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Fault and Punishment under Sections 7 and 12 of the Charter

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I. ANTONIO LAMER, THE *MOTOR VEHICLE REFERENCE* AND THE CRIMINAL LAW

Antonio Lamer took the lead, following the arrival of the *Canadian Charter of Rights and Freedoms*,[1] in constitutionalizing the substantive criminal law. Justice Lamer, who died recently, was a *puisne* judge from 1980 to 1990 and chief justice of Canada from 1990 to the end of 1999. It is common ground that his enduring contributions to the Charter are found in the criminal law jurisprudence, and many point to the *Motor Vehicle Reference* as his most important opinion.[2] There, he sidelined the Charter's drafters and granted section 7 a substantive interpretation. Not only did the *MVR* create a relationship between the Charter and the substantive criminal law, the decision became a jurisprudential lightning rod for debate about review.

The Court's decision provoked a negative reaction from skeptics who feared that an empowered judiciary might invoke section 7 to substitute its policy preferences for those of the legislature. That may be why Lamer J. granted the guarantee a substantive interpretation but limited review to matters arising in the justice system. The constraints he proposed

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[*] Professor of Law, Osgoode Hall Law School, York University. I would like to thank Ben Berger for his insightful comments, some of which I was unable to address in the scope of this paper. I would also like to thank Ms. Megan McLeese (LL.B. 2009) for assisting me in the research for this paper.

[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 [hereinafter "the Charter"].

[2] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) (hereinafter "*MVR*"). In my opinion, the *MVR* was Lamer J.'s most important opinion. See also D. Stuart, "Chief Justice Antonio Lamer: An Extraordinary Judicial Record of Reform of the Canadian Judicial System" (2000) 5 Can. Crim. L. Rev. 51, at 52 (describing Lamer J. as "the judge who has undoubtedly stamped his mark on our criminal justice system in a fashion unparalleled in Canadian history"). Stuart listed Lamer J.'s top 12 pronouncements on criminal justice issues and stated that the *MVR* "may well have been his most important and most activist judgment". *Ibid*.

were designed to assuage those who were apprehensive that the Court would engage in unbounded review under section 7.

There is much to commend in Lamer J.'s conception of the guarantee. A focus on the justice system played to section 7's status as the flagship in the Charter's fleet of legal rights.[3] Those who advocate the rights of the accused had little difficulty with the Court's conclusion in the *MVR*[4] that, when combined, absolute liability and imprisonment violate the Charter. In saying so, the *MVR* invoked the Court's iconic decision in *R. v. Sault Ste. Marie (City)*[5] and did not appear — on its face — to bring the judiciary inexorably into clash with the legislative branches. For those less concerned with the criminal law, what mattered was the *MVR*'s declaration that policy questions were strictly out of bounds for review under section 7.

Having realized that his decision was open to challenge, Lamer J. maintained that as long as section 7's content was stolidly fixed in the institutions of the justice system, review would not break the legitimacy barrier and stray into the forbidden realm of public policy. This claim depended, for its soundness, on two assumptions. First, Lamer J. claimed that the Court could circumvent the substance-procedure distinction by relying, instead, on a dichotomy between justice and policy. As presented, this dichotomy simply described the conventional hegemony of institutional roles: the courts would address questions of justice and the legislatures would remain solely responsible for policy choices. Second, Lamer J. assumed that his reading of the guarantee would limit review to the institutions of the justice system. Under the keen sense of institutional mandate he outlined in the *MVR*,[6] review would not, and could not, be co-opted.

It did not take long for Justice Lamer's concept of section 7 to break down. The *MVR*'s[7] foundational distinction between justice and policy dissolved when the Court realized that it was impossible to constitutionalize the criminal law without undercutting Parliament's policy choices. A trio of decisions which addressed the fault element — the *MVR*, *R. v.*

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[3] Section 7 states: "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."

[4] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[5] [1978] 2 S.C.R. 1299 (S.C.C.) [hereinafter "*Sault Ste. Marie*"].

[6] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[7] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

Vaillancourt,[8] and *R. v. Martineau*[9] — energized the section 7 jurisprudence but failed to generate enduring momentum to reform the criminal law. Beyond these landmarks, the Court applied the Charter in only two other substantive instances: *R. v. Daviault*[10] and *R. v. Ruzic*.[11] If anything, the early decisions which endorsed a minimum *mens rea* convinced the Court to go no further with the constitutionalization of fault.

In due course it also became difficult to defend a theory of review that made the criminal law a favourite of the Charter. At least to some, it was not credible for the *MVR*[12] to target injustices in the legal system and to exclude all other forms of injustice from section 7. Against the force of that view, Lamer J. struggled in vain to forestall a broader interpretation from taking root in the jurisprudence.[13] Once the entitlements clause drifted away from a narrow definition — one grounded in physical liberty, or a "corporeal" concept of the person, as he described it[14] — the Court became unwilling to restrict section 7's application to the administration of justice.

By the time Lamer C.J.C. retired at the end of 1999, the Court had all but abandoned the core of his centrepiece decision. Within the justice system, the constitutionalization of the substantive criminal law was — and to this day remains — stymied.[15] Not only that, the Court has

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8 [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

9 [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

10 [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.).

11 [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.). Although the Court invalidated Parliament's scheme for therapeutic abortions in *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.), only Wilson J., writing alone, adopted a substantive interpretation of the guarantee. See also *R. v. Hess; R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.) (invalidating the former s. 146(1) of the *Criminal Code*, which had been replaced before the case was heard); *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.) (invalidating a bail provision on vagueness grounds, under s. 7, rather than under s. 11(e), which guarantees the right not to be denied reasonable bail without just cause); and *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) (recognizing a right to remain silent under s. 7).

12 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

13 See Wilson J.'s concurring opinion in *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) (proposing a broad and generous definition of liberty of the person under s. 7).

14 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 346-47 [hereinafter "*CAS*"].

15 But see *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.) (invalidating elements of the definition of duress in the *Criminal Code*, R.S.C. 1985, c. C-46). See also *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.) (declining to grant a defence of necessity or grant a s. 12 claim); *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) (refusing to endorse the harm principle and constitutionalize elements of the *actus reus*); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6,

undertaken what the *MVR*[16] forbade, and recognized claims arising outside the administration of justice.[17] Even though Antonio Lamer could not mobilize enduring support for his conception of section 7, his opinions created a strong relationship between the Charter and the substantive criminal law. For that reason, exploring his criminal law legacy is an important backdrop, but not the main purpose of this paper. Examining the interaction between the Charter and the substantive criminal law under section 7 is its more pressing objective. Specifically, the question is whether the *MVR*'s[18] decision to grant section 7 a substantive interpretation can still be defended.

Despite the seemingly innocuous circumstances of the *MVR*,[19] the decision to grant the guarantee a substantive interpretation flushed diverse views about the boundaries of review into the open.[20] More than 20 years later there is little agreement, both inside the Court and among commentators, about section 7's purposes. This may explain, in part, why the jurisprudence has become such an unwholesome jumble of tests and doctrines.[21] Meanwhile, some have not forgotten the intent of the drafters, which would restrict the guarantee to questions of procedure.[22]

[2004] 1 S.C.R. 76 (S.C.C.) (concluding that s. 43 of the *Criminal Code* does not violate s. 7's principles of fundamental justice).

16 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

17 See *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.) (invalidating a residence requirement, as a condition of employment, *per* La Forest J.'s plurality opinion, under s. 7 of the Charter); *Winnipeg Child and Family Services v. W. (K.L.)*, [2007] S.C.J. No. 48, [2000] 2. S.C.R. 519 (S.C.C.) (adjudicating a s. 7 claim not arising in the administration of justice); *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) (endorsing an entitlement to welfare benefits under s. 7, *per* Arbour J. in dissent); and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) (invalidating a health care regulation which lacked any connection to the administration of justice, in a plurality opinion by McLachlin C.J.C. and Major J., under s. 7 of the Charter).

18 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

19 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

20 For an early criticism of the decision, see J. Cameron, "The *Motor Vehicle Reference* and the Relevance of American Doctrine in *Charter* Adjudication" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), at 69.

21 See J. Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105 (tracing the history of the jurisprudence and analyzing the Court's serial and overlapping approaches to s. 7's principles of fundamental justice).

22 See M. Stephens, "Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the *Canadian Charter of Rights and Freedoms*" (2002) 13 N.J.C.L. 183 and S. Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2004) 2(1) Int'l. J. Const. Law 1, at 16-27 (discussing the dynamics which surrounded the drafting of s. 7).

Even among those who favour a substantive interpretation, there is little consensus on the scope and content of the guarantee. Though Lamer J.'s focus on the justice system has supporters, others propose a mandate for section 7 which would empower the Court to enforce social and economic entitlements, and to impose positive obligations on the government. At the moment, section 7's future is desperately unclear.

On other issues the Supreme Court has recently indicated that it is prepared to consider the Charter's early landmarks[23] and to resolve unsettled questions.[24] The next section follows that lead and explains why section 7 is ripe for reconsideration. After analyzing the guarantee's journey, it concludes that the Court should not have granted this provision a substantive interpretation in the *MVR*.[25] In light of that view, the discussion presents an argument that section 7 should return to its prelapsarian state — one which rejects substantive review and re-trains the guarantee's attention on procedural issues. More than 20 years after a substantive interpretation has been accepted and conceded, this suggestion is not lightly or easily made. Any decision not to follow the *MVR* would eliminate review of social and economic policies and potentially leave defects in the substantive criminal law without a remedy. A proposal which will surely encounter resistance can be defended on two grounds. The first is that what is lost in the way of Charter protection will be more than offset by what is gained: a return to principle in constitutional interpretation. Second, the consequences for the substantive law need not be so draconian. In suggesting that the *MVR* now be abandoned, the paper proposes an alternative to section 7, in the case of the substantive criminal law, and that is section 12's prohibition against cruel and unusual treatment or punishment.

Up to now, a small number of decisions have given this guarantee an inhibited interpretation which has obscured its potential.[26] For reasons

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[23] See *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) (overruling the Court's landmark decisions excluding collective bargaining and the right to strike from s. 2(d), and adopting a broader interpretation of the guarantee which constitutionalizes the process of collective bargaining in the public sector).

[24] See *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.) (concluding, after a long period of uncertainty, that constitutional exemptions are an unprincipled form of relief and unavailable for that reason).

[25] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[26] A short list, for purposes of this paper, includes decisions which address the constitutionality of the sentence: *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.); *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.); *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R.

relating to its text and history, section 12 has made no more than a modest contribution to the jurisprudence of the Charter and criminal justice.[27] Though claims rarely succeed, this paper does not challenge the "disproportionality" principle or advance doctrinal reforms which would provide relief from sentences which are impermissibly harsh. Rather, the discussion focuses on the link between the Court's section 7 and section 12 jurisprudence, and concludes that the decisions under these guarantees essentially addressed the same issue: the relationship between fault and punishment. Under section 7, the Court found that offences which attenuated the mental element were unconstitutional when the punishment was disproportionate to fault. Meantime, the section 12 jurisprudence confirms that punishment cannot be imposed in the absence of fault, when to do so would offend the principle of proportionality.

This common bond suggests that a substantive interpretation of section 7 may not be the only check on the attenuation of fault. The final section of the paper pursues that logic by presenting an argument that section 12 can fill the gap which would arise should the Court reinstate a procedural interpretation of section 7. Review on policy matters would not be avoided, but would be focused and narrowed in ways that are not possible under the *MVR*.[28] This solution would preserve the integrity of the *MVR*'s concern about the relationship between fault and punishment, and eliminate the kind of substantive review under section 7 which brought the courts too frontally into "the realm of general public policy".[29]

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485 (S.C.C.); *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.); *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.); and *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.). See also *R. v. Arkell*, [1990] S.C.J. No. 86, [1990] 2 S.C.R. 695 (S.C.C.) (upholding the first degree murder provision in the *Criminal Code*, R.S.C. 1985, c. C-46, under s. 7 of the Charter); *R. v. Pontes*, [1995] S.C.J. No. 70, [1995] 3 S.C.R. 44 (S.C.C.) (confirming that imprisonment without fault violates s. 7); *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.), and *Reference re Ng Extradition (Canada)*, [1991] S.C.J. No. 64, [1991] 2 S.C.R. 858 (S.C.C.) (considering the constitutionality of extradition to face the death sentence).

[27] For background see W. Tarnopolsky, "Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?" (1978) 10 Ottawa Law Rev. 1; and S. Berger, "The Application of the Cruel and Unusual Punishment Clause under the Canadian Bill of Rights" (1978) 24 McGill L.J. 161 (discussing the predecessor provision in the *Canadian Bill of Rights*, R.S.C. 1985, App. III).

[28] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[29] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 503 (S.C.C.).

II. THE *MVR* PARADOX: AN INSTITUTIONAL THEORY OF SUBSTANTIVE REVIEW

Justice Lamer attempted to circumvent the legitimacy deficit in the *MVR*[30] by proposing a hybrid which granted section 7 a *substantive* interpretation and limited its scope to the *institutions* of justice. In doing so, he claimed that substantive review could be undertaken, without adverse institutional consequences, as long as it was confined to matters within the justice system. His opinion in the *MVR* offered a contextual interpretation to dampen the argument that the intent of the drafters should govern.[31] Specifically, Lamer J. reasoned that section 7's status as the flagship of the Charter's legal rights made it unacceptable for that guarantee to have narrower scope — through a purely procedural interpretation — than the discrete entitlements protected by sections 8 to 14.[32]

Due to the prospect of imprisonment, section 7's entitlements did not require interpretation in the *MVR*.[33] That enabled Lamer J. to focus on the fundamental justice clause and to suggest textual support, in its reference to justice, for his justice-policy distinction. That is how he rejected the nomenclature of substance and procedure in favour of a functional division of authority between policy, which is a legislative prerogative, and justice, which is the domain of the courts. The judiciary would be estopped from addressing policy questions falling outside the institutions of justice under Lamer J.'s reading of the guarantee, which did not allow it. The *MVR*'s answer to concerns about the legitimacy of a substantive interpretation was as simple and conclusive as that.[34]

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[30] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[31] More pointedly, he stated that "[i]f the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials [such as the evidence of intent] do not stunt its growth". *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 509 (S.C.C.).

[32] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 502 (S.C.C.) (stating that "[i]t would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14"; the alternative, "which is to interpret all of ss. 8 to 14 in a 'narrow and technical' manner for the sake of congruity, is out of the question").

[33] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[34] Justice Lamer was adamant that his concept of substantive review was strictly institutional, and this is how he explained review under s. 7: "[T]he principles of fundamental justice *are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system*": *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 503 (S.C.C.) (emphasis added).

This strategy fit the circumstances of section 94(2)'s absolute liability provision and, with the Court's reliance on *Sault Ste. Marie*,[35] provided reassurance that the *MVR*[36] respected the time-honoured pattern of common law decision-making, albeit under the Charter's mandate of constitutionally entrenched rights. If the *MVR*'s decision to invalidate a provincial driving offence was relatively uncontroversial, the Court's interpretation of the Charter was less straightforward. Whether section 7 would have force exclusively in the criminal justice system, as Lamer J. hinted but did not unequivocally declare, was unknown.

The jurisprudence which followed the *MVR*[37] and constitutionalized the *mens rea* revealed that the distinction between justice and policy was bogus, and that the elements of a criminal offence unavoidably engage policy considerations. The shattering of that distinction essentially brought the constitutional reform of the criminal law to a halt. Two features of this history are critical to the paper's purposes. First, the relationship between fault and punishment was a key variable in the *mens rea* decisions. That variable — which took the form of a proportionality principle — created a connection between the section 7 and section 12 jurisprudence. Second, as the Court distanced itself from criminal law policy, it paradoxically become more responsive to a broader conception of the guarantee which, in rejecting the *MVR*'s constraints on review, brought the Court into contact with policy outside the justice system.

1. The Fallibility of the Justice-Policy Constraint

After the *MVR*,[38] the Court took steps to constitutionalize the fault element before realizing that imposing a minimum *mens rea* brought the judiciary directly into the realm of criminal law policy. Before that realization dawned, Lamer J. described the Court's mandate to monitor and review the substantive criminal law in bold, confident terms. In *R. v. Vaillancourt*,[39] he declared that while Parliament "retains the power to define the elements of a crime", the courts have the jurisdiction and

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35 *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.).

36 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

37 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

38 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

39 [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

"*more important, the duty* ... to review that definition to ensure that it is in accordance with principles of fundamental justice".[40] *R. v. Martineau* added the "unassailable proposition" that Parliament had "directed" the Court to review its definitions of the elements of a crime for compliance with the Charter, and warned that the judges would be "remiss not to heed this command of Parliament".[41] By Lamer J.'s account, the Charter had granted the courts a power to review the criminal law which was near plenary in scope.

On its face, the *MVR*[42] held only that the Charter does not permit imprisonment without fault. At a broader level of principle, Lamer J.'s opinion gave constitutional gravitas to a "generally held revulsion against punishment of the morally innocent".[43] He emphasized that "[i]t has from time immemorial been part of our system of laws that the innocent not be punished".[44] From that vantage section 94(2) was unconstitutional because it had "the potential to convict a person who has not really done *anything* wrong".[45] It offended fundamental justice that wholly innocent individuals could be imprisoned under the legislation.

Parliament's second degree, felony murder scheme did not threaten to punish the innocent but provided, instead, that those who cause death in the commission of prescribed felonies can be prosecuted for murder. In other words, the *mens rea* to commit a felony was sufficient to ground a conviction for murder under section 213 of the *Criminal Code*.[46] In *R. v. Vaillancourt*[47] and *R. v. Martineau*[48] the Court considered whether the failure to include a fault element for causing death violated section 7's principles of fundamental justice.

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[40] [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 652 (S.C.C.) (emphasis added). Despite the bravado, and perhaps because he could not command support for that view, he decided the case on the more compelling ground that s. 213(d) did not require objective *mens rea* of the consequences which attracted the penalties that automatically attached to a conviction for second degree murder under that provision.

[41] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 643 (S.C.C.).

[42] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[43] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 514 (S.C.C.) (citing Dickson J.'s opinion in *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.)).

[44] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 513 (S.C.C.).

[45] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 492 (S.C.C.) (emphasis added).

[46] R.S.C. 1970, c. C-34.

[47] [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

[48] [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

That is how the *MVR*'s[49] principle of no imprisonment without fault took the form of a constitutional minimum for *mens rea*. In *R. v. Vaillancourt*[50] the Court invalidated the weapons subsection of the *Criminal Code*[51] provision for felony murder because an individual could be convicted and punished for second degree murder, even though death was neither subjectively nor objectively foreseeable.[52] Though the *mens rea* to commit the felony was an element of the offence, a fault element for causing death — which is what made section 213(d) a murder offence — had been eliminated.

Justice Lamer proposed that, in certain cases, a "special mental element" is a prerequisite to conviction. As he explained, this element ensures that the accused is morally blameworthy in relation to the consequences for which he is being punished. Thus it would be unfair, under section 7's principles of fundamental justice, for section 213(d) to stigmatize and punish a person, who is no more than a felon, as a murderer. In other words, there is a constitutional level or threshold of moral blameworthiness which must be reached to warrant the stigma and sentence that attach to convictions for particular crimes. This reasoning led the Court to conclude in *Vaillancourt* that the stigma and sentence attaching to murder generated a constitutional minimum which required fault in relation to the death element of the *actus reus*.[53]

Justice Lamer clearly stated his preference for a constitutional requirement of subjective fault, but could only attain majority support for a standard of objective fault.[54] Though section 213's failure to require objective fault meant that *R. v. Martineau* could have been decided the same way, Lamer J. chose to set a more exacting requirement of symmetry

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[49] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[50] [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

[51] R.S.C. 1970, c. C-34.

[52] At the time, s. 213(d) made it culpable homicide, punishable as second degree murder, for a person to cause a death in the course of committing certain specified felonies, when a person used a weapon or had it on his or her person, and death ensued as a consequence: *Criminal Code*, R.S.C. 1970, c. C-34, s. 213(d).

[53] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 654 (S.C.C.) (concluding that it is a principle of fundamental justice that "absent proof beyond a reasonable doubt of at least objective foreseeability, there surely cannot be a murder conviction").

[54] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 654 (S.C.C.) (stating his view that a murder conviction cannot rest on anything less than subjective foresight but concluding, for purposes of decision, that s. 213(d) did not even meet the lower threshold of objective foreseeability).

between the *actus reus* and *mens rea*.[55] Not only did he conclude that the Charter requires subjective foresight of death, he stated that the fault requirement follows from the "*general principle* that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result".[56] The Court did not need to comment further in *Martineau* on the implications of a subjective fault requirement under section 7 of the Charter; it was readily apparent that a baseline of that kind could deny Parliament the authority to criminalize acts which cause unintended consequences.

Vaillancourt[57] and *Martineau*[58] raised the spectre of radical reforms to the substantive criminal law, but introduced the variables that enabled the Court to contain the concept of a minimum *mens rea*. Justice Lamer explained, in both decisions, that the stigma and sentence for second degree murder create a disproportionality between the *mens rea* of the offence and the punishment imposed. The felony murder provisions were unconstitutional because the *mens rea* was too attenuated to support Parliament's mandatory minimum for second degree murder. Justice Lamer maintained that subjective foresight of death must be proved before an individual can be "labelled and punished" as a murderer, because the "punishment must be proportionate to the moral blameworthiness of the offender."[59] As will be seen below, this concept of proportionality brought the jurisprudence into contact with the standard that was emerging under section 12; it also enabled the Court to avoid the consequences of *Martineau* in the subsequent cases. For the time being, it was unclear where the Court's constitutionalization of fault might lead. Under Lamer J.'s reading of the *MVR*,[60] section 7's principles of fundamental justice were concerned not only with the absence of a fault element, but with its

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[55] [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.). At stake in this case was s. 213(a), which made second degree murder available as a charge when a person committed any one of certain specified felonies, intended to cause bodily harm, and the act resulted in death: *Criminal Code*, R.S.C. 1970, c. C-34, s. 213(a).

[56] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 645 (S.C.C.) (emphasis added).

[57] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

[58] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[59] In particular, he stated that "[t]he effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender", *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 645 (S.C.C.); he also declared that "a special mental element with respect to death is necessary before a culpable homicide can be treated as murder" and that "special mental element gives rise to the moral blameworthiness that justifies the stigma and punishment attaching to a murder conviction" (at 646).

[60] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

sufficiency as well. Following *Martineau*, it seemed as though the Court was poised to impose its view of moral blame on the criminal law.[61]

Meanwhile, dissenting opinions in both cases exposed the seamlessness of any distinction between justice and policy. In *Vaillancourt* McIntyre J. wrote that defining offences and setting punishment are matters of policy which belong to the legislatures, not the courts. Though an unintentional death might not be thought of as murder, Parliament was entitled to take a harsh approach to felony murder.[62] *Martineau*[63] also provoked a dissent by L'Heureux-Dubé J., who emphasized that fault and punishment are policy matters which, under the *MVR*'s[64] own logic, should rest with Parliament.[65] She complained that it is not the Court's job to second-guess Parliament's policy choices in this area, and pointed out that a conviction under section 213(a) of the *Criminal Code*[66] required a high degree of moral blame.[67]

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[61] See J. Stribopoulos, "The Constitutionalization of 'Fault' in Canada: A Normative Critique" (1999) 42 Crim. L.Q. 227, at 251 (stating that "[a] number of the statements made by the court in both *Vaillancourt* and *Martineau* lead to the inescapable impression that the Supreme Court was poised to elevate the need for subjective *mens rea* into a requirement for all criminal offences"). See also R. Cairns-Way, "Constitutionalizing Subjectivism: Another View" (1990) 79 C.R. (3d) 260 (stating that *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.) and *R. v. Logan*, [1990] S.C.J. No. 89, [1990] 2 S.C.R. 731 (S.C.C.) invite further lengthy, complex and unpredictable litigation challenging sections of the *Criminal Code*, R.S.C. 1985, c. C-46, on constitutional grounds, and create the potential for the judicial reformation of the substantive criminal law).

[62] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 663 (S.C.C.) (dissenting opinion).

[63] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[64] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[65] As she explained:

> Policy considerations in Canada as well as in other jurisdictions have inspired legislation that considers objective foreseeability sufficient as the minimum *mens rea* requirement for murder....
>
> Striking down the legislation simply because some other scheme may be preferable would be an unwarranted intrusion into Parliament's prerogative …The *Charter* does not infuse the courts with the power to declare legislation to be of no force or effect on the basis that they believe the statute to be undesirable *as a matter of criminal law policy.*

R. v. Martineau, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 681 (S.C.C.) (emphasis added).

[66] R.S.C. 1970, c. C-34.

[67] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 664 (S.C.C.) (detailing five respects in which a person must be found blameworthy before a conviction can be entered under this section). She also discounted the factor of stigma in determining the constitutionality of an offence (at 678-79). See also R. Cairns-Way, "Constitutionalizing Subjectivism: Another View" (1990) 79 C.R. (3d) 260, at 263 (expressing concerns about the contingency of the idea of stigma as a variable in determining the constitutionality of criminal offences).

In suggesting that the symmetry principle might demand subjective foresight of consequences, *Martineau*[68] had the potential to subvert a variety of *Criminal Code*[69] provisions. After flirting with a minimum *mens rea*, the Court balked when that requirement threatened to supplant Parliament's conception of criminal responsibility. Paradoxically, Lamer J.'s principle of proportionality spared the Court from interfering with Parliament's authority to decide what conduct is punishable.

Second degree murder fit the circumstances of a proportionality principle because conviction carries a mandatory minimum sentence of life imprisonment.[70] In the cases which followed *Martineau*,[71] the Court realized that section 7's requirement of proportionality could be met — despite the lack of symmetry between the *actus reus* and *mens rea* — whenever the sentence was a matter of discretion. Individualized sentencing meant that there was no gap between the constitutional requirement of fault and the punishment which would be imposed. That reasoning not only brought the section 7 analysis closer to the underlying concepts of section 12, but in doing so effectively re-interpreted *Vaillancourt*[72] and *Martineau* as cases which required a minimum *mens rea* because the consequences of a murder conviction were uniquely so severe.

The limits of section 7's minimum *mens rea* were tested in several cases which were decided in the early 1990s. Among them are two which stand out as tipping points for the constitutionalization of fault: *R. v. DeSousa*[73] and *R. v. Creighton.*[74] Both times, the Court rejected the concept of a threshold for fault under section 7 and in doing so handily

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68 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

69 R.S.C. 1970, c. C-34.

70 See *Criminal Code*, R.S.C. 1985, c. C-46, s. 235 (establishing life imprisonment as the statutory punishment for first and second degree murder), and s. 745 (defining life imprisonment, for purposes of first and second degree murder, respectively, as 25 and 10 years' imprisonment without parole).

71 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

72 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

73 [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.).

74 [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.). See also *R. v. Tutton*, [1989] S.C.J. No. 60, [1989] 1 S.C.R. 1392 (S.C.C.) (failing to decide, though not under the Charter, whether criminal negligence is based on a subjective or objective standard of fault); under the Charter see *R. v. Wholesale Travel Group Inc*., [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.) (*per* Lamer C.J.C., indicating that negligence is the constitutional minimum when an accused faces imprisonment under the *Competition Act [Combines Investigation Act]*, R.S.C. 1970, c. C-23); *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.) (declining to specify a constitutional requirement of subjective *mens rea*, in the context of the *Combines Investigation Act*); and *R. v. Hundal*, [1993] S.C.J. No. 29, [1993] 1 S.C.R. 867 (S.C.C.) (also rejecting subjective *mens rea*).

found that the principle of proportionality was satisfied. Assuming no imprisonment without fault, *Creighton* made it clear that, short of a mandatory minimum, no sentence or stigma would fail the *Vaillancourt-Martineau* standard. The decision also made it plain that the Court had little further interest in monitoring Parliament's definitions of crime.

The unanswered question in *Martineau*[75] was whether section 7 permits Parliament to punish an individual for causing unintended consequences. Any number of offences which attach additional penalties to conduct that causes specified consequences were at risk of being invalidated under this view of the guarantee's reach.[76] In that context, the Court's conclusion in *DeSousa*,[77] that the Charter does not require that degree of symmetry between fault and punishment, was pivotal. There, Sopinka J. stated, unambiguously, that once the *mens rea* for a predicate offence is satisfied, section 7 requires no more than objective foresight of the prohibited consequences. Specifically, he found that section 269's offence of unlawfully causing bodily harm does not require subjective foresight of the prohibited consequence.

Whether by way of clarifying *Martineau*[78] or in retreating from it, Sopinka J. stated that providing there is "*a* sufficiently blameworthy element in the *actus reus* to which *a* culpable mental state is attached", the Charter does not require a symmetrical fault element for every aspect of an unlawful act, including its consequences.[79] To impose such a demand, he remarked, would "substantially restructure current notions of criminal responsibility".[80] With those words, the Court acknowledged the impact section 7 could have on the substantive criminal law, and signalled its unwillingness to entertain challenges to a family of offences which penalize unintended consequences.

Rather than further the concept of a constitutional minimum, the Court deferred to Parliament's judgment that those who engage in unlawful conduct should be punished for the unintended consequences of their

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75 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

76 *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.) and *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.) do just that. Both are predicate offence provisions: a conviction under s. 269 requires an initial unlawful act followed by a consequence of bodily harm (*Criminal Code*, R.S.C. 1985, c. C-46, s. 269); a conviction for unlawful act manslaughter requires an initial unlawful act followed by a consequence of death (*Criminal Code*, s. 225(5)(a)).

77 *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.).

78 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

79 *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944, at 965-66 (S.C.C.) (emphasis added).

80 *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944, at 967 (S.C.C.).

action.[81] As Sopinka J. explained, "[n]either basic principles of criminal law, nor the dictates of fundamental justice require, by necessity, intention in relation to the consequences of an otherwise blameworthy act."[82] *Martineau*[83] may have required subjective fault for a second degree murder conviction, but section 269 was not the same. There, the commission of a predicate offence was sufficiently blameworthy to hold the accused responsible when his unlawful act resulted in bodily harm. *DeSousa*'s[84] conclusion that a lesser and non-symmetrical degree of fault would satisfy section 7's standard of fundamental justice put brackets around *Vaillancourt*[85] and *Martineau* as decisions which rested on the constitutionally lethal combination of felony murder and a mandatory minimum sentence of life imprisonment.[86] By contrast, there was nothing significant about the stigma of a section 269 conviction. More to the point, *DeSousa* demonstrated that few offences would fail proportionality's standard for punishment where sentencing was at the discretion of the trial court.[87]

The principle of a minimum *mens rea* stalled indefinitely when the Court held, in *R. v. Creighton*, that section 7 does not require a fault element for death in the case of unlawful act manslaughter.[88] *Creighton* achieved a degree of resolution after the Court had fussed, in a series of decisions, over the relationship between the Charter and the criminal law.[89] There, La Forest J. waffled between the two plurality opinions

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81 *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.).

82 A defendant is not morally innocent "simply because a particular consequence of an unlawful act was unforeseen by [the] actor". *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944, at 967 (S.C.C.).

83 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

84 *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.).

85 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

86 Meanwhile, the Court upheld Parliament's mandatory sentence for first degree murder in *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.). To explain why the sentence was not grossly disproportionate, Lamer J. relied, in part, on the Charter's requirement of subjective fault for murder.

87 See D. Stuart, "The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumphant Pragmatism and Law Enforcement Expediency" (1993) 15 C.R. (4th) 88, at 97 (commenting on *R. v. DeSousa*, [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.) and observing that the Supreme Court "appears to have pragmatically decided to call a halt to the full review of fault requirements earlier envisaged by Chief Justice Lamer").

88 *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

89 See *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.); *R. v. Tutton*, [1989] S.C.J. No. 60, [1989] 1 S.C.R. 1392 (S.C.C.); *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.); *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.); *R. v. Hundal*, [1993] S.C.J. No. 29, [1993] 1 S.C.R. 867 (S.C.C.).

before joining McLachlin J. and denying Lamer C.J.C. a majority. Justice McLachlin's opinion rejected the proposition that symmetry is a principle of fundamental justice,[90] and held that objective foresight of bodily harm suffices, for purposes of the Charter, in manslaughter cases. Justice McLachlin also invoked the Court's markers of stigma and punishment to dispose of the proportionality issue; the felony murder rule was an example of disproportionality, but unlawful act manslaughter was not.[91]

Critically, Lamer C.J.C. was unable to command majority support for the view that symmetry required objective foresight of death. Not only had the Court retreated from a concept of subjective fault, it had further diluted the symmetry principle by upholding a homicide conviction without a *mens rea* requirement for death. If section 7 did not require symmetry for a homicide offence, it was unclear when it would ever be required. In this way the constitutionalization of *mens rea* effectively ended with *Creighton* and its companion cases.[92] Commentators saw wholesale retreat, if not an about-face, in the post-*Martineau* decisions.[93] Once the Court refused to develop its fledgling concept of minimum fault, the Charter's impact on the substantive law would be relegated to occasional and episodic interventions. Though the defence of intoxication was constitutionalized under section 7, the ensuing brouhaha showed the

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[90] *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3, at 53 (S.C.C.). She stated that a rule must have universal application to be a principle of fundamental justice, and added that the existence of exceptions to the rule of symmetry meant that it was not constitutionally required by s. 7's principles of fundamental justice. As Simon France noted, McLachlin J.'s argument that a principle of fundamental justice cannot embrace exceptions "is rather puzzling" as it is equally true of most criminal law principles, and suggests that "constitutional review of aspects of the criminal law will always be disappointing". See "Gains and Lost Opportunities in Canadian Constitutional *Mens Rea*" (1994-1995) 20 Queen's L.J. 533, at 549.

[91] *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3, at 47 (S.C.C.): "The most important feature of the stigma of manslaughter is the stigma which is not attached to it"; and, at 48: "[T]he offence of manslaughter stands in sharp contrast to the offence of murder" because "[m]urder entails a mandatory life sentence; manslaughter carries with it no minimum sentence."

[92] See also *R. v. Gosset*, [1993] S.C.J. No. 88, [1993] 3 S.C.R. 76 (S.C.C.); *R. v. Naglik*, [1993] S.C.J. No. 92, [1993] 3 S.C.R. 122 (S.C.C.); *R. v. Finlay*, [1993] S.C.J. No. 89, [1993] 3 S.C.R. 103 (S.C.C.).

[93] As Patrick Healy observed: "The trend of the cases shows a court poised to lower the standard of fault in criminal cases *on grounds of policy, and to hold that such policy decisions not only respect but promote principles of fundamental justice*" (emphasis added). See "The *Creighton* Quartet: Enigma Variations in a Lower Key" (1993) 23 C.R. (4th) 265, at 279; see also D. Stuart, "Continuing Inconsistency But Also Now Insensitivity That Won't Work" (1993) 23 C.R. (4th) 240.

Court that it entered the policy fray at its own peril.[94] And despite tinkering with the *Criminal Code*'s[95] definition of duress, the Court has since declined to constitutionalize other elements of the offence or to subject the substantive law to Charter scrutiny in other contexts.[96] To this day, it is a matter of disappointment to some that the *MVR*'s[97] promise remains largely unfulfilled.

Despite expansive statements in *Vaillancourt*[98] and *Martineau*[99] about the Court's mandate under section 7, the constitutionalization of *mens rea* was no more than a modest success. In principle, there were two fundamental problems with the *MVR*'s[100] "constitutional aversion" to offences which might punish the morally innocent. First, the Court pushed the boundaries of review by pronouncing on the constitutionality of Parliament's concept of moral blame. Inasmuch as the *MVR* claimed that the Court would not tread on policy, that is exactly what happened in *Vaillancourt* and *Martineau*. A second problem was that there were no obvious or identifiable limits on the concept of minimum *mens rea*. A symmetrical requirement of fault for every act or consequence that Parliament made punishable would run judicial interference on a concept of criminal responsibility that was deeply entrenched in the *Criminal Code*.[101] By the time *R. v. DeSousa*[102] was decided, the Court had realized that such an interpretation of section 7 would take review to places it could not legitimately go.

Even so, the *MVR*,[103] *Vaillancourt*[104] and *Martineau*[105] established a constitutional minimum for offences which impermissibly attenuated the

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94 *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.). Parliament responded with *An Act to Amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32, s. 1; R.S.C. 1985, c. C-46, s. 33.1(1).

95 R.S.C. 1985, c. C-46.

96 See *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.). See also *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) (refusing to constitutionalize the harm principle as an element of the *actus reus*) and J. Cameron, "From the *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105, at 128-30.

97 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

98 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

99 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

100 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

101 R.S.C. 1985, c. C-46.

102 [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944 (S.C.C.).

103 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

104 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

mental element. Without *per se* addressing the question of punishment, the Court found the provisions unconstitutional because the sentence which could or would be imposed in each of these cases was fundamentally unjust: it carried a sentence which, in diluting the fault element, violated the principle that the punishment and blameworthiness of the accused must be proportional. In this, Lamer J. took the lead in developing the Court's section 7 jurisprudence, as he also did in the section 12 decisions — which may be one reason why the analysis under both guarantees bears a close resemblance. After discussing section 7's journey outside the criminal justice system, the paper discusses the relationship between fault and punishment under section 12.

Justice Lamer proposed a conception of section 7 that did not work well in the setting of the criminal justice system. But nor was the Court able to withstand the pressure to expand the guarantee beyond the boundaries of criminal justice. The *MVR*'s[106] theory of review began to buckle, almost from the start, because other members of the Court did not accept Lamer J.'s compromise between an all-or-nothing approach to substantive review. Over his objections, the Court granted the guarantee's entitlements a more generous interpretation. Decisions which entertained claims at large and without connection to the justice system directly contradicted the *MVR* and undermined its fundamental assumptions. Justice Lamer's warning that the Court should not engage in substantive review of legislative policy outside the administration of justice was ignored. In rejecting his conception of the guarantee, this jurisprudence challenged the foundation for review that had been laid in the *MVR*.

2. Letting the Institutional Constraint Go

The dichotomy of justice and policy was initally eroded, outside the *mens rea* context, by *R. v. Morgentaler*.[107] There, the Court invalidated the *Criminal Code*'s[108] framework for therapeutic abortions, claimed that the scheme was procedurally unjust, and declined to address a woman's substantive right to seek an abortion. Reviving the substance-procedure

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105 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

106 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

107 [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

108 R.S.C. 1970, c. C-34.

distinction which had been spurned in the *MVR*[109] did not alter the fact that the Court had invalidated Parliament's abortion policy. In doing so, Dickson C.J.C. proposed a "manifest unfairness" test[110] which subsequently took the form, in the dissenting opinion of McLachlin J., as she then was, in *Rodriguez v. British Columbia (Attorney General)*,[111] of a section 7 prohibition on arbitrary laws. *Morgentaler* and *Rodriguez*, which upheld the Code's assisted suicide provision, both satisfied the *MVR*'s administration of justice criterion; both likewise arose in a criminal setting. At the same time, both cases invited the Court to disagree with Parliament's decision to criminalize certain conduct. As well, the claim in each rested on a broader concept of entitlement than mere physical liberty, or freedom from the physical restraint of imprisonment. In *Morgentaler*, the Court focused on security of the person to avoid commenting on the guarantee's liberty entitlement, and *Rodriguez* likewise relied on security, rather than liberty of the person. Writing alone in *Morgentaler*, Wilson J. proposed a broad-ranging definition of liberty which recognized a woman's right to seek an abortion under section 7 of the Charter.[112] In doing so she placed upward pressure on section 7's entitlements by expanding liberty of the person to embrace a right to make fundamental personal choices, including the right to have an abortion, free from state interference.[113]

These and other decisions show how the *MVR*'s[114] institutional concept of substantive review faltered when the Court began to interpret section 7's entitlements clause. The *mens rea* jurisprudence did not

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[109] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[110] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 72 (S.C.C.).

[111] [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.). This principle later became a source of deep division within the Court in *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

[112] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 166 (S.C.C.) (maintaining that s. 7's "liberty", properly construed, grants the individual "a degree of autonomy in making decisions of fundamental personal importance"). A version of Wilson J.'s definition was adopted by the Court, some years later, in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307 (S.C.C.).

[113] The entitlement in *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 589 (S.C.C.) followed the majority approach in *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) and focused on security of the person rather than liberty of the person (concluding that the prohibition in the *Criminal Code*, R.S.C. 1985, c. C-46 on assisted suicide deprived Rodriguez of autonomy of person and caused her physical and psychological stress in a way that impinged her security of the person).

[114] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

engage that part of the guarantee, because imprisonment *per se* violates liberty of the person. It would not take Lamer J. long to see that the *MVR*'s institutional concept of review would not work unless definitional restrictions were placed on section 7's primary entitlements. In declining to comment further on liberty or to consider the meaning of security of the person, he had deliberately reserved the point in the *MVR*.[115] Though the attempt would be futile, Lamer J. later wrote two concurring opinions which fiercely defended a conception of liberty that would shackle its content to the coercive purposes of the criminal law.

Despite also arising under the *Criminal Code*,[116] the *Solicitation Reference* placed the scope of entitlement in issue.[117] The question there was whether a prohibition on solicitation infringed a prostitute's liberty to pursue a profession of choice or her security of interest in procuring the basic necessities of life. The prospect that section 7 might open up to economic entitlements provoked a vehement response from Lamer J. To his mind, an expansive interpretation of the guarantee's first clause threatened the legitimacy of review. Compliance with the *MVR*[118] and its focus on the institutions of justice required a restrictive interpretation of liberty: he was adamant that any other approach would entangle the Court in institutional transgressions which would compromise the legitimacy of review.

For that reason, his concurrence in the *Solicitation Reference*[119] urged rigid adherence to the contours of the *MVR*.[120] He wrote sternly and at length in an attempt to thwart efforts to enlarge section 7 beyond a mandate that was strictly focused on the justice system. In particular, he urged the Court to limit liberty of the person to state interferences with an individual's physical freedom.[121] The effect of his position was to read

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[115] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 500-501 (S.C.C.).

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

[117] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Solicitation Reference*"].

[118] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[119] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.).

[120] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[121] Following lengthy discussion, he summarized his position in these words: "s. 7 is implicated when the state, by resorting to the justice system, restricts an individual's physical liberty *in any circumstances*"; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1177 (S.C.C.) (emphasis in original); he added

the institutional focus of the fundamental justice clause into the definition of entitlement. Limiting both parts of the guarantee to matters arising in the administration of justice was imperative, in his view, to preserve that critical distinction between justice and policy.[122]

Justice Lamer's concurrence sounded an alarm and rested on a strained approach to the text; unlike section 7's second clause, the entitlements clause contains no language that remotely refers to, much less targets, the institutions of justice. Yet he was plainly concerned that the *MVR*'s[123] constraints on review would be disregarded and that the Court would stray into the realm of *pure* public policy.[124] That is why he wrote with such urgency to halt any movement toward an expansive interpretation of section 7's entitlements.[125] For him, the guarantee's integrity depended on both clauses receiving an interpretation that was consistent with the *MVR*'s theory of review.

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that the guarantee is also implicated when the state "restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity" (*ibid.*).

[122] Specifically, he indicated that "the principles of fundamental justice can provide an invaluable key to determining the nature of the life, liberty and security of the person referred to in s. 7", and added that "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration"; *Reference re ss. 193 and 195.1(1) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1173 (S.C.C.).

[123] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[124] As he explained, "the confinement of individuals against their will, or the restriction of control over their own minds and bodies, are *precisely the kinds of activities that fall within the domain of the judiciary*, as guardian of the justice system". In contrast, he added, that "once we move beyond the 'judicial domain', we are into the realm of general public policy, where the principles of fundamental justice … are *significantly irrelevant*. … The courts must not, *because of the nature of the institution*, be involved in the realm of pure public policy; *Reference re ss. 193 and 195.1(1) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at 1176 (S.C.C.) (emphasis added).

[125] Cases in which "economic" claims were advanced include *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 786 (S.C.C.) (*per* Dickson C.J.C., rejecting a claim that Sunday closing laws violate s. 7, and stating that he could not accept that liberty in s. 7 is synonymous with unconstrained freedom or extends to an unconstrained right to transact business whenever one wishes); and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 1002-04 (S.C.C.) (rejecting a claim that an advertising law violated a corporation's s. 7 rights, because "a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*" and "economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee"); see also *Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566, 30 B.C.L.R. (2d) 1 (B.C.C.A.) (holding that s. 7 is not confined to freedom from bodily restraint and, without extending to property or pure economic rights, could include the right to choose one's occupation).

The second decision in *B. (R.) v. Children's Aid Society*[126] isolated the Chief Justice and, in rejecting a conception of entitlement based on freedom from physical liberty, made further inroads on the *MVR's*[127] theory of review inevitable. The case considered section 7's requirements when a minor was removed from parents who refused, for religious reasons, to allow blood transfusions which were medically necessary. Though not a criminal case, *CAS* arose in the administration of justice. Despite agreeing that there was no violation of fundamental justice, members of the Court divided on the preliminary question of entitlement. In the contest to control the meaning of liberty, La Forest J.'s opinion must be seen as pivotal. He openly and unequivocally rejected a definition of liberty as "mere freedom from physical restraint", endorsed Wilson J.'s definition from *Morgentaler*,[128] and declared that section 7 guarantees each individual's "personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance".[129] He did not win majority support, but attracted four votes for that view of the entitlement.[130]

Chief Justice Lamer strenuously resisted La Forest J.'s suggestion that section 7 protects parental autonomy. He demanded that liberty of the person be limited to encounters with the administration of justice which place an individual's physical freedom at risk.[131] In doing so he insisted on a holistic interpretation of the guarantee which would restrict its entitlements to matters connected with the institutional processes of the justice system.[132] The most revealing parts of Lamer C.J.C.'s concurring

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126 [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.) [hereinafter "*CAS*"].

127 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

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

129 *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 368 (S.C.C.).

130 To his vote those of L'Heureux-Dubé, Gonthier and McLachlin JJ. were added.

131 In *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.) he introduced a theory of the person, as a corporeal entity, as the connection or linkage between s. 7's entitlements. As he explained (at 346-47):

> [T]he connection is found in the person himself or herself, as a corporeal entity, as opposed to the person's spirit, aspirations, conscience, beliefs, personality, or, more generally, the expression or realization of what makes up the person's non-corporeal identity. The right to liberty, in this context, must therefore be set up against imprisonment, detention or any form of control or constraint on freedom of movement.

132 Thus he stated that the liberty claim must be one "that may be limited through the operation of some mechanism that involves and actively engages the principles of fundamental justice". *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 339 (S.C.C.). He also explained (at 339) that, "[a]part from a situation in which the state engages the justice system", it was difficult to see how those principles otherwise could have application.

opinion expose his fears about the consequences of releasing the guarantee from the *MVR*'s[133] constraints. Doing so, he stated, "would not only be contrary to the structure of the Charter and of the provision itself, but would also be contrary to the scheme, the context and the manifest purpose of s. 7".[134] For the Chief Justice, the most serious problem was the absence of limits on the guarantee's scope and the lack of principled boundaries on review.[135] He fretted that La Forest J.'s definition would confer constitutional protection on "all eccentricities expressed by members of our society" and "would inevitably lead to a situation where we would have government by judges".[136] Ironically, these are the arguments he dismissed when he gave section 7 a substantive interpretation for the first time in the *MVR*.

Justice La Forest continued to batter the *MVR*[137] in *Godbout v. Longueuil (City)*, which invalidated a rule that required municipal workers to reside in their employer's city.[138] While six members of the Court decided the case under the Quebec Charter, three others led by La Forest J. held that the condition violated section 7 of the Charter. That view, which was supported by L'Heureux-Dubé and McLachlin JJ., was without precedent. Not only did the claim pose a free-standing substantive challenge to the municipality's resolution, which lacked an interaction with the justice system, it also asked the Court to enforce an economic entitlement. Justice La Forest stated that section 7 must be read "in light of the values reflected in the Charter as a whole, *and not just those* ...

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133 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

134 *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 348 (S.C.C.).

135 The Chief Justice stated:

> [S]ince most laws have the effect of limiting a freedom, the same approach could mean … that a large proportion of the legislative provisions in force could be challenged on the ground that they infringe the liberty guaranteed by s. 7... It would then be for the courts … to decide whether or not the freedom invoked was a fundamental freedom ..., whether the limit complied with the principles of fundamental justice …, or whether the limit was reasonable and could be justified. … We must keep in mind, first, that what may be important and fundamental to one person may very well not be to another, including the judge who hears the case, and second, that by adopting this approach the judiciary would inevitably be legislating, when this is not its function.

B. (R.) v. Children's Aid Society, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 347 (S.C.C.).

136 *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 348 (S.C.C.).

137 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

138 [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.).

described as '*legal rights*'",[139] and declared, once again, that liberty protects "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference".[140] This time, and for whatever reason, Lamer C.J.C. chose to remain silent and permit La Forest J.'s definition of liberty to stand unanswered.[141]

The *MVR*[142] claimed that section 7's substantive content would be limited to matters arising in the administration of justice. As the guarantee's interaction with the substantive criminal law tapered, other claims began to look more promising. *CAS*,[143] which had considered section 7 in a civil setting, was followed by *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, which would be one of Lamer C.J.C.'s final opinions.[144] There he held that the government's failure to provide legal representation to a parent who might lose custody of her children in a court hearing violated fundamental justice, because she did not have the opportunity to participate effectively in the hearing.[145] Though the Chief Justice had rejected the proposition in *CAS* that section 7 protects any element of parental liberty unrelated to physical restraint, he avoided that constraint in *G. (J.)* by shifting his attention to security of the person.[146]

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[139] *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at 890 (S.C.C.) (emphasis added).

[140] *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at 893 (S.C.C.). He added the qualification that the entitlement extends only to matters that are "fundamentally or inherently personal", those matters which, in his words, implicate "basic choices going to the core of what it means to enjoy individual dignity and independence".

[141] He joined the reasons of Major J., which disposed of the appeal under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and otherwise stated his agreement with the other plurality opinion by Cory J., that "it is unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the *Canadian Charter of Rights and Freedoms*." *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at 855 (S.C.C.).

[142] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[143] *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

[144] [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

[145] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at 84-85 (S.C.C.) (concluding that the parent needed to be represented by counsel for there to be a fair determination of the children's best interests, and that without the benefit of counsel she would not have been able to participate effectively at the hearing).

[146] Note, in comparison to the Chief Justice's view of liberty, as a purely corporeal concept, what he said about security of the person: "As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct"; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, at 78 (S.C.C.).

The decision was grounded in the administration of justice, but expanded section 7 by imposing an affirmative duty on the government to fund legal counsel in certain circumstances. From there the jurisprudence continued to loosen its connection with the *MVR*[147] in *Winnipeg Child and Family Services v. W. (K.L.)*[148] which, like *Godbout*,[149] addressed the content of section 7's principles of fundamental justice in a setting entirely outside the administration of justice. *Gosselin v. Quebec*,[150] which was decided after Lamer C.J.C. retired, was yet another section 7 turning point. There, Arbour J. wrote a dissenting opinion which charted a radical path for the guarantee. Daringly, she advocated an interpretation which would reach matters of social and economic policy, and claimed that affirmative entitlements could be enforced against government under this conception of the guarantee.[151] Though her view was endorsed only by L'Heureux-Dubé J., who was soon to retire, Arbour J. had liberated section 7 from the *MVR*'s taboo on matters of policy. In doing so, she validated an entirely different view of entitlement — one which had been dreaded for years by some, including the drafters, and advocated, at times fervently, by others.

The *MVR*'s[152] conception of section 7 all but toppled in *Chaoulli v. Quebec*, when a plurality opinion by McLachlin C.J.C. and Major J. held that a provision which prohibited access to private health care insurance violated section 7 because it was arbitrary.[153] Undeterred by the policy content of the law, the judges did not consider it problematic

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147 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

148 [2000] S.C.J. No. 48, [2000] 2 S.C.R. 519 (S.C.C.). There, the Court was divided on the question whether fundamental justice required prior authorization, in the form of a warrant, for the non-emergency apprehension of a child. Once having cited *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.), L'Heureux-Dubé J. and Arbour J. agreed, without discussion, that the state's action engaged the parent's security interest. Each then proceeded to a discussion of what principles of fundamental justice required in the circumstances; each did so without noting or commenting on the absence of any link between the s. 7 claim and the administration of justice.

149 *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.).

150 *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.).

151 See J. Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Quebec* (2003) 20 S.C.L.R. (2d) 65.

152 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

153 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.). Chief Justice McLachlin and Major J. co-wrote the opinion, and Bastarache J. concurred; Binnie and LeBel JJ. co-wrote a second plurality opinion, which dissented on the s. 7 question, and were joined by Fish J. Justice Deschamps wrote separately to prevent any majority opinion on s. 7 and decide the case under the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

that the section 7 claim was free-standing, and had no connection to the justice system. A regulation which was designed to preserve the integrity of the public health care system was pure policy, but the plurality opinion found that it arbitrarily violated the security rights of those who were denied access to medical services as a result.

Chaoulli's[154] foray into the policy domain contradicted the *MVR*[155] and provoked controversy. Inside the Court, the Binnie-LeBel plurality opinion dissented in the strongest terms from what it regarded as an inappropriate intrusion by judges into matters of democratic governance.[156] With the seventh member of the panel providing the determinative vote on statutory grounds, the split exposed a fault line inside the Court. On one side were judges who were prepared to invalidate legislation falling outside the *MVR*'s institutional theory of review; on the other were those who supported its administration of justice constraint.[157] *Chaoulli* has been praised some, including by those who advocate a mandate for section 7 which would include social and economic entitlements. It has also been denounced by those who were skeptical — from the outset — of *MVR*'s promise that review could and would be limited to non-policy matters falling within the administration of justice.[158]

This history leads to the unavoidable conclusion that section 7 is in a state of disarray. The Court has failed to regulate the scope of the guarantee or give its parameters conceptual coherence. In responding to claims on a case-by-case basis, the Court has developed an array of doctrines and tests to manage the question of fundamental justice which are unrelated to each other, or to an identifiable concept of the guarantee. These dynamics place section 7 at a juncture which requires that a choice be made. Reclaiming the conception of review first proposed by

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154 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

155 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

156 Among other things, the plurality dissent claimed that the debate is not about constitutional law, but social values, and not an appropriate subject of review, as a result, under s. 7. *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at 863 (S.C.C.).

157 On that issue, the Binnie-LeBel plurality stated that "[i]t will likely be a rare case where s. 7 will apply in circumstances unrelated to adjudicative or administrative proceedings" and that "[t]he further a challenged state action lies from the traditional adjudicative context, the more difficult it will be for a claimant to make that essential link [to the principles of fundamental justice]"; *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at 877-78 (S.C.C.).

158 For a range of views see B. Ryder, Guest Editor, Symposium on *Chaoulli*, 44 O.H.L.J. (Summer 2006) and C. Flood, K. Roach & L. Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).

Lamer J. in the *MVR*[159] — and rejecting *Chaoulli*'s[160] gesture to broader policy questions unrelated to the legal system — is one option. Another approach would relax the constraints on section 7 and allow the guarantee to address injustices of all kinds, wherever and however they arise. Finally, it is not too late to reject a substantive interpretation of section 7 and return to a prelapsarian concept of the guarantee solely as a source of protection against injustices of a procedural nature.

III. THE WAY FORWARD

The potentially unrestrained scope of liberty and security of the person made it imperative for constraints to be placed on the guarantee's interpretation. Justice Lamer recognized the problem inherent in an indeterminate, all-inclusive approach to entitlement under section 7, but was unwilling to deny the Charter a role in modifying the criminal law. Though restricting the guarantee's content to matters of procedural justice was the constraint the drafters had in mind, the *MVR*[161] rejected that option and proposed a form of substantive review which would be limited to proceedings arising in the justice system.

Justice Lamer's conception of section 7 offered an intermediate position between the extremes of all or nothing on substantive review. As seen above, he proposed a theory with built-in limits which he thought would ensure that the Court did not interfere with pure public policy. Yet the attempt to mediate section 7's content was unsuccessful; under his approach the constitutionalization of *mens rea* went too far and the protection of entitlements outside the criminal law did not go far enough. The Court's focus on fault and the symmetry principle placed a number of *Criminal Code*[162] offences at risk of being invalidated because the Court disagreed with Parliament's definition of criminal responsibility. Constitutionalizing the *mens rea* quickly brought the Court into conflict with Parliament's policy choices in deciding how criminal offences should be defined and punished.

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159 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

160 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

161 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

162 R.S.C. 1985, c. C-46.

Once a substantive interpretation was established, members of the Court grew restive under the *MVR*'s[163] constraints. Justice Wilson was quick to embrace a broad, substantive definition of liberty, and La Forest J. picked up on her initiative in *CAS*[164] and *Godbout*.[165] In each case he expressed the view that section 7 must be interpreted in light of all the Charter's values and not limited by its formal classification as a legal right. Over time, Lamer J.'s insistence that an institutional constraint be read into both of section 7's clauses lacked traction. Not only did it strain credulity to read the guarantee's entitlements as limited to constraints on physical liberty, the claim that the Charter could only address injustices arising in the legal system was unconvincing.

The Court's decision to abandon the *MVR*'s[166] administration of justice constraint was not the answer. An interpretation that empowers courts to invalidate social and economic policies which are "unjust" violations of liberty or security of the person is problematic. It is unsound for the reasons Antonio Lamer gave in the *MVR* and reinforced in the *Solicitation Reference*[167] and *CAS*.[168] It is unsound for the reasons identified by the Binnie-LeBel plurality in *Chaoulli v. Quebec*,[169] as well as for those offered in *Gosselin v. Quebec*[170] by Justice Bastarache.[171] It is the same problem that was identified when the *MVR* was decided, and was answered at that time by Lamer J.'s attempt to place definitional boundaries around a guarantee which, in terms, was potentially without limit. The problem with a concept of section 7 that addresses fundamental injustices whenever and wherever they arise is that review under that theory of entitlement is indefinite. It is either so broad as to bring the

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163 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

164 *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

165 *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.).

166 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

167 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.).

168 *B. (R.) v. Children's Aid Society*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.).

169 *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

170 *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.).

171 There, he insisted — in disagreeing with Arbour J.'s conception of entitlement — that the "judicial nature" of s. 7 rights could not be ignored without bringing "the legitimacy of the entire process of *Charter* adjudication" into question; *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at 546 (S.C.C.).

courts routinely into conflict with legislative policy, or so selective in the claims it protects as to be arbitrary.[172]

Though the *MVR*'s[173] distinction between justice and policy was unsound from the start, Lamer J.'s theory of section 7 held a certain attraction. By limiting the guarantee's substantive content to the institutions of the justice system, his concept constrained the scope of review. And though it was incapable of eliminating the concerns that are inherent in giving fundamental justice a substantive interpretation, it confined the range in which those concerns would operate. Though it was less than persuasive, Lamer J.'s concept of section 7 was strengthened by the structural argument that the text of the Charter directs attention to the justice system; the guarantee's placement under the heading of legal rights provided further support for the proposition that its content is legal rather than social or economic in nature.

At the same time, the *MVR*'s[174] distinction between the legal system and matters of legislative policy failed to explain why section 7 should have any substantive content at all. In the end, that may be the fatal flaw of Lamer J.'s theory of review: it was not obvious why the text allowed a substantive interpretation and then limited that interpretation to the criminal law. The suggestion that section 7 should privilege injustices arising in the justice system over all others proved unworkable and unpersuasive. As the *MVR*, *Morgentaler*,[175] the second degree murder cases, *Rodriguez*[176] and *Daviault*[177] all demonstrate, it is difficult to maintain — on principled grounds — that review under a restricted theory of section 7 is legitimate, or more legitimate, than the alternative of open-ended review. The text and history do not support a double standard for section 7's substantive interpretation.

It is unavoidable that any substantive approach to section 7 is problematic, whether limited to the criminal justice system or more open in nature. The Court's inability to articulate a coherent concept of

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[172] See J. Cameron, "The *Motor Vehicle Reference* and the Relevance of American Doctrine in *Charter* Adjudication" in R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 69, at 89 (explaining this dilemma of interpretation).

[173] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[174] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

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

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

[177] *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.).

review — one which would identify the core of the guarantee and explain the scope of entitlement — demonstrates that a procedural interpretation was not an unwise choice. Yet the most powerful argument against a minimalist conception of section 7 is the one which first succeeded in the *MVR*;[178] under a procedural interpretation there would be no recourse for laws that are substantively unfair.

From a certain point of view, the consequences of such a proposal need not be so draconian. The Court's section 7 landmarks established that the Charter demands a relationship of proportionality between fault and punishment. The trilogy — the *MVR*,[179] *Vaillancourt*[180] and *Martineau*[181] — invalidated offences which potentially imposed punishment that was disproportionate to the accused's blameworthiness. In the *MVR*, the offence was unconstitutional because it had the potential to send an innocent person to jail. The second degree murder provisions were invalidated in *Vaillancourt* and *Martineau* because mandatory life imprisonment was disproportionate in the case of a person who did not intend to cause death. Albeit from a different perspective, the Court's decision in *R. v. Oakes* reflects a similar concern.[182] There, the Court invalidated a reverse onus clause because it mandated a conviction — and punishment — in some circumstances where the accused might have been blameless.

While the section 7 cases examined the severity of the punishment to determine the constitutionality of the fault element, the section 12 decisions considered the role of fault in determining whether certain forms of punishment were cruel or unusual. Though articulated in guarantee-specific language, the section 7 and 12 cases rest, fundamentally, on the same analysis. And to the extent that is so, section 12 may offer a viable alternative to substantive review under section 7. The next section pursues that possibility by considering whether section 12 can fill the gap arising from any return to a procedural interpretation of section 7.

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178 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

179 *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

180 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

181 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

182 [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

IV. SECTION 12: THE CHARTER'S "FAINT HOPE" GUARANTEE[183]

Section 12, like section 7, had a promising start with the Supreme Court's decision, in *R. v. Smith*, to invalidate Parliament's mandatory minimum sentence for importing narcotics.[184] The Court's leading opinion there, as in the section 7 fault trio, was authored by Lamer J.[185] In the circumstances of an offender who was caught re-entering the country with seven-and-a-half ounces of pure cocaine in his possession, the conclusion that section 5(2) of the *Narcotic Control Act*[186] violated section 12 was extraordinary. The provision was unconstitutional because it imposed a minimum of seven years' imprisonment, without regard to the quantity of drug imported, and could apply — quite unfairly — to a person driving home from winter break in the United States, with "his or her 'first joint of grass'".[187] Justice Lamer stated that section 12 addresses the "quality of the punishment" and "is concerned with the effect that the punishment may have on the person on whom it is imposed".[188] He introduced the concept of proportionality but emphasized that the test under section 12 is one of gross disproportionality. Specifically, the guarantee would only be infringed, he said, when the sentence is "so unfit having regard to the offence and the offender as to be grossly disproportionate".[189]

Any expectation that the jurisprudence would blossom after *Smith*[190] was dashed by a series of decisions which, together, show that the Supreme Court regards section 12 as a "faint hope" guarantee of sorts — one which is available only on rare occasions and in exceptional circumstances.[191] Thus far, claims have succeeded, at the Supreme Court

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183 The reference is to Parliament's "faint hope" clause, which allows those convicted of first degree murder and subject to life imprisonment for 25 years, to apply for parole after 15 years in prison, under conditions which are stringent and difficult to meet; see *Criminal Code*, R.S.C. 1985, c. C-46, s. 745.6(1).

184 [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.). See K. Roach, "*Smith* and the Supreme Court: Implications for Sentencing Policy and Reform" (1989) 11 S.C.L.R. 433.

185 Only Dickson C.J.C. joined Lamer J.'s opinion; Wilson, Le Dain and La Forest JJ. wrote separately; McIntyre J. dissented; and Chouinard J. did not participate in the decision.

186 R.S.C. 1970, c. N-1.

187 [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1053 (S.C.C.).

188 [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1072 (S.C.C.).

189 [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1072 (S.C.C.).

190 [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

191 See *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.); *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.); *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.); *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.); and *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.).

level, on only two occasions.[192] Instead, the jurisprudence has consistently stated that a violation will only be found "on rare and unique occasions", because the test of proportionality "is very properly stringent and demanding".[193] A lesser standard, Cory J. warned in *Steele v. Mountain Institution*, "would tend to trivialize the *Charter*".[194]

As presently understood, section 12's prohibition against cruel and unusual treatment or punishment has little vitality as a Charter entitlement. Rather than require a relationship of proportionality between the offender's conduct and the sentence, the Court has focused on *disproportionality* and placed a heavy burden on the accused to prove that the punishment fails that standard.[195] Moreover, and instead of considering the proportionality between the blameworthiness of an accused's conduct and the punishment imposed, the Court considers whether a sentence is defensible in abstract and global terms.[196] It has found that generally, punishment which is not outrageous, excessive and beyond all standards of decency for a diverse and indeterminate class of offenders does not violate section 12.

The Supreme Court's standard of disproportionality demands re-examination against the objectives of section 12. This is especially so at this point in time, with mandatory minimums in ascendancy. With the exception of *Smith*[197] and the second degree, felony murder cases decided under section 7, the Court has held that mandatory sentences do not offend the Charter.[198] That assumption should be challenged by a concept of entitlement that focuses on the presence of proportionality, not an absence

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[192] See *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.), and *Steele v. Mountain Institution*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385 (S.C.C.).

[193] *Steele v. Mountain Institution*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385, at 1417 (S.C.C.).

[194] *Steele v. Mountain Institution*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385, at 1417 (S.C.C.).

[195] See, *e.g.*, *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90, at 108 (S.C.C.). There, Gonthier J. stated that no remedy is available under s. 12 when a punishment is "merely disproportionate". The Court must be satisfied, he said, that "the punishment imposed is *grossly* disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable" (emphasis in original).

[196] The abstract nature of the exercise is highlighted, without being ameliorated, by the Court's "reasonable hypothetical" analysis. In principle, the purpose of reasonable hypotheticals is to enable the Court to invalidate a sentencing provision which could result in gross disproportionality for third parties not before the Court. Yet *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) is the only decision that led to a conclusion that the plight of conjectural third parties required the Court to invalidate a mandatory minimum.

[197] *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

[198] See *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.); *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.); *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.); and *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.).

of disproportionality, and considers whether the punishment imposed is excessive in the circumstances of the particular individual who has been convicted. Whether and in what circumstances Parliament is entitled to set harsh sentences to promote general deterrence, retribution or denunciation — at the expense of objectives which relate to the circumstances of the accused — should be dealt with under section 1. The purpose of section 12 should be to identify impermissible gaps between fault and punishment; from there, further questions about the justifiability of a mandatory floor should be addressed under section 1. There, it is open to the government to show why a sentence that is disproportionate under section 12 nonetheless satisfies section 1's proportionality test, once Parliament's broader policy objectives in enhancing the penalty or adopting a mandatory minimum are taken into account.

A re-conceptualization of section 12 cannot be undertaken here, and nor is this the occasion to address the status of mandatory sentences.[199] This paper's concern is with the *MVR*'s[200] failure to state a viable concept of section 7 and the search for an alternative venue for criminal law review under the Charter. From that perspective, its limited objective is to demonstrate that, at least where the fault element has been attenuated, a substantive interpretation of section 7 may be unnecessary. In this regard, it is significant that the *punishment* was a key variable in the section 7 jurisprudence which stated a constitutional minimum for *mens rea*, and that *fault* has been a key variable in the assessment of proportionality under section 12. Though the test of breach is strict, the Court's decisions accept, in principle, that punishment which is excessive in relation to fault violates the Charter's prohibition against cruel and unusual punishment.

In *Luxton*, for instance, the Court rejected the claim, which was raised under sections 7 and 12, that Parliament's first degree felony murder provision was unconstitutional because it imposed a mandatory minimum of 25 years' life imprisonment.[201] Chief Justice Lamer held that Parliament was entitled to treat all offenders with equal severity,

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[199] For a comprehensive discussion, from a variety of perspectives, see E. Sheehy, Guest Editor, Symposium on Mandatory Minimum Sentences: Law and Policy (2001) 39 Osgoode Hall L.J.

[200] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[201] *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.), and see note 70 (explaining the *Criminal Code*, R.S.C. 1985, c. C-46 provisions which set the punishment for first degree murder). While *Luxton* upheld then s. 214(5)(e), dealing with the predicate offence of forcible confinement, *R. v. Arkell*, [1990] S.C.J. No. 86, [1990] 2 S.C.R. 695 (S.C.C.), which was decided the same day, upheld s. 214(5) under s. 7 of the Charter. See also *R. v. Paré*, [1987] S.C.J. No. 75, [1987] 2 S.C.R. 618 (S.C.C.) (upholding the distinction between first and second degree murder).

and without regard to the relative blameworthiness of individuals. Specifically, he found that the punishment satisfied proportionality; citing *Martineau*,[202] he stated that subjective foresight of death is required for every murder conviction, and that the moral blameworthiness of the offender is "markedly enhance[d]" where forcible confinement results in death.[203] The Chief Justice elaborated that "[t]his is a crime that carries with it the most serious level of moral blameworthiness, namely subjective foresight of death," and that the penalty accordingly "is severe and deservedly so".[204] To summarize, the punishment did not violate section 12 because subjective *mens rea*, the highest degree of fault, was required for a conviction.

Other decisions confirm that fault is a key variable in the section 12 analysis. In *R. v. Goltz*, Gonthier J. upheld a mandatory sentence of seven days' imprisonment for driving while prohibited.[205] The high threshold of gross disproportionality was not crossed, he said, because the accused "knowingly and contemptuously violated the prohibition".[206] The offender was blameworthy in his own right, and reasonable hypotheticals did not direct a different disposition. It is also instructive that McLachlin J., as she then was, dissented in *Goltz*, because the mandatory minimum could prevent the Court "from reaching a fair result" and "indeed require the judge in some cases to impose a sentence which is grossly disproportionate".[207] This could occur in situations where a person was relatively blameless in driving while prohibited. *R. v. Pontes*, which brought the constitutionality of a driving offence to the Court a third time, further embedded the relationship between fault and punishment in the jurisprudence.[208] The case, which focused on whether the offence created an absolute or strict liability offence and was decided under section 7, held that the *Motor Vehicle Act*[209] created an absolute liability offence and that "no person is liable to imprisonment for an absolute liability offence."[210] There was no violation of section 7 because the

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202 *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

203 *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711, at 722 (S.C.C.).

204 *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711, at 724 (S.C.C.).

205 [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.).

206 *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485, at 513 (S.C.C.).

207 *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485, at 531 (S.C.C.). Chief Justice Lamer and Stevenson J. joined her dissent.

208 *R. v. Pontes*, [1995] S.C.J. No. 70, [1995] 3 S.C.R. 44 (S.C.C.).

209 R.S.B.C. 1979, c. 288.

210 *R. v. Pontes*, [1995] S.C.J. No. 70, [1995] 3 S.C.R. 44, at 68 (S.C.C.).

provision, when read alongside the *Offence Act*,[211] did not place offenders at risk of imprisonment. *Pontes* showed, once again, the symbiosis of fault and punishment in the section 7 and 12 jurisprudence.

Subsequent decisions in *R. v. Morrisey*[212] and *R. v. Latimer*[213] also treat moral blameworthiness as an aspect of the disproportionality analysis. *Morrisey* tested the constitutionality of a mandatory minimum of four years for negligently causing death in the use of a firearm. In upholding the punishment, Gonthier J. repeatedly called attention to the level of blameworthiness the offence required and concluded, without difficulty, that no matter who the accused is, a floor of four years for this offence was not disproportionate. In particular, he stated that "[a]lthough less morally blameworthy than murder, criminal negligence causing death is still morally culpable behaviour that warrants a response by Parliament dictating that wanton or reckless disregard for the life and safety of others is simply *not* acceptable."[214] Justice Arbour dissented, though without invalidating the provision, to express her concern that the "inflationary floor" might be disproportionate in individual circumstances. Citing McLachlin J.'s statement in *Creighton*,[215] that "the sentence can be and is tailored [in manslaughter cases] to suit the degree of moral fault of the offender," she declared that "principles and practice reject pigeonhole approaches and favour a disposition that is sensitive to all the circumstances of *every* individual case."[216] And in *R. v. Latimer*, the Court emphasized the fault element in explaining why life imprisonment for second degree murder does not violate section 12.[217]

The relationship between fault and punishment in this jurisprudence has been recognized and discussed by Kent Roach, who is critical of the Supreme Court's propensity to cite the presence of a fault requirement

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[211] R.S.B.C. 1979, c. 305.

[212] [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.).

[213] [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.).

[214] *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90, at 118 (S.C.C.) (emphasis in original).

[215] *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

[216] *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90, at 132 and 139 (emphasis in original). Chief Justice McLachlin joined her opinion.

[217] *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.). The s. 12 standard requires the Court to consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the offence. In discussing the gravity of the offence, the Court stated (at 40) that "it cannot be denied that second degree murder is an offence accompanied by an extremely high degree of criminal culpability". The Court added (at para. 84): "In this case, therefore, the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality."

— as required *by section 7* — to support the conclusion that mandatory punishments do not violate *section 12*.[218] Yet his critique does not reject fault as one of the variables in the proportionality analysis. To the contrary, Roach supports individualized fault as the benchmark against which the proportionality of punishment should be measured under this guarantee. The difficulty, from his point of view, is that the Court has relied on the presence of a fault element to uphold mandatory sentences. Not only is fault an abstract rather than individualized concept under this approach, but the presence of a fault element has been relied upon to make it virtually impossible to show disproportionality under section 12.

Section 7 and section 12 each have their own problems. The conclusion reached in earlier sections of the paper, that the Court's conception of section 7 is irreparably incoherent, led to the proposal that the jurisprudence return to a procedural interpretation of the guarantee. It does not follow, though, that the Charter should no longer play a role in reviewing the criminal law. The goal of this discussion has been to consider whether the relationship between fault and punishment can be decided, in future cases, under section 12. In other words, the question is whether the minimum *mens rea* cases can be restated as a principle that section 12's requirement of proportionality will be violated when the *fault* element is too attenuated to support the sentence imposed.

The difficulty is that, at best, section 12 is little more than a faint hope guarantee. Whether read conjunctively, disjunctively or compendiously, the references to "cruel" and "unusual" invoke memories of a bygone era when physical barbarity and extreme forms of corporal punishment were part of the criminal law's artillery. Perhaps swayed by the text and history of a guarantee that suggested a narrow focus, the Court has given section 12 an interpretation which has crippled the entitlement. The meaning of cruel and unusual should not be stuck in that history, but should be determined — afresh — by section 12's underlying values. Instead of taking that approach, the gross disproportionality test has displaced a concept of proportionality which would examine the relationship between the blameworthiness of the accused and the prescribed punishment. It is particularly troubling, in this regard, that the Court's response to mandatory minimums takes decontextualization to new heights by consistently upholding measures which impose punishment on the

[218] K. Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" in E. Sheehy, Guest Editor, Symposium on Mandatory Minimum Sentences: Law and Policy (2001) 39 Osgoode Hall L.J. 367.

basis of a statutory abstraction, and without reference to the circumstances of the offender. Under the current standard, the threshold for breach is so high as to be insurmountable.

This paper has explored the Court's conception of section 7 in the first 25 years of the Charter, and examined alternatives to a substantive interpretation of the guarantee. In terms of the substantive criminal law, a minimum *mens rea* has been section 7's primary contribution to the Charter jurisprudence. The foundational cases — the *MVR*,[219] *Vaillancourt*[220] and *Martineau*[221] — stand for the proposition that certain punishments cannot be imposed in the absence of a constitutionally required fault element. Section 12 can support the same conclusion because both guarantees are concerned with the relationship between fault and punishment; while section 7 has been more immediately concerned with the sufficiency of the fault requirement, section 12 is directed, in terms, to take the measure of the punishment. Whether the fault is sufficient depends on the punishment which follows upon conviction, and whether the punishment is permissible depends on whether the sentence is proportionate to the accused's blameworthiness.

The Charter's prohibition against cruel and unusual treatment or punishment is the preferred venue for claims which consider whether there is a relationship of proportionality between fault and punishment. The problem arises where the fault element is too attenuated in relation to the punishment that attaches to conviction. In circumstances of imprisonment without fault or a mandatory prison term which is not calibrated according to the accused's fault, the punishment was impermissible under section 7. It would and should be unconstitutional, for the same reasons, under section 12. Shifting that aspect of proportionality to the punishment guarantee would retain a role for the Charter and the criminal law. In doing so, the shift would provide a focus and a context which has been lacking under section 7, but will direct the section 12 jurisprudence and at the same time avoid the problems spawned by the *MVR*.[222] The section 7 jurisprudence demonstrates that the scope for a minimum *mens rea* is and should be narrow; otherwise, as the Court discovered, the judges faced the prospect of substituting their concept of

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[219] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[220] *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

[221] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[222] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

fault for that chosen by Parliament. Still, and despite the importance of setting boundaries around the Court's authority to review criminal law policy, those which are currently in place under section 12 are too restrictive. A more extensive discussion of the guarantee must be deferred to another time and place; the point for present purposes is that section 12 can stand in for section 7 in cases which test the proportionality between fault and punishment in the criminal law.

Ending substantive review under section 7 would bring conceptual clarity back into the section 7 jurisprudence. Some claims would be lost under a procedural interpretation of the guarantee and others would survive, but be redirected to other provisions of the Charter.[223] In this way the problems associated with a substantive interpretation of section 7 will be avoided, without abandoning Charter review of the criminal law. There is no need, in cases of overlap between sections 7 and 8, to duplicate the analysis and find a violation under both guarantees.[224] Likewise, the cases which challenged bail provisions should be tested under section 11(e) and not under section 7.[225] By the same token, decisions dealing with the presumption of innocence should be decided under that provision, and not under section 7.[226] Nor, in discussing the criminal law, can other guarantees outside the framework for legal rights — such as the fundamental freedom and section 15 — be forgotten. Finally, claims which test the relationship between fault and punishment should be addressed by section 12. What will remain is section 7's vital purpose — as the source of additional procedural entitlements in the justice system — such as full answer and defence.[227] That, in brief outline, is what the Charter could look like if the Court were to adopt a procedural conception of section 7.

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[223] Those which would be lost include the kinds of substantive social and economic entitlements which were addressed by the Court in *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.); *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.); and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

[224] See, *e.g.*, *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.) (finding a breach, in circumstances of an unconstitutional search, of s. 7 as well as s. 8).

[225] See *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.) and *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.).

[226] See, *e.g.*, *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

[227] See, *e.g.*, *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) (establishing a constitutional right of disclosure and leading, in subsequent decisions, to a related right, in some circumstances, to production of documents as well as to other aspects of full answer and defence).

V. CONCLUSION

Early in the Charter's history, the late Antonio Lamer proposed a concept of section 7 which had the potential for significant impact on the substantive criminal law. This view of section 7 and of the Charter's interaction with the criminal law made headway in an important trio of cases, and then faltered. Justice Lamer's approach, which reserved a substantive interpretation of the guarantee for the institutions of justice, failed to hold the Court's support over time: its selective focus on the justice system proved unworkable and — in the larger scheme of questions about what is or is not unjust — idiosyncratic as well. Decision by decision, the Court skirted around the *MVR*'s[228] institutional constraint until little is left, today, of Lamer J.'s core assumptions: that justice and policy are readily separable, and that the legitimacy of review is unassailable, but only when the substantive content of the guarantee is limited to the justice system.

These dynamics lead to a conclusion that it was unwise for the Court to grant section 7 a substantive interpretation in the *MVR*.[229] With only a few decisions that enforce a substantive concept of fundamental justice in the criminal law, and no clear authority for substantive social or economic entitlements under the guarantee, it is not too late to reverse course and return to what the drafters intended, which is an entitlement of procedural scope and content. Within the criminal law, that approach would leave the existing section 7 jurisprudence on procedural entitlements untouched and shift other claims to the Charter's issue-specific legal rights guarantees. After the changes two gaps would still remain; a remedy would no longer be available under section 7 for injustices in the sphere of social and economic policy, nor would the guarantee entertain claims that the criminal law is substantively unfair. As has been argued throughout the paper, neither is an appropriate subject of review under section 7. To the extent a remedy is required, it must be sought and found under other Charter guarantees.

Justice Lamer's fault trilogy spotted and addressed a proportionality gap between fault and punishment in the substantive criminal law. Though the Court must exercise caution when reviewing Parliament's criminal law policy, some provisions invite intervention, and a disparity between

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[228] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[229] *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

an offender's blameworthiness and the sentence imposed is one of them. For that reason, this paper does not suggest that the fault trio was incorrectly decided; its position, instead, is that the section 7 cases rested on a question of proportionality which could and should have been addressed under section 12. In other words, a disproportionate relationship between fault and punishment should be an ongoing concern of the Charter's prohibition against cruel and unusual punishment. For that to happen, the section 12 jurisprudence must be released from the constraints of the gross disproportionality test, which has made it next to impossible for challenges to mandatory minimums and other departures from individualized justice to succeed.

The task of reforming the standard of breach for section 12 remains, but is deferred for now. The first step, in developing a coherent relationship between the Charter and the criminal law, is to return section 7 to its original conception and shift substantive issues about the proportionality of fault and punishment to section 12. Such a step would preserve the validity of the section 7 fault trio, retain a place for substantive review of a more focused nature under section 12 of the Charter, and fundamentally alter the scope and function of section 7.