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Deprivations of Liberty: The Impact of the Charter on Substantive Criminal Law

Alan Young*

I. INTRODUCTION

The Government of Canada's gift for the 30th anniversary of the *Canadian Charter of Rights and Freedoms*[1] has been the 2012 enactment of the omnibus bill known as the *Safe Streets and Communities Act*.[2] This piece of legislation has been the culmination of five years of net-widening initiatives to increase sentence severity and to proscribe new forms of criminal conduct. One might have expected that net-widening of social control through criminal sanctions would have diminished and not expanded in the Charter era, considering that rights-bearing constitutions are predicated on the values of classical liberalism. In this vision of political life, the state's role is largely to provide for order and security by establishing the conditions to allow individuals to freely choose and pursue the type of life they believe to be valuable and worthwhile without compelling them to follow a particular conception of the good life. The anomalous emergence of net-widening legislative initiatives in a political regime of constitutional constraints raises the often-debated question of whether there are constitutional limits to the growth of substantive criminal law and, specifically, whether the right to liberty enshrined in section 7 of the Charter can exert a countervailing force on a political agenda premised upon increased criminalization as a response to perceived social problems.

As we celebrate the 30th anniversary of the Charter, it is interesting and sobering to note that the World Justice Project's 2011 report, *The Rule of Law Index*, ranks Canada relatively low in terms of the protection

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 S.C. 2012, c. 1.

of "fundamental rights" in comparison to other Western liberal democracies (Canada ranks ninth out of 12 countries).[3] The World Justice Project takes the position that compliance with the dictates of the rule of law extend beyond the need for laws which are general, clear and accessible, as it recognizes that the "rule of law must be more than merely a system of rules — that indeed, a system of positive law that fails to respect core human rights guaranteed and established under international law is at best 'rule by law', and does not deserve to be called a rule of law system".[4] It is said that there are two versions of the rule of law, a thick version and a thin version. A "thick" conception of the rule of law demands that, in addition to meeting formal requirements, the law must reflect substantive requirements (*i.e.*, respect for dignity and equality and the strengthening of fundamental freedoms), whereas a "thin" conception places no substantive restrictions on law but does require that legal rules contain minimum standards relating to clarity, accessibility and consistency.[5] Although the Supreme Court of Canada has clearly held that the rule of law is a principle of fundamental justice under section 7 of the Charter,[6] the Court has also limited the scope of the principle and suggested that "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation ... based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation".[7]

The Supreme Court of Canada may be correct in suggesting that the rule of law principle does not place specific substantive constraints on the content of criminal law, but the Court has failed to recognize how the principle does serve to facilitate the protection of "fundamental rights" as suggested by the World Justice Project. The rule of law and liberty are intertwined. One need go no further than A.C. Dicey's first of three definitions of the rule of law: "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the

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[3] Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2011* (Washington, DC: The World Justice Project, 2011), at 21-24, 51.

[4] *Id.*, at 11.

[5] Mark Carter, "The Rule of Law, Legal Rights in the Charter, and the Supreme Court's New Positivism" (2008) 33 Queen's L.J. 459.

[6] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Prostitution Reference*"]; *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606, at para. 28 (S.C.C.).

[7] *British Columbia v. Imperial Tobacco Canada Ltd*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, at para. 59 (S.C.C.).

land".[8] In this sense, the rule of law serves to limit arbitrary power by ensuring that state-citizen relationships are governed by predictable rules of general application, but it goes one step further in terms of having a role to play in protecting liberty.

In serving to curb arbitrary power, Dicey's simple pronouncement establishes two constraints on the exercise of political power. One could engage in an endless philosophical debate on the meaning and scope of liberty in the futile effort to construct an "all-purpose, top-down, totalizing theory of liberty",[9] but it is easier, and more practical, to define liberty in terms of Dicey's first definition of the rule of law. First, liberty cannot be overridden unless the state explicitly creates a prohibitory sanction for the exercise of liberty. Liberty thrives where law does not extend. In other words, a "totalizing" theory of liberty is not needed as liberty becomes simply defined as any action not prohibited by law. However, this simple constraint on political power cannot adequately protect liberty in the face of a zealous crusader acting in the guise of a lawmaker. Omnibus legislation prescribing countless restrictions on liberty would not violate this notion of the rule of law, and liberty will be precariously protected if one does not recognize that the rule of law's opposition to arbitrary rule entails another constraint beyond the formal need to enact law in order to override liberty.

Accordingly, the rule of law imposes a second constraint on the exercise of arbitrary political power — the state should be able to provide a reasoned justification if its authority to enact law is called into question. Presumably, state action should be considered arbitrary if the state cannot provide a reasoned justification for the action being undertaken. One might disagree with the reasoning and the justification advanced by the state, but this would not relegate the action to the realm of the arbitrary. In commenting on the evolution of the concept of due process in the Anglo-American tradition, it has been noted that "the due process of law guarantee is an effort — one with deep roots in the history of western civilization — to reduce the power of the state to a comprehensible, rational and principled order, and to ensure that citizens are not deprived of life, liberty, or property *except for good reason*".[10] Good reasons, properly defined, can pre-empt any claim of arbitrariness.

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[8] A.V. Dicey, *The Law of the Constitution*, 2d ed. (London: Macmillan, 1886), at 174.

[9] *McDonald v. Chicago (City)*, 130 S. Ct. 3020, 3100 (2010) [hereinafter "*McDonald*"].

[10] Timothy Sandefur, "In Defense of Substantive Due Process, or the Promise of a Lawful Rule" (2011) 35 Harv. J.L. & Pub. Pol'y 284, at 285 (emphasis added) [hereinafter "Sandefur"].

There may be differences in various jurisdictions with respect to the specific rights enumerated in their constitutions, but several commentators have noted that a common feature of constitutional adjudication around the world is the application of some form of proportionality test in assessing the validity of state action.[11] At the heart of any proportionality test is the idea that the state should be in a position to justify its decision to override rights, and this justification will primarily involve showing that it is pursuing valid objectives that "sound in the constitutional register".[12] As Professor Greene has noted:

> Proportionality analysis is interesting not because it contemplates balancing in the strict sense, which I presume to be a feature of all the world's constitutional courts, but because it does so only after requiring the government to justify its actions by reference to a limited set of objectives and procedural options. These distinctive features aim for rule of law in the strictest sense — that is, the sense in which we mean to reduce the discretion of the entire government, and not just of judges.[13]

Canada may rank low in the Rule of Law Index, and in its protection of fundamental rights, but it is not clear if this low ranking is being assessed solely on the basis of the actions (or inaction) of government, or whether this assessment includes the response of courts to state action. Regardless, the inadequate protection of rights cannot be placed solely on the shoulders of government in a constitutional regime, as "most powerful supreme and constitutional courts in the world today understand their *central* mission to be the robust protection of fundamental rights".[14] On the surface, it appears that Canadian courts, and constitutional courts around the world, also understand that the rule of law prohibition on arbitrary power "means that legislatures are granted a limited power to override constitutional rights, which is validly exercised when the relevant burden of justification is satisfied".[15]

In this brief paper, I will address two related questions with respect to the contribution that section 7 of the Charter has made in advancing

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[11] Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 S.C.L.R. (2d) 501.

[12] Jamal Greene, "The Rule of Law as a Law of Standards" (2011) 99 Geo. L.J. 1288, at 1293.

[13] *Id*.

[14] Jud Mathews & Alec Stone Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing" (2011) 60 Emory L.J. 797, at 870.

[15] Stephen Gardbaum, "The Myth and Reality of American Constitutional Exceptionalism" (2008) 107 Mich. L. Rev. 391, at 430.

the pursuit of liberty. The first question is whether the "right to liberty" in section 7 protects "fundamental personal choices" by effectively creating a private sphere of conduct and choice free from routine criminalization. In other words, does section 7 facilitate "self-sovereignty"[16] by ensuring that fundamental personal decisions will not be the subject matter of criminal sanction unless the government has compelling reasons to invade this sphere of self-sovereignty? Assuming that a fundamental personal decision can be overridden by a compelling state objective raises a second question: what constitutes a valid and legitimate state objective that sounds in the constitutional register? In other words, in the context of criminal law, what state objectives can provide a sufficient justification to warrant the imposition of the punitive sanction?

Professor Hamish Stewart concludes that "even though relatively few statutes have been invalidated on section 7 grounds, the generous interpretation of section 7 in the *Motor Vehicle Reference* has had a beneficial effect on Canadian legal culture".[17] I would agree that the rhetoric employed by Canadian courts in fundamental justice cases does warmly embrace the notion of fundamental rights free from unjustified state interference, and in that sense, there has been a "beneficial effect on Canadian legal culture". However, the assessment of the strength and value of fundamental justice review by the Canadian judiciary is less impressive when one looks specifically at the question of whether the courts have employed a coherent and consistent approach to the question of when the state may have compelling reasons to override a fundamental personal decision.

II. THE PROMISE OF SUBSTANTIVE DUE PROCESS

The concept of substantive due process means different things to different people, but at its essence it is a form of judicial review which engages an assessment of the merits or value of public policy choices as reflected in legislative enactments. The concept was developed by the United States Supreme Court over the latter half of the 20th century, and it has many detractors in the United States who condemn the doctrine as a "contradiction in terms", an "oxymoron", a "momentous sham", a

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[16] *Washington v. Glucksberg*, 521 U.S. 702, at 724 (1997) [hereinafter "*Glucksberg*"].

[17] Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 311.

"made-up, atextual invention" and the "most unconstitutional branch of constitutional law".[18] The detractors believe that the concept of due process only extends to review of state action for compliance with norms of procedural fairness.

In previous papers, I have provided various justifications for engaging in vigorous substantive review in Canada,[19] and it is not my intention to revisit this ongoing debate. Suffice it to say, regardless of whether one supports judicial activism or judicial deference, there is no question that substantive review of some form has been accepted and adopted by the Supreme Court of Canada. In 1985, in the seminal *Motor Vehicle Reference*, 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 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".[20] 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".[21]

In 2006, a badly divided Supreme Court assessed and reviewed the merits of public health care and concluded that serious deficiencies in the public system required the constitutional invalidation of a prohibition on obtaining insurance for private health care.[22] The Court recognized that its review was an intrusion into a purely political consideration, *i.e.*, the merits of an exclusive and universal health care system and the efficient allocation of resources to administer this system, but this did not stop the Court. Chief Justice McLachlin noted that "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their

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[18] Ryan C. Williams, "The One and Only Substantive Due Process Clause" (2010) 120 Yale L.J. 408, at 411; Sandefur, *supra*, note 10, at 284.

[19] Alan N. Young, "Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law" (2008) 40 S.C.L.R. (2d) 441 [hereinafter "Young, 'Done Nothing Wrong'"]; Alan N. Young, "Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches" (2002) 16 S.C.L.R. (2d) 121.

[20] *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 20 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"].

[21] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, 39 C.C.C. (3d) 118, at para. 26 (S.C.C.).

[22] *Chaoulli v. Québec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter "*Chaoulli*"].

constitutional mandate"[23] 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"[24] 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."[25]

The real controversy in the United States surrounding substantive due process review is not simply the idea of a court reviewing the merits of public policy — this will be unavoidable with respect to some types of constitutional claims. Rather, the controversy involves a fear that the doctrine will allow a court to expand the protection of the Constitution beyond specific rights enumerated in the document. In fact, this is precisely what occurred in the zenith of American substantive review as the Supreme Court created a constitutionally protected zone of privacy despite the fact that privacy is not an enumerated right. The Court extended the concept of substantive due process to include protection for fundamental, but non-enumerated, rights on the theory that the rights enumerated "in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance".[26]

In 1997 the United States Supreme Court was faced with the question of whether a right to assisted suicide can be considered a fundamental, non-enumerated right. In rejecting assisted suicide as a fundamental right the Court provided this summary of its achievements under the rubric of substantive due process:

> The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068-1069, 117 L.Ed.2d 261 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'") (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1446-1447, 123 L.Ed.2d 1 (1993); *Casey*, 505 U.S., at 851, 112 S.Ct., at 2806-2807. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially

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[23] *Id.*, at para. 107.
[24] *Id.*
[25] *Id.*, at para. 108.
[26] *Griswold v. Connecticut*, 381 U.S. 479, at 484 (1965).

> protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278-279, 110 S.Ct., at 2851-2852.[27]

In 2010 Stevens J. of the United States Supreme Court noted that the "conceptual core" of the Due Process Clause "safeguards, most basically, 'the ability to define one's identity', 'the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny'".[28] This list of American substantive due process achievements in protecting autonomous decision-making on fundamental personal matters was cited by Wilson J. in her concurring judgment in the *Morgentaler* case.[29] Although *Morgentaler*, and the constitutional validity of a prohibition on abortion, was decided upon the basis of procedural unfairness in accessing this medical service, Wilson J. was the first Canadian judge to adopt the American due process concept that equates the right to liberty with the right to make fundamental personal decisions. She concluded that:

> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.[30]

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[27] *Glucksberg*, *supra*, note 16, at 719.

[28] *McDonald*, *supra*, note 9, at 3101.

[29] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Morgentaler*"].

[30] *Id.*, at para. 228.

After *Morgentaler*, the idea that the right to liberty extended to fundamental personal decisions was cited with approval in numerous decisions.[31] In addition, the protection of fundamental personal decisions finds further indirect support in cases dealing with the right to security. There exists a significant overlap between the right to liberty and the right to security when liberty is extended to fundamental personal decisions. The right to security includes the right to protect one's physical and psychological integrity,[32] and there is a greater likelihood of psychological harm when state action interferes with decisions that are integral to one's personhood and identity. The *Morgentaler* invalidation of the abortion provisions in the *Criminal Code*[33] was predicated on the fact that the procedural obstacles and delays found within the legislative regime impaired a woman's right to security by triggering an increased risk of both physical and psychological harm. However, the increased risk of psychological harm was directly related to the fact that the legislation interfered with autonomous decision-making of a very personal nature. Therefore, the right of security may not encompass a right to autonomous decision-making, but in cases in which a court finds that the security interest has been impaired because state action has negatively affected one's psychological well-being, this indirectly will provide some protection for self-sovereignty and the right to make fundamental personal decisions.[34]

In adopting the conceptual core of American due process by extending Charter protection to fundamental personal decisions, the Canadian courts may not have fully realized that there has been a constitutional price to be paid in American constitutional law when an individual's choice has been judicially characterized as being fundamental and personal. When a right is characterized as fundamental the American

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[31] For example, *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.) [hereinafter "*Rodriguez*"]; *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.)*"]; *Godbout v. Longueuil (City)*, [1977] S.C.J. No. 95, [1997] 2 S.C.R. 844 (S.C.C.) [hereinafter "*Godbout*"]; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 2 S.C.R. 46 (S.C.C.) [hereinafter "*G. (J.)*"]; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307 (S.C.C.); *R. v. Parker*, [2000] O.J. No. 2787, 49 O.R. (3d) 481 (Ont. C.A.) [hereinafter "*Parker*"]; *Hitzig v. Canada*, [2003] O.J. No. 3873, 231 D.L.R. (4th) 104 (Ont. C.A.) [hereinafter "*Hitzig*"].

[32] *Morgentaler*, *supra*, note 29; *B. (R.)*, *id*.

[33] R.S.C. 1985, c. C-46.

[34] *Chaoulli*, *supra*, note 22; *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*Insite*"]; *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29 (B.C.C.A.) [hereinafter "*Adams*"].

courts are required to apply heightened or strict scrutiny upon judicial review: the prohibition "may be justified by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake".[35] However, if a fundamental right is not at issue, the courts apply a more deferential standard known as "rational basis review" — this lower standard of scrutiny only requires that the impugned legislation be "rationally related to a legitimate governmental interest".[36] The constitutional cost of designating a right as fundamental is that it attracts a form of strict judicial scrutiny which readily leads to invalidation, whereas when legislation impairs a non-fundamental right, the lowered standard of scrutiny rarely leads to invalidation.[37]

It did appear that the Supreme Court of Canada finally came to adopt the American substantive due process concept that interference with fundamental rights attracts strict scrutiny upon constitutional review. The primacy of fundamental personal decisions crystallized in the overlooked decision of the Court in *Godbout* in 1997.[38] 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".[39] The Court noted that it 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".[40] 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".[41] Freedom to choose one's place of residence

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35 *Carey v. Population Services International*, 431 U.S. 678, at 688 (1977).

36 *Cook v. Gates*, 528 F. 3d 42, at 52, 55 (1st Cir. 2008).

37 Julie McKenna, "Stay Calm, Don't Get Hysterical: A User's Guide to Arguing the Unconstitutionality of Anti-Vibrator Statutes" (2011) 33 W. New Eng. L. Rev. 211, at 242 [hereinafter "McKenna"].

38 *Godbout*, *supra*, note 31.

39 *Id.*, at para. 66.

40 *Id.*

41 *Id.*, at para. 74.

could be "subordinated to substantial and compelling collective interests" but, in this case, the Court rejected a number of different state-sponsored justifications for the residency restriction. *Godbout* laid the foundation of exacting constitutional scrutiny when the law interferes with the right to decisions of "fundamental personal importance".

Strict scrutiny of fundamental rights' violations is nothing more than a rigorous balancing test with the scales tipped heavily in favour of the rights-holder, whereas rational basis review for non-fundamental rights is a balancing test with the scales tilted in favour of the state. This two-tiered structure of judicial review has been implicitly incorporated into fundamental justice review in Canada because the Supreme Court of Canada has often undertaken fundamental justice review on the basis of balancing state versus individual interests without the need for identifying a specific principle of fundamental justice. In most cases where a balancing exercise is undertaken it would be reasonable to assume that as the significance and importance of the right increases it will be incumbent on the state to provide a more significant and compelling reason for violating the right. Strict scrutiny in cases of fundamental rights' violation is a matter of common sense.

In 1993, the Supreme Court of Canada introduced a balancing approach to section 7,[42] and within two years the Court held 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".[43] A decade later, the Court held that

> 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".[44]

As will be discussed, the Supreme Court of Canada has retreated from the practice of balancing interests under section 7, but as the Charter was evolving, the Court developed all the conceptual tools to allow for vigorous judicial review to protect fundamental non-enumerated rights. Of course, the actual ability to achieve strict scrutiny

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[42] *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.).

[43] *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 para. 262 (S.C.C.).

[44] *Suresh v. Canada*, [2002] S.C.J. No. 3, at para. 45, [2002] 1 S.C.R. 3 (S.C.C.).

of state objectives to override an interference with a fundamental personal decision would be limited by two practical obstacles: a litigant's ability to compile the requisite legislative fact evidence, and the related problem that the burden of proof lies with the litigant to demonstrate the absence of a compelling state interest. Putting aside the notion that the rule of law would be better served if the state bore the burden of providing a reasoned justification for any restriction on liberty, even with the logistical obstacles, the courts have provided adequate doctrinal tools in its interpretation of the Charter to allow this branch of government to establish a zone of self-sovereignty free from criminal prohibition in the absence of a compelling and narrowly-tailored state objective. This did not actually happen.

III. THE REALITY OF SUBSTANTIVE DUE PROCESS

Despite the Supreme Court's insistence that the substantive merits of legislation can be reviewed in the course of constitutional adjudication, the courts do not readily embrace the concept that there is a sphere of personal decision-making that is beyond the authority of the legislature to control, save and except when there is a compelling state interest to override self-sovereignty. The courts pay lip service to the concept, but they rarely designate a person's choice as being fundamental and personal, and they rarely question whether the legislature has an interest that rises to the level of a compelling state objective.

The Supreme Court has employed the rhetoric of liberty as a fundamental personal decision in a number of cases both before and after the *Godbout* ruling. The discourse on fundamental personal decision has arisen in the context of choice of residence,[45] choice of shelter,[46] choice of medical treatment,[47] choices relating to the care and upbringing of one's children,[48] and choices relating to the terminal stages of one's life.[49] However, the characterization of a decision as fundamental has only led to the Court granting a remedy in three contexts: choice of medical treatment; choice of residence; and choice of shelter. *Godbout* was the frontrunner, and it did result in the invalidation of municipal restriction on choice of residence because the restriction on the funda-

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45 *Godbout*, *supra*, note 31.
46 *Adams*, *supra*, note 34.
47 *Parker*, *supra*, note 31; *Hitzig*, *supra*, note 31.
48 *B. (R.)*, *supra*, note 31; *G. (J.)*, *supra*, note 31.
49 *Rodriguez*, *supra*, note 31.

mental decision of where to reside was not overridden by a compelling state interest. However, even this designation of choice of residence as a fundamental, personal decision has proved controversial as, in 2011, the Supreme Court of Canada called into question this designation as not representing the views of the majority of the Court.[50]

With the designation of choice of personal residence as a fundamental decision being called into question, the only incontrovertible example of a liberty interest being designated as fundamental, and leading to far-reaching remedies, involves the decision-making with respect to the choice of medical treatment. The choice of medical treatment being designated as a fundamental personal decision has led to a suspended invalidation of laws relating to use of marijuana until the Parliament of Canada created a meaningful exemption program to allow medical patients to legally access and use marijuana as medicine.[51] It has also led to the lifting of the prohibition on privately insured medical treatment. In 2007, the Supreme Court of Canada confirmed that the choice of medical treatment should be treated as a fundamental right to autonomous decision-making.[52] As mentioned earlier, the elevation of medical decision-making to the level of a fundamental right is further strengthened by the fact that the courts have found in some cases that interference with this right constitutes a violation of one's right to security under section 7 without needing to rely upon the concept of liberty as encompassing fundamental, personal decisions.[53]

Outside of the context of medical care, the concept of fundamental, personal decision-making has had little or no practical impact. For example, in *Rodriguez*,[54] the Supreme Court had little difficulty in characterizing the choice of when to terminate one's life as a fundamental, personal decision, but this characterization did not lead the Court to assess whether Parliament had a compelling interest in prohibiting assisted suicide. Instead of assessing whether a compelling interest can serve to override the fundamental right, the Court simply concluded that Canada and other jurisdictions have historically limited the right to terminate one's life, and this historical practice seemed to serve as a

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[50] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, [2011] 2 S.C.R. 670, at paras. 93-94 (S.C.C.).

[51] *Parker*, *supra*, note 31; *Hitzig*, *supra*, note 31; *Canada (Attorney General) v. Sfetkopoulos*, [2008] F.C.J. No. 448, 2008 FCA 106 (F.C.A.).

[52] *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No 30, 2009 SCC 30 (S.C.C.) [hereinafter "*A.C. v. Manitoba*"].

[53] *Chaoulli*, *supra*, note 22; *Insite*, *supra*, note 34.

[54] *Rodriguez*, *supra*, note 31.

proxy for Parliament having a compelling interest in the modern era. Similarly, In *B. (R.)*,[55] the Court was faced with the right of parents to choose a medical intervention for their child which was consistent with their religious beliefs, but it ultimately held that the state had legitimate interests in overriding the fundamental, personal decision without an exacting assessment of whether these interests were compelling and narrowly tailored.

One can see how the designation as fundamental becomes mere rhetorical device by looking at how lower courts have recently applied the concept.[56] In 2011, a challenge was brought to provincial law which prevented the sale and distribution of unpasteurized milk. In an era of mass production of food, with the recurring problem of food recalls due to contamination, one can easily see how the choice of what foods one consumes might be characterized as a fundamental, personal decision. The Court acknowledges that this is an appropriate characterization, but the characterization does not lead to a form of strict scrutiny in search of a narrowly tailored state objective. The Court simply applies a deferential standard akin to the rational basis review employed by American courts. The Court stated:

> It is acknowledged that in general terms an individual has the right to make decisions regarding their own bodily integrity and personal health, as recognized by La Forest J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at paragraph 36. However, it does not logically follow that the right to security of the person of raw milk consumers will necessarily be infringed if the Respondent's cow-share arrangement is found to be illegal. The preponderance of scientific evidence cited offers factual support for the assertion that human consumption of raw milk may be hazardous to one's health or at least more hazardous than the health risk presented by the consumption of pasteurized milk. The wide interest in this litigation serves to confirm this assessment is not universally held and there are many residents of Ontario who have consumed a life-times worth of raw milk and raw milk products without any ill effects. On the basis of the expert evidence provided at trial it cannot however be concluded, in my view,

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[55] *B. (R.)*, *supra*, note 31.

[56] *R. v. Schmidt*, [2011] O.J. No. 4272 (Ont. C.J.) [hereinafter "*Schmidt*"]; *Thurber v. Thurber*, [2002] A.J. No. 992, 2002 ABQB 727 (Alta. Q.B.); *De Guzman v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 2119, [2006] 3 F.C.R. 655 (F.C.A.), leave to appeal refused [2006] S.C.C.A. No. 70 (S.C.C.); *Marchand v. Ontario*, [2006] O.J. No. 2387, 81 O.R. (3d) 172 (Ont. S.C.J.).

> that the resultant legislative restriction on the sale and distribution of raw milk is either arbitrary or overly broad.[57]

Perhaps the application of a rational basis test to a fundamental, personal decision can be justified on the basis that the prohibition on the sale of unpasteurized milk was not a criminal sanction but a mere regulatory offence. However, it would be difficult to justify resorting to the low, deferential standard when the state interferes with the fundamental, personal decision by resorting to the moral condemnation of the criminal sanction. Yet, in the recent challenge to the prohibition on polygamous relationships,[58] the Court had no difficulty concluding that one's choice of life partner(s) is a fundamental personal decision (as was decided by American courts over 40 years ago), but this characterization did not appear to have a practical impact on the constitutional analysis. The Court did go to great lengths to identify the various state objectives underlying the prohibition, but strict scrutiny for a narrowly tailored interest was not undertaken. There is little doubt that the state has an interest in protecting individuals from abusive relationships, but if the concept of a fundamental right has any practical meaning, it is not sufficient to simply identify that Parliament has a rational basis for enacting the prohibition. The real question should have been whether Parliament's interest is so compelling that it is constitutionally authorized to enact a blanket prohibition which prevents those who are not in abusive polygamous relationships from exercising their fundamental right to choose their life partners.

Due to the fact that it would be difficult for a court to justify the use of a low, deferential standard of review when Parliament has interfered with fundamental choices by way of criminal sanction, it is easier for a court to recast a person's choices as trivial as opposed to fundamental. In the challenges to the prohibition on the use and possession of marijuana, the Supreme Court did not feel the need to employ an exacting, strict scrutiny review because it characterized the choice to use marijuana as a trivial lifestyle choice. The Court stated:

> While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke

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[57] *Schmidt*, *id.*, at para. 85.

[58] *Reference re Criminal Code of Canada (B.C.)*, [2011] B.C.J. No. 2211, 2011 BCSC 1588 (B.C.S.C.) [hereinafter "*Polygamy Reference*"].

> marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, 'basic choices going to the core of what it means to enjoy individual dignity and independence' (*Godbout*, *supra*, at para. 66).
>
> In our view, with respect, Malmo-Levine's desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection. There is no free-standing constitutional right to smoke 'pot' for recreational purposes.[59]

It is obvious that the Charter will be trivialized if strict scrutiny is applied to personal decisions which are picayune and petty, but one has to question whether a choice of lifestyle should be so quickly relegated to the category of the trivial. It is not helpful to marginalize the claim as being the assertion of a "free-standing constitutional right to smoke 'pot' for recreational purposes". Narrowing the characterization of the claim renders it absurd. There is an abundance of sociological and anthropological evidence which demonstrates that the alteration of consciousness through plant intoxicants is an integral and fundamental aspect of personhood. Further, in the tradition of classical liberalism, the state should not be dictating lifestyle preferences, as the personal quest for self-fulfilment will take the individual down many different paths. It would be easy to characterize sporting activities as a mere lifestyle choice, but one has to wonder whether the Court would apply the same low, deferential standard of review should Parliament decide in its wisdom to ban sporting activities upon pain of criminal sanction.

Despite its analytical potential and promise, it appears that creating the category of "fundamental personal decision" has not really helped in the analysis of section 7 liberty claims. First, dividing personal decisions into fundamental and non-fundamental is a value-laden exercise, and without the development of some criteria for determining when a decision goes to the core of personhood, the section 7 analysis will be unpredictable and confused. Perhaps there is a zone of self-sovereignty that demands strict scrutiny upon judicial review, but it is not readily ascertainable within the current doctrinal approach. Second, when the Court can easily designate a decision as fundamental, this ultimately does not assist the analysis because the Court does not provide any

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[59] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 179 C.C.C. (3d) 417, at paras. 86-87 (S.C.C.) [hereinafter "*Malmo-Levine*"].

specific or unique methodology for analyzing the constitutionality of state interference with this type of fundamental decision.

Not only is the fundamental rights doctrine unpredictable and underdeveloped, there is also reason to conclude that the Court is basically unwilling to apply strict scrutiny, in its most rigorous form, to any parliamentary decision to criminalize conduct. The marijuana challenge has limited a court's ability to impose strict scrutiny in reviewing the validity of criminal legislation in two significant ways. First, the Court would not employ a balancing test of proportionality to determine whether the state objective could override the liberty interest of the accused. The Court employed the "basic tenets" approach to address a more specific question of whether there exists a principle of fundamental justice that dictates that Parliament can only criminalize conduct upon proof of significant harm to others or society at large. Under the basic tenets approach, a principle becomes elevated into a constitutional principle of fundamental justice, if three criteria can be met: (1) "[i]t must be a legal principle"; (2) there must be a "consensus that the harm principle is vital or fundamental to our societal notion of justice"; and (3) it must be "capable of being identified with some precision".[60] There is no question that these criteria provide a more transparent framework of analysis than does the proportionality analysis of state/citizen balancing,[61] but this basic tenets approach is self-limiting because so few substantive principles can or will be elevated to this status.[62] In addition, a basic tenet will prove resistant to growth and expansion because the requirement of "some degree of precision" will preclude principles of high generality from being adopted. Principles stated at a high level of generality have the potential for growth as the principle becomes instantiated in concrete cases.

In the marijuana cases, 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.[63] 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

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[60] *Malmo-Levine*, *id.*; *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.).

[61] Stewart, *supra*, note 17, at 311.

[62] In his book, *id.*, Professor Stewart identifies five substantive principles: a law must not be overly vague; a law must not be overbroad; a law must not be arbitrary; the impact of a law must not be grossly disproportionate; and the state must obey the law.

[63] *Malmo-Levine*, *supra*, note 59.

society at large. At its highest, the Court may require that Parliament have a reasoned apprehension of a non-trivial harm, but in rejecting the harm principle as a limiting principle, the Court also gave the stamp of approval to criminalization in pursuit of paternalistic objectives. In addition, the Court found that the state objectives of protecting the vulnerable and the protection of core, societal values were objectives which sound in the constitutional register. The only state objective which the Court rejected as valid or legitimate for the purposes of criminal law is the imposition of a "certain standard of public and sexual morality"[64] or to "maintain conventional standards of propriety" which do not involve "some fundamental conception of morality".[65] Whether intentionally or inadvertently, the basic tenets approach adopted by the Court authorizes Parliament to override liberty by criminal sanction whenever it has some rational basis for concluding a perceived social problem needs to be addressed by invocation of the criminal law. The bottom line is that there are no effective constitutional limits on the choice to criminalize conduct, and there is currently no zone of self-sovereignty which is presumptively beyond the reach of the criminal law unless the state can present compelling and narrowly tailored objectives to justify the intrusion in liberty.

Even though balancing has problems of indeterminacy and subjectivity that do not plague the basic tenets approach, balancing is the type of proportionality analysis which is needed to establish effective substantive review. It is this type of analysis which can give practical effect to the concept that restrictions on fundamental rights need to be subject to exacting constitutional scrutiny. However, it appears that, in 2004, the Supreme Court finally laid to rest the overt public policy balancing which had been employed in earlier Charter cases. In the *Demers* case,[66] the Supreme Court of Canada 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, but it was also argued that, on balance, the individual's liberty and security interest outweighed Parliament's goal on public protection. This balancing act was rejected by the Court:

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[64] *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at para. 81 (S.C.C.) [hereinafter "*Butler*"].

[65] *Malmo-Levine*, *supra*, note 59, at para. 116.

[66] *R. v. Demers*, [2004] S.C.J. No. 43, 185 C.C.C. (3d) 257 (S.C.C.) [hereinafter "*Demers*"].

> 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.[67]

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", nor is it clear if this decision has definitively eliminated proportionality and balancing from the fundamental justice equation. Since *Demers*, the Supreme Court of Canada has on two occasions employed a "striking the right balance" approach to the adjudication of a fundamental justice claim,[68] so it appears that the allure of balancing proves to be irresistible. Even though balancing will be a more effective technique to develop the zone of self-sovereignty, this assertion is predicated on the assumption that the courts would then naturally employ a form of strict scrutiny when confronted with a fundamental rights claim under section 7. This is not a safe assumption because it is not patently obvious that the Court has employed strict scrutiny when confronted with a fundamental rights claim under section 2(b) of the Charter. Unlike the right to liberty, freedom of expression comes with a built-in designation of being fundamental, and, even though the rhetoric of the Court tracks the strict scrutiny approach, the practical application of this approach falls short in terms of rigorous strict scrutiny.

The doctrinal structure of section 2(b) challenges requires the court to immediately apply a balancing or proportionality test because all forms of expression are covered by section 2(b), and the ultimate determination of the validity of the restriction turns on the application of the section 1 reasonable limits test. Upon a review of 31 constitutional challenges launched under section 2(b) of the Charter, we find 19 cases in which the restriction on expression was upheld under section 1, and 13

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[67] *Id.*, at para. 45.

[68] *May v. Ferndale Institution*, [2005] S.C.J. No. 84, [2005] 3 S.C.R. 809 (S.C.C.); *A.C. v. Manitoba*, *supra*, note 52.

cases in which the restriction was invalidated. However, of the 13 invalidations, only two were predicated on the finding that the state did not have a "pressing and substantial" interest (*i.e.*, compelling interest),[69] and the others were predicated upon the minimal impairment component of the section 1 analysis (*i.e.*, narrowly tailored). In fact, despite the fundamental nature of an expressive rights claim, it appears that virtually any state objective can override the fundamental right if the restriction is narrowly tailored. Restrictions on speech have been validated in pursuit of preventing street nuisance,[70] protecting personal reputation,[71] combating noise pollution,[72] maintaining a neutral public service,[73] preventing littering and aesthetic blight[74] and providing "a safe, welcoming public transit system".[75] Many of the section 2(b) challenges involve non-criminal restrictions; however, the fact that expression is criminalized has not led to a more exacting scrutiny of whether the state's overriding objective is truly compelling. There have been six challenges to criminalized speech, and in five of the cases the restriction was upheld as the Court readily accepted that the state had a pressing and narrowly tailored objective.[76] The only case in which the Court did not find a pressing objective was with respect to the archaic offence of "spreading false news". The Court concluded that the offence was originally designed to protect the nobility from slanderous statements and there was no evidence of a contemporary social problem necessitating the criminalization of spreading false news. This is the only case in which strict scrutiny was applied to the requirement of a compelling state objective, and its precedential value is limited as the invalidation is largely predicated on the fact that the offence is a relic of an earlier political and social culture.

The rather timid approach to questioning state objectives becomes clearer when contrasted to American jurisprudence on free speech. In 2011, the United States Supreme Court addressed the constitutionality of

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[69] *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.); *Committee for the Commonwealth of Canada v. Canada*, [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.).

[70] *Prostitution Reference*, *supra*, note 6.

[71] *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.).

[72] *Montreal v. 2952-1366 Quebec Inc*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.).

[73] *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69 (S.C.C.).

[74] *Ramsden v. Peterborough*, [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.); *R. v. Guignard*, [2002] S.C.J. No. 16, [2002] 1 S.C.R. 472 (S.C.C.).

[75] *Greater Vancouver Transportation Authority v. Canadian Federation of Students (British Columbia Component)*, [2009] S.C.J. No. 31, 2009 SCC 31 (S.C.C.).

[76] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.); *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.); *Prostitution Reference*, *supra*, note 6; *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.), *Butler*, *supra*, note 64.

a California prohibition on the sale of "violent video games" to minors.[77] The Court first confirmed that restrictions on the content of protected speech are invalid unless the state "can demonstrate that it passes strict scrutiny — that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest".[78] It then concluded that "California cannot meet that standard" because it "cannot show a direct causal link between violent video games and harm to minors".[79] There were competing empirical studies on this issue, but the Court concluded that this is insufficient to override a fundamental right as the studies only "show at best some correlation between exposure to violent entertainment and miniscule real-world effects".[80] In Canada, this type of inconclusive evidence is a sufficient basis for grounding a state interest capable of overriding any right. There is a world of difference between this exacting approach on the American court and the deferential approach the Supreme Court of Canada has taken in addressing the fact that there are competing studies on whether obscene depictions cause, or are correlated, to anti-social conduct. In *Butler*, the Supreme Court upheld criminal restrictions on obscene expression, noting that:

> Accordingly, the rational link between s. 163 and the objective of Parliament relates to the actual causal relationship between obscenity and the risk of harm to society at large. On this point, it is clear that the literature of the social sciences remains subject to controversy. ...While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. ...
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> In the face of inconclusive social science evidence, the approach adopted by our Court in Irwin Toy is instructive. In that case, the basis for the legislation was that television advertising directed at young children is per se manipulative. The Court made it clear, at p. 994, that in choosing its mode of intervention, it is sufficient that Parliament had a reasonable basis:
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> - In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had

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77 *Brown v. Entertainment Merchants Assn.*, 131 S. Ct. 2729 (2011).
78 *Id.*, at 2738.
79 *Id*.
80 *Id.*, at 2739.

> a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

And at p. 990:

> • ... the Court also recognized that the government was afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence.[81]

The Court's deferential assumption that legislatures have a "good reason" to restrict fundamental rights is aptly captured by the Court's statement that "in our view Parliament is also entitled to act on reasoned apprehension of harm even if on some points 'the jury is still out'".[82] Limiting rights on the basis of inconclusive evidence might be justified in the regulatory world, but once the choice of state intervention rises to the level of criminal sanction it would be reasonable to assume that a more exacting standard would be imposed. This expectation should be heightened when the sanction is being applied to the exercise of fundamental rights.

Contrasting the American and Canadian approaches to strict scrutiny in the area of expressive freedom does lead to the mistaken perception that American jurists take the concept of a fundamental right more seriously than their Canadian counterparts. This is probably true in the area of expressive freedom; however, in terms of substantive due process and liberty, the early potential for achieving zealous protection of fundamental, personal decisions through the vehicle of substantive due process review has equally floundered in both jurisdictions. Despite the fact that American courts created the concept of non-enumerated fundamental rights, as time wore on American courts became reluctant to designate any new fundamental rights and continue to apply strict scrutiny to recognized decisions of a fundamental and personal nature. The retreat of American courts, and the dilution of the doctrine of strict scrutiny for fundamental liberty rights, has undercut the significance and value of the American approach for defining liberty in the Canadian context.

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[81] *Butler*, *supra*, note 64, at paras. 101-104.

[82] *Malmo-Levine*, *supra*, note 59, at para. 78.

One of the problems which plagues both Canadian and American constitutional adjudication with respect to the validity of criminal sanctions targeting fundamental personal decisions has been the noticeable absence of any coherent theory of criminal justice animating the court decisions. The following critique from an American commentator applies with equal force to the shorter history of Canadian courts struggling with the contours and scope of liberty:

> Indeed, beginning with *Meyer v. Nebraska* in 1923 through the recent case of *Lawrence v. Texas* in 2004, the Court has been deciding cases about the limits of criminal law. The confusion, that most people do not think the Court has ever adopted any constitutional theory on substantive criminal law, stems from the Court's own decisions. None of the decisions explicitly reference traditional canons of criminal law; none of them rely on academic or philosophical justifications for criminalization; none of them acknowledge the limits of criminal sanctions as an independent constitutional value. Rather, these decisions rely on more rhetorical, lofty values such as privacy or liberty.[83]

The first indication of the retreat of the American courts came in 1986 with the infamous decision in *Bowers v. Hardwick*, in which the United States Supreme Court upheld a Georgia criminal prohibition on sodomy.[84] The previous cases on substantive due process appeared to establish as a fundamental liberty or privacy interest the right to sexual autonomy. The Court bluntly ruled that there is no fundamental right for homosexuals to engage in sodomy primarily because "condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards".[85] This decision allowed the dead weight of history to govern the development of fundamental, personal decisions worthy of constitutional protection.

History once again exerted a regressive force on American doctrine in 1997 when the United States Supreme Court articulated a new approach to determining when a right can be designated as fundamental for purposes of triggering strict scrutiny. In addressing whether assisted suicide can be designated as a fundamental, personal decision, the Court starts by noting that "we begin, as we do in all our due process cases by

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[83] Eric Tennen, "Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law" (2004) 8 Boalt. J. Crim. L. 3, at 4.

[84] *Bowers v. Hardwick*, 478 U.S. 186 (1986) [hereinafter "*Bowers*"].

[85] *Id.*, at 197.

examining our nation's history, legal traditions and practices".[86] The Court then reiterates that we "have always been reluctant to expand the concept of substantive due process"[87] before creating a new two-part test for classifying a right as fundamental or not:

> Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively "deeply rooted in this Nation's history and tradition". ... Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest.[88]

In applying the new criteria to the issue of assisted suicide, the Court was able to easily conclude that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest", and that the prohibition is "rationally related to legitimate government objectives".[89] To ensure that there is little doubt that the Court is signalling a retreat, the Court concludes by noting that "we do not weigh the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection."[90] Although the United States Supreme Court makes no mention of our Supreme Court's decision in *Rodriguez*, both courts arrive at the same deferential conclusions based primarily on the dead weight of history.

In 2003, there was a brief moment when it appeared that the United States Supreme Court was returning to its earlier activist approach to liberty with the release of the decision in *Lawrence v. Texas*.[91] The Court overturned its 1986 *Bowers* decision and invalidated a Texas sodomy prohibition. In a decision of "staggering rhetorical breadth"[92] the Court ruled that decisions about sexual intimacy were captured within the liberty interests protected by the due process clause. The Court's rhetorical breadth includes:

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86 *Glucksberg*, *supra*, note 16, at 710.
87 *Id.*, at 720.
88 *Id.*, at 720-22.
89 *Id.*, at 728.
90 *Id*., at 735.
91 539 U.S. 558 (2003) [hereinafter "*Lawrence*"].
92 John G. Culhane, "Writing On, Around, And Through *Lawrence v. Texas*" (2004) 38 Creighton L. Rev. 493, at 494.

> Liberty protects the person from unwarranted government intrusions into a dwelling house or other private places. ... Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. ... when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[93]

On first impression, *Lawrence* appears to create a distinctive zone of self-sovereignty in matter of sexual intimacy — the rhetoric supports the designation of sexual autonomy as a fundamental right which can only be overridden by a compelling and narrowly tailored state interest. However, a deeper look reveals that the Court was careful to ensure that it did not explicitly designate the right as fundamental, nor did it stipulate the standard of review it was employing. The dead weight of history from *Glucksberg* still played a major role, as the Court's primary reason for overturning its earlier *Bowers* decision was its different understanding of the nation's traditions. Contrary to *Bowers*' historical account, the Court concluded that "there has been no longstanding history in this country of laws directed at homosexual conduct as a distinct matter".[94]

The Court is clear as to what type of conduct is excluded from self-sovereignty in sexual matters: conduct with minors; conduct involving injury or coercion; public conduct or prostitution;[95] however, there is a lack of guidance and clarity with respect to sexual conduct warranting constitutional protection. In the post-*Lawrence* era courts are reaching disparate and inconsistent results on the reach of the right to sexual autonomy in the context of challenges to "anti-vibrator" laws, restrictions on "sexting", polygamy and adult incest.[96] It has been noted that "approximately seven years of *Lawrence* jurisprudence have demonstrated that courts are unwilling to find that *Lawrence* establishes a fundamental right".[97] *Lawrence* did manage to overturn the atavistic aversion that the Court displayed in 1986 with respect to homosexual sexuality, but it appears that the decision was not designed to do much more or to advance the substantive due process right to sexual autonomy:

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[93] *Lawrence*, *supra*, note 91, at 562, 567.

[94] *Id.*, at 568.

[95] *Id.*, at 578.

[96] McKenna, *supra*, note 37; Claudio J. Pavia, "Constitutional Protection of 'Sexting' in the Wake of *Lawrence*: The Rights of Parents and Privacy" (2011) 16 Va. J.L. & Tech. 189.

[97] Francis Curren, "Sexual Privacy After *Lawrence v. Texas*" (2011) 12 Geo. J. Gender & L. 333, at 342.

> Although *Lawrence*'s holding is clear — Texas's statutory proscription against homosexual sodomy is unconstitutional and *Bowers* is overturned — it is unclear how the Court arrived at its holding. Kennedy extensively criticized *Bowers* but did not engage in a lengthy discussion of the statute at issue in *Lawrence*. Additionally, Kennedy did not articulate whether the right to engage in private consensual sex acts is a fundamental right or a simple liberty interest; and, under what level of review the Court evaluated the Texas statute: rational basis, intermediate review, or strict scrutiny. These unanswered questions make *Lawrence* a complicated decision with several conceivable interpretations.[98]

Lawrence does not change the fact that the Court in *Glucksberg* changed the rules of the game to ensure that strict scrutiny for fundamental rights will rarely occur. The promise and potential of substantive due process has stalled as the lower courts struggle to understand the new rules of engagement:

> Unfortunately, the system described in *Glucksberg* has run into problems. This should be no surprise given the polarization that both the strict scrutiny test and the rational basis test have undergone. The strict scrutiny test is so strict that almost all legislation fails to meet it. Although it may not actually live up to its reputation as "strict in theory, fatal in fact," it is the rare case indeed where legislation lives up to its requirements. Because of this, the Court has retreated into what one commentator has referred to as a "rights-identifying shell," where it is hesitant to identify new rights. On the other hand, the only alternative allowed by the formula is the rational basis test, which is tantamount to no test at all ... .
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> What has emerged, then, is an unworkable system. In this system, the Court professes to have a standard framework for substantive due process, the *Glucksberg* test, with a carefully regimented procedure for defining rights and then assessing their importance, which then translates into a formula for judging the validity of the law in question. The problem comes in cases where this framework produces a result that is incompatible with what the majority of the Justices think the right answer should be. In these "hard" cases, the right involved is not sufficiently accepted as important enough to be classified as fundamental. However, the only alternative is the rational basis test, which, as noted above, is almost toothless. In such circumstances, the

[98] Alyssa Rower, "The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment" (2004) 38 Fam. L.Q. 711, at 722.

> Court abandons the framework altogether. Thus, instead of the framework determining the answer, the answer itself determines the framework in many cases.[99]

As in Canada, one cannot categorically conclude, based on the first three decades of the Charter, that the courts will never employ strict scrutiny to assess the validity of criminal sanctions being applied to fundamental, personal decisions. More accurately, it can be said that under the current doctrinal framework, the decision as to whether to designate a personal decision as fundamental and deserving of strong protection remains inscrutable and unpredictable. In reviewing the evolving history of substantive due process review in the United States, Professor Conkle has concluded that the American approach has become malleable and uncertain:

> [T]he contemporary Supreme Court has shifted its terminology from the "right of privacy" to "liberty," and it has replaced strict scrutiny with a more open-ended balancing test. In so doing, the Court has formally and significantly moderated the doctrine of substantive due process. At the same time, however, the Court's increasingly flexible approach is more malleable than its previous doctrine, making it all the more obvious that the Court is picking and choosing the liberties that it deems worthy of special protection. And the Court continues to be bold and aggressive, albeit on a highly selectively basis. In *Stenberg*, for example, the Court invalidated a "partial birth abortion" prohibition despite the broad political sentiment that favors such a ban. And in *Lawrence*, the Court reached out to overrule an existing precedent, and a relatively recent one at that, thereby thrusting itself once again onto the cultural battlefield of contemporary America.[100]

Although American and Canadian courts have not developed a coherent and predictable approach to liberty and autonomous decision-making, there has been greater success in Canada in employing section 7 of the Charter to give effect to the "thin" version of the rule of law. To respect the dictates of the thin version of the rule of law, the Supreme Court has created four doctrinal tools to evaluate the validity of criminal legislation: (1) the law must not be vague;[101] (2) the law must not be

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[99] Jeffrey D. Jackson, "Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment" (2011) 45 U. Rich. L. Rev. 491, at 526, 529.

[100] Daniel O. Conkle, "Three Theories of Substantive Due Process" (2006) 85 N.C.L. Rev. 63, at 76-77 [hereinafter "Conkle"].

[101] *Prostitution Reference*, *supra*, note 6.

arbitrary (the law does "little or nothing to enhance the state's interest");[102] (3) the law must not be overbroad (the means chosen to achieve the state objective "are broader than is necessary to accomplish that objective");[103] (4) the law must not be grossly disproportionate (the effects/harms of the law on people are grossly disproportionate when considered in light of the state objective).[104]

Although there is an overlap among the four doctrinal tools, they are independent mechanisms for assessing whether the deprivation of liberty by criminal sanction is in accord with the principles of fundamental justice.[105] These principles only permit indirect review of the merits of the law, as they are predicated only on reviewing the means chosen to achieve legislative ends. The ends or objective are not questioned as part of the review process. The four doctrinal tools developed by Canadian courts are far more rigorous than the tools employed by American courts to assess legislation in terms of compliance with the thin version of the rule of law.

The vagueness doctrine was originally developed in the United States, and both jurisdictions employ the same elements and criteria for the assessment of the clarity of law.[106] However, there is no American counterpart to the "gross disproportionality" doctrine, and the American arbitrariness and overbreadth doctrines, exist in a very limited manner. Facial review of legislation in the United States is very limited and a facial attack can only be sustained if it can be proven that "no set of circumstances exist under which [the legislation] would be valid" or "that the statute lacks any plainly legitimate sweep".[107] This test incorporates the spirit of our arbitrariness and overbreadth doctrines but the

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[102] *Rodriguez*, *supra*, note 31; *Chaoulli*, *supra*, note 22.

[103] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.); *Demers*, *supra*, note 66.

[104] *Malmo-Levine*, *supra*, note 59.

[105] There had been some developing case law in the Ontario Court of Appeal suggesting that overbreadth is not a free-standing doctrine and has been subsumed under gross disproportionality; however, in 2012, in *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186, at paras. 150-151 (Ont. C.A.) [hereinafter "*Bedford*"], the Court specifically held that overbreadth still remains an independent, free-standing doctrine.

[106] In light of the fact that the vagueness doctrine has been invoked countless times in Canadian courts, with invalidation only occurring in one case (see Young, "Done Nothing Wrong", *supra*, note 19, at 474-75), it may be fair to conclude that American courts are more demanding with this doctrine. For an example of a successful invocation of the doctrine in the United States, see *Chicago (City) v. Morales*, 527 U.S. 41 (1999). It is not certain that a Canadian court would have invalidated this type of legislation.

[107] *U.S. v. Stevens*, 130 S. Ct. 1577, at 1587 (2010); see also Catherine Gage O'Grady, "The Role of Speculation in Facial Challenges" (2011) 53 Ariz. L. Rev. 869 [hereinafter "O'Grady"].

review for these constitutional vices in the United States is basically toothless, as it sets the bar too high. With respect to facial review for First Amendment challenges, the United States Supreme Court expands the overbreadth doctrine in a way that makes it more in line with the Canadian approach — a law restricting speech is overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the state's plainly legitimate sweep",[108] but this review of overbreadth does not extend to liberty claims.

In the past year, the strength of the Canadian approach to compliance with the thin version of the rule of law has been demonstrated in dramatic fashion. In 2011, the Supreme Court of Canada relied upon these tools to compel the government of Canada to maintain an exemption, granted to a safe injection site, to allow this clinic to provide a safer venue for heroin addicts to inject their drugs.[109] In March 2012, the Court of Appeal of Ontario invalidated, and read down, some of the prostitution-related provisions in the *Criminal Code*, primarily on the basis that these provisions impaired the security interests of sex workers by denying them the legal ability to take basic safety measures when working.[110] These are significant decisions that show that review of criminal legislation on the basis of arbitrariness, overbreadth and gross disproportionality can impose significant constraints on legislative and executive acts. The cases may not advance the concept of liberty as fundamental, personal decision-making, but it is important to recognize that although there is confusion and uncertainty surrounding judicial implementation of fundamental rights under a thick version of the rule of law, the courts have shown a greater willingness to become more critical and demanding of lawmakers in terms of implementation of the "thin" version of the rule of law.

IV. THE WEAK LINKS IN THE CHAIN

The judicial reluctance to embrace heightened scrutiny for non-enumerated, fundamental freedoms may be a simple product of the fact that there is nothing in the structure of the Charter which inexorably leads to this powerful form of judicial review. The American role model may have appeared to be an attractive approach as the American courts'

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108 *U.S. v. Stevens*, *id.*
109 *Insite*, *supra*, note 34.
110 *Bedford*, *supra*, note 105.

reliance upon the "penumbra" of non-enumerated rights turned out to be a valuable tool for overturning some very regressive state policies in past decades. However, in contemporary times, the role model has retreated from this activist role. Although a commitment to classic liberalism and the rule of law supports the notion that the state must provide a reasoned justification for curtailing liberty, the concept puts a strain on judicial competence and legitimacy. It is easier to presume that lawmakers have a reasoned justification for acting than putting the government to strict proof of the compelling objective being pursued. In addition, courts may be reluctant to expand the reach of the Charter by creating a zone of self-sovereignty because the exercise is fraught with subjectivity and indeterminacy. Sticking to the four corners of the text of the Charter is a safe option that does not expose the judiciary to accusations of political overreaching.

Beyond the simple fact that judges may be uncomfortable taking on the responsibility of creating zones of self-sovereignty, which would be virtually immunized from state intrusion, there are other weak links in the chain. Both the crude structure of constitutional review and adjudication, and the state's routine reliance upon blanket prohibitions, have stultified the growth of the thick version of the rule of law. Constitutional review is driven by the ultimate goal of invalidating legislation, and this zero-sum approach to constitutional remedies serves to deter most judges from embracing strict scrutiny for non-enumerated rights. The lack of nuance and flexibility in addressing constitutional claims does not foster judicial creativity. Any drive to creative activism is further deterred by the fact that legislatures tend to employ blanket prohibitions to address undesirable conduct. The same lack of nuance and flexibility in the legislative initiative effectively prevents a court from addressing constitutional flaws in legislation with a less drastic remedy than invalidation, such as reading down the legislation to meet constitutional standards, or reading in the missing elements needed to make the legislation constitutionally sound.

In theory, there is little conceptual difficulty in categorizing and designating the choices of life-partners, and the decision about terminating one's life, as fundamental, personal decisions. As mentioned earlier, it could be argued that the choice of intoxicating substances could also be designated as fundamental. However, the challenges to polygamy, assisted suicide and marijuana possession all failed partly because the Court was forced into the zero-sum game of wholesale invalidation of a blanket prohibition. Substantive due process could not be achieved

because the Court was concerned about the practical impact of the legislative vacuum of invalidation. So, the Court avoids this untenable situation by either trivializing the fundamental choice claim by calling it a mere lifestyle choice, or by exaggerating the compelling nature of the state interest.

The Court can only stickhandle around the practical implications of designating a right as fundamental by elevating the state objective so that it appears compelling. This is accomplished by creating an impression that the conduct being restricted by state action is inherently harmful, and in this way, it becomes hard to resist the state's claim that the blanket restriction on liberty is necessary for the proper functioning of society. In the construction of the state objective, all polygamists are exploitive, all drug users are irresponsible, all sex workers are vulnerable to predatory pimps and all terminal patients are incapable of autonomous choice. Although it is far beyond the scope of this paper to address this issue properly, I think it can be said with little doubt that there are egalitarian polygamists, responsible drug-users, respectful purveyors of sex and autonomous suicide-planners. We often do not know the percentage of those who are good citizens and those who are in danger or are dangerous to others, but it cannot be gainsaid that for all these activities there are some people who are exercising fundamental, personal choices and the law is interfering with this choice for "no good reason", let alone a compelling reason.

Under the current structure of constitutional adjudication, a court is ill-equipped to deal with the fundamental rights claim in a creative and responsive manner. Since the 1985 decision in *Big M*,[111] it has been accepted constitutional doctrine that an accused person can challenge the constitutionality of criminal law even if the legislation can be applied in a constitutionally sound manner to the circumstances of the accused's case. In other words, the irresponsible drug user and the abusive polygamists are allowed to argue that the law violates the rights of others who may be deserving of constitutional protection. The *Big M* approach to standing may expand the ability of Canadians to raise constitutional claims, but it is self-defeating. First, bad facts make bad law, and when a court is confronted with an abusive polygamist it is unlikely to find the exercise of a fundamental, personal decision on the facts, or it will, consciously or inadvertently, elevate and exaggerate the state objective. It

[111] *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.) [hereinafter "*Big M*"].

is hard to find that the state does not have a compelling interest when you are dealing with rights-violators and not rights-advocates.

More significantly, judicial activism will be further deflated when a court has to consider the zero-sum option of the invalidation of a blanket prohibition. If the court invalidates the blanket prohibition to protect the interests of a certain percentage of accused persons who are exercising fundamental choices, it leaves the state powerless, at least temporarily, to deal with those who are hurting others, or themselves, under the guise of exercising fundamental choices. The court can issue a suspended declaration of invalidity, but this still leaves the future uncertain.

In the United States, an individual can launch an "as-applied" challenge in addition to a facial challenge — the as-applied challenge "targets the constitutionality of the statute as it is applied in the particular context of the case, and seeks to invalidate it only as applied to those circumstances".[112] This nuanced approach lowers the stakes of our zero-sum invalidation game and could encourage greater judicial activism in the realm of fundamental, personal choice. The exploitive polygamists can be sanctioned in law while the polygamists who pose no risk of harm to others or society at large will have their fundamental choices protected by the Constitution. Unfortunately, this approach appears to be foreclosed by the Supreme Court's consistent rejection of constitutional exemptions. A constitutional exemption under section 24(1), in lieu of the remedy of invalidation under section 52, is the equivalent of the "as-applied" form of constitutional review, but the Court has consistently frowned upon this alternative remedy.[113] Most recently, the Court stated that "such exemptions are to be avoided"[114] for the reasons cited in *Ferguson*:

> Attractive as they are, the arguments for constitutional exemptions in a case such as this are, on consideration, outweighed and undermined by counter-considerations. I reach this conclusion on the basis of four considerations: (1) the jurisprudence; (2) the need to avoid intruding on the role of Parliament; (3) the remedial scheme of the *Charter*; and (4) the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law.[115]

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[112] O'Grady, *supra*, note 107, at 873.

[113] *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at paras. 84-89 (S.C.C.); *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter "*Ferguson*"]; *Insite*, *supra*, note 34, at para. 149; *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

[114] *Insite*, *id.*, at para. 149.

[115] *Ferguson*, *supra*, note 113, at para. 40.

Without a constitutional exemption in the remedial armour, a court will easily succumb to the standard state argument that a blanket prohibition is essential to maintain the integrity of its prohibition, and that it is impossible for lawmakers to fashion a nuanced, exempting scheme to protect those who are genuinely exercising a fundamental, personal choice. In the assisted suicide challenge, and the marijuana challenges, the Court acceded to the state's argument that legislative resort to blanket prohibitions were necessary in order to "protect the vulnerable" and that there did not exist an effective mechanism for distinguishing in advance which people seeking assisted suicide or the use of marijuana would be vulnerable to the harms for which the law was enacted in the first place.

One has to wonder whether the creation of a nuanced, exempting scheme is beyond the competence of both court and legislature, or whether it is really a question of political will. For example, in *Rodriguez*, Lamer C.J.C., in dissent, provided a detailed set of criteria to be followed for those who wished to exempt themselves from the blanket prohibition on assisted suicide.[116] Although one could still argue over some of the details of this exempting scheme, his simple efforts, and the fact that subsequent to *Rodriguez* some jurisdictions have enacted exempting schemes,[117] clearly undercuts the legislative claim of impotence and suggests the problem is more related to indolence and a lack of political will.

If legislatures resist the allure of blanket prohibitions, and courts employ more nuanced remedies than simple invalidation, there will be greater protection for fundamental, personal choices. For example, the value of flexibility is demonstrated by the Supreme Court of Canada's treatment of the controversial issue of minors refusing blood transfusions based on religious objections. In *A.C. v Manitoba*,[118] the Court reviewed the constitutionality of legislation in Manitoba, which permitted the state to override the objections of a minor to a blood transfusion. The legislation created a presumption that the wishes of minors over 16 would be determinative unless it could be shown they lacked capacity to understand their decision. No such presumption existed for minors under 16. Not being faced with a blanket legislative prohibition on minors under 16 being allowed to refuse a blood transfusion, the Court was able to

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[116] *Rodriguez*, *supra*, note 31, at para. 116.

[117] See Michael Cormack, "Euthanasia and Assisted Suicide in the Post-*Rodriguez* Era: Lessons From Foreign Jurisdictions" (2000) 38 Osgoode Hall L.J. 591; Jocelyn Downie, "The Contested Lessons of Euthanasia in the Netherlands" (2000) 8 Health L.J. 119.

[118] *Supra*, note 52.

reconstruct the legislation to require that a court still undertake to balance the best interests of the child against the state interest before overriding the wishes of the minor. With this judicial construction, and the introduction of some degree of flexibility into the legislation regime, the Court was then able to dismiss the section 7 claim for invalidation on the basis that the legislation struck the right balance. Without wholesale invalidation, the Court was able to protect both the integrity of the legislation and the interests of the young person.

Due to the fact that the medical choices remain the only personal decision which has been consistently characterized as a fundamental right under section 7, it is not surprising that this is the one area in which the courts have resisted the allure of the argument that blanket prohibitions are indispensable to effectively achieving the legislative objective. As mentioned earlier, in the context of medical marijuana and safe injection sites, the courts have effectively required the legislature, or executive, to create exempting provisions to facilitate the medical use of a prohibited substance, or to permit a prohibited substance to be used in a controlled environment. These decisions did not lead to a surrender by the state in its war on drugs, nor did the introduction of flexibility and nuance impair the integrity of its prohibition. However, these decisions do permit the state to continue pursuing its policy of drug prohibition while allowing fundamental, personal choices to be respected and protected by exempting these choices from the reach of the prohibition.

The tide may be turning, as appellate courts have recently taken a more skeptical approach regarding the state's insistence that only a blanket prohibition will suffice to achieve a state objective. In *Adams*, the British Columbia Court of Appeal rejected the claim that a blanket prohibition on temporary, makeshift shelters was necessary to prevent nuisance and disorder, as the Court believed that the state could construct more flexible "time, place and manner" regulations and in this way protection could be given to a homeless person's fundamental, personal choice on how to shelter himself or herself in public spaces.[119] Most recently, the Ontario Court of Appeal in *Bedford* found the living on the avails provision to be constitutionally overbroad, and rejected state arguments that a blanket prohibition on accepting payment for services rendered to a sex worker was necessary to prevent abuse and harm to society. The Court stated:

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[119] *Adams*, *supra*, note 34, at para. 116.

> The Supreme Court has identified two circumstances in which a blanket prohibition can escape a charge of unconstitutional overbreadth. The first is if a narrower prohibition will be ineffective because the class of affected persons cannot be identified in advance: *Clay*, at para. 40. The second is if there is a significant risk to public safety in the event of misuse or misconduct: *Clay*, at para. 40; *Cochrane*, at para. 34. In our view, neither circumstance is present here.
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> No case has been made out for a blanket prohibition on the second basis, danger to the public at large. The objectives of the living on the avails provision have not been cast in terms of public protection; rather the legislation is more narrowly focused on protecting prostitutes from exploitation. As we have said, this is a group that is uniquely vulnerable because of the nature of prostitution itself and the legislative framework that surrounds most prostitution-related activities. The risk of harm from pimping accrues principally to the prostitute, not the general public.
>
> The case for a blanket prohibition on the first basis — the difficulty of identifying the vulnerable group in advance — is superficially more compelling. We are, however, satisfied that the application judge was right to find that the living on the avails provision violates the overbreadth principle.[120]

Although this decision was predicated on a deprivation of the security interest, and not the liberty interest of making a fundamental personal decision, it does signal a more exacting review. In the majority of cases dealing with restrictions on liberty, the Court has acceded to the state's claim that blanket prohibitions were integral to the integrity of a criminal prohibition by undertaking a highly deferential form or rational basis review, whereas, in this case, the Court appeared to be looking for a more solid empirical foundation beyond assertions based on limited research and anecdotal evidence. In *Reference re Assisted Human Reproduction Act*, the Supreme Court of Canada noted that "it is not enough to identify a public purpose that would have justified Parliament's action. ... Where its action is grounded in the criminal law, the public purpose must involve suppressing an evil or safeguarding a threatened interest."[121] The decision of the Court of Appeal in *Bedford* is

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[120] *Bedford*, *supra*, note 105, at paras. 245-247.

[121] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61, at para. 232 (S.C.C.); *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

one of the few occasions where a court seemed to demand from the state actual proof of the evil being fought instead of speculation about an imaginary axis of evil.

V. CONCLUSION

Substantive due process is a form of judicial review designed to give effect to the oft-quoted metaphor that the Charter is a "living tree capable of growth". If the courts continue to rely upon history and tradition to constrain the growth of fundamental, personal decisions, constitutional review will not yield "a vibrant living tree but a garden of annuals to be regularly uprooted and replaced".[122] The prohibition on assisted suicide in Canada was largely premised upon an understanding of history and tradition, but reliance upon past practice has not led to a conclusive and final determination of the issue. Since the assisted suicide decision was rendered in 1990, there have been two efforts to revisit the constitutionality of the prohibition,[123] and this is not surprising since a historical approach does not address the reality that values are constantly evolving. Tradition may be a good starting point for assessing whether the law is unnecessarily interfering with the exercise of a fundamental, personal decision, but, ultimately, if substantive due process is to be more than an academic issue to be debated, the courts will need to begin to struggle with the thorny issue of whether tradition has been overtaken by evolving values.[124]

In the assisted suicide case, Sopinka J. was aware of the stultifying impact of history on constitutional analysis. He noted that "[i]t is not sufficient ... to conduct a historical review. ... [A] strictly historical analysis will always lead to the conclusion in a case such as this that the deprivation is in accordance with fundamental justice."[125] Although Sopinka J. was unable to resist the call of history in making his decision on assisted suicide, his wise admonition must be taken seriously if substantive due process is to have any impact on the reach of substantive criminal law. In determining whether a restriction of liberty is legitimate

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[122] *Bedford*, *supra*, note 105, at para. 84.

[123] *Wakeford v. Canada (Attorney General)*, [2001] O.J. No. 4921 156 O.A.C. 385 (Ont. C.A.), affg [2001] O.J. No. 390, 81 C.R.R. (2d) 342 (Ont. S.C.J.); Keith Fraser "Ban on euthanasia fosters 'back-alley' suicides, lawyer says" *National Post* (December 1, 2011), online: National Post <http://news.nationalpost.com/2011/12/01/ban-on-euthanasia-fosters-back-alley-suicides-lawyer-says/>.

[124] Conkle, *supra*, note 100, at 121-45.

[125] *Rodriguez*, *supra*, note 31, at para. 42.

and sounds in the constitutional register, it matters little if the criminal prohibition has existed from time immemorial. Nor is it sufficient for assessing the validity of contemporary offences to simply trivialize the restriction on liberty by concluding that the conduct being prohibited has never in the past been considered a fundamental, personal decision. The rule of law demands that the state be able to provide a reasoned justification for the restriction, and this justification should be compelling and contemporary. It should also be capable of being proved in an objective manner without resort to unsubstantiated assertions, provocative anecdotes and personal opinion. Of course, historically, courts have never called upon lawmakers to justify their actions, but now that the constitutional tools are in place to facilitate this obligation to provide a reasoned justification, it does not seem entirely unreasonable or revolutionary to require the state to satisfy this obligation before it throws someone in jail for the exercise of a fundamental, personal decision.