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

Volume 104 Article 4

2022

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Citation Information

Adams, Eric M.. "Touch of Evil: Disagreements at the Heart of the Criminal Law Power." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 104. (2022).
DOI: https://doi.org/10.60082/2563-8505.1426
https://digitalcommons.osgoode.yorku.ca/sclr/vol104/iss1/4

Touch of Evil: Disagreements at the Heart of the Criminal Law Power

Eric M. Adams*

I. Introduction

In the long, famous, unbroken, opening shot of Orson Welles's 1958 film, *Touch of Evil*, a ticking bomb is placed in the trunk of a car. As the camera anxiously tracks the car's path through the busy life of a border town, residents and tourists bustle about oblivious to the danger in their midst.[1] The Supreme Court of Canada's decision, *Reference re Genetic Non-Discrimination Act*,[2] raises latent dangers and vulnerable borders of a different sort. Assessing the constitutionality of Parliament's *Genetic Non-Discrimination Act*,[3] the Supreme Court divided on both the appropriate conception and proper test to apply regarding Parliament's jurisdiction to enact laws under section 91(27), "The Criminal Law".[4] Drawing on the dissenting opinion and sharing its concerns, early critics of the Court's majority reasons warn that the decision upholding the constitutionality of the GNDA "comes at great cost to basic federalism principles".[5] In the dissenting judgment penned by Kasirer J., joined by Wagner C.J.C. and Brown and Rowe JJ., the protection of those principles lies in a concept not typically favoured in judicial decisions: evil, or at the very least, a touch of it. Evil has proven a durable theme in both film noir and the Supreme Court's jurisprudence on the scope of the criminal law power.

For two distinct but related reasons, the question of evil has consistently arisen in the jurisprudence of section 91(27) of the *Constitution Act, 1867*.[6] The first reason

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1 *Touch of Evil*, Orson Welles (United States: Universal-International, 1958). See Richard Deming, *Touch of Evil* (London, Bloomsbury, 2020), at 15 for analysis of "the dazzling opening sequence, rightly one of the most famous in film history".

2 *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.).

3 *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 [hereinafter "GNDA"].

4 *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, s. 91(27) [reprinted in R.S.C. 1985, App. II, No. 5].

5 Sharron Hale & Dwight Newman, "Constitutionalism and the *Genetic Non-Discrimination Act Reference*" 2020 29:3 Const. Forum Const. 31, at 31. See also Yann Joly *et al.*, "Erring in Law and in Fact: The Supreme Court of Canada's *Reference re Genetic Non-Discrimination Act*" 2021 99 Can. Bar Rev. 172.

6 *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3 [reprinted in R.C.S. 1985, App. II, No. 5].

is a feature of constitutional interpretation itself. Although it is often the interpretation of the pith and substance of the legislation at issue that draws attention in federalism analysis, just as important is the "classification" stage in which the court engages with the meaning of the relevant heads of power set out in the constitutional text. As I have argued elsewhere, the process of constitutional interpretation of the heads of power, as with other constitutional provisions, is an exercise best served by a methodology focusing on text, purpose and context.[7] Bounded by text, guided by purpose, and mindful of context, the Court searches for a balance of principled and pragmatic meaning in the constitutional provisions it applies.[8] In doing so, courts confront the words employed in section 91(27) in attempting to discern its meaning and scope: "the exclusive Legislative Authority of the Parliament of Canada extends to . . . The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."[9] The search for meaning of that text means confronting whether evil is a necessary characteristic of the constitutional definition of "Criminal law".

The second reason for the enduring presence of evil in section 91(27) cases is a feature inherent in the nature of federalism itself: the necessity of protecting and promoting balanced federalism by locating discernable limits among a list of often broadly-worded powers. "[T]he categories of laws enumerated in sections 91 and 92 are not in the logical sense mutually exclusive", William R. Lederman notes, "they overlap or encroach upon one another in many more respects than is usually realized".[10] The reality of that overlap has provoked two, paradoxically divergent, features of Canada's federalism jurisprudence. The first is the increasing judicial acceptance of the role of the double aspect doctrine in promoting the values of cooperative federalism, and the acceptance that heads of power should be interpreted broadly to enable the democratic exercise of jurisdiction at both the federal and provincial level.[11] "The Court tends to give the pith and substance, double aspect, ancillary powers and living tree doctrines liberal rein", Bruce Ryder observes, "promoting a great deal of overlap and interplay between federal and

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[7] See Eric M. Adams, "Canadian Constitutional Interpretation" in Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis Canada, 2018), at 128.

[8] "Courts apply considerations of policy along with legal principle" Sopinka J. explains, "the task requires 'a nice balance of legal skill, respect for established rules, and plain common sense.'" *R. v. Morgentaler*, [1993] S.C.R. 463, at 481 (S.C.C.).

[9] *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, s. 91(27) [reprinted in R.C.S. 1985, App. II, No. 5].

[10] William R. Lederman, "Classification of Laws and the British North America Act" in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981), at 236.

[11] See Andrew Leach & Eric M. Adams, "Seeing Double: Peace, Order and Good Government and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction" (2020) 29 Const. Forum Const. 1. On cooperative federalism see Eric M. Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR 26.

provincial laws in growing areas of *de facto* concurrent jurisdiction".[12] Pulling in the other direction, however, is recognition that an *overly* broad and generous interpretation of Parliament's constitutional jurisdiction could undermine the ultimate balance of federalism by eroding provincial jurisdiction, a perspective gaining renewed emphasis among the Wagner Court. Although the workings of the double aspect doctrine ensure that federalism is never a pure zero sum game, when Parliament's jurisdiction expands it can result in federal legislation overriding otherwise valid provincial laws under the mechanics of the paramountcy doctrine.[13] The judicial challenge in interpreting the criminal law power, not unlike Parliament's broad jurisdiction over the "Regulation of Trade and Commerce" and "Peace, Order and Good Government" is to avoid "an all pervasive interpretation" by ensuring that the head of power is defined with analytic rigour and discernable boundaries.[14] In the criminal law power, finding those definitional limits has often caused the court to query whether evil, or some analogue, might assist in providing those limits.

With a focus on evil as a potential dimension of the criminal law power, this article proceeds in two parts. First, I explore the intermittent but never vanquished presence of evil in the history of the Supreme Court's section 91(27) jurisprudence as a recurring theme in the effort to constitutionally define the federal criminal law power. In the second part, I explore the most recent iteration of that long-simmering jurisprudential debate as expressed in the divisions over evil that characterized the majority and dissenting judgments in *Reference re Genetic Non-Discrimination Act*. Rather than clarify the presence of evil in the analysis of section 91(27), the divisions the case exposed only sharpened both the controversy and uncertainty of the governing approach to the criminal law power. All of which suggests that removing evil from the definition of the criminal law power will be no easier than trying to purge evil as a plot device from pulp fiction. As in crime stories of all sorts, however, evil can obscure as much as illuminate, throwing up red herrings as often as clarity. Although evil may be difficult to completely eradicate from the jurisprudence of the criminal law power as a result of the laudable interests it aims to protect, I argue in what follows that the Supreme Court should be wary of its allure as a productive standard in approaching the application of the criminal law power.

II. A SHORT CANADIAN CONSTITUTIONAL HISTORY OF EVIL

Evil and its meanings have preoccupied religious thought, philosophy, art and

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[12] Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 Sup. Ct. L. Rev. 565, at 566.

[13] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61, at 43 (S.C.C.) [hereinafter "*AHRA*"].

[14] *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641, at 660 (S.C.C.).

literature since time immemorial. "[A]ll Good to me is lost", Satan says in Milton's *Paradise Lost*, "Evil be thou my Good."[15] I will leave to theologians, scholars and critics, the weightier matters of evil's true nature and focus on a more modest objective: to trace the history of evil in Canadian constitutional jurisprudence about the criminal law power. That history begins with section 91(27) of the *Constitution Act, 1867*.

The archival records surrounding the conceptualization and drafting of sections 91 and 92 of the *Constitution Act, 1867* are notoriously thin, and so the precise origins of what became section 91(27) remain obscure. What is clear in the historical record is that the assumption of federal jurisdiction over criminal law which, until that point had been a diverse local endeavour among colonial governments, fit within the centralizing tendencies of some of the framers.[16] John A. Macdonald, among others, clearly intended Canada's division of powers to distinguish itself from the more decentralized American federalism, including its allocation of criminal law jurisdiction to the states. "[T]he determination of what is crime and what is not and how crime should be punished", should be exclusively federal matters, Macdonald argued.[17] Views to the contrary appear to have been muted, if they existed at all, and Parliament's jurisdictional power over the criminal law proceeded as a relatively uncontested constant throughout the constitutional drafting process.[18] In one of the early texts on Canadian constitutional law, A.H.F. Lefroy praised federal uniformity in criminal law "so that the rights of all citizens shall as much as possible [be] equally respected, and the public wrongs of any citizen as much as possible [be] equally punished".[19] Of course, a small measure of pluralism continued since the provinces would have continuing authority over "the Constitution of Courts of Criminal Jurisdiction". Diversity at the provincial level diminished sharply, however, after the appearance of the consolidated *Criminal Code of Canada* in 1892, signaling Parliament's dominance in matters of substantive criminal law.

Perhaps not surprisingly given its ubiquity in the early jurisprudence of Canadian constitutional law, it was not the *Criminal Code* but the federal regulation of alcohol

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[15] See Cheryl H. Fresch, *A Variorum Commentary on the Poems of John Milton*, Vol. 5, Part 4: *Paradise Lost*, Book 4, ed by P.J. Klemp (Pittsburg, PA: Duquesne University Press, 2011), at 4.108-10 for an extended analysis of the meaning of the line.

[16] John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: Osgoode Society for Canadian Legal History, 2004), at 6, 7.

[17] Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892*, 2d ed. (Edmonton: University of Alberta Libraries, 1990), at 187.

[18] "[N]o record has been found of a voice raised in opposition to [s. 91(27)], either in the [Confederation debates] or in other published material": Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892*, 2d ed. (Edmonton: University of Alberta Libraries, 1990), at 188.

[19] AHF Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book Publishing, 1897), at 549.

that initiated the judicial engagement with the criminal law power.[20] In *Russell v. The Queen*, the Judicial Committee of the Privy Council ruled on the constitutionality of Parliament's *Canada Temperance Act*, which had enabled local municipalities to prohibit "intoxicating liquors".[21] Upholding the constitutionality of the Act largely under a broad conception of the "peace, order, and good government" clause, Sir Montague Smith nonetheless noted that a law prohibiting alcohol was not "in relation" to property and civil rights in the province any more than a law prohibiting the burning down of a house or cruelty to a horse was. Such laws, he reasoned, were instead "designed for the promotion of public order, safety or morals" "and have direct relation to criminal law", as a matter "of public wrongs rather than that of civil rights".[22] Smith's definition drew on Blackstone's famous typology dividing "private wrongs or civil injuries" engaging "civil rights which belong to individuals" from "public wrongs or crimes" as "a breach and violation of the public rights and duties due to the whole community".[23] Putting Blackstone's conception of public wrongs in action, Smith added that temperance legislation could not be characterized as local or private since the law "is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion".[24] In a case not really about the criminal law power, the Privy Council nonetheless tied the concept of evil to early conceptions of the criminal law power.[25]

Evil, shapeshifter that it is, was nowhere to be seen in the Privy Council's next significant decision regarding the criminal law power. In striking down Ontario's Sunday closing legislation, the Privy Council noted that the question of the provincial Act's validity "turns upon a very simple consideration". "The reservation of the criminal law for the Dominion of Canada", the Committee noted, "is given in clear and intelligible words which must be construed according to their natural and ordinary signification". Those straightforward words in the text — the "Criminal Law" — the Lords held, meant "the criminal law in its widest sense".[26] That statement, repeated in many judgments to follow, still begged the question of what

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[20] The Honourable Morris J. Fish, "The Effect of Alcohol on the Canadian Constitution . . . Seriously" (2011) 57:1 McGill L.J. 189.

[21] *Russell v. The Queen*, 1881-82 7 A.C. 829 (P.C.) [hereinafter "*Russell*"].

[22] *Russell v. The Queen*, 1881-82 7 A.C. 829, at 840 (P.C.).

[23] Wayne Morrison, ed., *Blackstone's Commentaries on the Laws of England* (London: Cavendish, 2001).

[24] *Russell v. The Queen*, 1881-82 7 A.C. 829, at 842 (P.C.).

[25] As Idington J. would later write, "In the *Russell Case*, the regulation of trade and commerce was not abandoned, the criminal law was hinted at, the right to prevent dangerous things being done suggested. What all these meant or might mean was not decided." *Reference re: Insurance Act 1910 (Canada) SS. 4 & 70*, (1913), 48 S.C.R. 260, at 287 (S.C.C.).

[26] *Reference re: An Act to Prevent the Profanation of the Lord's Day (Ont.)*, [1903] J.C.J. No. 1, [1903] A.C. 524, at 529 (P.C.).

that wide sense was, or how one might discern its limits.[27] Those characteristics emerged with modest specificity in the Privy Council's decision in *Reference re Board of Commerce Act*.[28] In that case, Lord Haldane, in keeping with his broader instinct to limit the breadth of Parliament's authority in order to protect provincial jurisdiction, held that the federal criminal law power should be limited to matters "which by [their] very nature belongs to the domain of criminal jurisprudence", and gave, as an example, incest.[29] But this too simply moved the abstraction one further link along the chain. What was "by nature" criminal?

In this same period, the implications for a relatively unconstrained criminal law power also came to the fore. Chief Justice Duff, in one of the cases in which he sat as a member of the Privy Council, noted with alarm the argument of Canada's lawyers that "the Dominion has authority to declare any act a crime" for constitutional purposes.[30] The implications of such a power were "far-reaching", Duff J. argued for if such a power existed, "the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces . . . by the device of declaring those persons to be guilty of a criminal offence."[31] That simply could not be the case, Duff J. reasoned, since the "governing principles of the Canadian Constitution" included the continuing integrity of both provincial and federal authority.[32] Legal scholar John Read agreed that a practically limitless criminal law power enabled "an unwarranted and unnecessary invasion of the

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[27] The "criminal law in its widest sense" quote from *Hamilton Street* Railway provided the opening words of the chapter on the criminal law power in Bora Laskin's leading treatise on Canadian Constitutional Law. Bora Laskin, *Canadian Constitutional Law*, 3d ed. rev. (Toronto: Carswell, 1969), at 849.

[28] *Re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, (1922) 1 A.C. 192 (P.C.).

[29] *Re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, (1922) 1 A.C. 192, at 199 (P.C.). On Haldane's constitutional theories see Frederick Vaughan, *Viscount Haldane: "The Wicked Stepfather of the Canadian Constitution"* (Toronto: Osgoode Society for Canadian Legal History, 2010).

[30] *Reference re: Reciprocal Insurance Act, 1922 (Ont.)*, [1924] J.C.J. No. 1, [1924] A.C. 328 (P.C.) [hereinafter "*Reciprocal Insurers*"].

[31] *Reference re: Reciprocal Insurance Act, 1922 (Ont.)*, [1924] J.C.J. No. 1, [1924] A.C. 328, at 340 (P.C.).

[32] *Reference re: Reciprocal Insurance Act, 1922 (Ont.)*, [1924] J.C.J. No. 1, [1924] A.C. 328 (P.C.). In a subsequent Supreme Court of Canada decision, Duff J. returned to the theme. "The words of head 27 read in their widest sense", he wrote,

> enable Parliament to take notice of conduct in any field of human activity, by prohibiting acts of a given description and declaring such acts to be criminal and punishable as such. But it is obvious that the constitutional autonomy of the provinces would disappear, if . . .. it were competent to Parliament by the use of those powers, to prescribe and indirectly to enforce rules of conduct, to which the provincial legislatures ad not given their sanction, in spheres exclusively allotted to provincial control.

provincial legislative field".[33] Despite such concerns, a grand theory capable of defining the criminal law power remained elusive. "Their Lordships think it undesirable", Duff J. wrote, "to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91".[34]

Undesirable as the task may be, the challenge of finding those limits would not go away. For one reason, cases kept emerging as Parliament continued to expand its legislative reach into economic and social life as government capacities expanded to meet new demands upon the 20th-century state.[35] Moreover, courts came to recognize that simply defining the parameters of jurisdiction under section 92 could never conclusively rule out federal validity of a particular enactment given the role of the double aspect doctrine. Accordingly, Duff C.J. shook off his earlier disinclination and attempted to define some aspects of the criminal law power. "The characteristic rules of the Criminal Law", he argued, are "rules designed for the protection of the State and its institutions, for the security of property and the person and public order, rules for the suppression of practices which the Criminal Law notices as deserving chastisement by the State, and so on".[36] Since the list was non-exhaustive, Duff C.J. suggested that what tied these particulars together was a concern for the "actual effects, physical or moral, as harmful to some interest which it is the duty of the State to protect". "They are concerned", he continued "with some evil or menace, moral or physical, which the law aims to prevent or suppress through the control of human conduct".[37] Evil had returned to the jurisprudence, but only briefly.

In *Proprietary Articles Trade Assn. v. Canada*, the Privy Council reasserted a conception of the federal criminal law power focusing on manner and form above substantive characteristics. "[I]f Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes", Lord Atkin wrote.[38] Confirming that federal jurisdiction extended to the creation of new crimes,

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Reference re: Combines Investigation Act (Canada), [1929] S.C.J. No. 19, [1929] S.C.R. 409, at 412 (S.C.C.) [hereinafter "*Re Combines Investigation Act*"].

[33] John E. Read, "*Constitutional Aspects of Rex v. Nadon*" (1926) 4:7 C.B.R. 460, at 461.

[34] *Ontario v. Reciprocal Insurers*, [1924] J.C.J. No. 1, [1924] A.C. 328, at 343 (P.C.).

[35] Richard Simeon & Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990); John Willis, ed., *Canadian Boards at Work* (Toronto: MacMillan, 1941).

[36] *Re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, (1922) 1 A.C. 192, at 413 (P.C.).

[37] *Re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, (1922) 1 A.C. 192, at 413 (P.C.).

[38] *Reference re: The Combines Investigation Act (Canada) s. 36*, [1931] J.C.J. No. 1, [1931] A.C. 310, at 323-24 (P.C.).

including activity not contemplated as criminal in 1867, Lord Atkin held that "[c]riminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State."[39] More to the point, "[t]he criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?"[40] Speaking directly to the relationship between morality and crime, Lord Atkin dispelled the notion that evil that anything to do with a constitutional definition of the criminal law power. There was little point, he held "to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'". Lord Atkin explained, "the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished."[41] There was an obvious formalism at the heart of Lord Atkin's definition of the criminal law power, but his opinion also appears informed by a descriptive sociological truth about the nature of the criminal law and its capacity for change. Having reviewed the jurisprudence of the criminal law power, it would have become obvious that notions of criminality tended to exist in context, to bend and shift in the currents of time. Better, he must have thought, to face that reality in clear-eyed terms rather than to search for a Platonic ideal of criminality that probably did not exist.

Following Lord Atkin's revisions to the conception of the criminal law power, a majority of the Supreme Court of Canada abandoned previous efforts to restrict Parliament's jurisdiction to a particular definition of criminality, by recourse to evil or otherwise.[42] Justice Duff went so far, perhaps with some sense of frustrated resignation, to claim that as a result of Privy Council precedents, "enactments passed within the scope of [the criminal law power] are not subject to review by the courts".[43] In a concurring opinion, Cannon J. refused to endorse that view and continued to press for a substantive account of the criminal law distinguished by some characteristics of public wrongs.[44] On hearing that appeal, Lord Atkin added

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[39] *Reference re: The Combines Investigation Act (Canada) s. 36*, [1931] J.C.J. No. 1, [1931] A.C. 310, at 323-24 (P.C.).

[40] *Reference re: The Combines Investigation Act (Canada) s. 36*, [1931] J.C.J. No. 1, [1931] A.C. 310, at 323-24 (P.C.).

[41] *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] J.C.J. No. 1, [1931] A.C. 310, at 323-24 (P.C.).

[42] *Reference Re: Criminal Code (Canada) Section 498A*, [1936] S.C.J. No. 26, [1936] S.C.R. 363 (S.C.C.).

[43] *Reference Re: Criminal Code (Canada) Section 498A*, [1936] S.C.J. No. 26, [1936] S.C.R. 363, at 366 (S.C.C.).

[44] *Reference Re: Criminal Code (Canada) Section 498A*, [1936] S.C.J. No. 26, [1936] S.C.R. 363, at 370 (S.C.C.).

a slim but significant qualification to his earlier definition of section 91(27), perhaps cognizant of Duff C.J.'s implicit criticism. First, he reiterated that the criminal law power contained "no other criterion of 'wrongness' than the intention of the Legislature *in the public interest* to prohibit the act or omission made criminal".[45] In addition, it remained true that "Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach" on provincial jurisdiction under section 92. Lord Atkin's definition was not, in that sense, limitless. It was bounded by form — the need for prohibitions and penalties — but also by substance, the need for those prohibitions to be publicly oriented, and by the operation of the division of powers more broadly, including the limits imposed by colourability.[46] For scholar, F.E. Labrie, Lord Atkin's still too formal definition of the criminal law power only ensured the inevitability of a future case to determine a "conclusively criminal aspect" to the criminal law power.[47] That case, surprisingly enough, involved margarine.

The Supreme Court of Canada heard the *Margarine Reference* a year after the Privy Council confirmed that Parliament had the constitutional authority to end appeals to the Judicial Committee of the Privy Council, but before such legislation had taken effect.[48] Nonetheless, there are elements of Rand J.'s famous judgment that seem alive to the growing sentiment, especially in English Canada, that Canadian law should no longer be adjudicated by a foreign judicial body.[49] "Under a unitary legislature", Rand J. noted with perhaps Lord Atkin in mind, "all

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[45] *Reference re: Criminal Code of Canada, s. 498*, [1937] J.C.J. No. 7, [1937] A.C. 368p, at 376 (P.C.) [emphasis added].

[46] *Reference re: Criminal Code of Canada, s. 498*, [1937] J.C.J. No. 7, [1937] A.C. 368p, at 376 (P.C.).

[47] F. E. Labrie, "Canadian Constitutional Interpretation and Legislative Review" (1950) 8:2 U.T.L.J. 298, at 316.

[48] *Ontario (Attorney General) v. Canada (Attorney General)*, [1947] J.C.J. No. 3, [1947] A.C. 127, at 154 (P.C.). The Judicial Committee of the Privy Council agreed with the Supreme Court that Canada had the constitutional authority to govern every aspect of its own legal system. "No other solution is consonant with the status of a self-governing Dominion," Lord Jowitt held. Canadian sovereignty, he concluded, could not flourish in a system of judicial appeals in "which it had no voice." Amendments to the Supreme Court Act in 1949 confirmed the Supreme Court's status as Canada's highest court of appeal. No judge took up the cause of articulating that independence more than Justice Rand. "The powers of this Court in the exercise of its jurisdiction," Rand J. would go on to argue, "are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee." "[T]hat incident of judicial power," he wrote, "must, now . . . be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision." *Reference re: Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198, at 212-13 (S.C.C.).

[49] Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 C.B.R. 1038.

prohibitions may be viewed indifferently as of criminal law", but he continued, "such a classification is inappropriate to the distribution of legislative power in Canada".[50] Given the stakes for federalism on which he would later elaborate, Rand J. focused on the notion of the public nature of the criminal law. "Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law?" he asked.[51] The next portions of his oft-cited judgment are worth quoting in full: "Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law", an echo of Duff C.J.'s listing of the non-exhaustive characteristics of the criminal law 20 years earlier. Like Duff C.J.'s earlier effort, Rand J.'s judgment attempts to find the thread that binds them. Noting that Lord Atkin rejected the prerequisite "that the actions against which criminal law is directed must carry some moral taint", Rand J. agreed that "[a] crime is an act which the law, with appropriate penal sanctions, forbids." Crucially, he added, "as prohibitions are not enacted in a vacuum, we can properly look for some evil *or* injurious *or* undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interest; and the legislature has in mind to suppress the evil *or* to safeguard the interest threatened."[52] Like the monster in a horror movie that will not die, evil was back, although Rand J. was careful to qualify its presence as a possible, but not necessary, *indicia* of a valid criminal public purpose. The repeating use of *or* in Rand J.'s formulation does important work that has often been ignored.

Justice Rand envisioned the mischief for federalism without the return of more robust limits on the criminal law power. Famous for his implied bill of rights jurisprudence, Rand J. was drawn to a substantive approach to federalism generally, one in which the division of powers functioned more than simply as lines outlining demarcations of power, but as a set of ideas with ends and in of themselves, a "pattern of limitations, curtailments and modifications" with normative value and utility.[53] In that light, an approach to a federal criminal jurisdictional power without appropriate safeguards or limits could enable Parliament to potentially "interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another".[54] In *Margarine Reference*, Rand J. returned the

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[50] *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1, at 50 (S.C.C.) [hereinafter "*Margarine Reference*"], affd [1950] J.C.J. No. 1, [1951] A.C. 179p (P.C.).

[51] *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1, at 50 (S.C.C.), affd [1950] J.C.J. No. 1, [1951] A.C. 179p (P.C.).

[52] *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1, at 50 (S.C.C.) [emphasis added], affd [1950] J.C.J. No. 1, [1951] A.C. 179p (P.C.).

[53] *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 303 (S.C.C.). See generally, Eric M. Adams, "Building a Law of Human Rights: *Roncarelli v Duplessis* in Canadian Constitutional Culture" (2010) 55 McGill L.J. 437.

[54] *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R.

jurisprudence to an account of the criminal law power less vulnerable to the unilateral power of Parliament to create the constitutional authority for its own enactments by virtue of the existence of the enactment itself. At the same time, as he would later clarify in *Goodyear Tire & Rubber*, Rand J. did not regard his decision in *Margarine Reference* as reviving the necessity of identifying a precise inherent character of criminal activities. "Lord Atkin", he confirmed "buries any lingering notion that acts denounced as criminal by law possesses any special taint or quality in themselves which places them in that category".[55] In *Goodyear Tire*, Rand J. walked a thin line. The real question, he stated, was whether the law at issue sought to suppress "a public evil", which he then described, in this particular case, as "the harmful effects upon the economic life of the public".[56] Perhaps these ambiguities in Rand J.'s influential reasons and reasoning, analysis that appears to both cast off and embrace a substantive definition of the criminal law tied in some sense to evil, explains the lingering unsettled nature of the criminal law power. Like a constitutional Rorschach test, Canada's foundational criminal law jurisprudence often yields what one would like to see.

What emerged in the decades following the *Margarine Reference* and at the dawn of the Charter-era was a consensus on two matters. The first was that *Margarine Reference* was the leading authority on the applicable test to apply to questions of whether or not Parliament had jurisdiction under section 91(27), usually by way of probing for the existence of a prohibition, a penalty, and a criminal public purpose within the law at issue (conveniently: the 3 Ps).[57] The second commonality was the sense among scholars (and some judges) of the protracted difficulty the definition of the criminal law power continued to pose. The "criminal law is easier to recognize than to define", Estey J. admits in a sentiment that neatly captures more than 100 years of jurisprudence.[58] Chief Justice McLachlin, for her part, laments the volume of "judicial ink [that] has been spilled in attempting to elucidate a precise definition of a valid criminal law purpose".[59] The definition of criminal law proved elusive in

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1, at 50 (S.C.C.), affd [1950] J.C.J. No. 1, [1951] A.C. 179p (P.C.).

[55] *R. v. Goodyear Tire and Rubber Co. of Canada*, [1956] S.C.J. No. 8, [1956] S.C.R. 303 (S.C.C.) [hereinafter "*Goodyear Tire*"].

[56] *R. v. Goodyear Tire and Rubber Co. of Canada*, [1956] S.C.J. No. 8, [1956] S.C.R. 303, at 313 (S.C.C.).

[57] *Labatt Brewing Co. v. Canada (Attorney General)*, [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914 (S.C.C.) [hereinafter "*Labatt Breweries*"]; *R. v. Boggs*, [1981] S.C.J. No. 6, [1981] 1 S.C.R. 49 (S.C.C.); *R. v. Wetmore (County Court Judge)*, [1983] S.C.J. No. 74, [1983] 2 S.C.R. 284 (S.C.C.); Peter Hogg, *Constitutional Law of Canada*, student edition (Toronto: Thompson Reuters, 2016) at 18-5; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2d ed. (Toronto: LexisNexis Canada, 2017), at 274-75 [hereinafter "*The Law of the Canadian Constitution*"].

[58] *Scowby v. Glendinning*, [1986] S.C.J. No. 57, [1986] 2 S.C.R. 226, at 236 (S.C.C.).

[59] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 41, 2010

part because the case law oscillated between narrow and expansive, formal and substantive, closed- and open-ended, conceptions of "criminal public purpose", and whether evil or some aspect of the "traditional field of criminal law" was necessary in meeting that requirement.[60] The arrival of the Charter may have dampened the intensity of some of those debates by transferring attention to the substantive challenge of criminal provisions on Charter grounds, but it did not eliminate continuing challenges to federal law on federalism grounds. In the federal regulation of tobacco, guns, environmental protection, marijuana, and emerging scientific research, the Supreme Court would encounter a host of new factual matrixes in which to debate the reach and content of the criminal law power.

Parliament's attempt to prohibit tobacco advertising at issue in *RJR-Macdonald* suggested that old divisions in the conception of the criminal law power remained alive and well in the post-Charter *era*. Justice La Forest takes inspiration from Lord Atkin's jurisprudence to remind that the federal criminal law power "is plenary in nature" and broad in scope.[61] Justice La Forest also quotes from *Margarine Reference* citing "the need to identify the evil or injurious effect at which a penal prohibition was directed".[62] In the case of tobacco, La Forest J. holds that the "evil targeted by Parliament is the detrimental health effects caused by tobacco consumption", although a few sentences later he appears to downgrade the description as merely "a concern with protecting Canadians from the hazards of tobacco consumption".[63] Justice La Forest rejects the argument that to be valid the federal law must have "an affinity with a traditional criminal law concern" on the basis that "Parliament's power to legislate with respect to the criminal law must, of necessity, include the power to create new crimes."[64] In dissent, Major J. spins a different picture out of the threads of a multifarious case law. "[T]he test should be one of substance, not form", he argues "and excludes from the criminal jurisdiction

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SCC 61 (S.C.C.). Justice Cory adds that "like a work of art, it is something that maybe be easier to recognize than define": *Knox Contracting Ltd. v. Canada*, [1990] S.C.J. No. 74, [1990] 2 S.C.R. 338, at 347 (S.C.C.). See generally Allan Hutchinson & David Schneiderman, "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies" (1995) 7 Const. Forum 16 Const.

[60] *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)*, [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914, at 933 (S.C.C.).

[61] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at para. 28, [1995] 3 S.C.R. 199 (S.C.C.).

[62] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.).

[63] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at para. 30, [1995] 3 S.C.R. 199 (S.C.C.).

[64] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at paras. 46, 47, [1995] 3 S.C.R. 199 (S.C.C.).

legislative activity not having the prescribed characteristics of criminal law".[65] "[T]he activity which Parliament wishes to suppress through criminal sanction", he suggests "must pose a significant, grave and serious risk of harm to public health, morality, safety or security".[66] Perhaps sensing the broad range of conduct that may fall within that list (including regarding tobacco consumption), Major J. describes the "heart of criminal law" as "the prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole". In addition, Major J. insists that such conduct must engage "a traditional criminal law concern".[67] Justice Major characterizes a prohibition on all tobacco advertising as falling below that necessary threshold. To emphasize the point, Major J. notes that the "underlying 'evil' of tobacco use which the Act is designed to combat remains perfectly legal".[68]

Despite that lingering division, a modest consensus on the Supreme Court followed in *Hydro-Quebec* in which the Court divided on the ultimate outcome but not on the question of whether federal environmental protection legislation could constitute a valid criminal law purpose under section 91(27). "To the extent that Parliament wishes to deter environmental pollution specifically by punishing it with appropriate penal sanctions, it is free to do so", Iacobucci J. and Lamer C.J.C. write, "without having to show that these sanctions are ultimately aimed at achieving one of the 'traditional' aims of criminal law. The protection of the environment is itself a legitimate basis for criminal legislation."[69] A few years later, that proposition became less clear after the Court upheld Parliament's federal firearms legislation. In assessing whether the Act possessed a valid criminal law purpose, the Court suggested that "courts look at whether laws of this type have traditionally been held to be criminal law".[70] Since "[g]un control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety", the reasoning appeared to keep alive some role for the "traditional" criminal law in assessing the scope of section 91(27).[71]

Reference re Assisted Human Reproduction Act resurfaced old tensions and

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[65] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at para. 197, [1995] 3 S.C.R. 199 (S.C.C.).

[66] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at para. 200, [1995] 3 S.C.R. 199 (S.C.C.).

[67] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at paras. 201, 204, [1995] 3 S.C.R. 199 (S.C.C.).

[68] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, at para. 211, [1995] 3 S.C.R. 199 (S.C.C.).

[69] *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at 43 (S.C.C.).

[70] *Reference re: Firearms Act (Canada)*, [2000] S.C.J. No. 31, at para. 32, 2000 SCC 31 (S.C.C.).

[71] *Reference re: Firearms Act (Canada)*, [2000] S.C.J. No. 31, at para. 33, 2000 SCC 31 (S.C.C.).

disagreements about the criminal law power.[72] While the majority and dissent both cite *Margarine Reference* as the guiding precedent, their application of the test differs in material ways. In writing for four judges, ultimately in dissent, McLachlin C.J.C. recognizes that "confining the criminal law power to precise categories is impossible", a position born out by decades of jurisprudence. She also rejects as equally untenable a limitless definition capable of eroding the balance of federalism.[73] The Chief Justice suggests a middle ground: "[t]o constitute a valid criminal law purpose, a law's purpose must address a public concern relating to peace, order, security, morality, health, or some similar purpose", while "extensions that have the potential to undermine the constitutional division of powers should be rejected".[74] In application, McLachlin C.J.C. finds the Act's objects of "prohibiting public health evils and promoting security", correspond to a valid criminal public purpose.[75] In what would become the majority judgment when joined in certain elements by the judgment of Cromwell J., LeBel and Deschamps JJ. agree with the Chief Justice, at least to this extent: "[d]efining the limits of the federal criminal law power has always been a difficult task."[76] In seeking to add substance to what qualifies as a criminal public purpose, the Justices hold that "the public purpose must involve suppressing an evil or safeguarding a threatened interest."[77] A mere paragraph later, the test is re-stated and drops the variable of "safeguarding a threatened interest" entirely in favour of a singular focus on evil. "Three criteria have to be met to connect a law or a provision with [the criminal law power], namely that it 1) suppress an evil, 2) establish a prohibition; and 3) accompany that prohibition with a penalty."[78] Moreover, the "evil" to be suppressed "must be real" in the sense that it reflects a "reasoned apprehension of harm", with reference to "to conduct or facts that can be identified and established".[79] It is only by insisting on "the requirement

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[72] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, 2010 SCC 61 (S.C.C.). See Ubaka Ogbogu, *"The Assisted Human Reproduction Act Reference* and the Thin Line Between Health and Crime" (2013) 22:1 Constitutional Forum 93.

[73] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 43, 2010 SCC 61 (S.C.C.).

[74] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 43, 2010 SCC 61 (S.C.C.).

[75] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 48, 2010 SCC 61 (S.C.C.).

[76] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 230, 2010 SCC 61 (S.C.C.).

[77] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 232, 2010 SCC 61 (S.C.C.).

[78] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 233, 2010 SCC 61 (S.C.C.).

[79] *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, at para. 236, 2010 SCC 61 (S.C.C.).

of a real evil and a reasonable apprehension of harm" that the criminal law power can be confined in such a way as to protect the essential balance of federalism, LeBel and Deschamps JJ. argue. Evil to the rescue.

The 4-4-1 divide on the Court in the *Reference re Assisted Human Reproduction Act* resulted in uncertainty on just where evil stood in relation to the criminal law power. Never banished entirely, evil had hovered at the edges of the criminal law jurisprudence for more than a century. Although it had moved from the shadows to a more prominent place in the Court's jurisprudence, the necessity of targeting evil as a precondition to classifying a law under section 91(27) had still not secured the backing of a clear majority or a developed sense of how it, as a standard to be applied, would work in practice. Commentators wondered whether a new "fourth element" had been added to the section 91(27) test, namely, "that the legislation in question be concerned with 'suppressing an evil'".[80] The stage was set for *Reference re Genetic Non-Discrimination Act*.

III. Evil in *Reference re Genetic Non-Discrimination Act*

Parliament enacted the GNDA in 2017 in response to the increasing accessibility of genetic testing materials in the Canadian marketplace and the capacity for genetic data to enable commercial misuse and discrimination against individuals on the basis of genetic characteristics.[81] The law emerged in unusual circumstances. Introduced in the Senate, the bill passed in the House of Commons as the result of an unwhipped free vote, despite the government opposing it on federalism grounds. The Act establishes a series of prohibitions in relation to genetic tests, including compelling either genetic testing or disclosing the results of genetic testing in order to qualify for goods and services, or to enter or continue to receive contractual services. Following the route it had employed to some success with the *Assisted Human Reproduction Act*,[82] the Government of Quebec initiated a reference case to its Court of Appeal challenging the validity of the GNDA as an unconstitutional interference in provincial jurisdiction. The Quebec Court of Appeal found that the GNDA failed to disclose a valid criminal law purpose and advised that the legislation was *ultra vires*.[83] "One cannot discern", the Court held "the 'evil' within the meaning of the criminal law that Parliament seeks to ban here, if not in the

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[80] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2d ed. (Toronto: LexisNexis Canada, 2017), at 277. See also Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask. L. Rev. 21, at 23-24.

[81] See generally Elizabeth Adjin-Tetty, "Striking the Right Balance: Does the *Genetic Non-Discrimination Act Promote Access to Insurance?*" (2021) 14:2 McGill J.L. & Health 201; Kathleen Hammond, "Unnecessary and Redundant? Evaluating Canada's *Genetic Non-Discrimination Act, 2017*" (2020) 98:3 C.B.R. 480.

[82] *Assisted Human Reproduction Act*, S.C. 2004, c. 2.

[83] *Reference of the Government of Quebec concerning the constitutionality of the Genetic*

perspective of fostering or promoting health, which cannot constitute a primary criminal law object."[84] "There is no 'real public health evil'", the Court concluded, "that would justify recourse to subsection 91(27) . . . .The criminal law object advanced to justify the *Act* is to provide higher quality health care . . . .This is clearly not a criminal law object."[85] Although no attorney general, including Canada's, sought to appeal the result, one of the interveners, the Canadian Coalition for Genetic Fairness, appealed the decision to the Supreme Court.

In a divided decision, the Supreme Court overturned the Quebec Court of Appeal and upheld the constitutionality of the GNDA. The majority of five Justices consisted of two separate sets of reasons: Karakatsanis J. writing for Abella and Martin JJ., and a concurring opinion written by Moldaver J., joined by Côté J. Justice Kasirer, on behalf of Wagner C.J.C., and Brown and Rowe JJ. dissented. Beneath the clarity of the ultimate outcome, however, churns a continuing disagreement about the criminal law power, and the place of evil within it. In many respects, the outcome of the case turns on the Justices differing approaches to the pith and substance of the legislation, and the question of validity trailed irreducibly behind the different approaches to characterizing the law. For the four dissenting Justices, a finding of invalidity followed inevitably from their finding that the Act's pith and substance "is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians".[86] Nonetheless, the differences that marked the judgments at the classification stage of the analysis and, in particular, the continuing disagreements about the nature of the criminal law power itself are the focus of my attention.

Remarkably given the history of the criminal law jurisprudence described earlier, Kasirer J. characterizes the Quebec Court of Appeal's reasons as having reflected

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Non-Discrimination Act, [2018] Q.J. No. 12399, 2018 QCCA 2193 (Que. C.A.), revd [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.).

[84] *Reference of the Government of Quebec concerning the constitutionality of the Genetic Non-Discrimination Act*, [2018] Q.J. No. 12399, at para. 21, 2018 QCCA 2193 (Que. C.A.), revd [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.). Put another way, the Court argued: "There is no 'real public health evil' here that would justify recourse to subsection 91(27) . . . . The criminal law object advanced to justify the *Act* is to provide higher quality health care . . . . This is clearly not a criminal law object" (at para. 24).

[85] *Reference of the Government of Quebec concerning the constitutionality of the Genetic Non-Discrimination Act*, [2018] Q.J. No. 12399, at para. 24, 2018 QCCA 2193 (Que. C.A.), revd [2020] S.C.J. No. 17, 2020 SCC 17 (S.C.C.).

[86] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 154, 2020 SCC 17 (S.C.C.). The pith and substance debates among the judges and the roads through the deep forests of abundant *Hansard* evidence that took them there will have to occupy the attention of others. I will simply add my agreement with the dissent's caution that "it is the substance of the legislation that needs to be characterized, not speeches in Parliament or utterances in the press by well-meaning sponsors or opponents of the law" (at para. 165).

"settled law" on the applicable approach to section 91(27) and the requirements for evil within it.[87] The GNDA's provisions, Kasirer J. argues, "do not prohibit what is often styled, in language archaic but telling, an 'evil' associated with the criminal law".[88] "Genetic discrimination may well be evil, injurious, or undesirable", he writes, but "the *Act* does not place this question before us" since the Act "does not prohibit reprehensible behavior or an inherent danger like violent crime or smoking".[89] It was not enough for Parliament simply to claim it "perceives a risk of harm as a basis for enacting legislation under the criminal law power".[90] For the dissent, since the GNDA did not prohibit *all* possible forms of discrimination on the basis of genetic testing, for example, by not prohibiting misuse of data "that comes from sources other than a genetic test, such as family histories, blood tests, or voluntary disclosure", the Act was really about simply promoting health by encouraging genetic testing.[91]

At the most general level, Kassirer J.'s outline of the applicable test under section 91(27) certainly reflected a longstanding uncontested view of section 91(27). "A law will be properly characterized as valid criminal law if three essential elements are satisfied: a prohibition, a penalty related to that prohibition, and a valid criminal law purpose."[92] On that description, every judge could agree. Beneath that consensus lay marked divisions on what constitutes a criminal law purpose. Citing Rand J.'s requirement in *Margarine Reference* to "look for some evil or injurious or undesirable effect upon the public", the dissent intermittently, and confusingly, dispenses with Rand J.'s crucial use of "*or*" and elevates evil to a place of necessity at a number of points. Conceding that evil or, in French, *mal*, "may echo language drawn from another time", the dissent foregrounds evil as "the traditional measure

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[87] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 159, 2020 SCC 17 (S.C.C.).

[88] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 154, 2020 SCC 17 (S.C.C.).

[89] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 159, 2020 SCC 17.

[90] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 160, 2020 SCC 17.

[91] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 213, 2020 SCC 17 (S.C.C.). The dissent's emphasis on the necessity of prohibiting all possibly-related harmful conduct in order to make valid use of the criminal law power would seem to contradict the Court's earlier acceptance of deference to the government in the exceptions it may select, or the particular conduct it may choose to focus on, in enacting valid criminal law: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.).

[92] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 213, 2020 SCC 17 (S.C.C.).

of the criminal law".[93] More than that, "the concept of 'evil' is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose".[94] *Not* requiring a standard of evil, the dissent charges, "would be a dramatic change of course from this Court's past jurisprudence".[95] "Parliament cannot use the criminal law to address a vague threat", the dissent concludes since, in this case, "there is no defined 'public health evil' or threat to be suppressed".[96]

The judgement written by Karakatsanis J. takes an altogether different approach to section 91(27), although it outlines the same general test as put forward by the dissent.[97] Also drawing on Rand J.'s *Margarine Reference*, Karakatsanis J. explains that "[a] law will have a criminal public purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest."[98] For Karakatsanis J., what animates and serves to limit the criminal law power is not evil, but Parliament's "'reasoned apprehension of harm' to a public interest" either "traditionally protected by the criminal law" or analogous to it.[99] "Parliament is not, and never has been", she points out "restricted to responding to so-called 'evil' or 'real evil' when relying on its criminal law power". The targeting of evil, Karakatsanis J. points out was only ever one description offered by Rand J. of the criminal public purpose. Additionally, to require it risks ignoring "other firmly established public interests protected by the criminal law" and limiting "criminal law's evolution".[100] For Karakatsanis J., any approach that relies on judicial determination "of what is good and bad" is unwise.[101] Since in her view the Act clearly advanced the traditional criminal law purposes of protecting individual "dignity, autonomy and privacy interests" in

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[93] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 232, 2020 SCC 17 (S.C.C.).

[94] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 232, 2020 SCC 17 (S.C.C.).

[95] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 232, 2020 SCC 17 (S.C.C.).

[96] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at paras. 237, 239, 2020 SCC 17 (S.C.C.).

[97] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 67, 2020 SCC 17 (S.C.C.).

[98] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 74, 2020 SCC 17 (S.C.C.).

[99] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 75, 2020 SCC 17 (S.C.C.).

[100] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 76, 2020 SCC 17 (S.C.C.).

[101] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 77, 2020 SCC 17 (S.C.C.).

response to a "threat to public health", the GNDA was a valid exercise of the criminal law power.[102]

The judgment of Moldaver and Côté JJ. ensured the ultimate disposition of the case by agreeing that the GNDA was valid federal law, but left evil to stew for another day. Although agreeing with Karakatsanis J.'s review of the "essential aspects of this Court's jurisprudence on the criminal law power", Moldaver J., without mentioning the characteristic of evil, notes that his colleagues divided on the degree of the seriousness of the harm required to authorize use of the criminal law power. He describes that gulf as the difference between a "reasoned apprehension of harm", to the dissent's preferred standard of a "real" threat with a "concrete basis".[103] Justice Moldaver declines "to weigh in on this question, since I am of the view that the criminal law purpose requirement is met under either of my colleagues' approaches".[104] The result is a decision that keeps alive a debate that appears to have no intention of dying. Although the largest plurality of the Court embraces the necessity of evil in conceptualizing section 91(27), it remains a view that has never gained a full majority. One perhaps sees in Moldaver J.'s siding with Karakatsanis J. in the disposition of the appeal and in agreeing with her setting out of the "essential aspects" of the jurisprudence some modest consensus for a criminal law power without evil at its core, but that is implied more than explicit. It does suggest that the question remains, as perhaps it always has, just what qualities characterize a criminal public purpose for constitutional purposes and what are the stakes for a definition with or without evil as a part of it. Nearly 50 years ago, Paul Weiler complained that "we are left in the dark as to the criteria for defining the nature of a 'criminal law' objective or determining when legislation is genuinely enacted for this purpose".[105] I am not sure much has changed.

On any accounting, however, the claim that the necessity of targeting of evil represents a "settled" aspect of the criminal law power jurisprudence is difficult to sustain. There have been, of course, judges and judgments that have seen in evil a standard to weave into an approach to the criminal law power. They have done so either because it reflected an understanding of the nature of crime itself, or, more frequently, because it proposed to limit the potentially unbalancing expansion of federal power by imposing a high threshold for the powers granted by section 91(27), or both. In a federation limiting federal jurisdiction is not an end in itself, it is an avenue to protect and promote provincial jurisdiction and the important

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[102] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at paras. 87, 95, 2020 SCC 17 (S.C.C.).

[103] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at paras. 137-38, 2020 SCC 17 (S.C.C.).

[104] *Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, at para. 138, 2020 SCC 17 (S.C.C.).

[105] Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307, at 326.

democratic values more local levels of governance represents.[106] All judges agree that an approach to section 91(27) which imposes no limits beyond form is neither desirable nor permissible given the Constitution's essentially federal character. Federalism, whatever the particulars of its precise balancing between federal and provincial powers, requires the continued integrity of the division itself — the essential idea that no conception of a head of power can serve to overwhelm the powers of the other level of government.[107] As Sir Montague Smith held in *Parsons*, the Constitution's division of powers must be read together in order to "reconcile the respective powers they contain, and give effect to all of them".[108] It is also true that jurisdiction to enact "Criminal Law" is necessarily broad. It is so because the constitutional text that conveys the power is worded generally, and because criminal law as a subject of legislative endeavour broadly encompasses the prohibition and punishment of public wrongs. It is the *public* nature of crime, and not its essential connection to evil, that animates Rand J.'s decision in *Margarine Reference*, and it distorts his decision, as some judges have attempted to do, to read Rand J.'s reasons as elevating evil to a necessary place in the test for the criminal law power.

The targeting of evil is surely one way to describe the purpose of some criminal prohibitions. Rand J.'s judgement in *Margarine Reference* recognizes that truism, as have countless philosophers, scholars, and practitioners of the criminal law. However, Rand J. deployed a much broader and more rooted description of the ends and nature of the criminal law, a conception he confirmed a few years later in *Goodyear Tire*. In addition to the suppression of evil, criminal law *equally* concerns itself with "injurious or undesirable" effects "upon the public" in areas as broad and diverse as "[p]ublic peace, order, security, health, morality", among others. Even if the presence of evil marked every criminal law, which it does not, evil presents an impossibly vague and subjective standard to quantify and apply with rigour, predictability or precision.[109] "Evil is the dark shadow that the light of Reason cannot banish", Terry Eagleton tells us. "It is the joker in the cosmic pack, the grit

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[106] See Hoi L. Kong, "Subsidiarity, Republicanism, and the Division of Powers in Canada" (2015) 45:12-2 RDUS 13, at 42-44 for the argument that "the LeBel-Deschamps definition of the criminal law power" preserves "a sphere of legislative autonomy which allows provincial legislatures, and enables citizens exercising their democratic agency through those legislatures, to check over-weaning exercise of federal power and the threats of domination to which these give rise". See also Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask. L. Rev. 21.

[107] *Reference re Securities Act*, [2011] S.C.J. No. 66 at para. 7 (S.C.C.); *References re Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J. No. 11 at para. 49 (S.C.C.).

[108] *Citizens Insurance Co. of Canada v. Parsons*, [1881] J.C.J. No. 1, 7 App. Cas. 96, at 109 (P.C.).

[109] Barbara von Tigerstrom, "Federal Health Legislation and the Assisted Human Reproduction Act Reference" (2011) 74:1 Sask. L. Rev 33, at 37; Dave Snow, "Blunting the Edge: Federalism, Criminal Law, and the Importance of Legislative History after the Reference re Assisted Human Reproduction Act" (2015) 48:2 U.B.C. L. Rev. 541, at 586.

in the oyster, the out-of-place factor in a tidy world."[110] Its ineffability also pulls judges into evaluating the moral stakes of the legislative problem at hand, a task for which they have no expertise, training or particular insight. The targeting of evil may be a good and justifiable end for all kinds of appropriate lawmaking, federal and provincial alike, but its purported value as a standard in the constitutional analysis of the criminal law power will invariably lead the court down paths it should not tread.

There remains, of course, the need for courts to substantively assess the presence of a criminal public purpose, and to critically evaluate the context of the proposed prohibition to ensure appropriate compliance with the strictures imposed by the division of powers. An approach to the criminal law power freed from the constraints of evil is not an invitation to a limitless definition of section 91(27) and an unconstitutional accumulation of federal power. Courts have been right to consistently and forcefully reject such an approach and to remain mindful of the need to protect the integrity of provincial and federal authority in its division of powers jurisprudence. Perhaps most crucially, pith and substance analysis is capable of much of this work. The protection of the dairy industry that formed the dominant purpose of the law at issue in *Margarine Reference* was driven by economic policy goals centered on the protection of a particular industry.[111] Judicial accounts of a law's pith and substance can differ, of course, as the divisions in *Reference re Genetic Non-Discrimination Act* illustrate, but that does not take away from the federalism protections that exists in the judicial exercise of characterizing laws by their dominant purpose. That dominant purpose, however, will only protect federalism if the heads of power of both levels of government have discernable meaning and identifiable boundaries. Criminal law poses a challenge in its breadth, but not in a way categorically different than several other broad heads of federal authority. The Court has shown willingness to protect provincial authority from federal incursions under Parliament's broad trade and commerce power, and the criminal law power should be no different.[112]

The requirement of a criminal public purpose remains a substantive restriction, without the unhelpful limits imposed by evil. In addition to prohibitions and penalties, classification under section 91(27) must require a criminal purpose as exemplified by the existence of a public harm engaging matters concerning peace, order, health, morality and analogous public purposes. That harm should be real in the sense that Parliament has a "rational basis" for seeking to suppress it with prohibitions and penalties.[113] Determining whether evidence exists to substantiate

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[110] Terry Eagleton, *On Evil* (New Haven: Yale University Press, 2010), at 131-32.

[111] *Reference re: Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1, at 50 (S.C.C.), affd [1950] J.C.J. No. 1, [1950] 4 D.L.R. 689 (P.C.).

[112] *Reference re: Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 (S.C.C.).

[113] Justice Laskin usefully suggests the "rational basis" standard as a helpful way of

Parliament's "reasoned apprehension of harm" is a judicial task that calls for the deferential weighing of evidence, not policy approaches, and certainly not the metaphysics of good and evil. Moreover, such public harms can be entrenched or emerging, threatened or raging, classic or novel. What matters is that a public harm or potential harm can be demonstrated with evidence.[114] The bar should not be a high one, but neither should it be a formality passed by mere assertion. In these respects, the judgments of Karakatsanis and Moldaver JJ. in *Reference re Genetic Non Discrimination Act* come closer to the mark of finding the productive balance between the two constitutional imperatives always at stake in division of powers cases. The first, to do justice to the constitutional authority vested in the heads of power at issue; and secondly, to ensure the protection and preservation of the integrity of the constitutional authority of both levels of government. Unquestionably, Parliament's criminal law power has posed a challenge on both objectives, but that hardly distinguishes it from Canada's productively dissonant federalism jurisprudence.

IV. CONCLUSIONS

Uncertainty in the law of various degrees and kinds often serves as a handy complaint for legal scholars and judges alike. Certainly uncertainty seems a fair characterization of the Supreme Court's unsettled approach to some fundamental questions at the heart of the criminal law power. In early decades courts struggled to articulate the core meaning of criminal law for constitutional purposes, resulting in the drift toward a largely formal definition focusing on the existence of prohibitions and penalties, although colourability always remained a substantive limit on the scope of section 91(27). Justice Rand's intervention in the *Margarine Reference* charted a new course, although its reasons took many decades to fully materialize into anything resembling a distinct test. For Rand J., the key to the lock of the criminal law power was understanding the need for a criminal public purpose, a substantive limit, although a necessarily broad one, that would help to ensure that Parliament could not simply invade provincial jurisdiction by manner and form. What would distinguish a criminal public purpose was both the public nature of the subjects of its concern — peace, order, health, morality, and the public nature of the harms it sought to limit, suppress, or eradicate, or public interest it sought to safeguard. Those public harms represented a broad spectrum encompassing evil, injurious or undesirable effects. Over time, Rand J.'s conception formalized itself

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distinguishing between a court's proper function in assessing whether evidence exists to support an argument grounding validity under a particular head of power and being drawn in to improperly evaluating the "wisdom or expediency or likely success of a particular policy express in legislation". *Reference re: Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373, at 423-25 (S.C.C.).

[114] See, for e.g., the requirement on Canada "to adduce evidence in support of its assertion of jurisdiction" under the national concern branch of POGG: *Reference re Greenhouse Gas Pollution Pricing Act,* [2021] S.C.J. No. 11 at para. 133 (S.C.C.).

into a test for section 91(27) requiring a prohibition, penalty and criminal public purpose, but descriptions of that final "p" could alter from case to case depending on the prominence the court attributed to the role and necessity of evil. The Supreme Court of Canada remains divided on that very question.

To the extent that requirements of evil represent an effort to confine the federal criminal law power to prevent it from overwhelming provincial jurisdiction it may remain destined to endure as a lodestar or irritant in the case law depending on your perspective of how useful or harmful a concept like evil could ever be in constitutional analysis. For my part, I hope that judges see how the existing interpretive tools of federalism including the principles of mutual modification, colourability, and pith and substance can and do serve to protect provincial jurisdiction from broadly worded federal powers, including the criminal law power. In addition, I hope courts appreciate the wisdom and utility in Rand J.'s conception of a criminal public purpose focused not on evil, but on public harms. The *Constitution Act, 1867* grants Parliament the constitutional authority to legislation in relation to such harms with criminal law. As much as we might crave certainty in our constitutional jurisprudence, the history of Canada's uncertain approach to the criminal law power reveals the ways that constitutional law productively engages with competing and compelling interests, grapples with messy life, deals with imperfect peoples and their institutions, and considers cross currents of ideas, values and principles. Only natural that such would be the constitutional life story of something as weighted as our approach to the deepest meanings of the criminal law. As enduring and important as evil has been in that story, it seems past time to free our constitutional jurisprudence of the criminal law power from its unhelpful grip.