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Section 7 of the Charter and the Principled Assignment of Legislative Jurisdiction

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I. INTRODUCTION

The criminal law can be bad for one's health. In recent years, the threat or application of criminal sanction has been identified as a barrier to health-seeking behaviour in a number of areas,[1] including sex work,[2] polygamy,[3] sexual activity of people living with HIV,[4] and various aspects of drug control.[5] How courts draw the constitutional landscape in which health and criminal justice interact has important consequences for health and criminal policy, and more broadly for how communities and individuals shape their surroundings, which in turn can determine their health. This paper advances the claim that the interpretation of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*[6] should include consideration of the democratic legitimacy with which health-affecting criminal policy is made and, in particular, the role of those marginalized from ordinary democratic processes.

In *Canada (Attorney General) v. PHS Community Services Society*,[7] the claimants sought to ensure the continued operation of Insite — North

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1 I leave aside a vast literature on the effects of criminal processes and incarceration themselves on physical and mental health.

2 Kim Blankenship & Stephen Koester, "Criminal Law, Policing Policy, and HIV Risk in Female Sex Workers and Injection Drug Users" (2002) 30:4 J.L. Med. & Ethics 548. The negative safety impacts of prostitution laws were also recognized in *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186, at para. 111 (S.C.C.).

3 Angela Campbell, "Bountiful Voices" (2009) 47:2 Osgoode Hall L.J. 183.

4 Eric Mykhalovskiy, "The Problem of 'Significant Risk': Exploring the Public Health Impact of Criminalizing HIV Non-disclosure" (2011) 73:5 Soc. Sci. Med. 668.

5 Thomas Kerr, Will Small & Evan Wood, "The Public Health and Social Impacts of Drug Market Enforcement: A Review of the Evidence" (2005) 16:4 International Journal of Drug Policy 210 [hereinafter "Kerr, Small & Wood"].

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

7 [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*PHS*"].

America's first legally sanctioned safe injection site — without risking criminal punishment for Insite's staff and clients. Insite had its origins in the grassroots movement for harm reduction in Vancouver's Downtown Eastside, and was ultimately endorsed and realized through collaboration among local, federal and provincial authorities.[8] After five years, Insite was threatened with closure when the federal government refused to renew the exemption from the application of federal drug laws under which Insite had been operating. Insite's supporters wanted to keep the facility open for the simple reason that it was saving lives without harming anyone. Criminal prohibitions on possession and trade in drugs, the claimants argued, should not be permitted to threaten or interfere with Insite's good work.

The claimants in *PHS* were two Insite clients, a grassroots organization of people who use drugs, and the non-profit organization that oversees the operation of the safe injection site. They moulded their claims into two constitutionally cognizable forms. First, they made a jurisdictional argument that the provincial policy establishing and supporting the safe injection site ought to take precedence over federal drug laws because provinces have legislative primacy over the regulation of health. Second, they argued that Insite ought to be constitutionally protected from federal drug laws because health, safety and life are fundamental rights that, in the circumstances, should prevail over other ends pursued by the criminal law. Remarkably, the claimants succeeded at each level of court (albeit on different bases), with only one dissenting judge at the Court of Appeal.[9] The Supreme Court of Canada ultimately ruled to prevent criminal drug possession laws from impeding Insite's operation on the basis of section 7 of the Charter.

I argue that in building and interpreting the emerging substantive guarantee in section 7 of the Charter — that laws restricting life, liberty or personal security cannot be arbitrary, overbroad or disproportionate — justification and balancing between the means and ends of legislation should be conducted in light of the democratic context in which policies are created. Judicial legitimacy in setting and policing constitutional boundaries in complex areas of social policy like state responses to

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[8] For a compelling narrative of how Insite was driven by grassroots efforts interacting with institutional support, see Hester Lessard, "Jurisdictional Justice, Democracy, and the Story of Insite" (2011) 19:3 Const Forum Const. 93, at 97-100 [hereinafter "Lessard"].

[9] *PHS Community Services Society v. Canada (Attorney General)*, [2008] B.C.J. No. 951, 2008 BCSC 661 (B.C.S.C.) [hereinafter "*PHS* Trial Level"]; *PHS Community Services Society v. Canada (Attorney General)*, [2010] B.C.J. No. 57, 2010 BCCA 15 (B.C.C.A.).

potentially harmful drug use depends, certainly, on the strength and nature of the factual evidence about whether policy is doing what it purports to do. But it also depends on the relative democratic legitimacy of competing policy options.

Courts defining and enforcing constitutional rights in complex areas of social policy are, understandably, reluctant to substitute judicial views for those of a democratically elected legislature. Yet some law-making processes might better account for the perspectives of its constituents than others. The broader arbitrariness analysis that I suggest would attend to the ways in which policy-making processes include or exclude marginalized and most-affected voices. If one underlying purpose of constitutional rights is to prevent majoritarian oppression,[10] then it makes sense for courts to be more deferential to democratic decisions taken in contexts that mitigate that oppression. In *PHS*, this means that the Supreme Court made the right decision in finding that section 7 of the Charter precludes the criminal law from interfering with Insite's work. In coming to that decision, however, it ought to have considered not only the effectiveness of Insite in promoting health and safety relative to blanket criminal prohibition, but also Insite's unique democratic pedigree and the democratic deficits affecting ordinary criminal legislation.

An evaluation of a law's arbitrariness, overbreadth or proportionality that responds to power imbalances within democratic institutions can be understood to carry jurisdictional implications by favouring laws created through processes that better account for the interests of those who may be marginalized in ordinary political processes. In this way, Charter analysis may develop to achieve what traditional jurisdictional analysis has so far been unable to: the promotion of better representation in decision making that affects fundamental issues like health.

II. BACKGROUND: DEMOCRACY, RIGHTS AND JURISDICTION

After the British Columbia Court of Appeal decided in favour of the complainants on both Charter and division of powers grounds, a number of scholars, however supportive of the outcome of the case, bemoaned the narrow approach taken by the Court of Appeal majority on the

[10] See, *e.g.*, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), at 15-31.

question of jurisdiction.[11] Gillian Calder and Hester Lessard felt that the justice claims which compelled the courts to support Insite's continued existence had been obscured by the Court of Appeal's treatment of the jurisdictional question. Applying the doctrine of "interjurisdictional immunity", the majority had held that Insite was a provincial undertaking that fit within a "core" of provincial health powers, and that federal laws could not limit it. The court had relied on textual analysis, restricting the scope of its consideration narrowly to two levels of government — federal and provincial. In doing so, the court had considered it irrelevant to the jurisdictional question that Insite served the life-and-death needs and had been created through the grass roots efforts of a group with limited access to political processes.

Calling prevailing jurisdictional doctrine "arid", "formal" and "technical", Calder and Lessard urged a federalism doctrine that better serves its underlying purpose of reconciling diversity and unity while furthering democracy.[12] Such a doctrine should take more substantive account of political and social marginalization. This far more robust conceptualization of federalism — where law-making power is situated not only according to where it is textually assigned, but according to where it enjoys the most legitimacy — has ample support among scholars,[13] but has arguably played a limited role in shaping judicial doctrine.[14]

The division of powers argument was ultimately rejected by the Supreme Court. The unanimous panel determined that interjurisdictional immunity would not apply because it would have ousted the federal competence to legislate in ways that would affect health. This, it held, would be inconsistent with principles of cooperative federalism, as well as the notion that regulating the use of drugs could not neatly be divided into health questions within exclusive provincial competence and criminal law questions within federal competence.[15]

Instead, the Supreme Court relied on the more explicitly values-driven Charter holding that the Minister's refusal to grant an exemption

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[11] Lessard, *supra*, note 8, at 103-104; Gillian Calder, "Insite: Right Answer, Wrong Question" (2011) 19:3 Const. Forum Const. 113 [hereinafter "Calder"].

[12] Calder, *id.*; Lessard, *id.*

[13] See, *e.g.*, Jean-François Gaudreault-DesBiens, "The Canadian Federal Experiment, or Legalism Without Federalism? Toward a Legal Theory of Federalism" in Manuel Calvo-Garcia & William Felstiner, eds., *Federalismo / Federalism* (Madrid: Dyckinson, 2004), at 81; Robert C. Post & Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act" (2003) 112:8 Yale L.J. 1943.

[14] See, *e.g.*, Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 S.C.L.R. (2d) 601.

[15] *PHS*, *supra*, note 7, at paras. 67-70.

from the application of criminal drug possession laws to Insite's clients and staff would arbitrarily and grossly disproportionately limit their section 7 rights to life, liberty and security of the person.

In deciding the matter on Charter grounds, one might have expected the Court's decision to be more directly animated by concerns around the protection of minorities and recognizing unique forms of grassroots and democratic engagement that led to Insite's creation in the first place. It was not.

Calder and Lessard's analysis of the poverty of jurisdictional analysis suggests the broad argument I pursue in this paper: just as they argue equality and democratic values ought to shape jurisdictional analysis, so too should the interpretation of Charter rights be responsive to the contextual democratic legitimacy of processes through which a facility like Insite is created. In doing so, section 7 can play a role in assigning law-making authority to the places in which it is most legitimate. Section 7 of the Charter could thus serve a jurisdictional function in contexts like this one.

III. INSITE: A NARROW DECISION?

Given the many ways in which criminal law might negatively affect health, it is unsurprising that the Supreme Court's unanimous decision in *PHS* was cabined.[16] It has been argued that *PHS* presented relatively few challenges to the judicial role on the facts.[17] The Court was able to keep its section 7 analysis narrow and shallow[18] in two primary ways. First, it side-stepped the issue of evaluating the constitutionality of the *Controlled Drugs and Substances Act*[19] itself, instead limiting its scrutiny to the Federal Minister of Health's discretionary decision to deny Insite an exemption from the law under section 56 of the Act. Second, it kept its focus on the evidence of Insite's responsiveness to health and safety issues specific to Vancouver's Downtown Eastside.

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[16] See, *e.g.*, Rahool P. Agarwal, "Case Comment: *Canada (Attorney General) v. PHS Community Services Society*" (2011) 20:2 Const. Forum. Const. 41 [hereinafter "Agarwal"] (suggesting that the decision may have little precedential value for new safe injection sites that might seek to be established).

[17] Jeremy Webber, "Section 7, Insite, and the Competence of Courts" (2011) 19:3 Const. Forum Const. 125.

[18] See Cass R. Sunstein, "Foreword: Leaving Things Undecided" (1996-1997) 110:4 Harv. L. Rev. 4, at 14-23.

[19] S.C. 1996, c. 19 [hereinafter "CDSA"].

By shifting the focus away from the prohibitions themselves and toward the Minister of Health's exercise of discretion under section 56 of the Act,[20] the Court avoided pronouncing on health-affecting criminal offences outside the CDSA.[21] The Court stated that "[i]f the Act consisted solely of blanket prohibitions with no provision for exemptions for necessary medical or scientific use of drugs, the assertions that it was arbitrary, overbroad, and disproportionate in its effects *might gain some traction*",[22] adding that "the availability of [section 56] exemptions acts as a safety valve that prevents the CDSA from applying where such application would be arbitrary, overly broad, or grossly disproportionate to its effects."[23]

Most criminal offences do not benefit from health-related exemption provisions like section 56. This leaves discretion in the application of the law with police and prosecutors. Courts have so far maintained a very deferential standard of review for police and prosecutorial discretion[24] (although *PHS* might call this practice into question). Moreover, many of the harms associated with criminalization of things like sex work, sexual exposure of HIV or polygamy come from the mere threat of criminal sanction. Finally, even in the context of drug control, where the section 56 exemption is available, not all circumstances lend themselves to the section 56 process. For example, neighbourhood crackdowns have been found to interfere with peoples' own individual health-seeking behaviour,[25] but it is difficult to imagine the application of a section 56 exemption that could practicably address those harms.

In addition, in finding the Minister's exercise of discretion both arbitrary and grossly disproportionate to the CDSA's purposes of protecting health and safety, the Court relied on facts and circumstances specific to Vancouver's Downtown Eastside. First, traditional criminal prohibitions on drug use were not working to protect health and safety in that area.[26]

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[20] The trial judge, by contrast, considered the Minister's discretion under s. 56 of the Act to be unfettered, and therefore confined his analysis to the constitutionality of the possession and trafficking provisions alone. See *PHS* Trial Level, *supra*, note 9, at paras. 154-156.

[21] *PHS*, *supra*, note 7, at para. 118 (distinguishing this case from *R. v. Parker*, [2000] O.J. No. 2787, 49 O.R. (3d) 481 (Ont. C.A.), in which the s. 56 mechanism was not yet sufficiently developed at an administrative level for it to be of use to a claimant seeking to legally obtain medical marijuana).

[22] *Id*., at para 109 (emphasis added).

[23] *Id*., at para. 113.

[24] See *R. v. Regan*, [2002] S.C.J. No. 14, 2002 SCC 12, at paras. 166-169 (S.C.C.); *Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45, 2002 SCC 65, at paras. 45-49 (S.C.C.); *R. v. Nixon*, [2011] S.C.J. No. 34, 2011 SCC 34, at para. 64 (S.C.C.).

[25] See Kerr, Small & Wood, *supra*, note 5.

[26] *PHS*, *supra*, note 7, at para. 131.

Insite had been introduced to respond to a crisis of increasing severity: between 1987 and 1993, deaths from overdose per year had risen from 16 to 200. In 1996, HIV and Hepatitis C epidemics were reported. A public health emergency was declared in 1997.[27] Second, supervised injection had been proven to minimize the risk of death and disease to injection drug users.[28] Finally, and most importantly in the Court's view, Insite in fact *furthered*, rather than undermined, the health and safety purposes of the CDSA. It had intervened in 336 overdoses since 2006, and encouraged clients to seek counselling, detoxification and treatment, all without increasing local crime rates, incidents of public injection, or relapse rates of injection drug users.[29] In other words, the Supreme Court found that on the facts, closely examined, there was no reason to believe that the denial would further the CDSA's objectives.

The court's heavy reliance on the particular circumstances in Vancouver's Downtown Eastside, and on the proven benefits of Insite during the period in which it did operate under a section 56 exemption, has led some commentators to conclude that its impact on health-affecting criminal laws may be limited.[30] There is no other area in Canada that resembles the open-air drug market of the Downtown Eastside. And of course, without an initial section 56 exemption, it may be difficult for other would-be safe injection sites to demonstrate their contextual effectiveness or the lack of negative neighbourhood impacts. On its face, the decision falls well short of recognizing, for example, a free-standing right of people who use drugs to access suitable, evidence-based health services free from criminal law interference, much less to recognizing any democratic superiority of the unique collaboration between grass roots and government actors that led to Insite's creation over the ordinary democratic processes that generated the CDSA.

IV. INSITE: A DOCTRINAL EXPANSION

Despite the limitations outlined above, the Court was in some ways bolder than might have been expected from previous Supreme Court

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27 *Id*., at para. 11.
28 *Id*., at para. 131.
29 *Id.*
30 Agarwal, *supra*, note 16.

jurisprudence. First, it showed no deference at all to a ministerial decision that was, on the face of the statute, a discretionary one.[31]

Second, it undertook a far more searching review of the facts supporting the Minister's decision than some prior judicial decisions on the arbitrariness standard would have suggested. In *R. v. Malmo-Levine*; *R. v. Caine*, for example, the government had successfully defended marijuana possession laws against a recreational user's allegations of arbitrariness by demonstrating simply that the law was "rationally connected to a *reasonable apprehension* of harm".[32] Relying on a belief that "marijuana can cause problems of varying nature and severity to some people", the Supreme Court stated: "we think the *Charter* allows Parliament a broad, though certainly not unlimited, legislative capacity to respond."[33] Following *Malmo-Levine*, the Court in *PHS* might have upheld the decision on the (blinkered) basis that some people might be discouraged from using drugs by the exception-free application of the possession laws in the CDSA. Instead, the Court looked beyond the conceptual relationship between the CDSA prohibition on drug possession and the health and safety of Insite's clients to evaluate whether the Minister's decision was arbitrary.

The expansion of section 7 scrutiny of substantive criminal prohibitions beyond the notional relationships of a piece of legislation's means to its ends opens up new possibilities for Charter review on the basis of the social impact of criminal justice policy. It also risks generating concern about judicial overstepping, to which the Court in *PHS* was alive:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for relevant governments, not the Court, to make criminal and health policy.[34]

In fact, *PHS* is not the first Supreme Court decision to require that section 7 arbitrariness be evaluated with close attention to legislation's

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[31] See Kent Roach, "The Supreme Court's Remedial Decision in the Insite Decision" (2012) 6 J. Parl. & Polit. L. 238. For a discussion of the tensions inherent to Charter review of exercises of statutory discretion, see David Mullan, "Section 7 and Administrative Law Deference: No Room at the Inn?" (2006) 34 S.C.L.R. (2d) 227.

[32] [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 136 (S.C.C.) (emphasis added).

[33] *Id.*, at para. 135.

[34] *PHS*, *supra*, note 7, at para. 105 (S.C.C.).

effectiveness in reality. In *Chaoulli v. Quebec (Attorney General)*,[35] the Court famously struck down the Quebec government's prohibition on obtaining private health insurance for publicly ensured services for violating the Quebec Charter. Three of the four majority judges also found that the prohibition was arbitrary and violated section 7 of the Canadian Charter. They based their decision on their own finding, contrary to that of the trial judge, that the insurance prohibition, however rationally connected to the protection of the public health care system, was not in fact necessary on a close examination of the evidence. This position was justified primarily with reference to how other Western democracies managed to maintain effective public health care systems without such prohibitions.[36] And indeed, the decision was subjected to sharp criticism for judicial misapprehension of the facts.[37] Critics contended that there was plenty of evidence suggesting that expanding access to private health care would negatively affect the public health care system, and that the Court was improperly imposing its own ideology rather than objectively evaluating that evidence.[38]

The turn to closer scrutiny of the impacts of legislation in the arbitrariness/overbreadth/disproportionality analysis is welcome. But, as suggested by the previous section, it can be difficult and costly for applicants to build a strong evidence-based record to support a Charter challenge, particularly where they are members of poor and marginalized groups. Martha Jackman has convincingly argued that such applicants tend to carry a much higher burden of proof than the government in similar constitutional cases.[39] In the next section, I argue that the evidential burden on claimants in a case like *PHS* should be eased where they are urging courts to overrule a legislative policy created through ordinary democratic processes (like the CDSA) with one created with special

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[35] [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter "*Chaoulli*"].

[36] *Id.*, at paras. 134-149.

[37] See, *e.g.*, Hamish Stewart, "Implications of *Chaoulli* for Fact-Finding in Constitutional Cases" in Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice* (Toronto: University of Toronto Press, 2005) 209; Charles J. Wright, "Different Interpretations of 'Evidence' and Implications for the Canadian Healthcare System", *id.*, at 220; Theodore R. Marmor, "Canada's Supreme Court and its National Health Insurance Program: Evaluating the Landmark Chaoulli Decision from a Comparative Perspective" (2006) 44:2 Osgoode Hall L.J. 311.

[38] See, *e.g.*, Christopher Manfredi, "Déjà Vu All Over Again: *Chaoulli* and the Limits of Judicial Policymaking" in *Access to Care, Access to Justice*, *id.*, 139.

[39] Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases" in Margot Young, Susan Boyd & Sheilagh Day, eds., *Poverty Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) 24.

attention to, and participation of, marginalized groups (like the process that generated Insite).

V. On Judicial Capacity and Legitimacy in Substantive Review of Health-Affecting Criminal Prohibitions

The Court in *PHS* limited its explicit reliance on social science evidence to information about the effects of Insite on its clients and the surrounding community. But deference need not depend solely on the strength of the social science evidence about means and ends. If the basis for judicial deference in areas like this one is concern about courts' relative capacity and legitimacy to intervene in complex questions of social policy (here, the proper response to the health and public safety questions around drug use), then courts should consider those capacity and legitimacy concerns in determining the level of deference they owe governments in a given situation.[40] Justice Deschamps' reasons in *Chaoulli* affirm this, even if the Court did not apply its own principles satisfactorily:

> The court's reasons for showing deference must always reflect the two guiding principles of justification: the measure must be *consistent with democratic values* and it must be necessary to maintain public order and the general well-being of citizens. The variety of circumstances that may be presented to a court is not conducive to the rigidity of an exhaustive list.[41]

In *PHS*, the Court did not advert directly to the democratic legitimacy of Insite itself in the context of its arbitrariness analysis. In the introductory paragraphs to the decision, however, the Court notes the democratic pedigree of North America's first legally sanctioned safe injection site: "Insite was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it. It was launched as an experiment. That experiment has proven successful."[42] Ultimately, it is the success of Insite, and not the circumstances

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[40] *Cf.* Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Thomson Canada Limited, 1999), at 233-37 (suggesting that courts ought to determine justiciability on a case-by-case basis, depending on whether they have the institutional capacity and legitimacy to adjudicate the claim).

[41] *Chaoulli*, *supra*, note 35, at para. 93 (emphasis added).

[42] *PHS*, *supra*, note 7, at para. 19.

through which it was created or the marginalization of the population it serves, that forms the basis of the Court's section 7 decision.

And yet, a number of features underscore Insite's legitimacy as an experiment in local democracy. First, it was created through grassroots organizing.[43] The Vancouver Area Network of Drug Users ("VANDU") represented and was comprised of members from the most marginalized groups whose interests are least likely to be represented in traditional elected government. In addition, Insite was made possible by the provincial transfer of responsibility for adult alcohol and drug services to regional health authorities. Giving local communities a greater say in health policies that affect them and ensuring evidence-based health practices were among the key purposes underlying regionalization of health service design and priority setting.[44] Regionalization grew out of the perception that health care resource distribution needed to be more democratically responsive.

This case can thus be distinguished from *Chaoulli*. There, the Court replaced a decision made through ordinary democratic processes (the provincial ban on insurance) with the Court's perceived default "state of nature" (the freedom to obtain private insurance). It justified its decision with reference to its own (much criticized) factual findings that the insurance ban threatened lives in the context of insufficient resources within the health care system, and that the insurance ban was not necessary to protect the integrity of the public health care system.[45] The Court did gesture toward some facts supporting the democratic legitimacy of its decision. It noted, for example, that the provincial government had already recognized and committed itself to fixing the problem of wait times within the public health care system.[46] In other words, the Court relied on evidence that its decision had already been supported by a government that was dragging its heels and failing to take action on a problem it recognized. But relative to *PHS*, the democratic legitimacy of the Court's decision to strike down the provincial insurance ban was weak.

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[43] See Lessard, *supra*, note 8.

[44] Steven Lewis & Denise Kouri, "Regionalization: Making Sense of the Canadian Experience" (2004) 5 HealthCare Papers 12, at 15-20; Colleen Flood, Duncan Sinclair & Joanna Erdman, "Steering and Rowing in Health Care: The Devolution Option" (2004) 30:1 Queen's L.J. 156; Jonathan Lomas, "Devolving Authority for Health Care in Canada's Provinces: 4. Emerging Issues and Prospects" (1997) Can. Med. Assoc. J. 817, at 818.

[45] *Chaoulli*, *supra*, note 35, at para. 106; see *contra*, *supra*, note 37.

[46] *Chaoulli*, *id.*, at para. 96.

In *PHS*, the Court was asked to choose between two democratically supported options. On the one hand was the Minister's decision to maintain criminal law obstacles to Insite's operation, a capacity that derives its authority from ordinary democratic processes at the federal level. On the other was a facility established through the collaboration of multiple levels of government authority and the participation of those most affected by the appeal's success or failure. The Court thus overruled a Minister's decision that not only ignored overwhelming scientific evidence of Insite's effectiveness and placed lives at risk, but was democratic only in the sense that it emanated from the discretion of a Minister whose authority derived from the democratically elected federal government. In a contest of relative democratic legitimacy, the provincial policy arguably won.

Discussion of the relative democratic legitimacy of Insite was nowhere to be seen in the section 7 arbitrariness/overbreadth analysis. But it represents the other half of a principled approach to managing deference in these kinds of claims: not only should the measure be sufficiently related to its objective on the facts, it should also be consistent with democratic principles.[47] Relative democratic legitimacy may also more fully explain the disposition of the case in light of the emphasis the Court placed in its introductory paragraphs on: (a) the unique collaborative and participatory process that generated Insite; and (b) the extraordinary marginalization of the community that Insite served.[48]

There are two principal ways in which democratic legitimacy might factor into section 7 adjudication. A court might consider relative democratic legitimacy as it sets the level of deference it will give to a challenged law or policy as an expression of democratic choice. Thus, for example, the court might maintain the *Chaoulli* rule that a law is arbitrary where it fails to align with its goals in practice, but exercise less strict scrutiny of that alignment where that law is created through efforts designed to compensate for democratic deficits in ordinary law-making processes. Where, as here, the law in question is made through ordinary democratic processes, the court might more closely scrutinize the means/end fit and be more likely to find it unsatisfactory where there is a competing, constitutional and more effective policy that does a better job representing marginalized voices.

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47 See *supra*, notes 30-31 and accompanying text.

48 *PHS*, *supra*, note 7, at paras. 7-9.

A bolder and perhaps more honest approach would explicitly recognize democratic legitimacy within or among the principles of fundamental justice, while acknowledging that such legitimacy is a relative concept. In other words, courts might require that laws limiting life, liberty and security of the person be relatively democratically legitimate in order not to run afoul of section 7 as a principle of fundamental justice. Certainly, democratic rule with attention to minority exclusion would count among the "basic tenets of our legal system".[49]

The marginalization of particular groups from ordinary law-making processes could likewise be addressed within the concept of arbitrariness. Arbitrariness would be enlarged from its present meaning under section 7 — state power wielded in a manner that is insufficiently connected to the goals it purports to serve — to include power wielded by a majority without sufficient consideration of and representation from most-affected and marginalized actors. This would accord with understandings of arbitrariness that focus on unrestrained, autocratic or overweening use of authority — tyrannical majoritarianism.

A possible objection to this suggestion is that the focus on democratic legitimacy might undermine the strength of individual rights claims to protect minority positions. One can easily imagine how some community initiatives might become oppressive to some groups in the future. Should courts support such initiatives simply because they appear to enjoy more democratic legitimacy understood as grassroots engagement beyond electoral participation?

I suggest that courts might avoid the trap of diluting rights or reinforcing oppressive democratic choice by keeping the focus on the goal of protecting against health-affecting policy choices that are of questionable effectiveness and represent overweening majoritarianism. Only those grass roots efforts that favour traditionally underrepresented groups and individuals would qualify as democracy-enhancing. Careful attention to context is necessary here.

VI. CONCLUSION

In this paper, I have argued that section 7 of the Charter should have jurisdictional implications in the sense that it should favour more participatorily created schemes, ones with greater democratic legitimacy

[49] *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 30 (S.C.C.).

broadly understood, particularly in relation to groups that are marginalized from ordinary political processes. This is not to suggest that the demonstrated success of harm reduction or other approaches to health and well-being that may require the withdrawal of criminal solutions should not matter. They do. But where the factual record is not as full — and indeed, for reasons explained earlier, future challenges may not benefit from the same rich factual record[50] — courts should remember to measure their own institutional competence to intervene on a case-by-case basis, bearing in mind the extent to which concerns about judicial meddling in democratic decision making might, as here, be mitigated.

The recent passing of Bill C-10 is expected to generate a number of constitutional challenges in relation to mandatory minimum sentences, prison conditions and the disparate impact of amendments on Aboriginal persons and people requiring mental health care.[51] Quebec Minister of Justice Jean-Marc Fournier has announced his intention to do everything he can to soften the impact of Bill C-10 in Quebec.[52] The Charter may prove to be a novel lens through which to consider jurisdictional justice.

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[50] See *supra*, notes 27 to 32 and accompanying text.

[51] See Canadian Civil Liberties Association, "Bill C-10, The Omnibus Crime Bill: Unwise, Unjust, Unconstitutional", online: <http://www.ccla.org/omnibus-crime-bill-c-10/>.

[52] "Quebec Vows to Limit Clout of Conservative Crime Bill" *Canadian Press* (March 12 2012), online: CTV News <http://www.ctv.ca/CTVNews/CanadaAM/20120313/quebec-to-fight-bill-c-10-120313/>.