



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

Volume 14 (2001)

Article 8

Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused

David M. Paciocco

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Paciocco, David M.. "Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 14. (2001).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol14/iss1/8>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

COMPETING CONSTITUTIONAL RIGHTS IN AN AGE OF DEFERENCE: A BAD TIME TO BE ACCUSED

David M. Paciocco^{*}

I. INTRODUCTION

The Charter¹ remains the single most important legal instrument in this country for the protection of the rights of accused persons. One need only read the dramatic decision in *United States of America v. Burns*² to see this.³ Still, in terms of its ability to protect the innocent and other values important to accused persons, the Charter is not what it once was. I am not referring so much to the fact that, *Burns* aside, the Charter did not ground any startling, pro-defence decisions in the past year.⁴ Nor am I referring to a retrenchment on any of the specific rights, such as the

^{*} Professor, Faculty of Law, University of Ottawa. This paper was originally presented at the April 6, 2001 conference entitled "2000 Constitutional Cases: Fourth Annual Analysis of the Constitutional Decisions of the S.C.C." sponsored by the Professional Development Program at Osgoode Hall Law School.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² (2001), 195 D.L.R. (4th) 1, 2001 SCC 7.

³ In *Burns*, the Supreme Court of Canada used the Charter to override the discretion of the Minister of Justice to extradite young Burns and Rafay, without securing assurances that the Americans would not kill them. Even though the Court accepted the authority of the Minister of Justice to extradite persons facing capital punishment in exceptional circumstances, the decision in *Burns* will no doubt be regarded as the leading international precedent supporting an abolitionist position. In terms of its social merits, it is a powerful, compelling decision. I nonetheless have some concerns about the legal techniques employed, which I will discuss below.

⁴ There have, of course, been modest successes by accused persons. The child pornography section of the *Criminal Code*, R.S.C., 1985, c. C-46, section 163.1, now recognizes exceptions that would not exist but for the Charter: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2000 SCC 2. As a result of the Charter, the reverse onus provision in section 152(3) of the *Customs Act* can no longer be used to put an onus on an importer to establish that the materials being imported are not obscene. Moreover, arbitrary acts by customs officials in targeting and seizing erotic homosexual material can now be more easily resisted as the result of a declaration describing discriminatory practices and identifying shortcomings in the administration of

withering of the *Hunter v. Southam Inc.*⁵ standard in the last decade. I am referring instead to generic developments having to do with the conception of constitutional adjudication. In particular, the Charter is not what it once was because of:

- the replacement of the state with the victim or future victims as the opposing party in constitutional adjudication;
- the recognition of pro-state “principles of fundamental justice” in defining rights;
- the “no trump” doctrine; and
- confusion between the concepts of “dialogue” and “deference”

Together, these four developments substantially undermine the utility of the Charter to accused persons. While none of these developments is new to the 2000-2001 jurisprudence, the influence of at least the first three of these developments has been confirmed in the past year.

II. REPLACING THE STATE WITH PRESENT AND FUTURE VICTIMS

The classic conception of the criminal prosecution as a wrong against the state that is prosecuted by the state has a number of significant implications. Most are beyond the scope of this paper. The key implication relevant to the current discussion is that conceiving of the prosecution of crime as state conduct is absolutely essential to the survival of integral liberty regarding principles for

the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69.

The Charter has also had an important impact on the interpretation of criminal legislation. In *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, section 8 of the Charter was used to sustain a restrictive interpretation of section 186(1)(b) of the *Criminal Code* relating to intercepted communications. Justice LeBel, writing for a unanimous Court, interpreted section 186(1)(b)'s requirement (at paras. 27 and 29 respectively) that “other investigative procedures are unlikely to succeed” as meaning that there must be “no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.” More importantly, in *R. v. Darrach* (2000), 148 C.C.C. (3d) 97 (S.C.C.), although the provision was capable of a more aggressive exclusionary interpretation, the Supreme Court upheld a construction of section 276 that reflects the essential requirements of the principles of fundamental justice, as defined in *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

⁵ [1984] 2 S.C.R. 145. See, for example, *R. v. Monney* (1999), 24 C.R. (5th) 97 (S.C.C.) (customs searches); *R. v. Caslake* (1998), 13 C.R. (5th) 1 (S.C.C.) (searches incidental to arrest); *R. v. Jacques* (1996), 110 C.C.C. (3d) 1 (S.C.C.) (roadside detention); *R. v. McInlay Transport Ltd.*, [1990] 1 S.C.R. 627 (administrative searches); *R. v. M. (M.R.)* (1998), 20 C.R. (5th) 197 (S.C.C.) (searches by school authorities); *R. v. Godoy* (1998), 21 C.R. (5th) 205 (S.C.C.) (emergencies).

accused persons. When the role of the state as the protagonist is forgotten, minimized or thrust into the background, those principles wither. They become anemic. Remembering that the state is the prosecutor and that a prosecution represents an effort by the state to deprive an individual of liberty is nothing less than the “open sesame” to vital rights in the criminal law context. By contrast, if we view a particular contest as being between private individuals, the impediments of fundamental principle largely fall away.

To see this, one need merely contrast our criminal process with our civil process. Whereas the criminally accused person has the right to remain silent, the defendant is examined for discovery. Whereas the criminally accused person is presumed innocent absent proof beyond a reasonable doubt, the defendant need merely be “probably responsible.” Whereas Crown evidence will be more readily excluded than defence evidence, in matters of proof, a plaintiff and defendant are treated equally. Whereas an accused person can prevent the state from relying on unconstitutionally obtained evidence, a civil defendant cannot. Whereas accused persons are sentenced, in part, based on what is in their own best interest, the civil defendant is liable to provide remedy according solely to the harm done to the plaintiff.

These differences are not coincidental. They emerge from our long-standing acceptance that state interests are subordinate to identifiable individual rights, and from appreciation that a criminal prosecution is a punitive, degrading exercise instigated by the state against an individual. It has been our tradition, our political ethos, that classic utility, the ability of the state to pursue the greatest good for the greatest number, is subject to limits in the form of individual rights. I cannot put it any better than Joseph Rawls has:

It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have an inviolability founded on justice, or some say, on natural right, which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by the greater good shared by others.... Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.⁶

Nor can I put the same general point more powerfully, in the context of the Charter, than Justice McLachlin, as she then was, did in the sympathetic case of Sue Rodriguez, who wanted to die with dignity:

⁶ Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), at 28.

The principles of fundamental justice require that each person, considered individually, be treated fairly by the law. The fear that abuse may arise if an individual is permitted that which she is wrongly denied plays no part at this initial stage. In short, it does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is possible that other people, at some other time, may suffer... As Lamer C.J. stated in [*R. v. Swain*], *supra*, at p. 977:

It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the Charter, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by s. 7 should take place within the confines of s. 1 of the Charter.

I add that it is not generally appropriate that the [Charter] complainant be obliged to negate societal interests at the s. 7 stage, where the burden lies upon her, but that the matter be left for s. 1, where the burden lies on the state.⁷

It is no secret that in a rights-based system, the concept that individual rights can limit social utility stands as a frustrating impediment to many initiatives that might make the streets safer. Consider, for example, the most general but most crucial of all individual rights tenable in a criminal system: "[t]he right of the innocent not to be convicted,"⁸ that is, the fundamental tenet of our legal system that an innocent person not be punished.⁹ According to our most basic conception of civil liberties, society can never claim the right to punish the innocent, or to risk the punishment of the innocent, in order to advance what it perceives to be its own interests. To the extent, however, that the prosecution of crime works at all, society would be safer if we convicted the probably guilty rather than insisting on proof beyond a reasonable doubt. Sacrifice a few innocent persons to catch a good number of guilty ones, and you protect future victims. Consider, as well, the bulwark of the principle against convicting the innocent, namely the right to present full answer and defence. To the extent that the principle of full answer and defence causes collateral damage to privacy, stress and anxiety to witnesses, or the uncomfortable spectacle of witnesses being challenged and doubted, society might choose not to favour full answer and defence. The same can be said of any fundamental right. Search homes, compel answers, deny access to counsel, lock criminals up for good based on what they are likely to do, and the streets will be safer. Without question,

⁷ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at 621-22.

⁸ *R. v. McClure* (2001), 195 D.L.R. (4th) 513, 2001 SCC 14, at para. 39.

⁹ *R. v. Seaboyer*, *supra*, note 4, at 611.

in the language of utility, the existence of individual rights impedes the flexibility of society to make decisions based on what it perceives, from time to time, to be the greatest good for the greatest number. In a constitutional system, of course, a charter of rights is the legal mechanism for ensuring that those individual rights are not sacrificed by the state for what it believes, at a given point in time, to be the greatest good for the greatest number. A charter is not always an instrument for social utility. Depending on society's mood, it can be the villain that impedes social utility.

Of course, as the *Rodriguez* passage quoted above demonstrates, in our system, no rights are guaranteed absolutely. Our Charter, a quintessentially Canadian document, provides for compromise on fundamental rights in the interest of social utility, but only subject to what are professed to be carefully controlled limits. As everyone knows, apart altogether from section 33, the Charter provides for reasonable limitations on fundamental rights that may advance social utility where those limits are “demonstrably [justifiable] in a free and democratic society.”¹⁰ In a system like this, the two most obvious strategies for reducing rights are to define those rights narrowly, or to be aggressive in identifying reasonable limits. We have witnessed both.¹¹

There is, however, a third strategy, one that is more dangerous and destructive of individual rights. That strategy is simple. Remove the issue from the constraints of limitations on state action by notionally removing “the state” as the protagonist who is limiting the right in question. Conceive, instead, of issues that have constitutional dimension as controversies between private actors rather than between the state and an individual.¹² This done, these competing rights can be “balanced” free of the constraints described by Rawls. Limitations are not being

¹⁰ Section 1.

¹¹ For example, the central principle of sentencing that the sentence fit the crime — the principle of proportionality — is not a principle of fundamental justice. Instead, our Charter protects solely against grossly disproportionate sentences. In effect, we have declared that Parliament has the right to create disproportionate sentences — sentences that do not fit the crime — so long as it does not reach the point of gross disproportion: see *R. v. Morrissey*, [2000] 2 S.C.R. 90, and *R. v. Latimer* (2000), 193 D.L.R. (4th) 577, 2001 SCC 1. With respect to section 1, the process of making it less difficult to satisfy has been an ongoing one of long standing: see even the first edition of Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough, Ont: Carswell, 1991), at 8-20, where this trend had already been observed and chronicled.

¹² A hint of the impact of this can be seen using the example of how section 1 is to operate. There has been recognition, at least from time to time, that if Charter rights are being used in the context of a dispute between private individuals, or groups with the legislation in question merely regulating competing interests, a more deferential approach to Parliament is possible. Where, on the other hand, the state is the singular antagonist, in other words, if the state is seeking to limit rights in order to pursue its own interests, less deference can be given. See, for example, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and then the retrenchment in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

imposed on the rights of the accused as the result of the “calculus of social interest.” Instead, they are being imposed out of deference to competing rights.

The accused, of course, is relying on constitutional rights, those higher rights that are guaranteed precisely so that they will not be compromised, in the absence of demonstrable justification, in the interests of social utility. If there is to be a contest between competing rights, then, it must be between competing constitutional rights, given that a constitutional right will notionally trump a non-constitutional claim. All that it takes to turn a constitutional claim by the accused against the state into a private dispute is to create constitutional rights in the complainant, or in other witnesses, or even in future victims, rights that are notionally abridged through the enjoyment by the accused of his or her constitutional rights. Those rights can be defined broadly, loosely and without careful technical evaluation, so long as they are proclaimed to exist. Do this, and you neutralize the rights of the accused, particularly if you then proclaim that no constitutional rights automatically trump other rights. Do this, and the ultimate balancing between rights can be done, free of any impediments that would limit the ability of the state to compromise rights. Do this, and the state does not even have to demonstrably justify anything under section 1. It is, at best, no more than the passive observer, or, at worst, no more than the honest broker between competing rights. In the meantime, once the dust settles, it is the state which can then prosecute the accused free of the impediments of individual rights. This, then, is the strategy. Push the state into the backdrop in constitutional adjudication, and the traditional interdiction against compromising rights in the interests of social utility disappears without the need to even worry about whether the state can meet its burden of justification under section 1. This is how fundamental rights enjoyed by accused persons can be disemboweled.

I am describing, of course, precisely what has happened with full answer and defence adjudication under the Charter. Attempts by the accused to insist on individual rights to obtain access to evidence *in a proceeding brought by the state in what the state perceives to be the interest of social utility* are being adjudicated as if the state is not the protagonist. Instead, notwithstanding that in litigation it invariably supports the rights claimed in opposition to the accused, the state is seen as a neutral, objective arbiter of competing constitutional rights — competing constitutional rights between the accused on the one hand, and victims, both current and future, on the other. The result has been to blunt the force of constitutional claims of access to evidence.

The move to push the state into the background in constitutional, criminal adjudication has been an evolutionary one. Take the example of the Court’s response to the ability of the state to limit access to evidence by accused persons, in the interests of encouraging reporting of sexual offences. In *R. v. Seaboyer*,¹³ the

¹³ *Supra*, note 4.

Court was asked to accept, altogether apart from section 1, that depriving accused persons of access to relevant evidence which revealed the sexual experiences of complainants could be justified because of fear that to permit access would discourage reporting of the crime. For the majority, Justice McLachlin, as she then was, approached that question by examining whether, in a state prosecution against an accused, the state can prefer considerations of social utility to the right of the accused to defend himself or herself effectively without violating the Charter. Her response was resounding and clear:

The argument based on the reporting of sexual offences similarly fails to justify the wide reach of s. 276. ... To accept that persuasive evidence for the defence can be categorically excluded on the ground that it may encourage reporting and convictions is ... to say either (a) that we assume the defendant's guilt; or (b) that the defendant must be hampered in his defence so that genuine rapists can be put down. Neither alternative conforms to our notions of fundamental justice.¹⁴

When we conceive of the contest as between society and an accused, and ask whether, in the interests of society, the accused should be deprived of evidence that may raise a reasonable doubt about guilt, the contest is not even close. Notions of fundamental justice prevent the state from achieving the benefit of encouraging reporting on the backs of individual accused persons who might, if access to evidence is granted, ultimately prove to be innocent.

Fast forward eight years to 1999. By 1999, according to *R. v. Mills*,¹⁵ altogether apart from section 1, the Constitution now enables judges to take into account, in deciding whether to provide access to the therapeutic or private records of a complainant, the impact that the order would have on the readiness of other complainants to report sexual offences. Judges may do so, the Court held, as long as they consider and balance competing factors, and acknowledge that this factor (along with the prospect of discouraging therapy for complainants) "will likely arise in every case and may be more readily supported by evidence, and take them into account accordingly."¹⁶ In other words, judges are not to give undue weight to the impact of production on reporting, but even bearing this caution in mind, encouraging reporting is now accepted as a counter-weight to production. By necessary implication, *Mills* contemplates that the perceived impact of production or disclosure on general reporting habits might make a difference in some cases, tipping the balance against access to evidence.

This past year, the same issue arose again, this time in *R. v. Darrach*.¹⁷ As *Seaboyer* had, *Darrach* involved a Charter challenge to the "rape shield" provision

¹⁴ *Id.*, at 617.

¹⁵ [1999] 3 S.C.R. 668.

¹⁶ *Id.*, at para. 142.

¹⁷ *Supra*, note 4.

of the *Criminal Code*, the successor provision that had been passed in response to *Seaboyer*. One of the grounds of challenge related to the fact that section 276(2)(c) requires defence evidence to have “*significant* probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice” (emphasis added) before it can be admitted. The Court interpreted “significant” as meaning that “the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt.”¹⁸ It then went on to affirm that even significant evidence can be excluded if it is “*substantially* outweighed by the danger of prejudice to the proper administration of justice” (emphasis added), including “society’s interest in encouraging the reporting of sexual assault offences.”¹⁹ Again, this was done not using section 1, but in the context of defining the right to full answer and defence. Consider the implications if this is to be taken literally. Evidence capable of raising a reasonable doubt can be excluded in order to encourage the reporting of sexual assaults²⁰ without violating the Charter.

How did this happen? What changed to enable the Charter to tolerate denying accused persons of significant information about their innocence in the pursuit of social utility, without the need to even get to section 1? What has happened is that we changed the way we view the issue. Whereas once it was dealt with as an issue between the state and the accused,

Mills [and *Darrach* approached it as] a conflict among ... three Charter principles: full answer and defence, privacy and equality.... The Court defined these rights relationally: ‘the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses.’²¹

Mills and *Darrach* were not viewed as cases in which the state, in the pursuit of social utility, was attempting to deprive the accused of his fundamental constitutional right to gain access to evidence. The state was simply brokering a dispute between the competing rights of private actors and, as such, could accomplish indirectly the very consequence that it could not accomplish directly. It could conduct a criminal trial in which it was attempting to deprive the accused of his liberty, and in which the ability of the accused to defend himself was abridged, even denied, because of the calculus of the social interest in such things as encouraging reporting, enabling complainants to seek therapy and preserving confidential relations.

¹⁸ *Id.*, at para 39.

¹⁹ Section 276(3)(b).

²⁰ It is true that there are a number of competing considerations, but if this matter can be considered at all, it is capable of making the difference.

²¹ *R. v. Darrach*, *supra*, note 4, at para. 28.

I want to be clear. I have no concern with competing considerations like privacy interests or any other matters of public utility being considered. Of course, they should be considered in opposition to constitutional claims. It is evident from the prior discussion, however, that what I do have grave concerns about is the practice of identifying constitutional rights in third parties that can be given presumptive weight equal to the constitutional rights of the accused, and then tendered in a criminal trial between the accused and the state, in opposition to the accused's efforts to defend himself or herself against the state. That troubles me because the ultimate effect of giving constitutional status to interests preferred by the state is to deprive the constitutional rights possessed by the accused of their very essence as constitutional rights. In particular, giving constitutional status to interests preferred by the state deprives the constitutional rights possessed by the accused of the presumptively superior status they were to have when tendered against opposing state interests. Conferring presumptive weight, after all, is the whole point in recognizing rights as constitutional ones.

I have also long had, and continue to have, concerns about the ease with which competing rights are identified. We have done so without subjecting those rights claims to the kind of Charter analysis that other rights claims are subjected to. Clearly, complainants do have expectations of privacy in personal records, but, as I understand it, the Charter is only violated where it is the state that is seeking to invade expectations of privacy. Is the Charter really violated, then, when a private citizen like an accused seeks to defeat the expectations of privacy of a complainant in order to protect himself or herself against the state in a proceeding between him or her and the state? It strikes me that it takes an attenuated theory of state action, one that disregards the substance of what is happening, to characterize the process by which an accused seeks to defend himself or herself against the state as involving state action. Yet, the authority never discusses how the state action doctrine is avoided because we have never subjected assertions of competing constitutional rights to the crucible of legal analysis.

I continue to be troubled, as well, with the claim that "equality" rights are implicated by the prosecution of sexual offences. As I understand the law of equality, a sexual offence complainant would be unable to meet the relevant legal test if that complainant were to initiate a constitutional challenge to any of the rules of law that have been at issue in these constitutional claims. Despite this, we are quick to proclaim section 15 rights without the impediment of legal analysis.²²

²² I accept, of course, that men are, in hugely disproportionate numbers, the sexual offenders, and that, leaving children of both sexes aside, it is most often women who are violated. It is also true that sexual offence complainants are more likely to be asked about their sexual experience, or to have their third party records sought. How do these facts give rise to a violation of the equality right? When a Charter challenge is brought against a statutory provision based on an equality rights violation, a precise legal test is employed for identifying whether there is a violation. I do not think that test is met in sexual offence cases, simply because the accused is seeking to access evidence. I am not sure how, for example,

I also continue to be troubled by the way that these competing constitutional rights are applied, once recognized. For example, even if there are constitutional privacy interests in complainants, why is it that every social policy interest supporting the suppression of evidence (including the impact of disclosure on reporting, or the readiness of complainants to obtain therapy), whether it has anything to do with the privacy interest of the complainant or not, is treated as though it shelters under that constitutional right?

I continue to be troubled, as well, that we allow these competing constitutional rights to offset the claim by the accused to full answer and defence without ever determining whether compromising those competing constitutional claims could be justified under section 1 of the Charter. If those compromises could be justified under section 1, and we fail to find this out, then, without knowing it, we are effectively neutralizing a real Charter claim by the accused with what is only a *prima facie* Charter violation of the right of the complainant. In such a case, there should be no *detente*. The accused's right should be a right of higher order and thereby less capable of being compromised. But we never use section 1 to find out.

Finally, I am troubled about where this is all going to lead. The implications are not confined to due process. In his book, *Due Process and Victim's Rights: The New Law and Politics of Criminal Justice*,²³ Professor Kent Roach demonstrates how offences, primarily involving groups perceived to be vulnerable,²⁴ were upheld against Charter challenge, largely by pitting the claims of accused persons against the equality and security rights of victims and potential victims. The key assumptions being made in these cases were that the creation and prosecution of offences can control crime, and that the successful prosecution of offences can protect security interests.²⁵ Professor Roach expressed his doubts about the efficacy of those assumptions, doubts that I share. However, whatever one thinks about the ability of the criminal prosecution to reduce crime, what is important is that Professor Roach has identified, in effect, the phenomenon of recognizing a constitutional right in persons, particularly in identifiable classes of persons thought to be vulnerable, to be free from harm. That constitutional right to be free from harm is then used, and can be used, to offset virtually any constitutional claim being made by the accused. In essence, the very notions of crime and the criminal

given that both men and women are sexual assault complainants, rules that operate the same for both sexes give rise to "differential treatment." I thought that section 15 has to do with "qualitative" rather than "quantitative" differences. Nor am I sure how it would amount to a form of "discrimination" for accused persons to seek access to "significant" information. Perhaps there are persuasive responses, but none of these questions has ever been discussed. We have simply proclaimed competing rights.

²³ (Toronto: University of Toronto Press, 1999).

²⁴ The examples he uses include "prostitution" (where the prostitutes are construed to be victims), hate propaganda and pornography.

²⁵ Roach, *Due Process and Victim's Rights: The New Law and Politics of Criminal Justice*, supra, note 23, at 150.

prosecution are reconfigured and conceptualized as contests not between the state and the accused, but between the accused and those vulnerable victims who might be harmed by the crime he or she is charged with.

Not surprisingly, the notional conversion of a criminal prosecution (and the constitutional issues that arise within it) into a dispute between the accused and the victim weakens dramatically all of the constitutional rights that an accused might claim. Consider *R. v. Sharpe*.²⁶ The dissenters in that case began their judgment with a plea for context, saying:

In the context of this case, the twin considerations of social justice and equality warrant society's active protection of its vulnerable members. Democratic and constitutional principles dictate that every member of society be treated with dignity and respect and accorded full participation in society. In this sense, government legislation that protects the vulnerable plays a vital role. *Given our democratic values, it is clear that the Charter must not be used to reverse advances made by vulnerable groups or to defeat measures intended to protect the disadvantaged and comparatively powerless members of society.*²⁷

This last sentence, in particular, should send a chill down the back of any criminal defence lawyer. Not only does it give equal weight to the perceived rights of the vulnerable in a contest with the constitutional claims of the accused, but it purports to give presumptive weight as against the Charter rights of the accused to perceived “gains” made on behalf of the vulnerable.

This aside, what the dissenting justices were doing was to conceive of the contest before them as between the claim of the accused to freedom of expression (a right they would have denied even existed in the case) and the claims of vulnerable, disadvantaged members of society seeking equality. At one time, it was considered that in a criminal prosecution, it is the accused who is the vulnerable one. During the trial, the accused stands before the awesome power that the state has to deprive him or her of his or her liberty, a state that is bringing its considerable resources to bear in order to brand him or her a criminal, and to punish him or her. Remove the state from the equation, and the accused is no longer vulnerable. Invoke the constitutional equality rights of complainants (conceptualized as the right of future victims of the vulnerable class to be free from victimization so that they can flourish in society), and put those complainants in the place of the state, and it is not the rights of the accused that require protection. Context, balance and even the issues of concern are altered dramatically. The claim of the accused is seen as being brought on behalf of victimizers, and it is seen as a claim being tendered against victims, not against the state. When we conceive of constitutional adjudication in this way, we do disservice to the presumption of

²⁶ (2001), 194 D.L.R. (4th) 1, 2001 SCC 2.

²⁷ *Id.*, at para. 133 (emphasis added).

innocence, and we debilitate the Charter rights of the accused. It is something of an understatement to say that in such a regime, things do not bode well for the rights of the accused.

III. THE RECOGNITION OF PRO-STATE “PRINCIPLES OF FUNDAMENTAL JUSTICE”

A related conception that can dull the ability of the accused to rely on constitutional rights, already alluded to above, is the denial to the accused of property over “full answer and defence” and “fair trial” rights. The gravamen of these rights is that they exist to preserve the presumption of innocence. This was appreciated fully in *Seaboyer*. The majority of the Court said:

The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. ... Procedural limitations make possible the conviction of persons who the criminal law says are innocent.²⁸

Even before *Seaboyer* was decided,²⁹ it was understood, however, that whether there has been a violation of section 7 requires a balancing of competing interests. A “contextual approach which takes into account the nature of the decision to be made [is to] be adopted.”³⁰ The fortunes of a claim by the accused to principles of fundamental justice depends largely, therefore, on how that balancing is to be conducted, what the nature of the competing considerations are, and on the level of commitment by judges to those traditional, liberty-regarding principles on which the accused relies. This injects an inherent fragility into any claim by the accused that his or her rights, as secured by the principles of fundamental justice, have been compromised. Notwithstanding this, in *Seaboyer*, the section 7 balancing process had little effect because of the high level of priority given to the principle that the innocent not be convicted. The only real issue in identifying whether there was a breach concerned whether the impugned legislation could have the effect of depriving the accused of access to evidence that could assist materially in his defence. The principle of fundamental justice was “that the innocent not be punished,” and if the accused was deprived of evidence that was needed to present a defence, then there was a constitutional violation.

Since *Seaboyer* the matter has not been as straightforward. Our practice has been to evaluate context, and to treat “full answer and defence” and even of the

²⁸ *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at 608.

²⁹ See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at 539.

³⁰ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at 848.

right to a “fair trial” as rights whose content in a particular case will vary as a matter of internal limitation, depending on competing considerations. The “fairness of the trial” must be assessed “from the point of view of fairness in the eyes of the community and the complainant and not just the accused.”³¹ As described above, “the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses.”³² It is now recognized, as well, that full answer and defence and the right to a fair trial, must also be “defined in a context that includes other principles of fundamental justice.”³³ Indeed, we have been balancing the rights of the accused against what we are treating as “pro-state” principles of fundamental justice.

R. v. Burns involved a challenge to the discretion of the Minister of Justice to extradite Burns and Rafay to stand trial for murder in the United States, without first obtaining assurances that the young men would not be capitally punished if convicted. The Court, after engaging in a contextual analysis of competing considerations, ultimately ruled that the deportation would violate section 7. The Court had performed a similar section 7 balancing approach in 1991 in *Kindler v. Canada (Minister of Justice)*³⁴ before deciding that the extradition in that case would not violate section 7. There are, however, two differences in the way the balancing was performed in *Burns*. First, the Court in *Burns* disclaimed that the “shocks the conscience” standard relied on in *Burns* had to be met for a violation of section 7 to occur. It was enough if the extradition contravened the principles of fundamental justice. Second, and more germane to the current discussion, when balancing competing interests, it notionally elevated a number of state interests to the stature of what were effectively “competing principles of fundamental justice.” Those “basic tenets of our legal system” included that “individuals accused of a crime should be brought to trial to determine the truth of the charges,”³⁵ that “justice is best served by a trial in the jurisdiction where the crime was allegedly committed,”³⁶ that “individuals who choose to leave Canada leave behind Canadian law and procedures,”³⁷ and that “extradition is based on the principles of comity and fairness to other co-operating states.”³⁸ When the mix was done, the “anti-extradition” factors prevailed, most notably the principle of fundamental justice that the innocent not be punished. This principle would be defeated were there to be a wrongful conviction that could not subsequently be corrected because of the execution of the wrongfully convicted subject.

³¹ *R. v. Mills*, *supra*, note 15, at para. 72, quoting *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155.

³² *R. v. Darrach* (2000), 148 C.C.C. (3d) 97, at para. 28 (S.C.C.)

³³ *R. v. Mills*, *supra*, note 15, at para. 76.

³⁴ [1991] 2 S.C.R. 779.

³⁵ *United States of America v. Burns* (2001), 195 D.L.R. (4th) 1, 2001 SCC 7, at para. 72.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Similarly, in *R. v. McClure*,³⁹ the Court engaged in a balancing between what were described as competing principles of fundamental justice. McClure was charged with a sexual offence against a young person who subsequently commenced a civil action. He sought access to the solicitor-client files relating to that action, and the trial judge granted it, ordering access to the file. That order was stayed pending appeal to the Supreme Court of Canada under section 40 of the *Supreme Court Act*.⁴⁰ The Supreme Court of Canada ultimately denied the accused access, but not before balancing the principle of fundamental justice relied on by the accused to gain access against the principle of fundamental justice of solicitor-client privilege. Interestingly, the Court did not focus on the complainant's privacy interest in the particular solicitor-client communications. Instead, it considered the more general question of the importance of the "solicitor-client relationship" to the legal system and to society. The effect of this was to permit considerations of general social utility to compromise the claim by the accused. The principle of fundamental justice relied on by the accused was met with, and ultimately defeated by, a pro-state principle of fundamental justice.

I worry about the treatment of pro-state factors as principles of fundamental justice that need to be balanced against the constitutional rights of the accused. These pro-extradition factors in *Burns* and the "pro-confidentiality" factors in *McClure* are no doubt important objectives for a legal system. They may well even be basic tenets of our system of justice. But should they be treated as competing principles of fundamental justice tenable by the state? Section 7 of the Charter provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 is found, of course, in a constitutional document. A constitutional document is one that imposes limits on state power. Read in that context, it strikes me that the relevant principles of fundamental justice that are guaranteed to "everyone" are those principles that are relevant to the protection of the life, liberty and security of the person of the Charter claimant. The section is meant to give constitutional standing to those principles of fundamental justice that limit state power, not those principles of fundamental justice that favour state interests, either generally, such as the "pro-extradition" factors described above, or in the context

³⁹ 2001, 195 D.L.R. (4th) 513, 2001 SCC 14.

⁴⁰ R.S.C. 1985, c. S-26. Section 40 (as am.) has become the refuge of third parties who seek to appeal interim orders which affect them directly in criminal cases. There is no right to appeal to provincial courts of appeal from superior courts in such cases. An application for leave must be made to the Supreme Court of Canada and then granted. This is a woefully impractical way to review interim decisions that have immediate consequences. Not surprisingly, in *McClure*, the Court called for legislative amendment to provide a more efficient and practical avenue of appeal.

of a specific case, such as the “pro-confidentiality” factors inherent in solicitor-client privilege. Again, I am not suggesting that these kinds of factors should not have been weighed in the process. Of course, they should have been. What I am suggesting, however, is that by treating them as competing principles of fundamental justice having the same legal status as the principles of fundamental justice that the accused is tendering denudes the constitutional principles that the accused relies on of any of their *a priori* weight. I suspect, for example, that a case could be made that it is a basic tenet of our legal system that people have the right not to be injured by others, and that it is a basic tenet of our legal system that the guilty should be punished. If we placed these basic tenets into the hopper as competing principles of fundamental justice every time a criminal defendant claimed constitutional rights, there would no longer be any pre-emptive, constitutional currency in those principles relied on by the accused. Grant it, Burns and Rafay’s right prevailed, and the particular outcome in *McClure* might have been resolved the same way without conjuring up competing principles of fundamental justice, but this is an important point, both symbolically and as a matter of principle. In undertaking the balancing process in a system intent on protecting constitutional rights, there must be presumptive weight given to the constitutional principles that the accused is relying on; however, the practice of recognizing competing state-based principles of fundamental justice obscures this.

IV. THE “NO-TRUMP” THEORY

In *R. v. Seaboyer*, principles of fundamental justice necessary to ensure innocence were accorded inherent priority over competing considerations. Dealing with the competing claim of privacy, the majority held:

Finally, the justification of maintaining privacy of the witness fails to support the rigid exclusionary rule embodied in s. 276 of the *Code*. First, it can be argued that important as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in case of conflict.⁴¹

This priority for full answer and defence appears no longer to exist, at least not with respect to competing constitutional interests. The case of *Dagenais v. Canadian Broadcasting Corp.*⁴² involved a “clash” between the accused’s claim to his right to a fair trial and the freedom of expression of CBC to broadcast a movie depicting incidents that bore resemblance to the allegations against the accused, and which could possibly influence potential jurors. The accused asserted that his right to a fair trial should prevail. The Court responded:

⁴¹ [1991] 2 S.C.R. 577, at 617.

⁴² [1994] 3 S.C.R. 835.

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.⁴³

This “no trump” doctrine has been repeated in other cases. In *R. v. Mills*⁴⁴ the majority of the Court, speaking of “full answer and defence, privacy, and equality” said that “[n]o single principle is absolute and capable of trumping the others. . . .”⁴⁵ As described above, the issue of a clash between competing constitutional rights arose again in *R. v. McClure*.⁴⁶ The Court, referring to “full answer and defence” on the one hand, and the principle of fundamental justice of solicitor-client privilege on the other, stated that “[the] importance of both of these rights means that neither can always prevail.”⁴⁷

The “no trump” doctrine is a devastating development for the accused. At best, it requires compromise where compromise is often not possible. If the evidence or procedure is indeed necessary to answer the case fully, there is no meaningful compromise possible because the right is vindicated absolutely only by giving access to it, and denied absolutely by denying access to it. At worst, it enables courts to select competing considerations over the rights of the accused, even where, *ex hypothesi*, that evidence or that procedure is essential to full answer and defence.

In practice, it seems, the “no trump” assertion has proven to be easy to state, but, in most cases, difficult to stick with. When push comes to shove, courts have most often continued to recognize a primacy in the principle that the innocent not be convicted. The Court in *Dagenais* was able to prefer the freedom of the press to broadcast its movie only because it was satisfied that *Dagenais* could still get a fair trial, despite the broadcast. It is inconceivable that the Court would have preferred broadcast rights of a corporation for entertainment purposes to the potential loss of liberty of an innocent person had it been otherwise. Even in *R. v. Mills*, the Court found it necessary to say that “the accused’s right must prevail [over competing interests] where the lack of disclosure or production of the record would render him unable to make full answer and defence.”⁴⁸ And in *R. v. McClure*, the right of the accused to make full answer and defence was said to prevail where “there is a genuine danger of wrongful conviction.”⁴⁹

⁴³ *Dagenais, id.*, at 877.

⁴⁴ [1999] 3 S.C.R. 668.

⁴⁵ *Id.*, at para. 61.

⁴⁶ *Supra*, note 39.

⁴⁷ *Id.*, at para. 42.

⁴⁸ *Supra*, note 44, at para. 89.

⁴⁹ *Supra*, note 39, at para. 49.

The readiness of courts to express priority for full answer and defence where innocence is at stake does not remove the damage that the “no trump” doctrine has created. Invariably, in an effort to find a compromise between competing rights where there is no real compromise possible, the Court will create or endorse the creation of “hurdles” that the accused must cross before enjoying the constitutional right. Legal tests are developed in which it is assumed that if there really is significant evidence available, or a real danger of wrongful conviction, the hurdles imposed by these legal tests will be successfully navigated. Unfortunately, this is not so. Those hurdles are invariably problematic, as much so for the innocent accused as for the guilty.

The rigid regime established in *McClure* is illustrative. The Court developed a test that involves a two-stage process. “Before the test is even considered,” however, “the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and [that] he is otherwise unable to raise a reasonable doubt as to his guilt in any other way.”⁵⁰ With respect, the requirement that the accused be unable to raise a reasonable doubt in another way is an impractical one. The accused will only know if he or she can raise a reasonable doubt at the end of the trial, when the verdict is in. What is to happen where the judge has denied access because there appeared at the time to be another way for the accused to raise a reasonable doubt, but where that other way proved not to be successful? Is the judge to reopen the trial and grant access, or is the accused to remain convicted, having been denied access on what proved to be an erroneous assumption? The first alternative is implausible, the second intolerable.

Assuming that the accused can jump that pre-test hurdle, at the first stage of the test the issue is whether the judge should inspect the solicitor’s file. To get the judge to look at it, the onus is on the accused to provide an evidentiary basis upon which to conclude that there exists a communication that *could* raise a reasonable doubt. This will be difficult enough to accomplish, given that the communications contained in the file are privileged pending that ruling, and cannot be asked about, even if the accused is fortunate enough to have one of those rare cases where he or she is entitled to a preliminary inquiry. The accused is met with the classic catch-22 situation that bedevils all constitutional discovery processes in which the onus is placed on the accused.

There is another significant hurdle. “[W]hen the accused is either challenging credibility or raising collateral matters, it [is said to be] difficult to meet the standards required of stage one”⁵¹ (this, notwithstanding that in most sexual

⁵⁰ *Id.*, at para 48.

⁵¹ *R. v. McClure, id.*, at para. 55.

offence cases, where access to civil litigation files is most likely to arise, the only issue will be credibility).⁵²

If the accused manages to jump these hurdles, the trial judge inspects the file. The trial judge is to determine whether, in fact, there exists a communication that is *likely* to raise a reasonable doubt as to the accused's guilt. In other words, the trial judge is not to hand over relevant information that is discovered, even if that information *could* raise a reasonable doubt. The judge is simply to close the file back up and try the accused as though information that could raise a reasonable doubt, of which he or she has become aware, does not exist. The final nail in the coffin of any realistic attempt by accused persons to secure access to solicitor-client files occurred with the Court observing that "in most cases," this second branch of the test cannot be met by evidence that relates to the credibility of the complainant.

Without question, the process of balancing is a challenging one, apt to satisfy no one. I do not envy the Court in the difficult task it must perform. The effect of regimes like that which has been adopted in *McClure*, however, is that the accused is unlikely to get to the point where, if "significant evidence" does exist, it will ever be discovered. We will never know. This might enable us to assume that there has been full answer and defence, even though there has not been, but it will do little to ensure that the innocent are not convicted.⁵³

V. CONFUSION BETWEEN "DIALOGUE" AND "DEFERENCE"

Prior to the Charter, it was the recognized function of courts to ensure that accused persons had fair trials. With the proclamation of the Charter, courts received a new tool to assist in discharging this obligation. In *R. v. Collins* we see the bold statement of Justice Lamer, as he then was, that courts are the "only effective shelter for individuals and unpopular minorities from the shifting winds of public passion,"⁵⁴ and he spoke of how the "Charter is designed to protect the

⁵² The line between credibility and proof of innocence is not always clear. If she claims in one statement that she was sexually assaulted, but in another says that she was not, is the denial to be treated as evidence relating to the credibility of her allegation, or is it to be considered proof that nothing happened? To attempt to rest doctrine on the line between credibility and innocence is worrisome, both because it is destined to be difficult to apply, and because it undervalues the central importance of credibility in sexual offence cases.

⁵³ I agree that almost invariably the defence will be enough to present its theory simply by showing that the complainant has launched a civil suit and is seeking financial gain from the allegation. The *McClure* decision is, therefore, not one of monumental practical import. It is nonetheless one of symbolic significance given that an access regime that is virtually impossible to meet, even in a case where there is important evidence in the file, has been identified as constitutionally satisfactory.

⁵⁴ [1987] 1 S.C.R. 265, at 282, quoting Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986).

accused from the majority, so the enforcement of the Charter must not be left to that majority.”⁵⁵ In *Rodriguez v. British Columbia (Attorney General)*,⁵⁶ Justice McLachlin rejected the assertion that the matter before the Court in that case, assisted suicide, was a policy matter unfit for constitutional adjudication given the sharp division of public opinion. She said:

Were the task before me that of taking the pulse of the nation, I too should quail ... I do not, however, see this as the task which faces the Court in this case. We are not asked to second guess Parliament’s objective of criminalizing [assisted] suicide. Our task was the much more modest one of determining whether, ... the legislative scheme regulating suicide which Parliament has put in place ... [comports] with the principles of fundamental justice.⁵⁷

Together, these remarks capture, what is in my view, the appropriate division of responsibility between courts and democratic institutions. Courts are to ensure that basic principles are not sacrificed in the public interest because of the shifting winds of public passion, unless this can be demonstrably justified by the state agency that is seeking to do so. Courts are not to perform the work of legislators. They are simply to show legislators where the constitutional limits are.

The need to be the guardians of where constitutional lines are to be drawn is particularly important in matters of criminal process. Judges, particularly trial judges, are expert in such matters. They are the ones who witness the application of these procedures, who understand them and the reasons for them. More importantly, judges, including appellate judges, are the ones who possess the institutional memory, through precedent and established principle, that has accumulated throughout hundreds of years of history. It is by relying on institutional memory and experience that judges can appreciate the long-range implications of the decisions they make about criminal law principles. It is because of their removal from political pressure, their expertise in matters of criminal process and, most importantly, their access to institutional memory that judges have long been relied on as the guardians of a fair trial process. Even in the most sober of times, it is, therefore, courts that must protect the rights of accused persons. By contrast, legislators, for their own political survival, must react to politically popular causes to fashion politically popular solutions. It is, therefore, a matter of great calamity that it is now, a time when unprecedented pressure for law and order initiatives is coming from both left and right, and where the desire to make the law tougher and more punitive has affected all parties at all levels of government, that we have chosen to create a tool for unprecedented deference to the views of legislators about the very definition of rights. I am referring to the

⁵⁵ *Id.*, at 282.

⁵⁶ [1993] 3 S.C.R. 519.

⁵⁷ *Id.*, at 628.

brand of “constitutional dialogue” that was embraced in the decision in *R. v. Mills*.⁵⁸ In my opinion, it is a conception of “constitutional dialogue” that confuses “deference” with “dialogue.”

The idea of “dialogue” was imported by the Court from American scholarship, through the introduction given to it in an article by Dean Peter Hogg and Allison A. Bushell.⁵⁹ In their article, Hogg and Bushell describe “constitutional dialogue” as existing “where a judicial decision is open to reversal, modification or avoidance,”⁶⁰ and where the legislature responds to a Charter decision. They explain that “the dialogue that *culminates* in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified or avoided by the ordinary legislative process.”⁶¹ In other words, the dialogue involves Parliament expressing its views, the Court responding by demonstrating where the lines are, and Parliament then responding to that message.

Most cases involve legislation being “modified” or “avoided.” The legislation is amended to avoid the constitutional impediment that the prior law contained, whether this is accomplished by deleting or substituting an offending characteristic, or by making the law more minimally impairing. In this form of dialogue, a new law comes back in a form that is more respectful of the constitutional limits pointed out by the courts. *R. v. Darrach*⁶² provides the perfect illustration. Parliament responded with legislation in an effort to track the constitutional guidance that had been provided by the Supreme Court of Canada.

What, then, of “reversal?” How can a judicial Charter decision be “reversed” by legislation? It can be “reversed” for some Charter rights by reliance on section 33, the opt-out provision. There is no other mechanism contemplated in the Charter through which legislators can reverse the impact of Charter provisions.

What is important is that in each of these kinds of cases — “modification or avoidance” and “reversal” — the “dialogue” about what the constitutional law is *culminates* with the response of the legislator. Nowhere does the concept of dialogue discussed by Hogg and Bushell contemplate courts reversing their prior decisions on the definition of rights after the legislators have “dialogued” back. Courts might overturn the responding legislation again because it has not gone far enough to correct the problem, but there is no suggestion that courts should hearken to the opinions of legislators about where the Court should have drawn the lines. Once the Court has spoken, the nature of the dialogue contemplated is for legislators to respond to either with legislation that does a better job of respecting

⁵⁸ *Supra*, note 44, at para. 57. The concept of “constitutional dialogue” was first referred to in *Vriend v Alberta*, [1998] 1 S.C.R. 1038, at para 139.

⁵⁹ “The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997), 35 Osgoode Hall L.J. 75.

⁶⁰ *Id.*, at 79.

⁶¹ *Id.*, emphasis added.

⁶² (2000), 148 C.C.C. (3d) 97 (S.C.C.).

rights or by using the opt-out provision, the tool that the Charter provided them with for avoiding the constraints of the Constitution.

What is unhealthy, in my opinion, about the concept of dialogue that was embraced in *Mills* is that it involved the Court hearkening to a legislative response to their decision in *R. v. O'Connor*,⁶³ which response rejected the constitutional lines that the Court had identified. Parliament's response was that it did not like the lines drawn by the Court,⁶⁴ and the Court's response was to listen, and to allow that to be of influence. The Court hearkened to Parliament without insisting on Parliament's use of section 33, and without even putting the onus on Parliament under section 1 to justify its departure from those standards. Dialogue effectively became a mechanism whereby the Court chose to defer to government's decision to redraw the lines about the scope of rights: "Courts do not hold a monopoly on the protection and promotion of rights and freedoms," the Court said. "Parliament also plays a role in this regard [T]his court has an obligation to consider respectfully Parliament's attempt to respond to [the voices of those vulnerable to being overlooked by the majority]."⁶⁵

I have a number of concerns about this conception of constitutional dialogue. First, in my opinion, it degrades the force of all Charter decisions. Are particular decisions those in which lines are drawn, or are they those representing one of a range of acceptable responses about which dialogue can be conducted? The very prospect of reconsideration invites a game of ping-pong. Second, constitutional litigation may be a unique form of litigation, but it is still a contest between the state and the citizen. Where else, in law, do courts engage in dialogue with party litigants in which they revisit legal issues based on the post-litigation response of one of the party litigants as to how they feel the rights of their opposing party litigant should be defined? If the *Mills* form of dialogue is like a game of ping-pong, the Charter claimant is the only one without a paddle. Third, this form of dialogue, in which the very definition of rights is to be reconsidered, obviates the need for government to use those structures that the Charter designed for brokering

⁶³ [1995] 4 S.C.R. 411.

⁶⁴ The reader should understand that the Court in *Mills* concluded that *O'Connor* was a common law decision in which a balance was struck: *supra*, note 44, at para 55. It is not to be read as a case defining the balance. Nowhere in *O'Connor*, however, did the Court signal that any lesser form of access to third-party records than that which it was defining would suffice. Indeed, if lesser access would suffice, it follows that the Court in *O'Connor* inexplicably decided to give accused persons more than they were constitutionally entitled to, notwithstanding the competing claims of privacy and equality considered by the Court.

⁶⁵ *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 58. One cannot help but ask, if those voices were vulnerable to being overlooked by the majority, why was it that they were the ones being championed in legislation presented by the majority? It is my perception, at least, that in sexual offence cases, the least recorded voices are those of persons accused of the crime. The very accusation is so stigmatizing that it taints anyone who stands with the accused. Protecting the rights of the accused, particularly in sexual offence cases, is not a cause that elected members of the majority tend to champion.

state interests against individual rights, namely section 33 and section 1. This makes it much easier for rights to be abridged. Fourth, one of the salutary impacts of Supreme Court Charter decisions is that they inspire compliance checks in the Department of Justice to see whether proposed legislation will meet the requirements of the Charter. Now, every opinion has to be prefaced with the answer, "it all depends on how the dialogue goes." It is not so much the simple fact of uncertainty that is troubling; it is that the concept of dialogue encourages greater risk-taking by legislators with the rights of Canadians, including accused persons. It takes years before the constitutionality of criminal enactments are finally resolved, and in the meantime, people are convicted on their strength. Fifth, and most troubling, this form of dialogue sends the message that the function of courts of protecting the rights of the accused is up for negotiation. It is up for further dialogue. If, prior to *Mills*, Charter litigation was about drawing lines, the conception of dialogue employed in *Mills* has the potential to change the medium. Lines are no longer drawn in law. They are drawn in sand.

VI. CONCLUSION

I have indulged myself from time to time in this paper by recording my protests and concerns, even where those protests and concerns are now no more than a record of historically insignificant regret. The law is the law, whatever I might happen to think. It is nonetheless important for those who work within, or otherwise influence the system, to be aware of trends and developments and to appreciate their full implications. I have, therefore, attempted to identify fundamental conceptual changes in the adjudication of Charter rights and to expose how they bode poorly for the rights of accused persons. My hope, of course, is that this will encourage sober second thought by judges, and alert counsel to what is happening. Most notable is the technique of neutralizing the constitutional rights of accused persons by recognizing competing constitutional rights of complainants, or even those of future victims of the kind of crime the accused is charged with. This, coupled with the "no trump" doctrine, denudes the accused's Charter rights of any presumptive force. The two constitutional rights, neither able to trump the other, become non-players, permitting judges to strike any balance between competing considerations they choose. The recognition of "principles of fundamental justice" that express state interests produces the same effect. State principles of fundamental justice, because they too are constitutional principles, have the same legal stature as do those principles relied on by the accused. This effectively deprives the principles relied on by the accused of the presumptive superiority over competing state interests that a true constitutional principle must, by definition, enjoy. Finally, if the surrogacy of "victim" for "state" in the constitutional litigation does not succeed in producing a balance that is acceptable to the state, it can respond to the Court decision by attempting to "dialogue" in the hope that the

Court will defer to its rejection of the solution adopted by the Court. I think that together these developments demonstrate the point that I have been seeking to make. When it comes to protecting the interests of the accused, the Charter is not what it once was. We conceive of claims by the accused against the state in a wholly different fashion than we once did.

The process by which this has happened is a testament to legal imagination and creativity. I say this only as a grudging compliment because these developments diminish fundamental principles and long-standing rights. They invariably depreciate our commitment to the protection of the innocent. This entire change in focus in our constitutional adjudication bears witness to what is doubtlessly the key truth in the struggle for human flourishing. It is not legal text that secures liberty. Only a shared commitment to liberty regarding principles can do so. The promise of the Charter for accused persons, as well as for all of us as potential accused persons, is being called into question because, in our desire to protect victims from horrid crimes, we have, in my respectful opinion, lost sight of our shared commitment to liberty regarding principles.

Three things are needed to reclaim that shared commitment. The first is clear and constant recognition by the courts that the worst evil that society can perpetrate on its citizens is the conviction of the innocent, and that the principle against the conviction of the innocent, including the right to full answer and defence, has a higher value in a criminal case than competing constitutional claims. The second is the resolve to ensure that any tests or mechanisms designed to preserve that principle are realistic and practically attainable. The third is the readiness to prevent the concept of dialogue from being used as a tool for legislative deference when the Court has already spoken. If these things are done, the new constitutional regime, as unattractive and puzzling as it is, may not wreak the havoc on the rights of accused persons that it is now threatening to.