FUNDAMENTAL JUSTICE IN SECTION 7 OF THE *CHARTER*: A HUMAN RIGHTS INTERPRETATION

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I. Introduction: In Awe of Justice

The *Charter*'s[1] full coming of age awaits a maturing of our understanding of the principles of fundamental justice in section 7.[2] As it stands, the concept of fundamental justice is in a state of arrested development. This is unfortunate because the principles of fundamental justice play one of the most important roles in Canadian human rights theory and practice. These principles allow governments to limit the Canadian Constitution's version of the rights that form the very basis of modern liberal philosophy: life, liberty, and security of the person. This current of liberal philosophy, with its central concern for limiting the power of government in critical respects, explains why we are supposed to need constitutionally entrenched bills of rights in the first place. Accordingly, as long as our understanding of the principles of fundamental justice is relative to the next Supreme Court decision on point, the status of the entire *Charter* project is compromised.

Obscuring the development of a clearer picture of the principles of fundamental justice are certain "economies of adjudication" that this lack of definition allows and which the judiciary might understandably be reluctant to abandon. So long as the concept of fundamental justice remains relatively undisturbed by a firm theoretical framework, the courts are able to claim novel powers of review and forms of jurisdiction that operate to abbreviate and expedite full analysis and decision writing in important respects. This discussion highlights several of these economies.

The definition of fundamental justice is not the only casualty of the courts' employment of these economies. These economies have also operated to effectively

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[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 [*Charter*].

[2] Section 7 of the *Charter* reads: "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."

erase any clear distinction between fundamental justice analysis and a consideration of reasonable limits on section 7 rights under section 1 of the *Charter.* I argue that the Supreme Court of Canada's decision in *R. v. Mills*[3] contributes to the confusion in this area, even while it provides some of the basis for a clearer understanding of the principles of fundamental justice.

A factor that may have interfered with the development of our understanding of the principles of justice mentioned in section 7 is the awe-inspiring adjective "fundamental." This adjective has given rise to the dominant assumption that the courts must somehow solve one of the greatest and thorniest philosophical issues of all time. This is the question as to whether there is a single concept of justice, with attendant principles, that has some absolute status above other justice claims. A result of this assumption about the breath-taking obligation that we have placed on our courts is the judiciary's understandable disinclination to say much more about the subject than it has to.

In order to allow section 7 of the *Charter* to come of age, we should encourage serious thinking about the nature of justice in general. I argue that this kind of serious thought leads, rather ironically, to a more modest estimation of the nature of the "principles of fundamental justice" in section 7 of the *Charter.* In thinking about justice, one is quickly confronted with the most basic point about the subject, which is that there are many versions of this concept. Of the various versions of justice, some are inconsistent with one another, but few are necessarily excluded by our legal system. Accordingly, the modifier "fundamental" in section 7 of the *Charter* cannot be understood to charge the courts with identifying the principles that are consistent with a single concept of justice that applies throughout the legal system. A more manageable judicial task involves identifying principles that are consistent with a version of justice that is fundamental to the particular context that section 7 provides. While placing some limits on the courts' scope of review under section 7, this approach takes seriously the Supreme Court's important early pronouncement that fundamental justice is more than "natural" or procedural justice by another name, notwithstanding evidence of the framers' intention in this regard.[4]

I argue that from among the competing conceptions of "justice" that exist, the principles of fundamental justice that section 7 refers to must be understood to be values that support and advance human rights theory. One doctrinal benefit of this

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[3] [1999] 3 S.C.R. 668.

[4] See *Reference Re. B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486 at 505 [*BCMVA*].

interpretation is that it "fits" and clarifies some of the Supreme Court's recent fundamental justice analysis. Another doctrinal benefit of this understanding is that it provides some clarity to the debate over how the limitation of *Charter* section 7 rights by the principles of fundamental justice is distinguished from the limitation of all *Charter* rights that is allowed by section 1. The human rights interpretation of the principles of fundamental justice would reopen the door to meaningful section 1 analysis of government activity that infringes section 7. The principles of justice that are fundamental to human rights theory are critically important to our legal system. However, the legal system of a free and democratic society should sometimes be able to respond to the dictates of other conceptions of justice and policy as well.

Although I argue for a conception of the principles of fundamental justice that is clearer and more limited than the one that the Supreme Court of Canada has provided to date, I accept the Supreme Court's position that it is not necessary to identify an exhaustive catalogue of such principles. The human rights concept of justice proposed here is a "more fully" theorized version of fundamental justice than we presently have. This concept remains, however, "incompletely" theorized. I believe that the incompletely theorized character of the concept of fundamental justice for which I argue is a strength of this approach, rather than a weakness. In this regard, I draw support from the work of Cass Sunstein. I argue that the concept of fundamental justice that I develop is consistent with what Sunstein calls "incompletely theorized agreements."[5] As Sunstein argues, rather than being liabilities to well-functioning constitutional orders, incompletely theorized agreements are essential to them.

II. Section 7 of the *Charter*: A "Legal" Right that is "Qualified"

Section 7 of the *Charter* reads:

> 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.[6]

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[5] Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001) at 50.

[6] *Charter*, *supra* note 1.

Section 7 is the first section in the Legal Rights part of the *Charter*. This part extends to section 14, the right to an interpreter in legal proceedings. The legal rights part of the *Charter* is dominated by a fairly specific concern for the procedural rights of people who are being subjected to the criminal law process. The wording of section 7, however, is broad enough to allow its application to matters of substance as well as procedure, and beyond the criminal law context as well.

Section 7 of the *Charter* is also a "qualified" right. This means that the protections that the section affords to everyone's right to life, liberty and security of the person are limited by the terms of the provision itself. The state can limit everyone's right to life, liberty and security of the person so long as it does so in a manner that is in accordance with the principles of fundamental justice.

III. The Special Relationship Between Section 7 and Section 1

An implication that flows from section 7's qualified nature relates to the fact that all *Charter* rights, including section 7, are subject to reasonable limitation under section 1. Section 1 of the *Charter* reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[7]

Qualified rights such as section 7 of the *Charter* are, therefore, potentially doubly limitable. Any formal limitations on constitutionally protected rights are a matter of concern to rights advocates.[8] Accordingly, these concerns are amplified by the double-limitability of qualified rights. As it applies to section 7, however, double-limitability has become something of a moot point. Supreme Court authority suggests that a statute or other example of government action that is not in

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[7] *Ibid.*

[8] Peter Hogg introduces this theme of concern (which he does not share) in the following terms: "The idea that rights can be limited in pursuit of other legislative objectives is a difficult one. If a right can be limited, what is its value? Indeed, this question should really be reformulated as, what is a right?" [Peter W. Hogg, *Constitutional Law of Canada*, 2001 student ed. (Toronto: Carswell, 2001) at 730]. For an extensive review and analysis of the debate that attended the drafting of the *Charter* concerning whether or not it should contain a general limitation clause and, if so, what the nature of that clause should be, see Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996).

accordance with the principles of fundamental justice cannot be reasonably justified in a free and democratic society except in a time of national emergency.[9]

The qualified status of section 7 of the *Charter* does make a difference, however, in relation to the party who bears the burden of providing evidence regarding the legitimacy of the limitation of the right. When a party alleges that government activity infringes non-qualified *Charter* rights, that party bears the burden of proving the breach on a balance of probabilities. The onus of proof then shifts to the government to establish that the infringement is reasonably justified under section 1 of the *Charter.*[10] However, if a qualified right is at issue, then the party challenging the government activity has the burden of proving not only that the basic guarantee has been infringed, but also that the qualifying or limiting factor is not satisfied. Therefore, in the context of section 7 litigation, the challenging party has to establish not only an infringement of life, liberty or security of the person, but also that this infringement is not in accordance with the principles of fundamental justice.[11]

IV. Principles of Fundamental Justice and the "Economies of Adjudication"

The principles of fundamental justice that allow the right to life, liberty and security of the person to be limited are concepts as enigmatic and amorphous as any in our jurisprudence. Although referred to in section 2(e) of the *Canadian Bill of Rights*,[12] in that setting the principles of fundamental justice were quite clearly focussed upon procedural protections. As such, fundamental justice in the *Bill of Rights* is little more than another name for "natural justice." Natural justice is a well-established concept that is concerned with the standards of fair procedure, rather than the substantive fairness of the objective or outcome of the process. Indeed, one of the great ironies of our recent constitutional history is that the principles of fundamental justice replaced a reference to "due process" in the draft of what is now section 7 of

[9] See *R. v. Heywood*, [1994] 3 S.C.R. 761.

[10] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[11] *BCMVA*, *supra* note 4.

[12] S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [*Bill of Rights*].

the *Charter*, specifically so as to placate concerns that our courts would engage in substantive review of government activity as had occurred in the United States.[13]

The Supreme Court of Canada provided the first and most general indication of its approach to the principles of fundamental justice in *BCMVA*.[14] Without saying what exactly the principles of fundamental justice are, Lamer J. told us where the courts should look for them: "in the basic tenets of the legal system."[15] These principles include the standards of natural or procedural justice but Lamer J. held that the modifier "fundamental" obliged the Court to engage in review of the substantive justice of government activity as well. The Supreme Court did not then, and has not since, attempted to give "exhaustive content or simple enumerative definition"[16] to these principles. The court has chosen, instead, to identify the principles of fundamental justice on a case-by-case basis. However, notwithstanding Lamer J.'s assumption in *BCMVA* that this incremental process would result in the principles of fundamental justice taking on "concrete meaning,"[17] a coherent picture of them has not emerged.[18] An on-going debate exists about the identity and, indeed, the legal character of these substantive norms.[19]

Operating against the hope that a clearer picture of the principles of fundamental justice will emerge any time soon are Supreme Court decisions that demonstrate benefits to the judiciary of leaving its options open. These benefits may be termed "economies of adjudication." By economies of adjudication I mean processes for facilitating and fast-tracking judicial reasoning and decision writing that would

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[13] See K. Michael 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. 3.

[14] *Supra* note 4.

[15] *Ibid.* at 503.

[16] *Ibid.* at 513.

[17] *Ibid.*

[18] See Hogg, *supra* note 8 at 930, where he writes that "subsequent decisions [since *BCMVA* where Lamer J. indicated that the principles of fundamental justice are the central tenets of our legal system] have not succeeded in giving better definition to the basic tenets of the legal system. On the contrary, later decisions have demonstrated that there is little agreement as to what are that basic tenets of the legal system or even as to the sources from which the basic tenets might be derived."

[19] For a recent review of the debate over the substantive or procedural character of "fundamental justice," and an argument for a more purely procedural understanding of the concept, see Stephens, *supra* note 13.

otherwise require considerable attention to doctrine relating to other *Charter* sections.

One aspect of this phenomenon is reflected in the Court's rulings on the constitutionality of the common law. In case law from the early 1990s, the Supreme Court took considerable advantage of fundamental justice's lack of definition to allow itself to avoid doctrinal constraints and to respond to "pure" judicial instincts. The indication that the principles of fundamental justice are to be found in the basic tenets of our legal systems opened up huge tracts of judge-made law as potential candidates for these standards. On the other hand, the *Charter* may be used to challenge parts of the common law rules and principles that involve government actors.[20] What is missing is any theory to assist in distinguishing the parts of the common law that reflect the principles of fundamental justice, and the parts that are subject to review under those principles.

The Supreme Court has demonstrated how the absence of such a guiding theory allows it to fall back on such things as Blackstone-style, "test of time" analysis as to the constitutionality of a common law rule or principle. This was demonstrated in McLachlin J.'s decision for the majority in *R. v. Creighton*.[21] The majority upheld the low traditional standard for the mental element for unlawful act manslaughter. In doing so, the Court rejected arguments that this standard was constitutionally insufficient given (then) recent Supreme Court authority establishing high standards of subjective *mens rea* for murder.[22] As a prelude to her decision, McLachlin J. opined that the presumption that a common law rule is consistent with the principles of fundamental justice increases with the age of the rule.[23] This presumption operates, not *despite* the fact that we have no idea what the time-honoured principle

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[20] See *R. v. Rahey*, [1987] 1 S.C.R. 588; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

[21] [1993] 3 S.C.R. 3

[22] See *R. v. Martineau*, [1990] 2 S.C.R. 633.

[23] See *Creighton*, *supra* note 21 at 45, where McLachlin J. states:

> Before venturing on analysis, I think it appropriate to introduce a note of caution. We are here concerned with a common law offence virtually as old as our system of criminal law. It has been applied in innumerable cases around the world. And it has been honed and refined over the centuries. Because of its residual nature, it may lack the logical symmetry of more modern statutory offences, but it has stood the practical test of time. Could all this be the case, one asks, if the law violates our fundamental notions of justice, themselves grounded in the history of the common law?

is that supports the rule, but *because* we do not know. Assuming, as Blackstone largely did, that the common law is self-perfecting, its rules can reflect correct principles that may be beyond our ability to articulate.

In other cases from the first half of the 1990s, the lack of definition of the principles of fundamental justice allowed the Supreme Court to identify for itself fairly sweeping powers in relation to the review of judge-made criminal law under section 7 of the *Charter*. By locating the principles of fundamental justice among the basic tenets of the legal system, without having to say in precise terms what those principles are, Chief Justice Lamer in *R. v. Swain*[24] could claim that the Court had been engaged in a *Charter*-like enterprise before 1992. This was the basis for the Court's claim of the jurisdiction to fill in the holes in the common law left from its declaration that parts of it are inconsistent with the principles of fundamental justice and, therefore, of no force or effect under s. 52(1). Indeed, in that decision Lamer C.J. almost seems to invite counsel to invoke this pre-*Charter* rights-enforcing jurisdiction. This fast-track for rights enforcement, it seems, would allow counsel to avoid the doctrinal framework with which some aspects of *Charter* litigation have become encumbered. Thus, Chief Justice Lamer wrote:

> [I]t is not strictly necessary to invoke s. 52(1) of the *Constitution Act,* 1982 in order to challenge a common law, judge-made rule on the basis of the rights and values guaranteed by the *Charter* if a common law rule can be reformulated so as to attain its objectives while removing any inconsistency with basic principles [i.e. standards that are candidates for principles of fundamental justice], a judge is entitled to undertake such reformulation and is not obliged to seek jurisdiction for this action under 52(1).[25]

Mister Justice Cory in *R. v. Daviault*[26] extended these economies of adjudication. In that case Cory J. relied on Lamer C.J.'s decision in *Swain* to hold, in effect, that section 1 analysis is only a chore for judges who are not creative enough to devise constitutionally sufficient rules to replace ones that infringe section 7.[27]

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[24] [1991] 1 S.C.R. 933.

[25] *Ibid.* at 979.

[26] [1994] 3 S.C.R. 63.

[27] *Ibid.* at 93.

A final economy of adjudication is a by-product of the Supreme Court's response to a dilemma that arose in its section 7 jurisprudence. This dilemma concerned the relationship between section 7 and section 1 combined with the assumption that whatever the principles of fundamental justice may be, in the final analysis their "fundamental" character gives them absolute authority in our legal system. Presented in this way, the incongruity of activity that is inconsistent with the principles of fundamental justice — "fundamentally unjust" as it were — being "reasonably justified in a free and democratic society" effectively prevents laws that infringe section 7 from being considered under section 1.

The dilemma arises when it is concluded that section 7 is exclusively concerned with the rights of people who are challenging the constitutionality of government activity. Any interests that are served by the maintenance of a challenged law are to be considered under section 1. Such interests would include the state's reason for wanting to maintain the law which, in turn, would include protecting the security and equality rights of victims of criminal activity. McLachlin J. presented this perspective in her dissent in *R. v. Rodriguez*:

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by s. 7 should take place within the confines of s. 1 of the *Charter*.[28]

Although in dissent in *Rodriquez*, McLachlin's approach to section 7 was favoured by the majority of judges on the Supreme Court in a number of important decisions.[29] When this approach is coupled with the fact that government activity that infringes section 7 does not stand a realistic chance of being upheld under section 1, the interests that are served by the legislation being challenged receive

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

[29] See *e.g. R. v. Seaboyer*,[1991] 2 S.C.R. 577; *R. v. Gayme*, [1991] 2 S.C.R. 577; *Daviault*, *supra* note 26.

very little consideration. Thus the Court was criticized for showing insensitivity to victims in cases such as *R. v. Seaboyer*[30] and *R. v. Daviault*.[31]

The Supreme Court responded to these limitations by taking advantage of fundamental justice's lack of definition. In the absence of a clear idea as to what this concept is, it can be used to serve the Court's purposes. Sopinka J.'s decision for the majority in *Rodriquez* represented the beginning of the court's transfer of considerations that might otherwise be associated with section 1 analysis, into its analysis of the principles of fundamental justice. In *Rodriquez* Sopinka J. rejected McLachlin J.'s contention that there was no place in section 7 analysis for state interests to be balanced against the interests of the person challenging the law. Accordingly, Sopinka J. held that the sanctity of life is a principle of fundamental justice that the state can rely upon to justify the limitations that the assisted suicide provisions of the *Criminal Code*[32] place upon everyone's right to security of the person.[33] The economical aspect of this trend from the courts' point of view is that any of balancing of interests that is undertaken in the fundamental justice context is not subject to the doctrinal demands of the *Oakes* test, which applies to section 1 analysis.

More recently, the Supreme Court seems to have taken this process to the point at which it needs to convince itself, however unpersuasively, that a substantive distinction exists between balancing of interests in the fundamental justice context and doing so under section 1. In *R. v. Mills*[34] McLachlin and Iacobucci JJ. concede that the approaches are "quite similar"[35] although "several important differences"[36] remain. As it turns out, these differences includes the very reason that one might be concerned about the tendency to use the principles of fundamental justice as an outpost for section 1 issues. It is, furthermore, not a substantive distinction at all. Justices McLachlin and Iacobucci state:

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[30] *Ibid.*

[31] *Supra* note 26.

[32] *Criminal Code*, R.S.C. 1985, c. C-46, s. 241(b).

[33] *Rodriguez, supra* note 28 at 605.

[34] *Supra* note 3.

[35] *Ibid.* at para. 65.

[36] *Ibid.* at para. 66.

> If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the *Charter* rights.[37]

By way of substantive differences, the Court does not offer much. McLachlin and Iacobucci JJ. quote Lamer J.'s indication in *BCMVA* that the principles of fundamental justice are to be found in the basic tenets of our legal system. Section 1 concerns, on the other hand, are "the values underlying a free and democratic society, which are broader in nature."[38] Notwithstanding such "broadness," it must be assumed that at least some of the values that underlie a free and democratic society are also tenets of our legal system. One would certainly hope that this is the case. Accordingly, this pronouncement by the Court does not significantly advance our understanding of the principles of fundamental justice as they may be distinguished from section 1 concerns.

Furthermore, McLachlin and Iacobucci JJ.'s comparison of section 1 and section 7 in *Mills* rather disingenuously implies that section 1 analysis is a practical option after a law has been found to infringe section 7. As the Court itself has indicated, this is very unlikely. Accordingly, the Court skirts around what seems to be the real reason that "the s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by section 7."[39] They are the same thing. The differences between them are entirely formal. When interests are balanced under section 7 a burden is placed on the party challenging government activity that it does not have to bear when interests are balanced under section 1. Also, as compared to section 1 analysis, the Court is subject to far fewer doctrinal constraints when balancing interests under section 7.

In fact, a more theoretically coherent understanding of the principles of fundamental justice would allow for some balancing of interests in the context of section 7 analysis, including some of those identified by the Court in *Mills*: the security and equality rights of women and children. Excluded as candidates for principles of fundamental justice, however, would be principles that support conceptions of justice that are not primarily rights-based. Non-rights-based

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[37] *Ibid.*

[38] *Ibid.* at para. 67.

[39] *Ibid.* at para. 65.

conceptions of justice do exist and their dictates do deserve serious consideration. A sophisticated acceptance of the multifarious nature of justice allows us to understand how one version may be "fundamental" and yet amenable to other versions in the same legal system. This understanding could provide a real and distinct place for section 1 analysis of government activity that infringes section 7.

V. Taking Justice Seriously

As outlined above, the Supreme Court's indication that the principles of fundamental justice lie somewhere among the "basic tenets of the legal system" has not subsequently led the Court to a clear picture of the nature of these principles. The case law reflects a lack of consensus even in relation to how the field of candidates for such principles might be narrowed. This is the case notwithstanding the fact that some important guides have always been close at hand. The most coherent reading of section 7 suggests that the range of candidates for principles of fundamental justice is narrowed by at least two factors. The first factor is the precise terms of section 7's qualifying concept: fundamental *justice*. The second factor is the role of fundamental justice in qualifying the scope of the right to life, liberty and security of the person in particular.

Alisdair MacIntyre reminds us that there are many conceptions of justice. Furthermore, some conceptions of justice are rights respecting and some may be indifferent or even opposed to the concept of rights. MacIntyre writes:

> [A] set of conflicting conceptions of justice [exists], conceptions which are strikingly at odds with one another in a number of ways. Some conceptions of justice make the concept of desert central, while others deny it relevance at all. *Some conceptions appeal to inalienable human rights*, others to some notion of social contract, and others again to a standard of utility.[40]

From among the possible values that may give substance to section 7's reference to "the principles of fundamental justice," logic strongly suggests that these will be principles that "appeal to ...human rights" rather than ones that are "strikingly at odds" with them. This does not mean, however, that conceptions of justice that are

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[40] Alisdair MacIntyre, *Whose Justice? Which Rationality*? (Notre Dame, Ind.: University of Notre Dame Press, 1988) at 1 [emphasis added].

indifferent to or opposed to rights theory are illegitimate, or that they have no significance in our legal system.

Without belabouring possible distinctions between rights and freedoms, civil liberties and human rights,[41] it is safe to say that the *Charter* proclaims, and assists in protecting from government activity, a number of values, some of which at least qualify as human rights. Life, liberty and the concept of personal autonomy that "security of the person" in section 7 recognises are the Canadian version – absent property rights – of the classic triumvirate of natural rights that John Locke pronounced. With the ink barely dry on the English *Bill of Rights* (1689),[42] Locke's *Second Treatise on Government* (1690)[43] defended that experiment in limiting the power of the sovereign. Locke argued that the legitimacy of government activity is defined by the extent to which it respects and protects individuals' natural inalienable rights. Accordingly, of all the *Charter*'s guarantees, the rights in section 7 enjoy a pedigree that links them most directly to the dawn of modern human rights thought and the use of bills of rights to protect those rights.

Section 7, therefore, provides a rarefied and privileged context for the introduction of the concept of justice into the Constitution. In the very section of the *Charter* that distils the human rights project into three primary rights, logic demands that the reference to "justice" in that section be invested with a meaning that is consistent with that project. Supporting this argument is the logical incoherence of allowing the principles of fundamental justice to include, or be confined to, principles that are not consistent with the human rights project. As an initial matter, the Supreme Court itself has held that the principles of fundamental justice include *Charter* rights, not least of which are life, liberty and security of the person.[44] That being the case, allowing the principles of fundamental justice also to embrace values that are at odds with human rights thought attempts simultaneously to push our sense of the nature of the concept in opposite directions.

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[41] Justice Rosalie Abella, for example, argues that only anti-discrimination rights are "human rights," assigning to negative rights and liberties the title and lesser status of civil liberties. Justice Rosalie Silberman Abella, "A Generation of Human Rights: Looking Back to the Future" (1998) 36 Osgoode Hall L.J. 597.

[42] *An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (U.K.), 1 Wm. & Mary, Sess. 2, c. 2.

[43] J. Locke, *The Second Treatise of Government* (Indianapolis: Bobs-Merrill, 1952).

[44] *Mills, supra* note 3 at para. 62.

Furthermore, allowing fundamental justice to embrace non-rights-respecting values threatens to obviate our understanding of the need for section 7 in the first place. As emphasised above, conceptions of justice exist which are indifferent to, or at odds with, theories about inalienable rights. If section 7 protects everyone's right to life, liberty and security of the person except when governments are responding to dictates of a version of justice that is indifferent or opposed to rights, then the section adds nothing to the pre-*Charter* situation. This is what governments have always done. No constitutional guarantee would be required in order to protect this state of affairs. Peter Hogg captures this point in his review of arguments that are opposed to formal limits being imposed upon constitutional rights: "If a right could be taken away for only the reasons that would be sufficient if no right existed, then the claim to a right is pointless."[45] Accordingly, limiting the principles of fundamental justice to those values that support the human rights project rescues the significance of this critical section of the *Charter*.

VI. Doctrinal Benefits of Making "Fundamental Justice" Appeal to Human Rights

Preceding parts of this discussion emphasised the lack of a clear distinction between the rationales and methods for allowing limitation of rights under section 7 and section 1 of the *Charter* respectively.[46] Some clarity would be brought to this state of affairs by emphasizing the human rights respecting nature of the principles of fundamental justice. Jamie Cameron identifies a way of conceptualizing the difference between section 1 and the principles of fundamental justice under section 7, which seems to appeal to the Supreme Court in *Mills*. Cameron writes that whereas the "basic tenets of the legal system ... [are] s. 7's terrain, ... democratic values fall ... under s. 1's mandate."[47] "Deference to democratic policy-making" is an example of democratic values, which Cameron would place under section 1.[48] An important characteristic of democratic policy-making is the pursuit of utilitarian

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[45] Hogg, *supra* note 8 at 730 [paraphrasing Ronald Dworkin's argument in *Taking Rights Seriously*, rev. ed. (Cambridge, Mass.: Harvard University, 1978)].

[46] See also Jamie Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*" (2000) 38 Alta. L. Rev. 1051; Leon E. Trakman, William Cole-Hamilton and Sean Gatien, "*R. v. Oakes* 1986-1987: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83; Andrew Lokan, "The Rise and Fall of Doctrine Under Section 1 of the *Charter*" (1992) 24 Ottawa L. R. 163.

[47] Cameron, *ibid.* at para. 33.

[48] Cameron faults the Court in *Mills*, however, for considering this under *Charter* s. 7, *ibid.*

agendas that benefit most people in society at the expense of the interests — or rights — of a few.

Utilitarianism is an entirely legitimate theme of policy making. It is, however, one that cannot be reconciled with strong human rights theory.[49] If the principles of fundamental justice are values that respect human rights theory, then utilitarianism's antipathy to strong rights claims disqualifies utilitarian considerations from being allowed to limit the right to life, liberty and security of the person under section 7. Section 1, however, continues to provide a home for utilitarian justifications for limiting rights. This, in turn, enhances our understanding of the substantive distinction between the different ways that *Charter* rights may be limited and gives substance to comments made by McLachlin and Iacobucci JJ. in *Mills*. Only a select range of rights-respecting principles will support infringements of life, liberty and security of the person. A broader range of justifications is available under section 1 analysis.

VII. The Minimum Content of Fundamental Justice: An "Incompletely Theorized Agreement"

There is an on-going debate over the precise nature and content of human rights and fundamental freedoms.[50] Notwithstanding this debate, however, there is also considerable consensus in relation to the idea that whatever these normative standards may be in precise terms, their general purpose is to recognize, and compel respect for, the equal worth and dignity of every individual human being.[51] This theme of consensus allows us to provide some minimum content to the principles of fundamental justice. When the principles of fundamental justice are understood to

[49] Jeremy Bentham (1748-1832), the leading early utilitarian theorist, famously dismissed the French Declaration of Rights as "nonsense upon stilts." See "Anarchic Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution" in *The Works of Jeremy Bentham, Volume Two* (New York: Russell and Russell, 1962) at 501. A rejection of utilitarianism has been a central theme of the work of Ronald Dworkin, the most influential contemporary defender of liberal rights theory. See *e.g.* "Reverse Discrimination" in Dworkin, *supra* note 45 at 232-238.

[50] See *e.g.* Michael J. Perry, "Are Human Rights Universal? The Relativist Challenge and Related Matters" (1997) 3 Hum. Rts. Q. 461.

[51] See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithica: Cornell University Press, 1989) at 25: "Equality, autonomy, and equal concern and respect are very abstract values that can be realized in a great variety of ways. Nonetheless, an international consensus has formed around this particular list of human rights, not some other list."

reflect a conception of justice that is consistent with human rights theory, then government activity that is inconsistent with the *sine qua non* of human rights – the equal worth and dignity of every individual human being – must offend those principles. Purely utilitarian considerations, such as those relating to administrative efficiency, would fall into this category. This does not mean, however, that there would not be a place for arguments of efficiency under section 1. Furthermore, an understanding that "justice" as referred to in section 7 is "fundamental" in a sense that is relative to that section, allows the real possibility that some infringements of section 7 may be upheld under section 1, even when there is no national emergency.

It may be argued that this approach promises only a "non-definition" of the principles of fundamental justice: we will know them in their breach rather than in themselves. In fact, however, this approach reflects the kind of "incompletely theorized agreement" that Cass Sunstein identifies as "an important phenomenon in constitutional law and politics; it makes constitution-making possible."[52] Sunstein continues:

> My basic suggestion is that people can often agree on constitutional practices, and even on constitutional rights, when they cannot agree on constitutional theories. In other words, well-functioning constitutional orders try to solve problems of deliberative trouble, through reaching incompletely theorized agreements....[P]eople can agree that a certain practice is constitutional or is not constitutional, even when the theories that underlie their judgments sharply diverge.[53]

The Supreme Court has demonstrated the way in which the principles of fundamental justice can limit the right to life, liberty and security of the person in a manner that remains consistent with the human rights project. In *R. v. Mills*,[54] for example, the Court held that *Criminal Code* provisions restricting access to complainants' records in sexual assault cases was an infringement of accused persons' right to full answer and defence. This right is an incident of *Charter* section 7's liberty guarantee. The Court also held, however, that this infringement was in accordance with the principles of fundamental justice.

The Court's analysis demonstrated considerable deference to the policy

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[52] Sunstein, *supra* note 5 at 50.

[53] *Ibid.*

[54] *Supra* note 3.

challenges faced by Parliament in drafting the *Criminal Code* provisions. As discussed above, arguments of "pure" policy may be utilitarian in nature and, therefore, indifferent to rights issues. Significantly, however, the Court in *Mills* recognized that in drafting the *Criminal Code* provisions under review in that case, Parliament's primary policy objective was to balance the *Charter* rights of both persons accused of sexual offences against the *Charter* rights of complainants.[55] The Court accepted that these latter rights claims were part of the principles of fundamental justice and represented a sufficient basis for limiting the liberty rights of accused persons.

The *Mills* decision has been criticized for the way in which it allows section 7 analysis to continue to drift away from an exclusive concern for the rights of persons charged with criminal offences.[56] As well-founded as some of these concerns may be, it is nonetheless the case that the Court's analysis of the principles of fundamental justice in *Mills* demonstrates how that concept can operate to limit section 7 rights from within the context of human rights theory. The need to balance competing rights claims by identifying which of them has more "weight" in particular circumstances is a well-established part of the contemporary interest in "taking rights seriously."[57]

VIII. Conclusion

Although they are the concepts that allow governments to limit the most basic values in the human rights canon, the principles of fundamental justice in section 7 of the *Charter* remain amazingly ill-defined. Operating against their better definition is the extent to which their obscurity offers the courts certain economies of adjudication. Notwithstanding these benefits for the judiciary, this central part of the Constitution needs more of the coherent meaning and predictability of application that are basic characteristics of the rule of law. Serious thinking about the nature of justice, and an analysis of that concept's unique situation in section 7 of the *Charter*, suggests that "fundamental justice" is best understood as the complement of principles that support human rights theory. This interpretation of fundamental justice retains central aspects of the Court's section 7 jurisprudence, including the power of

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[55] *Ibid.* at para. 59.

[56] Cameron, *supra* note 46. See also Don Stuart, "*Mills*: Dialogue with Parliament and Equality with Assertion at What Cost?" (2000) 28 C.R. (5th) 275.

[57] Dworkin, *supra* note 45 at 26.

substantive judicial review. At the same time it relieves the Court of the quixotic obligation of identifying principles of justice that have some absolute premium in our legal system. Defining fundamental justice in relation to human rights theory would allow a more honest and doctrinally defined debate about reasonable limitations on section 7 rights by policy imperatives and alternative interpretations of justice under section 1 of the *Charter*.