminal liability.

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<sup>150</sup> *R. v. Smith*, [1987] S.C.J. No. 36, 34 C.C.C. (3d) 97 (S.C.C.).

<sup>151</sup> *R. v. Mills*, [2000] S.C.J. No. 68, 139 C.C.C. (3d) 321 (S.C.C.) and *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257 (S.C.C.); *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.).

<sup>152</sup> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Thomson Carswell, 2007-), at 47-54.

(b) *The Constitutionalization of Mens Rea*

As with the rule of law, there are many different formulations of the principles governing criminal liability. In the early 17th century, Lord Coke formulated the famous maxim: “*Actus not facit reus nisi mens sit rea*”<sup>153</sup> (the act is not criminal unless the mind is criminal), and for centuries theorists and jurists have struggled with defining the requisite level of fault needed to make the commission of wrongdoing a blameworthy act. The *Motor Vehicle Reference*<sup>154</sup> constitutionalized the principle with its admonishment that imprisonment cannot be imposed in the absence of fault, but fault is an amorphous concept and the *Motor Vehicle* principle provides little guidance in terms of establishing minimum standards for imposing criminal liability.

Professor Fletcher sees the evolution of the Coke maxim as manifesting itself in the following principles of liability:

1. Every criminal offence presupposes a voluntary human act.
2. Every criminal offence includes a dimension of wrongdoing.
3. Claims of justification negate wrongdoing.
4. Every punishable act presupposes blameworthy commission of the elements of the offence.
5. Blameworthy commission requires at least negligent conduct with respect to every element of the offence.
6. Intentional, knowing, and reckless actions are worse than negligent conduct with respect to the elements of the offence.
7. Excused conduct is not blameworthy.
8. Reasonable mistakes are not blameworthy.
9. Subjective perceptions alone cannot justify conduct.
10. Self-defence is available only against unjustified attacks.<sup>155</sup>

Similarly, in the 2007 edition of *Principles of Criminal Law*, Colvin and Anand extract 16 principles which have emerged under the Charter

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<sup>153</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: By M. Flesher, for W. Lee and D. Pakeman, 1644), at 107.

<sup>154</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

<sup>155</sup> George P. Fletcher, “The Nature and Function of Criminal Theory” (2000) 88 Cal. L. Rev. 687, at 702.

in relation to criminal culpability, including “the fault principle, the fair warning principle, the contemporaneity principle, the voluntariness principle, the cognitive capacity principle, the moral voluntariness principle, and the symmetry principle”.<sup>156</sup> Some of the principles formulated by Fletcher and Colvin/Anand find expression in common law and constitutional principles while others are more honoured in the breach. In actuality, the courts have been fairly modest and circumspect in articulating the principles of fault demanded by the Constitution.

In retrospect, the *Motor Vehicle Reference*<sup>157</sup> did not effect a significant change in the legal landscape. First, substantive review of the principles of liability concerned issues which historically have been within the expertise of the judiciary. *Mens rea*, *actus reus*, excuses and justifications have all been developed primarily within the context of court decisions. Parliament has never provided much guidance with respect to the fault requirements of a criminal offence, preferring to leave this issue for judicial development. Consequently, judicial review for a constitutionally sound minimum level of fault simply echoes the role and function of common law courts for the past few hundred years. Thus, the *Motor Vehicle Reference* did not actually signal the beginning of a rigorous form of constitutional review which would incidentally trench upon Parliament’s policy choices — it was just a reflection of the Court already engaged in a very familiar and comfortable discourse.

Second, the articulation of the principle of the fundamental justice — no imprisonment without fault — may have been full of sound and fury signifying nothing. Since the invalidation of the constructive homicide provisions in the late 1980s,<sup>158</sup> the courts have found few occasions to invalidate offences on the basis that they contain a constitutionally deficient level of fault. In the constructive homicide cases, the Court incrementally concluded that the offence of murder must contain an element of subjective foresight of death, but little guidance is provided as to when subjective fault will be required for other offences. The Court’s only concrete stipulation is that a subjective form of *mens rea* is constitutionally required only when the offence contains a high degree of stigma and is subject to a high level of punishment. Accordingly, courts dismissed

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<sup>156</sup> Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3d ed. (Toronto: Thomson Carswell, 2007), at 39-71.

<sup>157</sup> *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

<sup>158</sup> *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.) and *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

virtually every challenge demanding subjective fault as a constitutional minimum standard on the basis that the penalty and stigma associated with the crime was not very severe.<sup>159</sup> Of course, without a standard for measuring the severity of sanction this conclusion is meaningless. Within six years of the constructive murder invalidations, the Court also concluded that the offence of manslaughter did not have a sufficiently high level of stigma and punishment to trigger the substantive requirements of fundamental justice respecting the minimum level of fault.<sup>160</sup> If manslaughter is not a stigmatizing classification with a high penalty (maximum life) then it is unlikely that any other criminal offence will ever trigger the constitutional requirement of subjective fault.

So it remains unclear when objective versus subjective liability will be required, and it also remains unclear whether the “symmetry principle” demands that there be an element of fault, either objective or subjective, attaching to every element of the *actus reus*. In the *Creighton*<sup>161</sup> case, the Court stated that:

I agree that as a general rule the *mens rea* of the offence relates to the consequences prohibited by the offence . . . Yet our criminal law contains important exceptions to this ideal of perfect symmetry. The presence of these exceptions suggests that the rule of symmetry is just that — a rule — to which there are exceptions. If this is so, then the rule cannot be elevated to the status of a principle of fundamental justice which must, by definition, have universal application.

It is important to distinguish between criminal law theory, which seeks the ideal of absolute symmetry between *actus reus* and *mens rea*, and the constitutional requirements of the Charter.<sup>162</sup>

Based upon this reasoning, the Supreme Court in *Creighton*<sup>163</sup> was able to conclude that the *mens rea* for unlawful act manslaughter only

<sup>159</sup> *R. v. Brooks*, [1988] B.C.J. No. 394, 41 C.C.C. (3d) 157 (B.C.C.A.); *R. v. Peters*, [1991] B.C.J. No. 3821, 69 C.C.C. (3d) 461 (B.C.C.A.); *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.); *R. v. L. (S.R.)*, [1992] O.J. No. 2305, 76 C.C.C. (3d) 502 (Ont. C.A.); *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.); *R. v. Finlay*, [1993] S.C.J. No. 89, 83 C.C.C. (3d) 513 (S.C.C.); *R. v. Naglik*, [1993] S.C.J. No. 92, 83 C.C.C. (3d) 526 (S.C.C.); *R. v. Krushel*, [2000] O.J. No. 302, 142 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Gosset*, [1993] S.C.J. No. 88, 83 C.C.C. (3d) 494 (S.C.C.).

<sup>160</sup> *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.). In fact, it is arguable that in the Charter era, the courts have become more receptive to finding criminal liability on an objective standard as a result of the *Creighton* case and related decisions involving minimum standards of fault under s. 7 of the Charter.

<sup>161</sup> *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

<sup>162</sup> *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3, at 53 (S.C.C.).

required objective foreseeability of bodily harm. Objective liability was justified because “the stigma attached to manslaughter is an appropriate stigma”,<sup>164</sup> and the *mens rea* did not need to extend to the stipulated consequence of death because the symmetry principle was not elevated to a principle of fundamental justice. Ultimately, the underlying thrust of this judgment is to undercut the creation of minimum standards of fault and leave the determination to an *ad hoc* assessment of whether there exist good policy reasons for departing from common law principles for assessing fault.

After a flurry of *mens rea* cases, it is clear that Parliament will never be able to combine absolute liability with imprisonment in the future, nor will it be able to create a crime of negligent murder. These were significant developments in the short history of Charter adjudication in Canada, but in a practical sense the substantive principle of fault-based criminality has been restricted to invalidating an archaic relic (constructive murder) and prohibiting a form of legislation which rarely occurs (combining absolute liability with imprisonment). Beyond these two clear developments, the rules and principles governing fault are few in number and modest in scope.

As a bedrock principle, it has been established as a constitutional principle that all acts must be voluntary.<sup>165</sup> Although technically an *actus reus* and not a *mens rea* principle, regardless of the classification, the utility of this cornerstone principle as a minimum standard of fault is somewhat undercut by common law developments in which a skeptical Supreme Court has reversed the onus of proof for a claim of involuntariness (“the last refuge of a scoundrel”).<sup>166</sup> Beyond the voluntariness principle, the Supreme Court has expressed support for four basic principles of fault. This modest expression of principles governing minimum standards is formulated differently from case to case, but the basic components find expression in the following statements made by the Court:

1. Punishment and stigma “must be proportionate to the . . . blameworthiness of the offender”.
2. “[C]riminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result.”

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<sup>163</sup> *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

<sup>164</sup> *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3, at 47 (S.C.C.).

<sup>165</sup> *R. v. Daviault*, [1994] S.C.J. No. 77, 93 C.C.C. (3d) 21 (S.C.C.).

<sup>166</sup> *R. v. Stone*, [1999] S.C.J. No. 27, 134 C.C.C. (3d) 353, at paras. 29, 175 (S.C.C.).

3. “Those causing harm intentionally [should] be punished more severely than those causing harm unintentionally.”
4. “[T]here must be an element of personal fault in regard to a culpable aspect of the *actus reus*, but not necessarily in regard to each and every element of the *actus reus*.”<sup>167</sup>

Of course, these principles do not come close to providing guidance on crucial questions like when is a “culpable mental state in respect of that result” to be assessed subjectively or objectively, or what are the criteria to be employed for the classification of an *actus reus* component as “culpable”? At the highest level of abstraction, the courts uniformly pay homage to the constitutional requirement of fault, but at the level of implementation and application, the rules and principles do not dictate uniform and consistent results. This has always been the case at common law with respect to *mens rea* and it remains true as the interpretation of *mens rea* still appears haphazard and unprincipled despite the presence of section 7 of the Charter. In recent years, the Supreme Court has ruled that the *mens rea* for counselling an offence never committed can be lowered from intent to recklessness,<sup>168</sup> and that the *mens rea* for party liability can be lowered from purpose to intent (oddly defined as mere knowledge).<sup>169</sup> These cases make little sense in terms of statutory interpretation and the Court’s act of interpretation seems to bear no relationship to the modest principles articulated in constitutional cases.

Although there remains some doubt as to the constitutional minimum standard for *actus reus* and *mens rea* elements, if a court concludes that a certain element is an essential element, then the presumption of innocence under section 11(d) of the Charter has a role to play in substantive review. For the most part, the presumption of innocence is used to review the constitutionality of statutory provisions which impose an evidentiary or persuasive burden upon the accused. Certain elements of crime, usually *mens rea* elements, present practical problems of proof for the Crown. To ease the evidentiary and persuasive burdens placed on the Crown, Parliament will often create a statutory presumption allowing a court to presume that the problematic element has been proved by inference from another easily proved fact. Unless there is a strong rational connection

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<sup>167</sup> *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 645 (S.C.C.); *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944, at 965 (S.C.C.).

<sup>168</sup> *R. v. Hamilton*, [2005] S.C.J. No. 48, 198 C.C.C. (3d) 1 (S.C.C.).

<sup>169</sup> *R. v. Hibbert*, [1995] S.C.J. No. 63, [1995] 2 S.C.R. 973 (S.C.C.).

between the proved fact and the presumed fact, there is a good chance that the presumption will be invalidated. If, under the operation of the presumption “it would be possible for a conviction to occur despite the existence of a reasonable doubt”,<sup>170</sup> then the provision cannot stand.

If all the accused is required to do is cast some doubt on the inference from proved to presumed fact (an evidentiary burden), then the presumption will usually be upheld or saved by operation of section 1.<sup>171</sup> It is much more difficult to uphold a persuasive burden under which the accused must disprove on a balance of probabilities the link between proved and presumed facts. Persuasive burdens will usually require justification under section 1.<sup>172</sup> The presumption of innocence operates to ensure that in the ordinary course it will be incumbent upon the Crown to prove all essential elements beyond a reasonable doubt, and this obligation extends to essential elements of a defence and not just the *actus reus* and *mens rea* elements.<sup>173</sup>

The presumption of innocence not only constrains Parliamentary choices to utilize evidentiary presumptions, but also operates to prevent Parliament from eliminating an essential element altogether, or substituting some other element for proof of the essential one. For example, the crime of constructive murder operated by eliminating the essential element of foresight of death and replaced this element with four enumerated acts — *i.e.*, using a firearm, causing harm for facilitating escape, administering a stupefying thing and stopping breath. The Supreme Court recognized that section 11(d) of the Charter had a role to play above and beyond the role played by section 7 in conducting substantive review. Justice Lamer (as he then was) stated:

Finally, the legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be

<sup>170</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 132 (S.C.C.).

<sup>171</sup> See, *e.g.*, *R. v. Slavens*, [1991] B.C.J. No. 692, 64 C.C.C. (3d) 29 (B.C.C.A.); *R. v. Osolin*, [1993] S.C.J. No. 135, 86 C.C.C. (3d) 481 (S.C.C.); *R. v. Martin*, [1992] S.C.J. No. 32, 71 C.C.C. (3d) 572 (S.C.C.); *R. v. Downey*, [1992] S.C.J. No. 48, [1992] 2 S.C.R. 10 (S.C.C.); *R. v. Gosselin*, [1988] O.J. No. 1921, 45 C.C.C. (3d) 568 (Ont. C.A.).

<sup>172</sup> See, *e.g.*, *R. v. Keegstra*, [1990] S.C.J. No. 131, 61 C.C.C. (3d) 1 (S.C.C.); *R. v. Keegstra*, [1996] S.C.J. No. 21, 105 C.C.C. (3d) 19 (S.C.C.); *R. v. Driscoll*, [1987] A.J. No. 716, 38 C.C.C. (3d) 28 (Alta. C.A.); *R. v. Curtis*, [1998] O.J. No. 467, 123 C.C.C. (3d) 178 (Ont. C.A.); *R. v. Laba*, [1994] S.C.J. No. 106, 94 C.C.C. (3d) 385 (S.C.C.); *R. v. Fisher*, [1994] O.J. No. 358, 88 C.C.C. (3d) 103 (Ont. C.A.).

<sup>173</sup> *R. v. Whyte*, [1988] S.C.J. No. 63, 42 C.C.C. (3d) 97 (S.C.C.).

unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(d).<sup>174</sup>

There may be some uncertainty as to whether an element of an offence is an essential element required by the principles of fundamental justice, but if the element is deemed essential by virtue of statutory or constitutional interpretation, then the courts are quite vigilant in ensuring that Parliament does not eliminate the element through clever drafting and evidentiary presumptions. The bottom line is that a “statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other”,<sup>175</sup> and this principle imposes significant constraints on Parliament’s ability to tinker with statutory definitions of crime in order to ease the burden of prosecution.

The extension of the presumption of innocence to safeguard essential elements of a defence foreshadowed the judicial enterprise of creating minimum standards for the invocation of exculpatory defences. Fault is comprised of *mens rea* and the absence of exculpatory defences, and the Supreme Court has recognized that the principles of fundamental justice have relevance for the elucidation of the essential elements of an excuse or justification. For example, in 1991, the Supreme Court concluded that the regulatory offence of misleading advertising was a strict liability offence allowing for a defence of due diligence.<sup>176</sup> However, the regulatory regime required that the accused make a retraction as a precondition for avoiding conviction. The Court invalidated the obligation of retracting as it undercut the defence of due diligence. One could have been duly diligent before the fact of the offence and a retraction after the fact has nothing to do with conduct leading to the offence.

More significantly, in 2001, the Supreme Court held that “moral involuntariness” (as opposed to “moral blamelessness”) was a principle of fundamental justice,<sup>177</sup> and with it created a constitutional minimum standard for all defences in the nature of an excuse. In 1984, the Supreme Court of Canada characterized the common law defence of necessity as

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<sup>174</sup> *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 656 (S.C.C.).

<sup>175</sup> *R. v. Downey*, [1992] S.C.J. No. 48, [1992] 2 S.C.R. 10, at 29 (S.C.C.).

<sup>176</sup> *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, 67 C.C.C. (3d) 193 (S.C.C.).

<sup>177</sup> *R. v. Ruzic*, [2001] S.C.J. No. 25, 153 C.C.C. (3d) 1 (S.C.C.).



an excuse based upon moral involuntariness.<sup>178</sup> An act will be excused when it was “realistically unavoidable” because it was “remorselessly compelled by normal human instincts”.<sup>179</sup> In a physical sense, the act is voluntary but in a moral sense the actor must be excused because in the circumstances of necessity, or any other disabling circumstance, he or she was prevented from exercising real choice. In 2001, the Court elevated this common law principle to a constitutional principle and, as a result, invalidated the statutory defence of duress because the defence set preconditions for operation of the defence which bore no rational relationship with the overriding consideration of assessing moral involuntariness.<sup>180</sup>

Finally, the Supreme Court has also strengthened the operation of statutory defences by requiring that the conditions of the defence are not arbitrary. In *Morgentaler*,<sup>181</sup> substantive review of the abortion offence quickly was transformed into procedural review as the Court recognized that the statutory exemptions for obtaining a lawful abortion were procedurally flawed. In the course of invalidating the obstacle course enacted for securing a lawful abortion, the Court held that the exculpatory conditions of a statutory defence (or exemption) must be conditions which all accused persons can effectively meet:

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. The criminal law is a very special form of governmental regulation, for it seeks to express our society’s collective disapprobation of certain acts or omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

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Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability. But if that structure is so “manifestly unfair, having

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<sup>178</sup> *R. v. Perka*, [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.).

<sup>179</sup> *R. v. Perka*, [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232, at 250, 249 (S.C.C.).

<sup>180</sup> *R. v. Ruzic*, [2001] S.C.J. No. 25, 153 C.C.C. (3d) 1 (S.C.C.).

<sup>181</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] S.C.R. 30 (S.C.C.).

regard to the decisions it is called upon to make, as to violate the principles of fundamental justice”, that structure must be struck down.<sup>182</sup>

The “illusory defence” principle will compel a court to review the effectiveness of a regulatory regime if this regime is designed to exempt people from the ordinary operation of the law. Perhaps the courts are not as concerned with assessing the merits and practical efficacy of a statutory defence because the courts continue to exercise a lawmaking function under section 8(3) of the *Criminal Code*<sup>183</sup> with respect to the development of defences. Nonetheless, the type of review contemplated by the *Morgentaler*<sup>184</sup> illusory defence claim is a significant intrusion into the legislative domain. The question we now turn to is whether substantive review can be expanded beyond the invalidation of ineffective defences to the invalidation of ineffective offences which do not serve the public interest.

## 2. The Wrongfulness of the *Actus Reus* Is a Sacred Cow

The Supreme Court has stated that “[t]he efficacy of a law, or lack thereof, is not relevant to Parliament’s ability to enact it under the division of powers analysis.”<sup>185</sup> It appears that the ineffectiveness of a legislative initiative is also not relevant under the Charter analysis; however, a utilitarian assessment of the effectiveness of a law could be relevant to the balancing for arbitrariness and gross disproportionality under section 7 and the balancing of state versus individual interest under section 1. To date, there has been little discussion of the relevance of efficacy of law primarily because this is the type of claim which takes time to present itself ripe for challenge. It may take decades from the time of enactment to discover through the collection of social science evidence that the legislation is not effectively serving its objective, and for this reason it is not surprising that few challenges have been predicated on an empirical assessment of the operation of the law.

A more fundamental challenge relates to the claim that the law does not serve a valid purpose from the outset. Unlike an efficacy claim, this claim does not track future operation of the law but is predicated on the

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<sup>182</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] S.C.R. 30, at 70, 72 (S.C.C.).

<sup>183</sup> R.S.C. 1985, c. C-46.

<sup>184</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] S.C.R. 30 (S.C.C.).

<sup>185</sup> *Reference re Firearms Act (Canada)*, [2000] S.C.J. No. 31, 144 C.C.C. (3d) 385, at para. 57 (S.C.C.).

assertion that Parliament did not have a sound and compelling reason to designate certain conduct as criminal at the time of enactment. In essence, the claim is being made to challenge the presumed wrongfulness of the legislative designation of the *actus reus* — it is a claim that the *actus reus* does not contain sufficient elements to state a “coherent moral imperative”.<sup>186</sup>

A claim of this nature was brought in relation to the offence of possession of marijuana.<sup>187</sup> In a nutshell, a voluminous evidentiary record was compiled to demonstrate that there is no hard evidence to prove that marijuana use leads to significant harm to the user, to others and to society at large. It was argued that the “harm principle” is a principle of fundamental justice and a criminal offence must be invalidated if it is shown that the impugned conduct does not lead to harm to others (including societal harm). The Supreme Court rejected this argument and the reasons for judgment display a confused and incoherent theoretical vision of the role of criminal law in modern society.

The Supreme Court of Canada’s decision in *Caine*,<sup>188</sup> *Clay*<sup>189</sup> and *Malmo-Levine*<sup>190</sup> has received extensive academic commentary<sup>191</sup> and I will not spend much time dissecting the case and commentary. The problem I wish to discuss extends far beyond the question of the proper political approach to marijuana use, or the relevance and importance of the rejected “harm principle”. In my view, the marijuana cases clearly demonstrate that the Supreme Court views the legislative designation of wrongful conduct to be a sacred cow beyond challenge. Although some room to challenge is left with the arbitrary and overbreadth claims, this case simply gives Parliament *carte blanche* in its criminal law power with absolutely no recognition that any *carte blanche* grant of power will eventually come back to haunt the grantor.

In the context of obscenity and freedom of expression, the Supreme Court noted that the lawmaker is entitled to enact criminal law if there is

<sup>186</sup> George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), at 566-69.

<sup>187</sup> *R. v. Clay*, [2003] S.C.J. No. 80, 179 C.C.C. (3d) 540 (S.C.C.); *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417 (S.C.C.).

<sup>188</sup> *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417 (S.C.C.).

<sup>189</sup> *R. v. Clay*, [2003] S.C.J. No. 80, 179 C.C.C. (3d) 540 (S.C.C.).

<sup>190</sup> *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417 (S.C.C.).

<sup>191</sup> Janine Benedet, “Hierarchies of Harm in Canadian Criminal Law: The Marijuana Trilogy and the Forcible ‘Correction’ of Children” (2004) 24 S.C.L.R. (2d) 217; Paul Burstein, “What’s the Harm in Having a ‘Harm Principle’ Enshrined in Section 7 of the Charter?” (2004) 24 S.C.L.R. (2d) 159; Alan Young, “Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches” (2002) 16 S.C.L.R. (2d) 121.

a “reasoned apprehension of harm”.<sup>192</sup> The standard is low and it is inconceivable that lawmakers could not show a reasonable apprehension of harm as the basis for enacting most criminal offences. Technically, this statement was made in the assessment of whether obscenity prohibitions were a section 1 reasonable limit on freedom of expression, and some review of the merits and objectives of the law will be necessary to determine whether a violation of free expression can be justified. In the marijuana cases, it was argued that this low threshold test of a reasonable apprehension of harm should also be employed as a constitutional barometer of whether the enactment of a law is in accordance with the principles of fundamental justice.

The lower courts accepted that the “harm principle” was a principle of fundamental justice,<sup>193</sup> but on any formulation of this principle, the courts concluded that there was sufficient harm associated with the use of marijuana to satisfy the dictates of the principle. Surprisingly, the Supreme Court of Canada did not resolve the challenge solely on the basis that there did exist reasonable evidence of harm, but took the additional step of rejecting the harm principle for not being a legal principle for which a societal consensus exists. The Court concluded that Parliament is not restricted to the enactment of criminal laws which prevent harm to others, and that the goals and objectives of criminal law are multi-faceted and diverse. In addition, Parliament need not justify its decision to criminalize on the basis of any of these diverse objectives. At its essence, these cases release the state from any meaningful obligation to justify its criminal law power. While this is consistent with the recognized proposition that a prosecutor need not justify his or her decision to prosecute a particular charge,<sup>194</sup> when both propositions are combined you are left with a legislative and executive power which is painfully unaccountable.

The harm principle was rejected as a principle of fundamental justice primarily because the Court believed it was not a recognized legal principle since time immemorial. This cannot mean that a principle can only be a fundamental one if it is found in judicial decisions of

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<sup>192</sup> *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 467 (S.C.C.).

<sup>193</sup> *R. v. Malmø-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417 (S.C.C.); *R. v. Clay*, [2003] S.C.J. No. 80, 179 C.C.C. (3d) 540 (S.C.C.); *R. v. Murdock*, [2003] O.J. No. 2470, 176 C.C.C. (3d) 232 (Ont. C.A.).

<sup>194</sup> *R. v. Ng*, [2003] A.J. No. 489, 173 C.C.C. (3d) 349 (Alta. C.A.); *R. v. Durette*, [1992] O.J. No. 1044, 72 C.C.C. (3d) 421 (Ont. C.A.), revd on other grounds [1994] S.C.J. No. 22, [1994] 1 S.C.R. 469 (S.C.C.).

ancient vintage. *Mens rea* has become constitutionalized yet as recently as 1957, the Supreme Court of Canada struggled with the question of whether the offence of possession of a narcotic required proof that the accused knew he or she was in possession of a drug.<sup>195</sup> *Mens rea* evolved slowly over centuries and absolute liability had a role to play for many centuries.<sup>196</sup> In addition, restricting the principles to those expressed in judicial pronouncements is myopic and inconsistent with the requirement that the principle be supported by a societal consensus. Judicial decisions are not a proxy for societal consensus and judicial decisions should be animated by the entire legal topography, including scholarship, government reports and empirical studies.

Political theory has a role to play in constitutional adjudication. As Fletcher has noted, “the political theory we choose will invariably shape our answers to innumerable questions about what should be punished, when nominal violations are justified and when wrongdoing should be excused”.<sup>197</sup> It is puzzling that the Supreme Court did not acknowledge the significance of J.S. Mill, Bentham and Beccaria in assessing whether the harm principle was fundamental. Ultimately, the political theories supporting constraints and limits on the enactment of criminal law became reflected in contemporary scholarship, law commission reports and government reports.<sup>198</sup> This movement from theory to practice provides the Court with the type of evidence needed to show societal consensus. Ultimately, the Court ignored the fact that

apart from the libertarians and communists at the extremes, the vast majority of us are unreflective liberals. We are suspicious of common law crimes and accept at face value Mill’s principle that the state should punish only to prevent harm, and we take these two positions to be an adequate theoretical foundation for our work.<sup>199</sup>

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<sup>195</sup> *R. v. Beaver*, [1957] S.C.J. No. 32, 118 C.C.C. 129 (S.C.C.).

<sup>196</sup> Stanislaw Frankowski, “Mens Rea and Punishment in England: In Search of Interdependence of the Two Basic Components of Criminal Liability (A Historical Perspective)” (1986) 63 U. Det. L. Rev. 393.

<sup>197</sup> George P. Fletcher, “The Nature and Function of Criminal Theory” (2000) 88 Cal. L. Rev. 687, at 700.

<sup>198</sup> Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: The Commission, 1976); Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969); Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Gov’t of Canada, 1982).

<sup>199</sup> George P. Fletcher, “The Nature and Function of Criminal Theory” (2000) 88 Cal. L. Rev. 687, at 698.

Without engaging the nuances of political theory, it is hard to argue against the political ascendancy of liberalism, however conceived, in the modern era. A prominent version of liberal political theory provides clear support for limiting the state's power of criminalization:

Liberalism is not one political doctrine but a family of doctrines — a kind of “faith” with many rival denominations. We can distinguish two prominent types of liberalism in terms of how they conceive of liberty: the first conceives of it in Lockean terms, the second conceives of it in more Rousseauian terms. The Lockean focus on the danger to liberty coming from the power of the state, and thus advocate minimal government and certain liberties (or rights) of subjects (such as habeas corpus and the right to bail); such Lockean include Montesquieu, Constant, Humboldt, and many American revolutionaries. Philosophers such as J.S. Mill, H.L.A. Hart and Joel Feinberg also work within this tradition when they insist that a liberal society can, by and large, only admit laws sanctioned by the “harm principle”, which require that the state can only interfere with behavior that either harms, or gives offence, to people other than the person interfered with.<sup>200</sup>

I suggest that this notion of liberalism is so deeply rooted we all assume that lawmakers will only activate the criminal law to prevent harm to others and society at large, though we often disagree on the definition of harm and the proof of its existence. Although the Supreme Court appears to reject this basic component of liberalism by rejecting the harm principle as a principle of fundamental justice, it then embraces another component of liberalism by rejecting “legal moralism” as a basis for enacting criminal law. Joel Feinberg describes this notion as follows:

The liberal does *not* urge that the legislators of criminal law be unconcerned with “a man's morals”. Indeed, everything about a person that the criminal law should be concerned with is included in this morals. But not everything in a person's morals should be the concern of the law, only his disposition to violate the rights of other parties. He may be morally blameworthy for his beliefs and desires, his taboo infractions, his tastes, his harmless exploitations, and other free-floating evils, but these moral judgments are not the business of the criminal law.<sup>201</sup>

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<sup>200</sup> Jean Hampton, “Retribution and the Liberal State” (1994) 5 J. Contemp. Legal Issues 117, at 125.

<sup>201</sup> As quoted in Jean Hampton, “Retribution and the Liberal State” (1994) 5 J. Contemp. Legal Issues 117, at 138.

Similarly, the Court notes that “the objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*.”<sup>202</sup>

It appears that the Court does not have a coherent theoretical vision of the role of criminal law, but ultimately the Court is a political institution and an accusation that the Court lacks a coherent philosophical framework is not that devastating. The accusation becomes more serious when there is an incoherence between what the Court says and what the Court does. Concluding that the harm principle is not a legal principle makes little sense when the harm principle is a fundamental principle of statutory construction. Under the guise of strict construction, the Supreme Court has been inspired by the harm principle to effect significant changes in the scope of criminal offences.<sup>203</sup> The Court has said that it must impose limitations on the reach of the criminal law “in order to avoid a weakening of the authority of the criminal law by its application to trifles”.<sup>204</sup> In addition, the doctrine of “*de minimis*”, which is simply a restatement of the harm principle, has received some recognition by the Court.<sup>205</sup>

The most telling example of internal incoherence within the Court’s theoretical framework is to contrast its rejection of the harm principle as a legal principle in 2003 with its reconstruction of the concept of indecency in 2005. In two companion cases, *Kouri* and *Labaye*,<sup>206</sup> the Supreme Court was asked to determine whether or not “sex clubs” in Montreal constituted bawdy houses for the purpose of indecency. Prior

<sup>202</sup> *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 498 (S.C.C.).

<sup>203</sup> See discussion of *R. v. Labaye*, [2005] S.C.J. No. 83, 203 C.C.C. (3d) 170 (S.C.C.) and *R. v. Kouri*, [2005] S.C.J. No. 82, 203 C.C.C. (3d) 217 (S.C.C.) cases for an example of a significant alteration of an offence to achieve consistency with the harm principle, and see *R. v. Skoke-Graham*, [1985] S.C.J. No. 6, [1985] S.C.R. 106 (S.C.C.) for an example where the Court uses strict construction to change the elements of an offence to an earlier and narrower version of the offence even though it was clear from the act of legislative amendment that Parliament wished to expand the scope of the offence. Two dramatic examples in which statutory interpretation has resulted in a significant alteration of the elements of the crime on the basis of constitutional principles are: *R. v. Sharpe*, [2001] S.C.J. No. 3, 150 C.C.C. (3d) 321 (S.C.C.) (child pornography) and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 180 C.C.C. (3d) 353 (S.C.C.) (correction of child by force).

<sup>204</sup> *R. v. Skoke-Graham*, [1985] S.C.J. No. 6, [1985] 1 S.C.R. 106, at 134 (S.C.C.).

<sup>205</sup> *R. v. Boulanger*, [2006] S.C.J. No. 32, 210 C.C.C. (3d) 1 (S.C.C.); *Canada Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 180 C.C.C. (3d) 353 (S.C.C.).

<sup>206</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, 203 C.C.C. (3d) 170 (S.C.C.) and *R. v. Kouri*, [2005] S.C.J. No. 82, 203 C.C.C. (3d) 217 (S.C.C.).

to this sex club case, the Supreme Court had recently grappled with the concept of indecency in clubs and public spaces on three other occasions, and the results were not entirely consistent or clear.<sup>207</sup> In *Kouri and Labaye*, the Court decided to change the rules of engagement and it rejected the community standards test for indecency it had applied in the previous cases. The Court formulated a new test inspired and animated by the harm principle:

The first step is to generically describe the type of harm targeted by the concept of indecent conduct under the *Criminal Code*. In *Butler* at p. 485 and *Little Sisters* at para. 59, this was described as “conduct which society formally recognizes as incompatible with its proper functioning”.

Two general requirements emerge from this description of the harm required for criminal indecency. First, the words “formally recognize” suggest that the harm must be grounded in norms which our society has recognized in its Constitution or similar fundamental laws. This means that the inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its laws and institutions, has recognized as essential to its proper functioning. Second, the harm must be serious in degree. It must not only detract from proper societal functioning but must be incompatible with it.

. . . . .

Three types of harm have thus far emerged from the jurisprudence as being capable of supporting a finding of indecency: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct.<sup>208</sup>

(emphasis in original omitted)

The Court imposed a heavy, if not impossible, burden of proof upon the trial prosecutor. Above and beyond the *actus reus* elements needed to prove the crime of keeping a bawdy house, the Crown is now required to prove the additional element of showing that the activities taking place in the house were harmful to the participants, other people or society at

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<sup>207</sup> *R. v. Tremblay*, [1993] S.C.J. No. 85, 84 C.C.C. (3d) 97 (S.C.C.); *R. v. Mara*, [1997] S.C.J. No. 29, 115 C.C.C. (3d) 539 (S.C.C.); *R. v. Pelletier*, [1999] S.C.J. No. 72, 142 C.C.C. (3d) 288 (S.C.C.).

<sup>208</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, 203 C.C.C. (3d) 170, at paras. 28-29, 36 (S.C.C.).



large. Ironically, the manner in which a prosecutor must prove indecency is not much different than the way in which Parliament would be required to prove the merits of enacting the offence if called upon to do so in an expanded form of substantive review of the *actus reus*. To prove that a bawdy house was kept for indecent purposes, the Crown must now present evidence akin to legislative facts:

Incompatibility with the proper functioning of society is more than a test of tolerance. The question is not what individuals or the community think about the conduct, but whether permitting it engages a harm that threatens the basic functioning of our society. This ensures in part that the harm be related to a formally recognized value, at step one. But beyond this it must be clear beyond a reasonable doubt that the conduct, not only by its nature but also in degree, rises to the level of threatening the proper functioning of our society.

Whether it does so must be determined by reference to the values engaged by the particular kind of harm at stake. If the harm is based on the threat to autonomy and liberty arising from unwanted confrontation by a particular kind of sexual conduct, for example, the Crown must establish a real risk that the way people live will be significantly and adversely affected by the conduct. The number of people unwillingly exposed to the conduct and the circumstances in which they are exposed to it are critical under this head of harm. If the only people involved in or observing the conduct were willing participants, indecency on the basis of this harm will not be made out.

If the harm is based on predisposing others to anti-social behaviour, a real risk that the conduct will have this effect must be proved. Vague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behaviour will not suffice. The causal link between images of sexuality and anti-social behaviour cannot be assumed. Attitudes in themselves are not crimes, however deviant they may be or disgusting they may appear. What is required is proof of links, first between the sexual conduct at issue and the formation of negative attitudes, and second between those attitudes and real risk of anti-social behaviour.

Similarly, if the harm is based on physical or psychological injury to participants, it must again be shown that the harm has occurred or that there is a real risk that this will occur. Witnesses may testify as to actual harm. Expert witnesses may give evidence on the risks of potential harm. In considering psychological harm, care must be taken to avoid substituting disgust for the conduct involved, for proof of harm to the participants. In the case of vulnerable participants, it may be easier to

infer psychological harm than in cases where participants operate on an equal and autonomous basis.

These are matters that can and should be established by evidence, as a general rule.<sup>209</sup>

Although the Court applies the “harm principle” on a routine basis, it may have rejected the characterization of the principle as fundamental in order to keep open the possibility that criminal law can serve paternalistic purposes. In the marijuana cases, the Court was clear in stating that “we do not accept the proposition that there is a general prohibition against the criminalization of harm to self.”<sup>210</sup> The only examples the Court can point to of paternalistic criminalization are regulatory laws relating to “seatbelts and motorcycle helmets”,<sup>211</sup> and these examples clearly do not prove that as a society we believe we can imprison people for their own good. Even though the Court has had occasion to say that “all criminal law is ‘paternalistic’ to some degree”,<sup>212</sup> it is unclear what this means and from where this principle is derived.

In a constitutional challenge to the anal intercourse prohibition on the basis of age discrimination, the state claimed it had a compelling interest in criminalizing anal intercourse under the age of 18 to protect the participants from a variety of medical harms.<sup>213</sup> In dismissing this claim, *Abella J.A.* (as she then was) aptly describes why paternalism has no meaningful role to play in criminal law:

Health risks ought to be dealt with by the health care system . . .

. . . . .

When governments define the ambits of morality, as they do when they enunciate laws, they are obliged to do so in accordance with constitutional guarantees, not with unwarranted assumptions. Sending young people to jail for their own protection when they exercise sexual choices not exercised by the majority, represents, in my view, even if benignly intended, precisely such unwarranted assumptions . . .

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<sup>209</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, 203 C.C.C. (3d) 170, at paras. 56-60 (S.C.C.).

<sup>210</sup> *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at para. 124 (S.C.C.).

<sup>211</sup> *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at para. 124 (S.C.C.).

<sup>212</sup> *R. v. Jobidon*, [1991] S.C.J. No. 65, [1991] 2 S.C.R. 714, at 765 (S.C.C.).

<sup>213</sup> *R. v. C. (M.)*, [1995] O.J. No. 1432, 98 C.C.C. (3d) 481 (Ont. C.A.).

There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising serial preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the draconian criminal means chosen to achieve them.<sup>214</sup>

The Supreme Court of Canada's endorsement of paternalism in criminal law is the most frightening aspect of the Court's incoherent vision of criminal law. It is not simply bad public policy to incarcerate an individual for his or her own protection, but paternalism can lead to a political nightmare:

Paternalism at its best entails well-meaning and justified interference with autonomous choice. But if in practice things do not work out for the best — if, for example, one's leaders are incompetent, corrupt, stupid, or evil — paternalism is the royal road to totalitarianism, since it invites government to substitute for its citizens' expressed preferences that which the state judges they "really" (objectively) want or need. This is a recipe for tyranny.<sup>215</sup>

I do not think that the Supreme Court fully considered the implications of accepting paternalism as a proper goal of criminal law. The Court's endorsement of paternalism just seemed to flow naturally from its replacement of the impugned goal of "legal moralism" with a "core values" approach to criminalization. Criminal law may not be used to dictate personal moral choices but "it is open for Parliament to legislate 'on the basis of some fundamental conception of *morality* for the purposes of safeguarding the values which are integral to a free and democratic society'" (emphasis in original).<sup>216</sup> In the absence of demonstrable harm to others, the criminal law power can extend to "fundamental social and ethical considerations" and criminal prohibitions can be enacted to protect societal core values. Of course, as with the debate over harm, there will be different understandings of "core values", but even in a "polycentric"<sup>217</sup> moral universe, the notion of "core" should mean that these values will

<sup>214</sup> *R. v. C. (M.)*, [1995] O.J. No. 1432, at paras. 31, 34, 35, 98 C.C.C. (3d) 481 (Ont. C.A.).

<sup>215</sup> Paul Roberts, "Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform" (2001) 5 Buff. Crim. L. Rev. 173, at 228.

<sup>216</sup> *R. v. Malmö-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at para. 116 (S.C.C.).

<sup>217</sup> Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968), at 265.

be few in number. The Supreme Court's reformulation and narrowing of legal moralism as core value legislation provides some rational support for its puzzling endorsement of paternalism. Perhaps the Court was simply stating that paternalism can be invoked, and the consent of the participants overridden, if the end goal is the protection and preservation of core values.

In the end it is difficult to ascertain whether the Supreme Court of Canada has a clear and coherent vision of the objectives of contemporary criminal law. In the midst of the confusion, one point emerges with clarity. Substantive review does not extend to questioning the wrongfulness of the *actus reus*. Even when the Court of Appeal of Ontario placed the harm principle on the short list of principles of fundamental justice, it was quick to point out that the principle "does not give the judiciary licence to review the wisdom of legislation".<sup>218</sup> Parliament is the sole judge of what is wrongful and this cannot be challenged directly by the judiciary. Parliamentary supremacy is pushed aside to review all the elements of an offence save and except for the presumed wrongfulness of the act or omission. This stubborn refusal to extend substantive review to this last element is based upon the conventional wisdom that reviewing the merits of law is beyond the competence and legitimacy of the judiciary. Unfortunately, reliance upon this conventional wisdom in the context of criminal law leads to the denial of another conventional wisdom relating to the transformative legal significance of consent and choice.

### 3. Unifying Principles and the Legal Significance of Consent

As mentioned at the outset, there is no single and simple unifying theory to explain the operation of criminal law, and one cannot really expect that the courts will have developed a consistent and coherent theoretical framework for understanding the minimum content of criminal law. The harm principle may be attractive to many and pervasive in modern thought, but the Supreme Court's movement away from this simple proposition may reflect the fact that there are so many theoretical formulations of the concept of harm<sup>219</sup> that the Court was concerned about the future implications of enshrining a principle filled with ambiguity.

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<sup>218</sup> *R. v. Murdock*, [2003] O.J. No. 2470, 176 C.C.C. (3d) 232, at para. 31 (Ont. C.A.).

<sup>219</sup> For a sampling of the debate, see, Albin Eser, "The Principle of 'Harm' in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests" (1966) 4 Duq. U. L. Rev. 345; R.A. Duff, "Harms and Wrongs" (2001) 5 Buff. Crim. L. Rev. 13; Hamish Stewart, "Harms, Wrongs, and Set-Backs in Feinberg's *Moral Limits of the Criminal Law*" (2001) 5 Buff.

It may have been a mistake to advance the harm principle as the governing principle for substantive review as the shifting sands of political theory may not present a coherent foundation for judicial intrusions into the political realm. It may have been more prudent to rely upon a narrower principle more recognizable in legal discourse. The marijuana possession offence is just one in a series of offences characteristically classified as “consensual crime” — crimes designed to “ban through criminal legislation the exchange between willing partners of strongly desired goods or services”.<sup>220</sup> The common denominator of all consensual crimes is the unique fact that the participants do not see themselves as victims and through their consent express a desire to choose harm to themselves (and presumably not to cause harm to others or society — an issue that still is hotly debated). In light of the significance of consent in structuring many, if not most, legal arrangements, the focus of the fundamental justice inquiry should have revolved around the question of whether there is a “fundamental social or ethical consideration” to justify a legal prohibition on eliminating the absence of consent from the definition of the *actus reus* of a given crime.

It has been said that consent is a “moral transformative” in that it “derives its normative power from the fact that it alters the obligations and permissions that collectively determine the rightness of others’ actions”.<sup>221</sup> There is no doubt that the state may successfully argue that consent can be overridden in a specific context in order to protect “core values” based upon “fundamental social or ethical considerations”, but the fact remains that core value limitations on the exercise of consent should be fairly limited in a pluralistic society. With the exception of these few limitations on consent, the starting point for analysis should be the recognition that exercising choice is an inherent good because “to have the ability to create and dispel rights and duties is what it means to be an autonomous moral agent”.<sup>222</sup> Therefore consent should

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Crim. L. Rev. 47; John Kleinig, “Crime and the Concept of Harm” (1978) 15 American Philosophical Q. 27; Heidi M. Hurd, “What in the World Is Wrong?” (1994) 5 J. Contemp. Legal Issues 157.

<sup>220</sup> E. Schur & H. Bedau, *Victimless Crimes: Two Sides of a Controversy* (Englewood Cliffs, NJ: Prentice-Hall, 1968), at 6. The Schur and Bedau debate remains the most thorough and thoughtful analysis of the problem of consensual crimes; however, for a brief introduction to the literature continuing the debate over criminal law and consensual crimes, see P. McWilliams, *Ain’t Nobody’s Business If You Do: The Absurdity of Consensual Crimes in a Free Society* (Los Angeles, CA: Prelude Press, 1993); R. Meier & G. Geis, *Victimless Crime? Prostitution, Drugs, Homosexuality, Abortion* (Los Angeles, CA: Roxbury Publishing, 1997); C. Carr, “Between Virtue and Vice: The Legal Enforcement of Morals” (2004) 14 Kan. J.L. & Pub. Pol’y 1.

<sup>221</sup> Heidi M. Hurd, “The Moral Magic of Consent” (1996) 2 Legal Theory 121, at 124.

<sup>222</sup> Heidi M. Hurd, “The Moral Magic of Consent” (1996) 2 Legal Theory 121, at 124.

be presumptively effective to shield an actor from criminal law and the burden should be on the state to rebut the presumption.

H.L.A. Hart analyzed the common features of ascriptions of liability in civil and criminal law and concluded that the conditions of liability are structured to maximize the effectiveness of choice:

It is at this point that I would stress the analogy between mental conditions that excuse from criminal responsibility and the mental conditions that are regarded as invalidating civil transactions such as wills, gifts, contracts, marriages and the like. These institutions provide individuals with two inestimable advantages in relation to those areas of conduct they cover. These are (1) the advantage to the individual in determining by his choice what the future shall be and (2) the advantage of being able to predict what the future will be. . . . In brief, the function of these institutions of private law is to render effective the individual's preferences in certain areas. . . . If with this in mind we turn back to criminal law and its excusing conditions, we can regard their function as a mechanism for similarly maximizing within the framework of criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict the future.<sup>223</sup>

The political value of actualizing choice found expression in a legal principle formulated 1,000 years earlier than the principle *actus not facit reus nisi mens sit rea*. Sixth-century Roman law recognized the maxim *volenti non fit injuria* (no wrong is done to one who consents). This principle was incorporated into British law in the 14th century and by the 17th century it became a maxim of British private law.<sup>224</sup> Originally, the maxim had application in both civil and criminal law, but “changes in the power of an individual to consent to personal harm came in the seventeenth century” as a “natural consequence of the monopolization of the system of punishment by the state”.<sup>225</sup> The maxim has never been seriously challenged but its significance in criminal law has been tempered by the growth of exceptions to the general rule that consent governs liability.

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<sup>223</sup> H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968), at 44-46.

<sup>224</sup> Vera Bergelson, “The Right to Be Hurt: Testing the Boundaries of Consent” (2007) 75 Geo. Wash. L. Rev. 165, at 171.

<sup>225</sup> Vera Bergelson, “The Right to Be Hurt: Testing the Boundaries of Consent” (2007) 75 Geo. Wash. L. Rev. 165, at 172.

In the realm of criminal procedure the Supreme Court of Canada has recognized that the “scope of the criminal procedure power under section 91(27) [of the *Constitution Act*, 1867<sup>226</sup>] needs to be re-evaluated in light of the evolution in our constitutional culture since the entrenchment of the *Charter*”.<sup>227</sup> One critical part of this constitutional culture is the recognition that the law must facilitate an informed choice by the accused as to whether procedural rights can be waived in certain circumstances.<sup>228</sup> Once consent or waiver is present, the courts will allow this personal decision to override virtually all the constitutional obligations imposed upon the state by the Charter. For example, with respect to search and seizure, “the giving of consent has been treated as a private transaction between individuals, thus rendering irrelevant such public law issues as the sufficiency of the peace officer’s grounds for acting and the adherence to procedural prerequisites to intrusion.”<sup>229</sup> In the area of self-incrimination, the Court has unequivocally stated that “the single most important organizing principle in criminal law is the right of an accused person not to be forced into assisting in his or her own prosecution.”<sup>230</sup> The Court has stated that this “case to meet” principle is a “unifying thought” in criminal procedure, and the “central assumption of this theory is that criminal suspects should, as a matter of principle, have the freedom to choose whether to provide self-incriminating evidence to the state”.<sup>231</sup>

In the fair distribution of rights and obligations in the criminal process, autonomous choice is a governing and dispositive legal event. Many legal structures can be explained and understood as reflecting a “protected choices” theory of rights:

This theory, known as the choice, will or power theory, promotes the idea “of the right holder having the freedom to choose among a set of options, and of this freedom being protected by a set of duties imposed on others”. Modern rights theory sees a right as a complex of Hohfeldian positions that contains a core element and a protective perimeter of

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<sup>226</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>227</sup> *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257, at para. 90 (S.C.C.).

<sup>228</sup> Alan Young, “‘Not Waving But Drowning’: A Look at Waiver and Collective Constitutional Rights in the Criminal Process” (1989) 53 Sask. L. Rev. 47; Steven Penney, “What’s Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part I: Justification for Rules Preventing Self-Incrimination” (2003) 48 Crim. L.Q. 249.

<sup>229</sup> Law Reform Commission of Canada, *Police Powers: Search and Seizure in Criminal Law Enforcement (Working Paper 30)* (Ottawa: Law Reform Commission of Canada, 1983), at 52.

<sup>230</sup> *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451, at 469 (S.C.C.).

<sup>231</sup> Steven Penney, “What’s Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era” (2003) 48 Crim. L.Q. 249, at 250.

associated elements. Regardless of whether we are dealing with a Hohfeldian claim right, power or immunity, the “unifying factor” is that “the law specifically recognizes the choice of an individual either negatively by not impeding or obstructing it (liberty and immunity) or affirmatively by giving legal effort to it (claim and power)”.<sup>232</sup>

There is no need to look beyond the substantive criminal law itself to find support for the proposition that the deep structure of law is designed to foster autonomous choice. Criminal liability is based upon the “culpability of choice”<sup>233</sup> as manifested by a subjective *mens rea*. The endless and divisive debate over the proper role of negligence in the ascription of criminal liability arises from the fact that negligent acts do not reflect choice and are based upon a “culpability of inadvertence”.<sup>234</sup> On countless occasions, the Supreme Court of Canada has spoken of the “critical importance of autonomy in the attribution of criminal liability”:

The treatment of criminal offenders as rational, autonomous and choosing agents is a *fundamental, organizing principle* of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to ground a conviction. . . . Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society. . . . Criminal liability also depends on the capacity to choose — the ability to reason right from wrong. . . . this assumption of the rationality and autonomy of human beings forms part of the *essential premises* of Canadian criminal law.<sup>235</sup>

(emphasis added)

Choice is a “fundamental” and “essential” principle with respect to the *mens rea*, but for some reason it loses its potency when applied to the wrongful aspects of the *actus reus*. Therefore, in the world of constitutional adjudication, Parliament may be called upon to justify a

<sup>232</sup> Alan Young, “‘Not Waving But Drowning’: A Look at Waiver and Collective Constitutional Rights in the Criminal Process” (1989) 53 Sask. L. Rev. 47, at 94.

<sup>233</sup> G. Fletcher, “The Theory of Criminal Negligence: A Comparative Analysis” (1971) 119 U. Pa. L. Rev. 401; M. Bayles, “Character, Purpose and Criminal Responsibility” (1982) 1 Law & Phil. 5; M. Moore, “Choice, Character and Excuse” in E. Paul, F. Miller & J. Paul, eds., *Crime, Culpability and Remedy* (Oxford: Blackwell, 1990); P. Arenella, “Character, Choice and Moral Agency”, in E. Paul, F. Miller & J. Paul, eds., *Crime, Culpability and Remedy* (Oxford: Blackwell, 1990); H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968).

<sup>234</sup> George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), at 262-64.

<sup>235</sup> *R. v. Ruzic*, [2001] S.C.J. No. 25, 153 C.C.C. (3d) 1, at para. 45 (S.C.C.).



departure from the requirement that the offence contain a *mens rea* which reflects choosing harm to others, but it will never be required to justify the creation of a criminal *actus reus* which eliminates the legal significance of the consent of all the parties to the transaction. Not only are the courts ignoring the fundamental role consent plays in structuring legal arrangements, but they are also ignoring the fact that there may be a societal consensus recognizing the fundamental primacy of consent:

[I]t is well documented that the public's view of consensual harm differs dramatically from the one promoted by law. A famous study of the American jury has shown that from the jury's perspective "insofar as the victim is disqualified from complaining, there is no cause for intervention by the state and its criminal law".<sup>236</sup>

The wide gap between the public's perspective and the perspective of lawmakers was clearly demonstrated by the legacy of the *Morgentaler*<sup>237</sup> abortion cases — despite the formal or technical violation of the elements of the offence, juries consistently nullified the law by acquitting Dr. Morgentaler.

The reluctance of the courts to embrace the absence of consent as an essential element of the *actus reus* seems to be based upon the courts' fear that the apparent consent to choose harm may in actuality be a coerced choice. Looming behind the Supreme Court's refusal to recognize Sue Rodriguez' right to assisted suicide was the fear that unscrupulous doctors and nurses will exploit the vulnerable and coercively persuade people to commit suicide. Similarly, in the sex club cases, the Supreme Court acknowledged that

[t]he consent of the participant will generally be significant in considering whether . . . harm is established. However, consent may be more apparent than real. Courts must always be on the lookout for the reality of victimization. . . . In the case of vulnerable participants, it may be easier to infer psychological harm than in cases where participants operate on an equal and autonomous basis.<sup>238</sup>

It seems a bit disingenuous for courts to allow the consent of the participants to be overridden by legislative will simply because of a fear that the courts will not recognize a coerced choice. The determination of

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<sup>236</sup> Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent" (2007) 75 Geo. Wash. L. Rev. 165, at 196.

<sup>237</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] S.C.R. 30 (S.C.C.).

<sup>238</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, 203 C.C.C. (3d) 170, at paras. 49, 59 (S.C.C.).

whether choices are real or coerced is part of the courts' daily business. Every time a confession is admitted into evidence, the courts have assessed the validity of consent, and in assault and sexual assault trials, the courts are often required to undertake an assessment of the reality of consent. The Supreme Court of Canada may have struggled in its attempt to illuminate the pre-conditions for a valid consent to sexual activity, but it has developed a coherent and comprehensive jurisprudence for distinguishing consent from coercion.<sup>239</sup>

In a small handful of cases,<sup>240</sup> the accused has argued for constitutional invalidation on the basis that a criminal offence does not require proof of an absence of consent or "because no defence of consent is available".<sup>241</sup> The courts have summarily dismissed the claim that the "absence of consent" is a principle of fundamental justice. In dismissing the claim in the context of challenge to section 155 (incest among adults), the Nova Scotia Court of Appeal had little to say about the fundamental nature of consent in structuring legal relationships, but it was quick to point out that "[o]ne of the difficulties with this argument . . . is that the consent given in an incestuous relationship may be mere acquiescence."<sup>242</sup>

It is not surprising that courts give little weight to the express preferences and choices of accused persons, in light of the Supreme Court of Canada's troubling 1991 decision in *Jobidon*.<sup>243</sup> Perhaps one can understand why a court would not want to second-guess a legislative decision to override consent, but in *Jobidon*, the Court actually read out the requirement of an "absence of consent" from the legislative definition of assault in cases where the accused intends and causes bodily harm. Relying upon a misguided invocation of the notion that "[a]ll criminal law is 'paternalistic' to some degree",<sup>244</sup> the Court second-guessed Parliament's decision that people have the right to engage in consensual physical fights. The Court recognized that it would be imprudent to read out the significance of consent in all cases because of the implications

<sup>239</sup> *R. v. Ewanchuk*, [1999] S.C.J. No. 10, 131 C.C.C. (3d) 481 (S.C.C.); *R. v. Cuerrier*, [1998] S.C.J. No. 64, 127 C.C.C. (3d) 1 (S.C.C.).

<sup>240</sup> *R. v. Hann*, [1992] N.J. No. 203, 75 C.C.C. (3d) 355 (Nfld. C.A.); *R. v. Marcotte* (1992), 73 C.C.C. (3d) 570 (Que. C.A.); *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.); *R. v. F. (C.J.)*, [1996] N.S.J. No. 79, 105 C.C.C. (3d) 435 (N.S.C.A.); *R. v. S. (M.)*, [1996] B.C.J. No. 2302, 111 C.C.C. (3d) 467 (B.C.C.A.).

<sup>241</sup> *R. v. F. (C.J.)*, [1996] N.S.J. No. 79, at para. 26, 105 C.C.C. (3d) 435 (N.S.C.A.).

<sup>242</sup> *R. v. F. (C.J.)*, [1996] N.S.J. No. 79, at para. 30, 105 C.C.C. (3d) 435 (N.S.C.A.).

<sup>243</sup> *R. v. Jobidon*, [1991] S.C.J. No. 65, [1991] 2 S.C.R. 714 (S.C.C.).

<sup>244</sup> *R. v. Jobidon*, [1991] S.C.J. No. 65, [1991] 2 S.C.R. 714, at 765 (S.C.C.).

for “rough sporting activities” and “appropriate surgical interventions”.<sup>245</sup> Accordingly, the Court ruled that the “absence of consent” will remain an essential element of the offence of assault when “the activities have a positive social value and the intent of the actors is to produce a social benefit . . .”.<sup>246</sup>

It is difficult to reconcile the Court’s aversion to reviewing the merits of law as part of substantive review with its willingness to reformulate the elements of the *actus reus* in accordance with its views on “social value”. More significantly, basing a decision to criminalize upon considerations of “social value” comes very close to the type of “legal moralism” the Court condemned as having no role to play in a modern, pluralistic society. Recognizing the fundamental primacy of consent, and only allowing this consent to be overridden when the state has a demonstrable compelling interest, is the most effective way to ensure that modern criminal law does not slide back to legal moralism. Overriding consent, especially for activities conducted in private, will always come perilously close to the impugned criminal law objective of “maintaining conventional standards of propriety”.<sup>247</sup>

. . . individual choices that are not congruent with dominant social perceptions and preferences are routinely denied recognition by the criminal justice system. When collective preference or interest, and individual preference or choice are in conflict, the criminal law doctrines of Anglo-American legal systems are used to deny recognition and enforcement to individual preference. . . . Individual choices that do not coincide with the dominant interpretation of social values (and may also conflict with the interests of one of the more powerful social groups) can be ignored or disregarded with impunity. . . . Development in the law of consent to recognize and protect individual preference, even when that preference conflicts with societal convenience, would enhance the autonomy, dignity and quality of life of many people, especially members of disempowered social groups whose choices most need legal protection.<sup>248</sup>

The reluctance to recognize the absence of consent as a fundamental component of a constitutionally valid *actus reus* is not simply related to the problem of ascertaining true consent. There is also a concern that

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<sup>245</sup> *R. v. Jobidon*, [1991] S.C.J. No. 65, [1991] 2 S.C.R. 714, at 766-67 (S.C.C.).

<sup>246</sup> *R. v. Jobidon*, [1991] S.C.J. No. 65, [1991] 2 S.C.R. 714, at 767 (S.C.C.).

<sup>247</sup> *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 498 (S.C.C.).

<sup>248</sup> Lucinda Vandervort, “Consent and the Criminal Law” (1990) 28 Osgoode Hall L. J. 485, at 489, 494.

elevating the absence of consent to a constitutionally required element will open a Pandora's box of evil. Extreme examples like consensual slavery and consensual cannibalism are often raised to counter the argument that consent is dispositive of liability. In fact, the Supreme Court of Canada in the marijuana challenges rejected the harm principle by invoking cannibalism as an example of an offence which is not predicated on this principle. Extreme examples of consensual harm can always be found but the exceptions should not govern the rule. In advocating the recognition of the primacy of consent, I would still have no difficulty convicting Armin Meiwes, who advertised on a chat room his interest in hiring someone for slaughter and a cannibalistic feast.<sup>249</sup> It defies belief that the victim would accept this invitation, but apparently, before the ultimate slaughter Meiwes had cut off and fried a part of the victim's body for the two of them to eat together. Despite the apparently genuine and perverse consent, it would be difficult to successfully argue that consent ought to operate in these extraordinary circumstances to shield the cannibal from murder charges.

Extreme examples do not undercut the primacy of consent but they do demonstrate why the Supreme Court of Canada has endorsed a "core values" approach to criminalization. There is no need to resort to paternalism or legal moralism to condemn the actions of Meiwes as the state can raise core value objections to justify overriding a consent for mutilation, slaughter, cannibalism and murder:

Meir Dan-Cohen, for example, argues that the reason society should outlaw slavery, even in the hypothetical case of voluntary "happy slaves" is because slavery represents a "paradigm of injustice" which "by its very terms denies people equal worth and thus treats them with disrespect". Similarly, R.A. Duff finds voluntary gladiatorial contests unacceptable because of "dehumanization or degradation perpetrated by the gladiators on each other, and by the spectators on the gladiators and on themselves". I agree with both Duff and Dan-Cohen that certain degrading behavior may be harmful, even though it does not violate the victim's rights. Society may be concerned about human dignity even in cases in which a prohibitory norm does not originate in a rights violation, such as experiments involving fresh cadavers as "crash dummies" or pieces of art made with body parts of dead fetuses.<sup>250</sup>

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<sup>249</sup> Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent" (2007) 75 *Geo. Wash. L. Rev.* 165.

<sup>250</sup> Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent" (2007) 75 *Geo. Wash. L. Rev.* 165, at 216.

Despite the fact that core value justifications for criminal law will be few and far between, the Supreme Court's recognition of this modern version of legal moralism should encourage courts in the future to recognize the absence of consent as a fundamental principle of justice. The fear of the cannibal and other deviants who push the recognizable boundaries of consent being granted constitutional protection under this principle is unfounded in the presence of the availability of core value justifications for prohibiting this conduct. The only question remaining is whether the courts would ever consider endorsing a principle which by definition reverses the traditional burden of proof in Charter claims. Crowning the absence of consent as a fundamental principle is meaningless without the qualifier "unless the state has a compelling justification for overriding the participant's consent". Therefore, the very formulation of the principle builds in a requirement that the state justify the intrusion into autonomous choice. The doctrinal purist will insist that the state only bears the burden of demonstrating a compelling justification when it comes to the reasonable limits assessment under section 1 of the Charter, but as criminal law continues to expand in an unprincipled manner, there may come a time when the Court recognizes the political and constitutional benefits that can be reaped by imposing a burden of justification on the state whenever a criminal offence eliminates absence of consent from the definition of the *actus reus*.

#### IV. CONCLUSION

Beyond the constitutionalization of fault, substantive review of criminal law has not led to a clearly defined collection of concrete principles designed to set minimum standards for the ascription of criminal liability. Some progress has been established with respect to the principles of fault, but judicial review loses its potency when it approaches *actus reus* issues above and beyond the core principle that all acts must be voluntary. Our judiciary has not embraced the notion advanced by L'Heureux-Dubé J., in her dissenting opinion to uphold some forms of constructive murder, on the basis that "the assessment of moral guilt depends on a view of the whole circumstances, and not on the distinction between the presence or absence of a particular mental event such as the foresight and acceptance of a risk."<sup>251</sup> In her view, an offender's fault is not

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<sup>251</sup> *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 657 (S.C.C.), quoting from G.H. Gordon "Subjective and Objective Mens Rea" (1975) 17 Crim L.Q. 355, at 389-90.

restricted to evaluations of mental states, but includes an analysis of the degree of fault and blameworthiness which is built into the *actus reus* component of a crime. The “denigration of *actus reus*”<sup>252</sup> has led the courts to abandon any effort to determine whether Parliament has constructed an *actus reus* which bears a rational relationship to harmful conduct deserving of punishment.

Understandably, a foray into evaluating the content of the *actus reus* compels the Court to enter the political realm to assess Parliamentary justifications for depriving people of liberty for the commission of the stipulated *actus reus* elements. The Court’s reluctance stems from the celebration of legislative supremacy, but once the “pathological politics” of criminal law reform is understood there is little reason to cling to a political precept which may be responsible for massive overcriminalization and creating an undue burden on limited justice resources. As Professor Stuntz has noted:

If criminal law is inescapably political, both in the sense that it rests on contestable value judgments and in the sense that it embodies trade-offs between different values, it seems natural to assign responsibility for it to the most politically accountable actors [*i.e.*, legislatures]. My response to that argument is not to deny its premise. Rather, I seek to show that legislator’s political incentives are to criminalize too much — with “too much” defined by the preferences of the very constituents whose wishes legislators are supposed to represent. Once one understands those incentives, one may conclude that courts are more likely than legislatures to capture social value judgments accurately.<sup>253</sup>

The problem with the current approach to substantive review is that the courts have not constructed any doctrinal tools to combat a legislature gone bad. Perhaps the Supreme Court had a basis for upholding the obscenity provisions, the marijuana possession offence and other consensual crimes of dubious validity, but its outright rejection of the harm principle, or a related principle relating to the primacy of choice and consent, is somewhat myopic. There was no reason to throw the baby out with the bath water. The courts should maintain some control

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<sup>252</sup> *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 666 (S.C.C.).

<sup>253</sup> W. Stuntz, “The Pathological Politics of Criminal Law” (2001) 100 Mich. L. Rev. 505. In support of some notion of judicial supremacy in relation to criminal lawmaking, it is interesting to note that public opinion polls clearly demonstrate that the public has greater trust and confidence in judges than in politicians: see Dene Moore, “Canadians put their trust in judges, but not politicians” *Edmonton Journal* (March 20, 2006) A5 and Kirk Makin, “Judges garner greater trust than politicians, survey finds” *The Globe and Mail* (April 9, 2007) A5.

of the criminalization process, and they should be developing doctrine which will allow an assessment of the wrongfulness of the *actus reus* in rare cases in which Parliament has succumbed to the unprincipled influence of a moral panic.

Even if one believes in the reality of electoral accountability as a real constraint on political action, it is naive to assume that the process can never short-circuit. I am certain that courts are aware of this possibility, but they tend to adopt a cavalier “wait and see” attitude, believing that if a true political short-circuit were to happen, the courts will be able to fashion some constraint when the time arrives. This cavalier attitude of “wait and see” crippled the U.S. Supreme Court in terms of its ability to protect privacy,<sup>254</sup> and, to my dismay, we can see our Supreme Court starting to adopt this approach. In 2005, the Supreme Court of Canada concluded that there is no constitutional protection in relation to law enforcement’s use of infra-red technology because the current technology was fairly non-intrusive. It is beyond dispute that the technology will clearly be improved and will become more intrusive, yet the Court was content to lie back and wait:

Whatever evolution occurs in the future will have to be dealt with by the courts step by step . . . [i]f as expected, the capability of FLIR [infrared] and other technologies will improve . . . it will be a different case, and the courts will have to deal with its privacy implications at that time. . . .<sup>255</sup>

It is more prudent to set constitutional constraints in advance to nip a crisis in the bud than to struggle to develop constraints in the face of the crisis.

Perhaps the Court cannot be faulted for a failure to develop a coherent theoretical framework for assessing the merits and validity of the content of criminal law — theory can be divisive and indeterminate and conventional thinking has always asserted that the merits of law are beyond judicial review. More disconcerting than the failure to operate upon a clear theoretical vision of the purpose of criminal law is the Court’s lack of understanding that “the danger is not that our few prized liberties will expire in some anguished and bloody battle, but rather by

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<sup>254</sup> In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court dismissed the fear of 24/7 surveillance of citizens with tracking devices and stated at 284, “if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable”.

<sup>255</sup> *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129, at paras. 55, 29 (S.C.C.).

slow degrees, by slight turnings of the screw, by steady constant erosion, they will slowly disappear".<sup>256</sup> Parliament may never enact ridiculous offences, such as the sausage prohibition discussed at the outset of the paper, but if substantive review cannot serve to place some constraints upon the criminalization process, there will never be an effective constitutional obstacle to prevent Parliament from slowly turning the screw of criminal law to gradually erode liberty in the quest for false security.

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<sup>256</sup> S. Cohen, "Invasion of Privacy: Police and Electronic Surveillance in Canada" (1992) 27 McGill L.J. 619, at 633.



