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What's the Harm in Having a "Harm Principle" Enshrined in Section 7 of the Charter?

Paul Burstein *

I can still remember back in the early 1980s sitting in my undergraduate "Constitutional Law" class, being taught by the venerable constitutional scholar, Peter Russell, about the "pending" political power shift we could soon expect in light of the newly minted *Canadian Charter of Rights and Freedoms*. I remember hearing him tell us that less than two years earlier, Canada had acquired a new constitutional document which had the potential to make individual citizens more powerful than the entire government of Canada. Ignoring the more interesting political debate about the appropriate boundaries between the legislative and judicial branches of government, I was awed by the notion that this "Charter" could be so powerful. Was it some kind of book of magic spells? As the lecture continued, and Professor Russell spoke of laws being "struck down", I began to conceive of it being more like the sacred chest in "Raiders of the Lost Ark", capable of firing bolts of holy lightning at evil government legislators. When I finally bothered to read the text book which had been assigned for Professor Russell's course, I soon came to realize that the power of the Charter, while more benign than the sorcery I had imagined, resided more in the imagination of the lawyers and judges who would be asked to define the vague contours of the rights expressed in the Charter's guarantees. Wanting in on some of that action, I quickly set off to law school in the hopes of acquiring the tools necessary to build one of those Charter challenges.

I have had the distinct privilege and pleasure of being part of a number of different Charter challenges over the years, challenges which

* I am indebted to my friend and colleague, Professor Alan Young, for his assistance in piecing together this paper. It is based on *facta* which the two of us have filed mounting these arguments in courts as well as on a previously written paper.

have relied upon a variety of different Charter rights. None have proven to be as interesting as the challenges to the federal legislation criminalizing the personal possession of marijuana. Apart from the fascinating evidentiary record which my colleague, Professor Alan Young, and I created in support of that challenge, we were provided with an opportunity to expand the scope for judicial review of the “wisdom” of certain criminal prohibitions. Put differently, the novel legal issue raised by *R. v. Clay*¹ was the extent to which section 7 of the Charter provides a mechanism for judicial review of stupid “criminal” laws.

I. DO WE EVEN NEED TO RECOGNIZE A “HARM PRINCIPLE” IN SECTION 7 OF THE CHARTER?

No one disputes that section 7 of the Charter entitles a rights claimant to argue that Parliament has gone too far in the manner by which it has defined a criminal offence. Ever since the mid 1980s, with the Supreme Court’s decisions in *Motor Vehicle Reference*² and *R. v. Vaillancourt*,³ we have known that section 7 of the Charter imposes some restrictions on how the State can define criminal conduct. However, the decisions in those cases did not go so far as to say that section 7 of the Charter imposed limits on the State’s ability to choose whether or not certain conduct could be criminalized at all. No one was arguing that the State could not criminalize being part of a robbery where someone is killed, or that the State could not impose “criminal” sanctions for driving while one’s licence has been suspended. The question in those cases was simply whether proof of the offence, as it had been defined, would necessarily mean that all of those offenders would be deserving of the punishment to be imposed, irrespective of whether their conduct had the

¹ *R. v. Clay*, [2003] 3 S.C.R. 735, [2003] S.C.J. No. 80, as well as its two companion cases *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, were decided on (23 December 2003). Some of the Charter issues which Professor Young and I raised in *Clay* were disposed of in the reasons delivered in the companion cases. For ease of reference, and as a result of a lawyer’s self-indulgent pride, I will refer to the decisions collectively as “the *Clay* trilogy”.

² *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289.

³ [1987] S.C.J. No. 83, 39 C.C.C.(3d) 118 (S.C.C.). See also, *R. v. Hess*; *R. v. Nguyen* [1990] 2 S.C.R. 906, 59 C.C.C. (3d) 161.

potential to cause harm to society. But what about a situation where proof of the offence, as defined by the State, is not necessarily commensurate with the offender having caused any real harm to society? For example, imagine if the government suddenly decided to criminalize golfing with all the attendant threats which attach to criminal offences (*i.e.*, jail, fines, probation and a criminal record). While no one would deny that there is a remote possibility of golfers causing harm to themselves (*e.g.*, as a result of being struck by lightning while on the course) or to others (*e.g.*, by striking them with an errant golf shot), is this the kind of stuff of which criminal law is made? Is it contrary to the “principles of fundamental justice” to enact criminal laws which do not serve the public interest by protecting people from harm, or is this purely a question of policy best left to elected officials? Is there room for a section 7 Charter challenge when it appears that there is no constructive purpose behind a criminal prohibition?

The scope of judicial review of legislation under section 7 of the Charter is dependent upon two factors; namely, the interpretation of the terms “life”, “liberty” and “security of the person” and the discovery of the “principles of fundamental justice”. While the threshold issue concerning “life, liberty and security” serves as a gatekeeper to judicial review of legislation, when the analysis is undertaken in the context of a criminal prohibition, this threshold will almost always be met by virtue of the threat of imprisonment and/or the stigma associated with a criminal prohibition.⁴ Accordingly, I propose to focus on the more elusive questions concerning the content of section 7’s “principles of fundamental justice”.

⁴ The distinction between the mere “threat” of imprisonment as opposed to the actual “use” of imprisonment is relied upon by the majority in *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, in its analysis of whether or not the potential deprivation of liberty accords with the “principles of fundamental justice”. The majority, in seeming contradiction to the tenor of earlier Supreme Court of Canada cases (*e.g.*, *Reference re Motor Vehicle Act (British Columbia)* S. 94(2), [1985] 2 S.C.R. 486, *Reference re British Columbia* at 492, [1985] S.C.J. No. 73 and *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, [1991] S.C.J. No. 79), held that while the threat of punishment may be enough to engage a rights claimant’s “liberty” interest, the “principles of fundamental justice” focus on the likelihood that the person will actually go to jail for the impugned offence.

II. ARE THERE EXISTING ALTERNATIVES TO THE “HARM PRINCIPLE” AS A MEANS OF SUBSTANTIVE REVIEW OF CRIMINAL PROHIBITIONS?

The search for specific principles of fundamental justice which arise out of the “basic tenets of the legal system” has proved to be a difficult exercise. It may appear helpful for the Court to remind us that “section 7 must be construed having regard to those interests and against the applicable principles of policies that have animated legislative and judicial practice in the field”,⁵ yet the problems remain in identifying principles of justice which deserve the label of “fundamental”. Seven years after the *Motor Vehicle Reference*, the Court had another opportunity to better explain how we are to discover the principles of fundamental justice. In *Rodriguez*,⁶ the Court addressed the question of whether the criminal prohibition on assisted suicide violated section 7 of the Charter because of the impediment it created for disabled people wanting to end their lives as a release from chronic pain and suffering. The Court rejected the argument that respect for human dignity is a “principle of fundamental justice” on the basis that “dignity” is too vague a concept to constitute a principle of fundamental justice. As for the process by which we are to discern these principles of fundamental justice, the Court stated:

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principle upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.⁷

In *Rodriguez*, the Court had also reminded us of the need to respect the traditional roles of the legislative branch as compared to the judicial

⁵ *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, at 402-403, [1988] S.C.J. No. 92.

⁶ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, [1993] S.C.J. No. 94.

⁷ *Id.*, at 590-91.

branch of government. At the same time, however, the Court recognized that respect for this traditional division of powers does not mean that courts are precluded from reviewing legislation for compliance with substantive principles of fundamental justice:

On the one hand, the Court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of legislation. On the other hand, the Court has not only the power but the duty to deal with this question if it appears that the *Charter* has been violated. The power to review legislation to determine whether it conforms to the *Charter* extends not only to procedural matters but also substantive issues. The principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder *only*.⁸

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

Two years later, the Court resolved another difficult and sensitive rights claim with a similar balancing act. In *B. (R.) v. Children's Aid Society*,⁹ the Court addressed the issue of whether a child's compulsory blood transfusion, over the religious objections of his parents, violated section 7 of the Charter. Although the Court was badly divided on the threshold issue of "liberty and security" a majority of the Court concluded that the legislation providing for the compelled transfusion was constitutional because the fundamental rights of the parents were out-

⁸ *Id.* at 589-90 [emphasis in original].

⁹ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, [1995] S.C.J. No. 24.

weighed by the State's right to protect the life and health of children (and because this objective had been pursued in a manner consistent with fair process).

Less than two years after the Court had first introduced this "balancing" approach to section 7 (in its 1993 decision in *Cunningham v. Canada*),¹⁰ the Court was now saying that "fundamental 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".¹¹ In fact, in one of the most recent pronouncements from the Court on the meaning of "fundamental justice", it is clear that the search for specific principles has been overtaken by the allure of simply balancing the individual interests at stake with the public interest promoted by the impugned legislation:

The principles of fundamental justice are to be found in "the basic tenets of our legal system"...: "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system"... The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made"... The approach is essentially one of balancing. As we said in *Burns*, "[i]t is inherent in the...balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance".¹²

Simply put, as recently as 2002, the year before the *Clay* trilogy was argued before the Court, it seemed well settled that, if nothing else, section 7's "principles of fundamental justice" included (1) a balancing of the individual interests at stake with the societal interests promoted by the legislation and (2) a consideration of the context of the impugned legislation (or state action).

Any doubt about the primacy of the balancing approach to section 7's "principles of fundamental justice" should have been laid to rest by

¹⁰ [1993] 2 S.C.R. 143, [1995] S.C.J. No. 47.

¹¹ *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at 583, [1990] S.C.J. No. 23.

¹² *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3, at para. 45.

the Court's 1997 decision in *Godbout v. Longueuil (City)*.¹³ In *Godbout*, after expressly confirming that there is a substantive component to section 7 of the Charter,¹⁴ the Court made clear that the "principles of fundamental justice" require a balancing of the state's interest with the relevant "life", "liberty" or "security of the person" interest:

But just as this Court has relied on specific principles or policies to guide its analysis in particular cases, it has also acknowledged that looking to "the principles of fundamental justice" often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right to life, liberty or security of the person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so. To my mind, performing this balancing test in considering the fundamental justice aspect of s. 7 is both eminently sensible and perfectly consistent with the aim and import of that provision, since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. We need look no further than the *Charter* itself to be satisfied of this. Expressed in the language of s. 7, the notion of balancing individual rights against collective interests itself reflects what may rightfully be termed a "principle of fundamental justice" which, if respected, can serve as the basis for justifying the state's infringement of an otherwise sacrosanct constitutional right.¹⁵

Consistent with American due process analysis, the Court appeared to have accepted that the countervailing state interest had to be both "compelling and substantial".¹⁶ As for defining the substantive "principles of fundamental justice", the only guidance provided by the *Godbout* case

¹³ [1997] S.C.J. No. 95, 152 D.L.R. (4th) 577. See also *R. v. Morgentaler* [1988], 1 S.C.R. 30, [1988] S.C.J. No. 1, 37 C.C.C. (3d) 449 and *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68.

¹⁴ *Supra*, note 13, at 619 (D.L.R.).

¹⁵ *Supra*, note 13, at 620 (D.L.R.).

¹⁶ However, it remained unclear whether this high standard only applied when the state interference pertained to decisions of a fundamental, personal nature.

was that the substantive component of section 7 allows a court to assess the “ends” sought to be achieved by a legislature to determine if these “ends” are consistent with the basic tenets of both our judicial system and our legal system more generally.

In view of its seemingly well-settled existence, as an alternative to urging the Court to recognize and apply the “harm principle”, in the *Clay* trilogy we had advanced an alternative argument under the balancing approach. The appellants’ arguments in this regard are concisely summarized (and accepted) by Lebel J., writing for himself in dissent:

The process of delineation of rights under s. 7 unavoidably involves balancing competing rights and interests (*R. v. Mills*, [1999] 3 S.C.R. 668 at p. 715). In this respect, concerns about the harm done to society or some of its members or even to the accused themselves must be weighed together with the consequences which flow from the criminalization of simple possession. A balancing of this nature must occur when it is asserted that the liberty interest of the accused has been infringed in a way that is inconsistent with the tenets of fundamental justice under s. 7 of the *Charter*. Such an analysis is not as narrowly focused as a review of a punishment under s. 12 of the *Charter* where courts must determine whether a specific penalty should be considered as cruel and unusual because of its grossly disproportionate nature.

In the course of a s. 7 analysis, the inquiry of the Court is more subtle, broader, and more difficult. Although the availability of imprisonment triggers the inquiry into the applicability of s. 7, the investigation must move beyond the sole question of the penalty and the courts must take into account all relevant factors viewed as a whole, in order to determine whether a breach of fundamental rights has been made out. It is made out if and when the response to a societal problem may overreach in such a way as to taint the particular legislative response with arbitrariness. (See for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 47; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 76; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 621, 625.)

On the evidence which is available in this appeal, such a legislative overreach happened. I do not need to engage in any additional review of this evidence, given that it was carefully reviewed and discussed by my colleagues. I will not even attempt to summarize it again. In my mind, it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them. Nevertheless, the harm its consumption may cause seems rather mild on the evidence we have. In contrast, the harm and the problems connected with the form of

criminalization chosen by Parliament seem plain and important. Few people appear to be jailed for simple possession but the law remains on the books. The reluctance to enforce it to the extent of actually jailing people for the offence of simple possession seems consistent with the perception that the law, as it stands, amounts to some sort of legislative overreach to the apprehended problems associated with marihuana consumption. Moreover, besides the availability of jail as a punishment, the enforcement of the law has tarred hundreds of thousands of Canadians with the stigma of a criminal record. They have had to bear the burden of the consequences of such criminal records as Arbour J. points out. The fundamental liberty interest has been infringed by the adoption and implementation of a legislative response which is disproportionate to the societal problems at issue. It is thus arbitrary and in breach of s. 7 of the Charter.¹⁷

The majority dismissed this argument on the basis that a general balancing of interests under the auspices of the “principles of fundamental justice” would improperly merge the section 7 inquiry with the section 1 analysis:

We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure “strikes the right balance” between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7.¹⁸

The majority’s reasoning on this point was directed more at the argument that, because the balancing approach under section 7 was so similar to that done under section 1 of the Charter, the burden should similarly shift to the government to demonstrate that a criminal offence provision which deprives a person of life, liberty or security of the person is in accordance with the principles of fundamental justice. That issue, however, had nothing to do with whether or not the “principles of fundamental justice” require a generalized balancing of the interests at stake. Yet, it was in an effort to remove societal interests from the mix that the Court relegated the “balancing approach” to a subsidiary role

¹⁷ *R. v. Marmo-Levine*, *supra*, note 1, at paras. 278-80 and paras. 179-82.

¹⁸ *Id.*, at para. 96 [emphasis in original].

within the “principles of fundamental justice” stage of the section 7 analysis:

The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka explained in *Rodriguez* ... “in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required” (pp. 592-93 [emphasis omitted]). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such “societal interests” as health care costs. Those considerations will be looked at, if at all, under s. 1....¹⁹

The reference to the single (partial) line quotation from *Rodriguez* does little (or nothing) to “elucidate” why the Court’s previous decisions, such as *Godbout*, were being overturned. Consequently, in addition to eradicating any hope of developing a “harm principle” as a basis for substantive review of legislation under section 7’s “principles of fundamental justice”, the *Clay* trilogy has also managed to erase years of jurisprudential advances on the “balancing approach”.²⁰

Even had the majority not rejected the “balancing approach”, we had always recognized the limitations of relying on this approach as a mechanism for seeking judicial review of the merits of criminal prohibitions on “lifestyle choices” (e.g., the “vice” offences referred to above). When resisting the section 7 Charter challenges in the earlier cases, the government had always argued that the Court should only undertake exacting constitutional scrutiny under the “principles of fundamental justice” when the law interferes with the right to decisions of “fundamental personal importance”. For example, in *Morgentaler*,²¹ the Court was faced with having to categorize the right of a woman to decide what would be best for her and her unborn child. In *B. (R.)*, it was the right of parents to prevent a medical intervention inconsistent with their religious beliefs. In *Rodriguez*, the issue concerned the right of a disabled person to choose when to end her life just as a non-disabled person

¹⁹ *Id.*, at para. 98.

²⁰ Indeed, much could be written on how the majority has greatly altered, if not, eviscerated the “balancing approach” which the Court had developed over a long line of cases, beginning with *Cunningham*, *supra*, note 10, in 1993. However, because the focus of this paper is the “harm principle”, that discussion is left to another day.

²¹ *R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449, [1988] S.C.J. No. 1.

could.²² It is obvious that the Charter will be trivialized if its guarantees extend to any personal decisions, including those which are picayune and petty. On the other hand, creating a category of “fundamental personal decision” does not help define the scope of the constitutional limits imposed by section 7 of the Charter. Dividing personal decisions into “fundamental” and “non-fundamental” is a value-laden exercise not well suited for the judicial arena. More importantly, designating a decision as “fundamental” does not assist because the Supreme Court has not provided any specific methodology for assessing the constitutionality of state interference with “fundamental”, as opposed to “non-fundamental”, decisions.²³

One might wonder why we would even attempt to develop a new substantive principle of fundamental justice given the balancing approach that had been repeatedly adopted by the Court over the past 10 years. However, as noted above, the problem with relying upon this balancing approach with respect to section 7 challenges to consensual crimes had always been the need to get over two hurdles: (1) whether the constitutional demand for an overriding and compelling state interest applies only to “decisions of a fundamental personal nature” and (2) whether consensual pleasure-seeking activities involve decisions of a fundamental personal importance. Despite the fact that a strong philosophical argument can be made for characterizing hedonistic pursuits as involving fundamental decisions, it had always proven difficult to persuade the judiciary to accept this proposition. Indeed, one of the few points which all nine Supreme Court justices agreed upon in the *Clay* trilogy was that, even taking the “widest view on liberty” or interpreting “security as including the right to personal autonomy”, section 7 did not cover the recreational use of marijuana, even in the privacy of one’s home.

²² One would have thought that these cases all involved fundamental, personal decisions and, yet, the s. 7 constitutional challenge succeeded only in the *Morgentaler* case, and did so primarily on procedural concerns (not upon any substantive principle of fundamental justice). In the other two cases, the Court balanced competing interests and found that a state interest outweighed the decision of “fundamental personal importance”.

²³ Moreover, as the *B. (R.)* and *Rodriguez* cases both show, persuading the court that the personal decision should be categorized as “fundamental” does not necessarily lead to the conclusion that state interference is unconstitutional.

Regarding the other facing a successful challenge, the majority decision in the *Clay* trilogy has implicitly removed the need for the counter-vailing state interest to be “compelling or substantial”.²⁴ After having rejected the “harm principle” (which I will discuss more fully below), the majority went on to address the “balancing approach” argument which we had advanced in alternative to the “harm principle” argument. As noted above, the majority declined to follow the general “balancing” approach which the Court had employed on a number of prior substantive section 7 challenges. Moreover, as also noted above, the majority seems to have dispensed with the “balancing approach” argument on the basis that “it is not within the ambit of s. 7 to bring into account such ‘societal interests’ as health care costs. Those considerations will be looked at, if at all, under s. 1.”²⁵ On the other hand, the majority was quite willing to recognize the “avoidance of harm” as a valid state interest in assessing whether the adverse effects of criminalization of marijuana possession were “disproportionate to any threat posed by marihuana use”.²⁶ At first blush, one is hard pressed to understand what the difference could be between a “balancing” approach and a “disproportionality” approach; either way, the issue is whether the harm caused by the criminal prohibition outweighs the harm prevented by the criminal prohibition. Reading further along in the majority’s reasons sheds light on why they may have been trying to draw this distinction without, in my view, a difference. By framing the debate in terms of “disproportionality”, the majority was able to shift the test along the spectrum into the much narrower realm of “*gross* disproportionality”:

²⁴ As Arbour J. points out (in “*Scalia*-like” fashion), Gonthier J. (one of the authors of the majority opinion in the *Clay* trilogy) in his dissenting reasons in *R. v. Butler*, [1992] 1 S.C.R. 452, stated at 522-3:

... the avoidance of harm to society is but one instance of a fundamental conception of morality....

First of all, the moral claims must be grounded. They must involve concrete problems such as like, harm, well-being, to name a few, and not merely difference of opinion or of taste. Parliament cannot restrict Charter rights simply on the basis of dislike; this is what is meant by the expression “substantial and pressing” concern.

²⁵ *Id.*, at para. 98.

²⁶ *Id.*, at para. 141.

In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marijuana were, in the language of *Suresh*, "so extreme that they are *per se* disproportionate to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of gross disproportionality, the proof of which rests on the claimant.²⁷

Moreover, in recognizing that the "avoidance of harm" was a valid state interest within the rule against arbitrary or irrational state conduct mentioned in *Rodriguez* — a variant of the "balancing" approach²⁸ — the majority held that once it has been demonstrated that the harm is not *de minimis* (or not insignificant or trivial), "the precise weighing and calculation of the nature and extent of the harm is Parliament's job".²⁹ In other words, unless and until Parliament decides to re-institute corporal or capital punishment, it appears that a criminal prohibition aimed at "non-trivial" harm will be neither constitutionally irrational or disproportionate.

Apart from resorting to section 7's general balancing approach, another alternative to developing a whole new substantive principle of fundamental justice might have been the attempted expansion of two already accepted principles of fundamental justice; namely, the vagueness³⁰ and overbreadth³¹ doctrines. For either of these, however, the constitutional principles permit only a form of indirect judicial review of the criminal prohibition, as both doctrines are predicated on reviewing only the means chosen to achieve the legislative ends. The necessity of invoking the criminal law to achieve those ends is not questioned as part of this review process. However, it can be assumed that if the state has

²⁷ *Malmo-Levine*, [2003] 3 S.C.R. 571, at paras. 143 and 159-62.

²⁸ In *Malmo-Levine*, *id.*, at para. 90, the majority relied on the following passage from *Rodriguez* [1993] 3 S.C.R. 519, at 594 to illustrate the "rule against arbitrary or irrational state conduct":

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

²⁹ *Supra*, note 27, at para. 133.

³⁰ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028, [1995] S.C.J. No. 6.

³¹ *R. v. Heywood*, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101.

only a vague sense of the need to create the prohibition in the first place this will translate into an ill-defined and overly general law. While much could be written about the vagueness doctrine, the sad reality is that it is constitutionally toothless. The way in which the Supreme Court has characterized and constructed the vagueness doctrine ensures that it could only serve to invalidate the most poorly-defined offence imaginable.³² The Court has actually only invalidated one provision on the basis of the vagueness doctrine (denial of bail in the “public interest”),³³ and there is little chance that the doctrine will fare any better in the realm of consensual crime.

Despite one seemingly bold invalidation by the Court,³⁴ the future of the overbreadth doctrine as a means for substantive review under section 7 is even bleaker. In *Clay*, relying on *Rodriguez*, we had argued that the criminal prohibition on marijuana does little to enhance the State’s objective as it is grossly overbroad and ineffective. In *R. v. Heywood*, the Court had characterized the overbreadth analysis as follows:

Overbreadth analysis looks at the means chose by the state in relation to its purpose. A court must consider whether those are means necessary to achieve the state objective. If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual’s rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.³⁵

In light of *Heywood*, we had submitted that in order to accord with the overbreadth principle, the harm caused by a legislative provision cannot be disproportionate to the harm prevented by it; that is, a “not insignificant” level of prevented harm cannot justify a legislative provision

³² As demonstrated by Arbour J.’s opinion in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, the majority opinion that has effectively raised the bar on the test for vagueness so high as to render the doctrine meaningless.

³³ *R. v. Morales*, [1992] 3 S.C.R. 711, [1992] S.C.J. No. 98.

³⁴ See *R. v. Heywood*, *supra*, note 32. Of course, as the Court was quick to observe in *Heywood*, the impugned legislation had since been replaced. In other words, the Court was prepared to rely upon the overbreadth doctrine to strike down a piece of legislation which no longer existed.

³⁵ *Supra*, note 31, at 764.

which seriously harms the interests section 7 of the Charter was intended to protect. The essence of our argument is found in the following paragraph in our Factum:

27. As the Crown's own expert, Dr. Kalant, acknowledged, the vast majority of cannabis users are moderate users who do not present *any* risk of harm to themselves or others. Indeed, both the trial Judge in *Clay* (and the Ontario Court of Appeal) recognized this fact:

However, to be fair, there is also general agreement among the experts who testified that moderate use of marijuana causes *no physical or psychological harm*. Field studies in Greece, Costa Rica and Jamaica generally supported the idea that marijuana was a relatively safe drug — not totally free from potential harm, but unlikely to create serious harm for most individual users or society. [Emphasis in Factum.]

However, the criminal prohibition on cannabis does not distinguish between those few whose consumption presents a potential risk of *some* harm (assuming that harm is sufficiently serious to justify criminal sanctions) and those for whom moderate consumption presents little or no risk of any harm. Yet, the criminal prohibition attaches criminal sanctions to *all* users, regardless of whether it is their first, second or tenth time using cannabis. Even though the Crown's expert estimates that there are only about 30,000 chronic users in Canada for whom there is some risk of harm, the criminal prohibition has adversely impacted upon no less than 600,000 Canadians. Crudely put, the criminal prohibition needlessly causes harm to 20 people for every one person who might benefit from the putative deterrent effects of the law. From another perspective, the gross overbreadth of the criminal prohibition on cannabis means that the overwhelming majority of convicted offenders have "not really done anything wrong" and that we are convicting them to prevent harm to the small percentage of chronic users: see *B.C. Motor Vehicle Reference*, *infra*.³⁶

While this point found favour with the three dissenting justices, especially with Deschamps J., the majority's response was, as noted above, to import the "*gross disproportionality*" requirement from section 12 of

³⁶ *Appellant Clay's Factum* (S.C.C. Court File #28189), on file with S.C.C. and with author, para. 27.

the Charter into the overbreadth analysis.³⁷ As the majority's reasons go on to show, this is a threshold that will rarely be met:

We agree that the effects on an accused person of the criminalization of marihuana possession are serious. They are the legitimate subject of public controversy. They will undoubtedly be addressed in parliamentary debate. Applying a standard of gross disproportionality however, it is our view that the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action.³⁸

III. WORKING TO DEVELOP THE "HARM PRINCIPLE" AS A PRINCIPLE OF FUNDAMENTAL JUSTICE

It would be impossible to mount a challenge premised upon a criminal prohibition's lack of social utility without the support of social science evidence calling into question the foundation for the prohibition's existence. It does not appear that this type of evidence was introduced on any of the earlier incarnations of this type of challenge, such as in the *Prostitution Reference*.³⁹ If the assessment of legislative objectives is to be made as part of a section 7 claim (as opposed to waiting for the stage of the litigation where the government tries to justify a violation), then the rights claimant bears the burden of proving the violation.⁴⁰ Rhetorical

³⁷ Were one to be so cynical as to believe that the majority was engaging in result-oriented reasoning, it is easy to understand why it was compelled to reformulate the overbreadth test by raising the bar through use of the word "gross" to qualify the standard of disproportionality. In addition to the repeated and consistent criticisms of the criminal prohibition on marijuana that are found in the professional literature and in law reform papers, two Parliamentary committees had very recently found that the consequences of the Canadian criminal prohibition were "disproportionate" to the harms which the prohibition was hoping to prevent. Of course, once the operative test became "gross disproportionality" those recent governmental findings were of little use to the majority.

³⁸ *Malmo-Levine*, *supra*, note 27, at para. 175.

³⁹ *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.

⁴⁰ Although much of the information relating to legislative objectives will be uniquely in the possession of the Crown, it will be incumbent upon the rights claimant to discharge a persuasive burden relating to proof of the absence of sound policy supporting the enactment. As noted above, this was a subsidiary issue raised in the *Clay* trilogy; namely, whether s. 7 of the Charter contemplates a "shifting burden" such that the state may, in certain situations, be

flourishes by counsel will not suffice. Invalidation will require a careful marshaling of legislative facts. As the Supreme Court of Canada has said on two different occasions:

Charter cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression, and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions.⁴¹

As with the *Prostitution Reference*, the Supreme Court in *Butler*,⁴² dismissed the claim that the obscenity prohibition was unconstitutionally vague. However, while *Butler* did not directly provide support for a claim that section 7 permits judicial review of the merits of the law, there were two aspects of this case which became integral to the quest for a sound juridical basis for challenging the constitutionality of consensual crimes on the basis of their lack of social utility. First, in *Butler*, the Supreme Court rejected “legal moralism” as a sound justification for criminal law. The Court stated that “to impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms”.⁴³ The rejection of legal moralism (and perhaps its

called upon to justify why it has criminalized a certain activity. The majority rejected this contention.

⁴¹ *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at 361, [1989] S.C.J. No. 88; *Danson v. Ontario (Attorney General)* [1990] 2 S.C.R. 1086, [1990] S.C.J. No. 92.

⁴² *R. v. Butler*, [1992] 1 S.C.R. 452, [1992] S.C.J. No. 15, 70 C.C.C. (3d) 129.

⁴³ *Id.*, at 156.

distant relative, legal paternalism) suggested that a harm-based justification must support the enactment of criminal law. The type of harm and the level of proof of harm was not addressed in *Butler*, save and except for the Court's finding that, in the context of obscenity, Parliament was acting upon a "reasoned apprehension of harm".⁴⁴

Following *Butler*, Professor Young and I began to work on constructing a harm-based constitutional challenge to the gambling provisions based upon an extensive record of legislative facts showing that "legalized" gambling had become an everyday Canadian pastime. Provincial governments were amassing huge revenues from the recent explosion in regulated gambling. We argued that the intense involvement of the State in gambling activities completely undercut the argument that gambling was harmful to society. Surely the province would not engage in activities contrary to the public interest, and their decision to promote gambling showed that there has been a change in social, political and moral perspectives on gambling. Armed with *Butler*, we argued that the "harm principle" is a principle of fundamental justice which required Parliament to have a "reasoned apprehension of harm" before it could enact constitutionally-sound criminal prohibitions. Ultimately, the constitutional challenge to the gambling provisions failed on the basis that the Ontario Court of Appeal found that, despite the proliferation of government-run gambling ventures, there still remained some degree of harm warranting resort to the criminal law. As a result of its factual finding, the Court provided no comment relating to whether it considered the harm principle to be a principle of fundamental justice.⁴⁵

IV. JUDICIAL RECOGNITION OF THE "HARM PRINCIPLE"

To what extent can the "harm principle" be considered a principle of fundamental justice? When does a principle become a "basic tenet" of criminal justice policy? These questions do not have simple answers. Presumably, the fundamental nature of a principle can be demonstrated by showing that it is consistent with other accepted principles of justice. A vibrant principle against self-incrimination was largely constructed by the Supreme Court on the basis of a synthesis of interconnected princi-

⁴⁴ *Id.*, at 164.

⁴⁵ *R. v. Andriopolous*, [1994] O.J. No. 3630 (C.A.).

ples of common law, statutory law, constitutional law and policy.⁴⁶ Similarly, as nine provincial appellate court justices — the three members of the B.C. Court of Appeal in *Malmo-Levine*, the three members of the Ontario Court of Appeal in *Clay* and the three members of the Ontario Court of Appeal in *Murdock*⁴⁷ — and Arbour J. (dissenting in the *Clay* trilogy) all recognized, support for a “harm principle” can be traced back to our common law traditions and to other constitutional rights and principles.⁴⁸

We can begin with a look to some of the cases decided under the constitutional predecessor to the Charter, namely, the *Constitution Act, 1867*. One need only turn to the scope of constitutional review under the *Constitution Act, 1867* to see that courts are constitutionally empowered to review legislative determinations of harm. With respect to the criminal law power under section 91(27) of the *Constitution Act, 1867*, the following summary of the scope of section 91(27) has been repeatedly adopted by the Supreme Court in “division of powers” cases:

The traditional root of discussions in this field is found in *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), where Sir Montague E. Smith said at p. 839:

Laws...designed for the promotion of public order, safety or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights...and have direct relation to the criminal law.

That there are limits to the extent of the criminal authority is obvious and these limits were pointed out by this Court in The Reference as to the Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference), [1949] S.C.R. 1, aff'd [1951] A.C. 179, where Rand J. looked to the object of the statute to find whether or not it related to the traditional field of criminal law, namely public peace, order, security, health and morality. In that case, the Court found that the object of the statute was economic:...

⁴⁶ See *R. v. Hebert*, [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64, 57 C.C.C. (3d) 1, and *R. v. S. (R.J.)* [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1.

⁴⁷ *R. v. Murdock*, [2003] O.J. No. 2470 (C.A.).

⁴⁸ It was upon these same considerations that all three justices of the B.C. Court of Appeal came to recognize the “harm principle” as a principle of fundamental justice in *R. v. Malmo-Levine*, *supra*, note 27.

The test is one of substance, not form, and excludes from criminal jurisdiction legislative activity not having the prescribed characteristics of criminal law:

“A crime is an act which the law, with appropriate penal sanctions, forbids; but 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 interests; and the legislature has had in mind to suppress the evil or the safeguard the interest threatened.” [*Reference re Validity of Section 5(a) of Dairy Industry Act, Canadian Federation of Agriculture v. AG Que. et al. (the Margarine case)*, [1949] S.C.R. 1 at 49, [1949] 1 D.L.R. 433 at 472-3, aff’d [1951] 4 D.L.R. 689 (P.C.) (Rand J.)] (emphasis added)⁴⁹

The *Margarine Case*⁵⁰ provides a perfect example of the constitutional proposition that “there are limits to the extent of criminal authority”.⁵¹ In that case, the Supreme Court invalidated a criminal prohibition on the sale of margarine on the basis that the original legislative assumption of harm (*i.e.*, that margarine was injurious to health) was no longer valid in light of new scientific evidence, and in light of the fact that the government itself was importing and selling margarine during the war. Originally, the law had conformed to the harm principle, but with the passage of time this “reasoned apprehension of harm” had disappeared. This 54-year old decision provides significant support for the elevation of the “harm principle” into a principle of fundamental justice.

The spirit of the *Margarine Case* lives on in contemporary constitutional adjudication. Whether a court was balancing interests under section 7 or under section 1, Charter challenges to legislation have always required a court to assess the social utility of an impugned law. For example, in balancing the competing interests at issue in *Rodriguez*, the Court noted:

Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems to me that a

⁴⁹ *Labatt Breweries of Canada v. Canada (Attorney General)*, [1980] 1 S.C.R. 914, at 943.

⁵⁰ *Reference re Validity of section 5(a) of the Dairy Industry Act (Margarine Case)*, [1949] 1 D.L.R. 433 (S.C.C.); aff’d [1950] 4 D.L.R. 689 (P.C.).

⁵¹ *Supra*, note 49.

breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.⁵²

In the context of criminal law, asserting that a provision “does little or nothing to enhance the state's interest” is another way of saying that the law does not protect society from the harm which the law was designed to prevent.

In 1997, the Nova Scotia Court of Appeal dismissed another challenge which was based upon an early incarnation of the “harm principle”. In dismissing the Charter challenge, the Court focused on the lack of evidence calling into question the social utility to the consensual crime of incest among adults:

The analysis of these arguments must be undertaken with the recognition that the appellants have the burden of proving on the balance of probabilities that their fundamental rights are violated by the law in question. In that respect, I note that the appellants have not presented any evidence that indicates that incest between consenting adults is permitted by the law of any other civilized nation, nor have they filed any articles or learned publications, law reform commission papers or other material that supports their position that “recreational” sexual activity with blood relations should be legalized and constitutionally protected.⁵³

Based upon this passage, it became apparent that the prohibition on marijuana possession would be an opportune case for advancing the harm principle as a constitutional tool for decriminalizing consensual crimes. In contrast to the criminal prohibition on incest, the criminal prohibition on marijuana has been strongly criticized by a vast body of academic literature⁵⁴ and by virtually every commission of inquiry to have studied the issue, including the 1972 Canadian LeDain Commission. In addition, many other civilized nations have already changed their prohibitory policies with respect to marijuana possession. Finally, for the past decade (or more) there has been considerable public support for law reform in this area. Perhaps the incest, obscenity, prostitution and gambling provisions are supported by a “reasoned apprehension of

⁵² *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at 594.

⁵³ *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, at 441 (N.S.C.A.).

⁵⁴ The literature on this issue is too voluminous to note for this brief paper, but it has been summarized in the *Joint Statement of Legislative Facts* filed in the appeal to the Supreme Court of Canada in the *Clay* trilogy (and is on file with the author).

harm”, but with respect to marijuana, there is a wide array of legislative facts which casts serious doubt upon the legitimacy of this criminal prohibition.

The “harm principle” challenge to the prohibition on marijuana possession initiated in the *Clay* case⁵⁵ was predicated on the introduction of an extensive body of expert evidence from the fields of history, sociology, psychiatry, criminology, pharmacology and medicine. Ultimately, the challenge was dismissed at trial, primarily on the basis that the question of harm is primarily a political question best left to the policy determinations of a legislature. The trial judge did not conclude that the harm principle was a principle of fundamental justice. However, in order to facilitate further judicial review in the appellate courts, the trial judge agreed to make findings of fact with respect to the evidence of “harm” which had been presented. Despite rejecting the legal basis for the constitutional challenge, the trial judge made the following findings of legislative fact:

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marijuana probably does not lead to “hard drug” use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;

⁵⁵ *R. v. Clay* (1997), 9 C.R. (5th) 349, [1997] O.J. No. 3333 (Gen. Div.).

8. Marijuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marijuana;
10. There is no evidence that marijuana causes amotivational syndrome;
11. Less than 1% of marijuana consumers are daily users;
12. Consumption in so-called "de-criminalized states" does not increase out of proportion to states where there is no de-criminalization;
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.⁵⁶

Subsequent to the *Clay* case, the trial judge in *Malmo-Levine*, faced with almost the identical record of legislative facts, reached virtually identical findings of fact. In addition to the minimal harms putatively avoided by the criminal prohibition, the British Columbia court provided an overview of the social harms which are *caused by the criminal prohibition*:

1. countless Canadians, mostly adolescents and young adults, are being prosecuted in the "criminal" courts, subjected to the threat of (if not actual) imprisonment, and branded with criminal records for engaging in an activity that is remarkably benign (estimates suggest that over 600,000 Canadians now have criminal records for cannabis related offences); meanwhile others are free to consume society's drugs of choice, alcohol and tobacco, even though these drugs are known killers;
2. disrespect for the law by upwards of one million persons who are prepared to engage in the activity, notwithstanding the legal prohibition;
3. distrust, by users of health and educational authorities who, in the past, have promoted false and exaggerated allegations about marijuana; the risk is that marijuana users, especially the young, will no longer listen, even to the truth;

⁵⁶ *Id.*, at 360-62.

4. lack of open communication between young persons and their elders about their use of the drug or any problems they are experiencing with it, given that it is illegal;
5. the risk that our young people will be associating with actual criminals and hard drug users who are the primary suppliers of the drug;
6. the lack of governmental control over the quality of the drug on the market, given that it is only available on the black market;
7. the creation of a lawless sub-culture whose only reason for being is to grow, import and distribute a drug which is not available through lawful means;
8. the enormous financial costs associated with enforcement of the law; and
9. the inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful.⁵⁷

Both of these cases were appealed. Both the Ontario and British Columbia Courts of Appeal concluded that the harm principle is a substantive principle of fundamental justice. The Ontario Court of Appeal adopted the following statement made by a majority of the B.C. Court of Appeal (*per* Braidwood J.A.):

I conclude that on the basis of all of these sources — common law, Law Reform Commissions, the federalism cases, *Charter* litigation — that the “harm principle” is indeed a principle of fundamental justice within the meaning of s. 7. It is a legal principle and it is concise. Moreover, there is a consensus among reasonable people that it is vital to our system of justice. Indeed, I think that it is common sense that you do not go to jail unless there is a potential that your activities will cause harm to others... the proper way of characterizing the “harm principle” in the context of the *Charter* is to determine whether the prohibited activities hold a “reasoned apprehension of harm” to other individuals or society ... The degree of harm must be neither insignificant nor trivial.⁵⁸

⁵⁷ *R. v. Marmo-Levine* (1999), 145 C.C.C. (3d) 225, at 240-41, [1999] B.C.J. No. 1095 (C.A.).

⁵⁸ *Id.*, at 274-75.

Despite recognizing that the “harm principle” was a principle of fundamental justice, the Ontario Court of Appeal, and a majority of the British Columbia Court of Appeal, dismissed the constitutional challenges to the marijuana prohibition on the basis that there was some evidence to support a conclusion that “marihuana poses a risk of harm to others that is not insignificant nor trivial.”

In his discussion of the reports from Canadian law reform commissions over the past few decades, Braidwood J.A. specifically noted the 1969 *Report of the Canadian Committee on Corrections* (Ouimet Report), which had asserted that harm to society was a precondition to legislative resort to a criminal prohibition:

The Committee then adopted the following three criteria as “properly indicating the scope of criminal law”:

1. No act should be criminally proscribed unless its incidence, actual or potential, is *substantially damaging to society*. [Emphasis in original.]
2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process.
3. No law should give rise to social or personal damage greater than that it was designed to prevent.⁵⁹

Like the majority in the Supreme Court who ultimately disagreed with him, Braidwood J.A. also took note of a 1982 Government of Canada policy statement with respect to the purposes and principles of the criminal law, stating that:

The basic theme, however, is important, in stressing that *the criminal law ought to be reserved for reacting to conduct that is seriously harmful*. The harm may be caused or threatened to the physical safety or integrity of individuals, or through interference with their property. It may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values—those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians. Since many acts may be “harmful”, and since society has many other means for controlling or

⁵⁹ *Id.*, at 267.

responding to conduct, *criminal law should be used only when the harm caused or threatened is serious*, and when the other, less coercive or less intrusive means do not work or are inappropriate.⁶⁰

Based on his review of “all of these sources — common law, Law Reform Commissions, the federalism cases, Charter litigation”, Braidwood J.A. had no difficulty finding that the “harm principle” (1) is a legal principle, (2) which is precise and (3) which enjoys a consensus among reasonable people that it is vital to our system of justice.⁶¹

Before turning to the Supreme Court’s response to the “harm principle”, it is worth noting that, Prowse J.A., dissenting in the B.C. Court of Appeal’s decision in *Malmo-Levine*, had adopted a slightly more robust formulation of the “harm principle” than had her colleague Braidwood J.A., before then going on to hold that the trial judge’s findings did *not* satisfy the constitutionally requisite level of harm:

While I agree with Mr. Justice Braidwood that the risk of harm to society from simple possession of marijuana is not insignificant or trivial, and that the evidence of the trial judge justifies the findings she made in that regard, I do not agree that this is the appropriate formulation of the test to be applied in these circumstances. Rather, I would interpret the *Butler* test as justifying Parliament in imposing criminal law sanctions to prohibit specified activity if there is a reasoned apprehension of harm of a “serious”, “substantial” or “significant” nature, whether or not actual harm can be established.

I find support for this formulation of the relevant test to be applied in this case in the detailed discussion of the “harm principle”, and its relationship to the criminal law, set forth at paras. 97 to 130 of Mr. Justice Braidwood’s reasons. He refers to numerous authorities in that regard, drawn from the common law, leading treatises on the criminal law, the work of law reform commissions, Canadian “federalism” cases, and leading *Charter* cases, including *Butler* and *Sharpe*.

...

In my view, none of the cases referred to by either Judge Howard or by Mr. Justice Braidwood supports a finding that a lesser degree of harm than described in those passages would justify Parliament’s intervention through the imposition of criminal law sanctions.

⁶⁰ *Id.* at 268 [emphasis in original].

⁶¹ *Id.*, at 247 and 274.

...

In summary, it is apparent from Mr. Justice Braidwood's discussion of the "harm principle" in relation to Parliament's use of criminal law sanctions, that the level or degree of harm, or apprehended harm, which justifies Parliament's intervention through its use of such sanctions (whether under s. 91(27) of the *Constitution Act, 1867* (criminal law) or under the residual power to make laws for the peace, order and good government of Canada) must be harm of a "serious", "significant" or "substantial" nature. It is not sufficient to say that the apprehended harm be "non-trivial" or "insignificant". In my view, those words posit too low a threshold to justify Parliament's intervention through the imposition of criminal law sanctions.

As earlier stated, the findings of Judge Howard, based on the evidence before her, do not amount to a finding of a reasoned risk of serious, substantial or significant harm to society or to others from the mere possession (or use) of marijuana. If there is evidence available which would gainsay this conclusion, it was not placed before the trial judge, nor is it before us on this appeal.⁶²

This difference in the formulation of the "harm principle" was much more than hair-splitting. Had Braidwood J.A. shared Prowse J.A.'s view of the appropriate test for "harm", Braidwood J.A.'s reasons make clear that a unanimous B.C. Court of Appeal would have been satisfied that the legislative facts did *not* support the constitutionally requisite level of harm. It was on the strength of Prowse J.A.'s dissent that the "harm principle" and its applicability to the criminal prohibition on marijuana possession made their way up to the Supreme Court of Canada.

Following the appellate court decisions in *Malmo-Levine* and in *Clay*, the Ontario Court of Appeal, in *R. v. Murdock*,⁶³ decided another constitutional challenge to a drug offence that had been mounted on the basis of the "harm principle". The accused in *Murdock* had been convicted of "trafficking by offer"; that is, he had been found to have offered to sell a drug to an undercover officer when he did not in fact have any drug to sell. Counsel challenged the offence of "trafficking by offer" on the basis that there was no harm caused by the mere offer to sell someone a drug when no drug was actually sold. Though it ultimately

⁶² *R. v. Malmo-Levine*, *supra*, note 57, at 284-86.

⁶³ [2003] O.J. No. 2470 (C.A.).

rejected the challenge, the Court did again recognize that the “harm principle” is a substantive principle of fundamental justice. However, the Court also made clear that the formulation of the “harm principle” which it was prepared to recognize provided only a very narrow scope for judicial review of the merits of a criminal prohibition. Writing for the majority, Doherty J.A. said:

[para27] I am spared much of the intellectual heavy lifting involved in a consideration of this submission. Braidwood J.A. in a well reasoned analysis in *R. v. Malmo-Levine* (2000), 145 C.C.C. (3d) 225 at 246-82 (B.C.C.A.), leave to appeal to S.C.C. granted [2000] S.C.C.A. No. 490, accepted that the “harm principle” was a principle of fundamental justice. He framed the principle in these words at p. 275:

The proper way of characterizing the “harm in the criminal law can be a nebulous and unruly standard. The harm principle, like other principles of fundamental justice, does not give the judiciary licence to review the wisdom of legislation: Creighton, *supra*, at p. 378; *Rodriguez v. British Columbia (A.G.)*, *supra*, at p. 65.

[para31] Nor should the harm principle be taken as an invitation to the judiciary to consecrate a particular theory of criminal liability as a principle of fundamental justice. This is so even if that theory has gained the support of law reformers, some of whom also happen to be judges. Judicial review of the substantive content of criminal legislation under s. 7 should not be confused with law reform. Judicial review tests the validity of legislation against the minimum standards set out in the Charter. Law reform tests the legal status quo against the law reformer’s opinion of what the law should be.

[para32] The nature and degree of harm said to justify resort to the criminal sanction is a matter of debate among philosophers and criminal law theorists. To some, harmful conduct has a broad meaning encompassing any conduct which threatens or harms any legitimate individual or societal interest: Canada, Department of Justice, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982) at p. 45. Others prefer a more restricted notion of harm. Some reject self-harm as a basis for the imposition of criminal liability because it is unduly paternalistic. Still others reject public morality [See Note 3 below] as an appropriate basis upon which to impose the criminal sanction: A. Ashworth, *Principles of Criminal Law*, 2d ed. (Oxford: Clarendon Press 1985, chap. 2); J.P. McCutcheon, “Morality in the Criminal Law: Reflections on Hart-Devlin” (2002) 47 *Crim. L.Q.*, at p. 15.

[para33] It is not for the judiciary under the guise of applying the harm principle as a principle of fundamental justice to choose from among the competing theories of harm advanced by criminal law theorists. The harm principle, as a principle of fundamental justice, goes only so far as to preclude the criminalization of conduct for which there is no “reasoned apprehension of harm” to any legitimate personal or societal interest. If conduct clears that threshold, it cannot be said that criminalization of such conduct raises the spectre of convicting someone who has not done anything wrong. Difficult questions such as whether the harm justifies the imposition of a criminal prohibition or whether the criminal law is the best way to address the harm are policy questions that are beyond the constitutional competence of the judiciary and the institutional competence of the criminal law adversarial process. [footnote omitted]

[para35] With respect, having concluded that the relevant statutory provisions accorded with the harm principle, I do not agree that a further consideration of whether the provisions struck “the right balance” was mandated by the harm principle as a principle of fundamental justice. In my view, the harm principle as described by Braidwood J.A. (Malmo-Levine, *supra*, at p. 275) itself reflects the balancing of societal and individual interests required by s. 7. The state interest is the protection of individuals in the community from the harm occasioned by the conduct in issue. The individual interest is the right to be left alone by the state. The harm principle, as described by Braidwood J.A., balances those competing interests by directing that the state can interfere with individual autonomy by way of a criminal prohibition only where there is a reasoned apprehension of harm occasioned by the conduct of the individual. To engage in a further balancing process based on harm related concerns, after it is determined that the impugned legislation complies with the harm principle, leads inevitably to a review of policy choices and goes beyond protecting those who have done nothing wrong from the criminal sanction. For example, I do not think that considerations of the overall harm caused to the due administration of justice by the criminalization of conduct has anything to do with whether criminalization of that conduct offends the harm principle. The effect of criminalization on the overall administration of justice is an important question, but it is a policy question which is not germane to the judicial review contemplated by s. 7 of the Charter.

[para36] In holding that the harm principle as a principle of fundamental justice contemplates only a determination of whether the prohibited conduct presents a reasoned apprehension of harm, I do not suggest that the substantive review of crime creating statutes is limited to that narrow question. The harm principle is but one of several related principles of fundamental justice that are engaged on a substantive review of criminal legislation. Principles of fault, overbreadth, vagueness, and gross

proportionality between the harm caused and the punishment imposed are among the principles of fundamental justice that are germane to a substantive review of criminal legislation under s. 7: see *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Nova Scotia Pharmaceutical Society (No. 2)*, [1992] 2 S.C.R. 606; *R. v. Heywood*, [1994] 3 S.C.R. 761. In addition, other specific provisions of the Charter impose constitutional limits on the availability of the criminal law sanction: see *R. v. Zundel*, [1992] 2 S.C.R. 731.⁶⁴

Unless and until the Supreme Court were to say otherwise, it appeared that, in Ontario at least, the scope of review afforded by the “harm principle”, would be extremely limited. Indeed, it was my view at the time that if the record and findings of legislative fact in *Clay* did not fall *below* the harm principle’s dividing line, there would be few, if any, existing criminal prohibitions which would fail the Ontario Court of Appeal’s test for the minimum level of constitutionally required harm.

V. THE SUPREME COURT TAKES THE BITE OUT OF THE HARM PRINCIPLE

Prior to the release of the Supreme Court’s decision in the *Clay* trilogy of cases, Professor Stuart had commented on the significance of the Court’s pending judgment in these appeals:

The harm principle awaits the imprimatur of the Supreme Court. If accepted, it would introduce a welcome new vehicle for restraint and give teeth to years of rhetoric about the need to use the criminal sanction with caution. The Braidwood test appears as workable as presently accepted Charter grounds of challenge under principles of vagueness and overbreadth [footnote omitted]. Indeed it may be easier to apply. The resolution of the harm principle issue will provide a good barometer of how activist the present Supreme Court chooses to be.⁶⁵

The majority in the *Clay* trilogy refused to constitutionalize the “harm principle” because (1) “there is no sufficient consensus that the harm principle is vital or fundamental to our societal notion of criminal justice, (2) “there [is no] consensus that the distinction between harm to

⁶⁴ *Id.*

⁶⁵ D. Stuart, *Charter Justice in Canadian Criminal Law* (3rd ed., Carswell, 2001), at 60.

others and harm to self is of controlling importance, and (3) “the harm principle is not a manageable standard against which to measure deprivation of life, liberty or security of the person”.⁶⁶ At the risk of sounding like a sore loser, and with the greatest of respect to the majority, the support they provide for each of these three propositions is weak, at best.

First, regarding the majority’s contention that there is insufficient consensus about the fundamental nature of the “harm principle”, the majority, in contrast to Arbour J. and Braidwood J.A. in the British Columbia Court of Appeal, fails to make mention of the overwhelming number of credible sources which recognize the importance of harm as a justification for resort to the criminal sanction.⁶⁷ Instead, the majority simply asserts that “these sources, read in context, do not support the ‘harm principle’ as defined by the appellants”⁶⁸ and then goes on to note that included within the appellant’s long list of authorities that support the existence of the “harm principle” were J.F. Stephens and a 1982 report by the Law Reform Commission, both of which suggest that justificatory “harm” extends to harms beyond those mentioned by Mill in his original formulation of the “harm principle” centuries ago. As Arbour J. observes, the majority’s analysis focuses on the wrong issue. The issue in the *Clay* trilogy of cases was not whether Mill’s conception of a “harm principle” was right or wrong. The issue in these cases was simply whether, *since Mill*, has a solid consensus developed that recognizes “harm to others” as an organizing principle of criminal law.

In the *Clay* trilogy, Arbour J. (at paras. 226 to 244 of *Malmo-Levine*) makes a compelling case for why “harm to others” has been well accepted, both by academics and by earlier Supreme Court of Canada decisions, as a principle of fundamental justice — a case which seems unanswered by the majority’s opinion. The only answers provided by the majority to Arbour J.’s arguments on this point are (1) a

⁶⁶ *Id.*, at paras. 114-29.

⁶⁷ These sources include, but are not limited to the ones set out in the reasons of Braidwood J.A. in the British Columbia Court of Appeal’s decision in *Malmo-Levine* and in the historical review of the “harm versus morality” debate (also known as the “Hart-Devlin” debate) that is set out in B. Harcourt, “The Collapse of the Harm Principle” (1999) 90 J. Crim. L. & Criminology 109 (an article referred to both by the majority and by Arbour J. in their decisions in *Malmo-Levine*).

⁶⁸ *Id.*, at para. 119.

one-sentence passage from *Rodriguez*, a case in which the focus had been on the autonomy of the individual and not on whether the conduct caused harm to others, and (2) a reference to the fact that “Canada continues to have paternalistic law”.⁶⁹ In terms of this latter point, the majority refers to the fact that our country has laws which require people to wear seatbelts and motorcycle helmets so as to “save people from themselves”. Reference is then made by the majority to a very recent policy paper from the Law Commission of Canada entitled *What is Crime? Challenges and Alternatives*.⁷⁰ What the majority seems to have overlooked, however, is that, in its Report, the Law Commission had this to say about those paternalistic laws:

[E]ven if we agree that certain conduct is harmful, we may disagree on whether it ought to be tolerated, prohibited or regulated. It is often claimed that if conduct is harmful to others, it warrants a more serious response. However, in a society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively. There are pressures to regulate and control conduct that primarily harms the individual. The requirements to wear a seatbelt or a helmet for certain activities are examples of a collective decision to protect people against their own risk taking.⁷¹

In other words, unlike the majority in the *Clay* trilogy, the Law Commission recognized that out of the range of available governmental responses — tolerance, prohibition or regulation — it is only conduct causing harm to others that generates a consensus calling for “a more serious response” (*i.e.*, prohibition).

Finally, the majority in the *Clay* trilogy rejected the “harm principle” on the basis that they did not think it was a “manageable standard”. Apart from the fact that Arbour J. was quite able to articulate how courts could and should go about assessing “harm to society” — *i.e.*, a balancing of the salutary versus the deleterious effects of the prohibition within the context of society’s tolerance for the harm caused by the conduct or comparable conduct — the majority’s concern for a “manageable standard” appears unduly sensitive. Indeed, the apparent vague-

⁶⁹ *Id.*, at para. 124.

⁷⁰ Law Commission of Canada, *What is Crime? Challenges and Alternatives* (2003, Ottawa: Government of Canada).

⁷¹ *Id.*, at 17.

ness of the term “undue” was not sufficient to rise to any constitutional concern for Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*,⁷² one of the authors of the majority judgment in the *Clay* trilogy. The fact that, as Arbour J. acknowledged, “harm caused to collective interests... is not easy to quantify”, does not mean that the “harm principle” is unquantifiable.⁷³ Measuring the “harm” associated with a criminal prohibition is certainly no more difficult than measuring a crime’s “stigma”⁷⁴ or whether the amount of discrimination associated with a legislative provision is “discriminatory”.⁷⁵

VI. THE ABSENCE OF A “HARM PRINCIPLE” IS NOT SUCH A BAD IDEA

About a month after I had finally read through the Supreme Court opinions in the *Clay* trilogy I noticed that the Court had just released its reasons for judgment in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.⁷⁶ I recalled that the case had been argued shortly after our hearing in the *Clay* trilogy and that the case had involved issues surrounding the constitutional significance of the “harm” associated with criminal conduct. Prior to picking up the Court’s reasons for judgment, that is all that I had remembered about the case. By the time I had reached the end of the majority’s opinion in that case, I thought that, like Alice, I had fallen through the looking glass. Having read the majority judgment, I was left scratching my head as to how it was that almost the same group of judges had rejected our “harm principle” arguments only a month earlier:

... a reasonable person acting on behalf of a child, apprised of the harms of criminalization which s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child’s dignity has been offended...⁷⁷

⁷² [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67.

⁷³ *Id.*, at para. 248.

⁷⁴ *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118.

⁷⁵ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

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

⁷⁷ *Law*, *supra*, note 75, at para. 68.

In *Canadian Foundation*, the applicants had brought a constitutional challenge to the Parliament's failure to criminalize certain conduct; that is, the applicants were complaining that Parliament had shirked its constitutional duty to prevent harm by "decriminalizing" assaults upon children by virtue of the corrective force defence afforded by section 43 of the *Criminal Code*.⁷⁸ In rejecting the applicants' constitutional claim, the majority observed:

The criminal law is the most powerful tool at Parliament's disposal. Yet it is a blunt instrument whose power can also be destructive of family and educational relationships. As the Ouimet Report explained:

To designate certain conduct as criminal in an attempt to control anti-social behaviour should be a last step. Criminal law traditionally, and perhaps inherently, has involved the imposition of a sanction. This sanction, whether in the form of arrest, summons, trial, conviction, punishment or publicity is, in the view of the Committee, to be employed only as an unavoidable necessity. Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense: all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere.

(Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969), at pp. 12-13).⁷⁹

As I read this, I thought to myself, "I could not agree more!" It was not long before I realized that my concurrence was undoubtedly due to the fact that this was the exact same argument and the exact same passage that we (and Braidwood J.A.) had relied upon in the *Clay* trilogy to support the constitutional recognition of the "harm principle".

Upon further reflection, however, I began to reluctantly accept the wisdom of the majority's approach in *Canadian Foundation* and, by necessary implication, the majority's decision in the *Clay* trilogy. Despite my everlasting belief (based upon an extensive scientific eviden-

⁷⁸ R.S.C. 1985, c. C-46.

⁷⁹ *Id.*, at para. 60.

tiary record) that the criminal prohibition on marijuana possession is the paradigmatic example of a “stupid” criminal law, the *Canadian Foundation* case revealed the potential danger of the kind of judicial activism encouraged by a constitutionalization of the “harm principle”. While I would never urge our courts to shy away from their constitutional duty to engage in substantive review of legislation which conflicts with the Charter, I have come to appreciate that the constitutionalization of a “harm principle” could “cut both ways”; that is, it could cut away at both liberties and prohibitions. This is not intended as either a criticism or a comment on the merits of the constitutional claim brought in *Canadian Foundation*, but rather is simply to say that, were the applicants in that case to have succeeded, it would have left the door open to any public interest group launching a constitutional challenge to *the absence of a criminal prohibition*. More importantly, had we been able to persuade the Supreme Court in the *Clay* trilogy to recognize the “harm principle”, it would have strengthened the argument of the applicants in *Canadian Foundation* that where conduct is associated with non-trivial harm then Parliament has a constitutional duty to criminalize that conduct. Had that been the result, we may well have won the battle but lost the war.⁸⁰

VII. CONCLUSION

With the preceding discussion in mind, I return to the question posed at the outset: does section 7 of the Charter have a role to play when it appears that there is no constructive purpose behind a criminal prohibition? In view of the decision in the *Clay* trilogy, Parliament has free rein to criminalize any conduct which may cause non-trivial harm to the actor or to society; anything from amusement park rides to zoo-keeping.⁸¹ Moreover, to the extent that earlier Supreme Court cases had offered alternative means for substantive constitutional challenges to

⁸⁰ For example, disgruntled opponents of marijuana consumption could have launched a constitutional claim for criminalization of the possession of “junk food” as there is clearly evidence that consumption of junk food is associated with serious harm; *e.g.*, obesity, diabetes, heart disease, high blood pressure, arthritis and/or age-related muscular degeneration.

⁸¹ Given the dangers inherent to these sources of entertainment, there would be nothing stopping Parliament from “regulating” the operation of them by resorting to the *criminal* sanction, namely, imprisonment and a criminal record.

overreaching and/or unnecessary criminal offence provisions, the majority judgment in the *Clay* trilogy severely restricts them as well. From a social activist's point of view, the *Clay* trilogy would seem to have been a resounding failure. Nevertheless, with the benefit of hindsight offered by the subsequent Supreme Court decision in *Canadian Foundation for Children, Youth and the Law*, it may well be that the majority in *Clay* came to the right result (even if, arguably, for the wrong reasons). As the constitutional challenge in *Canadian Foundation* demonstrates, a constitutionally enshrined "harm principle" could equally *compel criminalization* of conduct which Parliament had otherwise decriminalized. Citizens who were disposed to make a case *for* the criminalization of relatively harmless, though "offensive" (*i.e.*, immoral) recreational behaviour (*e.g.*, rave dance parties), would be empowered to launch constitutional challenges urging the courts to criminalize such behaviour. That kind of power is too much, even for me.