THE *CHARTER* AND SUBSTANTIVE CRIMINAL "JUSTICE"

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Not long ago, Don Stuart expressed the hope that "the Supreme Court of Canada will stay the distance in its attempts, over these past 10 years, to reform the criminal justice system by a strong assertion of *Charter* values."[1] The implication of such a statement is clear: the *Canadian Charter of Rights and Freedoms*,[2] in the hands of the Supreme Court, has been a powerful instrument of criminal law reform. While there are those who might doubt that the reform has been "radical," it is hard to deny that the *Charter* has had a significant impact in the areas of substantive criminal law, criminal procedure, and criminal evidence.

The scope of the impact is indicated by the appearance in recent years of such volumes as Stuart's *Charter Justice in Canadian Criminal Law*,[3] S. J. Whitley's *Criminal Justice and the Constitution*,[4] D.C. McDonald's *Legal Rights in the Canadian Charter of Rights and Freedoms*,[5] J. Atrens' *The Charter and Criminal Procedure*,[6] D. Paciocco's *Charter Principles and Proof in Criminal Cases*,[7] and W. H. Charles, T.A. Cromwell and K.B. Jobson's *Evidence and the Charter of Rights and Freedoms*,[8] not to mention countless articles and comments.

Clearly, the topic "*Charter* Implications in Criminal Justice" is vast, and it would be a hardy or hopelessly ingenuous soul who would attempt to summarize the area in a brief paper. Being neither very hardy, nor, (I hope), very naive, I propose to narrow my focus somewhat.

I take my lead from an observation made by another academic commentator, S.J. Usprich: "*Vaillancourt* has a fair claim to be considered the most important criminal law decision in Canadian legal history."[9] The reference is to the

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[1]"*Wholesale Travel*: Presuming Guilt for Regulatory Offences is Constitutional but Wrong" (1992) 8 C.R. (4th) 225 at 234.

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

[3](Toronto: Carswell, 1991).

[4](Toronto: Carswell, 1989).

[5](Toronto: Carswell, 1989).

[6](Toronto: Butterworths, 1989).

[7](Toronto: Carswell, 1987).

[8](Toronto: Butterworths, 1989).

[9]"Felony Murder and Far Beyond" (1988) 60 C.R. (3d) 332 at 336.

Supreme Court's decision in *Vaillancourt* v. *R.*,[10] which, at the very least, was a remarkable departure. The case involved the application of s. 7 of the *Charter* to a question of substantive criminal liability.

That conjuncture is the focus of this paper. Section 7, which has been called "the most eloquent but mysterious provision" of the *Charter,*[11] guarantees the rights to "life, liberty and security of the person," or at least, the right "not to be deprived thereof except in accordance with the principles of fundamental justice." This paper examines how the Supreme Court of Canada has used the notion of fundamental justice to establish the basic parameters of criminal liability and to answer the question, "what is the minimal substantive content of offences?" Another way of formulating the question would be to ask: "What are the substantive prerequisites to concluding that a person is guilty and punishing him or her?" Note that, in this formulation, the question involves liability *and* penalty, and focuses on the person rather than the offence.

In this paper I am not explicitly concerned with what has been called "procedural justice," even where it involves the definition of offences,[12] a matter closely related the topic. Nor will I deal with other *Charter* provisions that could be invoked to challenge a criminal offence on substantive grounds. (An example of this is *Zundel* v. *R.*[13] in which s. 181 of the *Criminal Code* was found to violate s. 2(b) of the *Charter.*) This is not to say that such cases are somehow less important, or less interesting. I am limiting myself to s. 7 in this way: first, because s. 7 explicitly requires reflection on "justice," and this seems an appropriate focus for a paper concerned with criminal *justice*; and second, because s. 7 involves examining the internal, or essential principles of criminal liability, as opposed to referring to an external standard like freedom of expression.[14]

Having said this by way of locating my inquiry, I propose to proceed in the

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[10](1987) 60 C.R. 289 (S.C.C.) [hereinafter *Vaillancourt*].

[11]E. Colvin, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 Can. Bar. Rev. 560 at 560.

[12]Here, I have in mind such matters as the "void for vagueness" doctrine, as elaborated, for example by Lamer J. in *Reference Re Criminal Code, Sections 193 and 195.1(1)(c)* (1990), 77 C.R. (3d) 1 at 26ff. (S.C.C.). To the extent that this principle applies, it applies not so much because the definition of an offence contains elements inconsistent with fundamental principles of criminal liability, but because the definition is such that persons affected cannot know what those elements are.

[13](1992) 16 C.R. (4th) 1 (S.C.C.).

[14]This is not to say, of course, that the violation of some other right or freedom will not be a factor in determining whether the principles of fundamental justice have been transgressed. Thus, for example, Wilson J. in *Morgentaler* v. *R.* (1988) 44 D.L.R. (4th) 385 (S.C.C.) opined that where s. 7 rights were violated in a way that also violated freedom of conscience, the principles of fundamental justice were, *ipso facto*, transgressed (at 494).

following manner. First, I will analyze the scope of s. 7's impact on substantive matters, and I shall outline some of the major cases and issues they involved. Then, I will address more specifically the question: "What account of 'justice' emerges from the cases?" This involves two kinds of questions: (1) where have the courts been going to find the principles of fundamental justice? and (2) what "tests" of justice can be identified as arising from the cases? The concept(s) of justice that seem to be emerging will be briefly evaluated by considering whether they are coherent and consistent, or ambiguous. The relationship between s. 7 and s. 1 of the *Charter* is especially relevant here. Because this relationship is problematic, notions of justice and "expediency" seem to become conflated in some of the cases. Finally, what might be involved in a coherent account of justice in this context will be considered, as well as a few of the implications.

The starting point for this kind of discussion must be Lamer J.'s (as he was then) judgment in *Re B.C. Motor Vehicle Act*,[15] which C. McDonald sees as "the governing case concerning the meaning of the principles of fundamental justice."[16] This case did not involve the *Criminal Code*, but a provision of a provincial statute creating an absolute liability offence. However, its implications for penal liability are generally undeniable.

This case made it clear that "fundamental justice" in s. 7 is not limited to procedural justice, but extends to matters of substance.[17] At the same time, Lamer J. drew a distinction between courts' deciding upon "the appropriateness of policies underlying legislative enactments," and measuring "the content of legislation against the guarantees of the Constitution."[18] One of the concerns about substantive fundamental justice is that it is arguably not for the courts to say what the *content* of laws *should* be. Thus, we encounter distinctions like that of Lamer J. just cited, and Colvin's between "legal means" and "social ends," between "the justice of the processes by which social objectives are pursued" and "the justice of the ends which are sought."[19]

The *Motor Vehicle Reference* also established that absolute liability, the exclusion of any element of fault, is inconsistent with principles of fundamental justice, at least where there is the possibility of imprisonment. While this clearly involves "substance," since it goes to the definition of the elements in offences, it is perhaps not "substantive" in the broadest sense, as Colvin explains:

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[15](1985), 48 C.R. (3d) 289 [hereinafter *Motor Vehicle Reference*].

[16]*Supra*, note 5 at 143.

[17]See, for example, Lamer J. at 305 and McIntyre J. at 300.

[18]*Ibid.* at 304.

[19]*Supra*, note 11 at 561.

> The question addressed by the court was whether or not culpability is a precondition for the sanction of imprisonment to be just. This is a question about how substantive rules of conduct can be enforced. It is a question about the means by which substantive goals can be pursued.[20]

To the extent that the distinction here is valid, it may be another basis for differentiating s. 7 from s. 2(b), which arguably would entail substantive review in a much broader form: "You may not make a law having this objective, because it violates freedom of expression."

The *Motor Vehicle Reference* validated, as part of a s. 7 inquiry, courts' consideration of the relationship between fault, moral culpability, or guilt and punishment, or other consequences of the conviction of an offence. It also suggested that for such relationships to be just certain minimum standards must be observed.

This approach has been pursued in *Vaillancourt* and its progeny, which have put an end to the doctrine of constructive murder in Canada. *Vaillancourt* involved s. 229(d) (s. 213(d) as it then was), of the *Criminal Code*. This section mandated conviction for murder without any requirement that the accused knew or ought to have known that death (or, for that matter, injury), would ensue from his or her act. A majority of the Court found this to be inconsistent with s. 7.[21] Subsequent cases have made it clear that nothing short of subjective advertence to the victim's death will suffice for the offence of murder in its various guises.[22]

While s. 7 apparently requires subjective *mens rea* for murder, that is not the case for all offences. Thus, although in *Vaillancourt* Lamer J. opined that, "[i]t may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act ... ,"[23] in *Logan* we find him saying: "the principles of fundamental justice require a minimum degree of mens rea for only a very few offences."[24] The lack of coherence

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[20]*Ibid.* at 567.

[21]McIntyre J., dissenting, expressed doubt about the courts' power to question Parliament's definition of "the elements of a crime" in terms of s. 7: *supra*, note 9 at 314. This is essentially a concern about how "substantive" the courts' review can be.

[22]See, for example, *R.* v. *Martineau* (1990) 79 C.R. (3d) 129 (S.C.C.), *R.* v. *Logan* (1990) 79 C.R. (3d) 169 (S.C.C.), *R.* v. *Rodney* (1990) 79 C.R. (3d) 187 (S.C.C.), and *R.* v. *Sit* (1991) 9 C.R. (4th) 126 (S.C.C.)

[23]*Supra*, note 10 at 325.

[24]*Supra*, note 22 at 178. This point has been invoked, for example, by some provincial courts of appeal in refusing to apply s. 7: see *R.* v. *Peters* (1991) 11 C.R. (4th) 48 at 53 (B.C.C.A.) and *R.* v. *Gingrich* (1991) 6 C.R. (4th) 197 (Ont. C.A.). Stuart sees the Supreme Court as back-pedalling in this regard: "[i]n *Wholesale Travel*, only Mr. Justice La Forest indicates that he would be reluctant to

involved in saying that a minimum *mens rea* is demanded by justice for only *some* criminal offences is a question to which we shall return.

In any event, s. 7 has been applied to other provisions that have sought to exclude, or to limit, the *mens rea* requirement in some way. For example, in *Hess* v. *R.*,[25] involving the former s. 146(1), the Supreme Court held that the provision which rendered the accused's belief about the complainant's age irrelevant was inconsistent with the principles of fundamental justice. Moreover, dissenting judges have seen the intoxication defence as involving s. 7,[26] and this section is also arguably relevant to other kinds of cases involving questions of mental capacity.[27]

A further dimension of s. 7's significance, specifically involving sentencing, arises in cases such as *R.* v. *Lyons*,[28] which addressed the "dangerous offender" provisions of the *Criminal Code*. This case considered "whether the imposition of preventive detention for an indeterminate period offends against the principles of fundamental justice."[29] In addition to the Supreme Court cases, many cases in the provincial courts of appeal have involved substantive applications of s. 7.[30] This also indicates the kinds of substantive issues upon which s. 7 has been brought to bear. A unifying theme in each of these cases is the attempt to define what level of fault or moral culpability must be present in order for the imposition

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accept a lower level of *mens rea* than subjective recklessness 'for most criminal offences' " (*supra*, note 1 at 233).

[25](1990), 79 C.R. (3d) 332 (S.C.C.) [hereinafter *Hess*].

[26]See, for example, Dickson C.J.C. in *R.* v. *Bernard* (1988), 67 C.R. (3d) 113 (S.C.C.) "This court has held that legislation which imposes the sanction of imprisonment without proof of a blameworthy state of mind violates the guarantee of fundamental justice contained in s. 7 of the Charter ..." (at 129); and Lamer C.J.C. in *Penno* v. *R.* (1990), 80 C.R. (3d) 97 (S.C.C.) "I am of the view ... that the unavailability of the defence of intoxication for general intent offences as interpreted by the courts is a limit on the rights of an accused entrenched in ss. 7 and 11(d) ... ." (at 111).

[27]Thus, although the *Charter* provision explicitly addressed in *R.* v. *Chaulk* (1990), 2 C.R. (4th) 1 (S.C.C.) was the application of s. 11(d), we find in that case language reminiscent of s. 7: "It is now necessary for this Court to reconsider its decision in *Schwartz* in order to redefine the scope of criminal liability in a manner that will bring it into accordance with the basic principles of our criminal law" (*per* Lamer C.J.C., at 42). See also A. Brudner, "Imprisonment and Strict Liability" (1990) 40 U.T.L.J. 738 at 758.

[28](1987), 61 C.R. (3d) 1 (S.C.C.) [hereinafter *Lyons*].

[29]*Ibid.* at 22.

[30]See, for example, *R.* v. *Burt* (1987), 60 C.R. (3d) 372 (Sask. C.A.) (striking down a provision of the Saskatchewan *Vehicles Act* creating vicarious liability); *R.* v. *Pellerin* (1989), 67 C.R. (3d) 305 (Ont. C.A.) (striking down a provision of the Ontario *Highway Traffic Act* creating vicarious liability); *R.* v. *Collins* (1989), 69 C.R. (3d) 235 (Ont. C.A.) (s. 7 requiring knowledge that victim was a police officer for first-degree murder conviction); *R.* v. *Finlay* (1991), 6 C.R. (4th) 157 (Sask. C.A.) (storing firearms in a careless manner, "mere negligence does not meet the fault requirement now enshrined in s. 7").

of criminal sanctions to accord with principles of fundamental justice?

In answering this question we must first ask, where have the courts been looking for the principles of fundamental justice? Although it is not a case involving questions of "substantive justice," in *R.* v. *Hebert*,[31] McLachlin J. offers a basic structure for classifying possible sources. Beginning from Lamer J.'s observation that "the principles of fundamental justice are to be found in the basic tenets of our legal system," McLachlin J. suggests we go to the existing legal rules relating to the issue in question, as these will give some insight into those basic tenets. However, "existing common law rules may not be conclusive; only a fundamental principle of justice under s. 7 ... may be broader and more general than the particular rules which exemplify it."[32] Thus, a court should refer to the *Charter* to gain insight into the scope of this concept.

The determination of s. 7 rights requires reference to the related rights enumerated in ss. 8-14. Beyond that, a court may have recourse to "the general philosophy and purpose of the *Charter*" and of the particular *Charter* guarantee. The cases involving substantive applications of s. 7 exploit these various strategies although not always in a systematic fashion, and in ways that suggest that the strategies may be largely rhetorical.

Different cases emphasize different sources for the principles of fundamental justice. The *Motor Vehicle Reference* recognizes a wide range of possible sources. We have already alluded to "the basic tenets of our legal system," but these may be found in a variety of places. One of these places is the common law: thus, *actus non facit reum, nisi mens sit rea*.[33] Many of these fundamental common law principles have been incorporated into the *Charter*, in ss. 8 to 14, to "provide an invaluable key to the meaning of principles of fundamental justice."[34] Other such principles "have found expression in the international conventions on human rights."[35] All of them can be traced ultimately to a philosophical conception of "the dignity and worth of the human person."[36] Lamer J. suggests that the inquiry involves considering a complex set of factors:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our

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[31][1990] 2 S.C.R. 151.

[32]*Ibid.*

[33]*Supra*, note 15 at 318.

[34]*Ibid.* at 309.

[35]*Ibid.*

[36]*Ibid.*

legal system, *as it evolves*.[37]

Although, as McLachlin J. notes in *Hebert*, the *status quo* cannot be determinative, some cases do emphasize existing "rules" as criteria. In *Beare* v. *R.*,[38] a case involving the question of fingerprinting pursuant to the *Identification of Criminals Act*, La Forest J. invoked Lamer J.'s language in the *Motor Vehicle Reference*, and his own language in *Lyons*, to the "basic principles of penal policy that had animated legislative and judicial practice in Canada and other common law jurisdictions."[39] In this case, he found those principles in the existing law. Thus, "the common law experience strongly supports the view that subjecting a person to being fingerprinted ... does not violate fundamental justice"[40] and, "[w]hile [legislative practice in other jurisdictions is] not conclusive, this too suggests that compulsory custodial fingerprinting does not offend against the principles of fundamental justice."[41]

In *Kindler* v. *Canada (Minister of Justice)*,[42] a case determining whether the individual should be extradited to face the possibility of the death penalty, McLachlin J. again showed significant deference to the rules and understandings with respect to the matter in issue. She noted that "a contextual approach which takes into account the nature of the decision to be made must be adopted."[43] "Thus," she continued, "the Court in defining the principles of fundamental justice relevant to the extradition draws upon principles and policies underlying extradition law ... ."[44]

This kind of approach, a deference to the basic tenets defined in terms of the law relating to the subject matter of the dispute, conceals an ambiguity and a tautology. The ambiguity lies in the difficulty of ascertaining, in a given instance, what is a "basic tenet" and what is a challengeable "rule." Thus, while the cases regularly recite the observation that "the common law is not determinative," they do not articulate criteria for ascertaining when it does express the basic tenets and when it does not. Wilson J., in the *Motor Vehicle Reference*, notes that "not all principles of law are covered by the phrase [basic tenet] only those which are basic

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[37]*Ibid.* at 318. The last three words quoted introduce an element of relativity into the concept.

[38](1988), 66 C.R. (3d) 97 (S.C.C.).

[39]*Supra*, note 28 at 23.

[40]*Supra*, note 38 at 113.

[41]*Ibid.*

[42](1991), 8 C.R. (4th) 1 (S.C.C.).

[43]*Ibid.* at 18. In this regard, she cited Sopinka J. in *Syndicat des employés de production du Québec et de l'Acadie* v. *Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 897 at 895-96: "the rules of natural justice and the duty of fairness are variable standards."

[44]*Ibid.* at 19.

to our system of justice."[45] In dissent, in *R.* v. *Martineau*,[46] L'Heureux-Dubé J., referring to the statutory provisions in question, observed:

> The fact that the principles embraced by s. 213(a) have existed for over 300 years is in itself relevant, though not necessarily determinative, of whether or not a rule of 'fundamental justice' has been breached by virtue of their adoption by the Parliament of Canada.[47]

Perhaps s. 213(a) incorporates a principle of fundamental justice, especially if, as we shall see some judges maintaining, the interests of society are to be assimilated to the inquiry into justice. The approach involves a tautology in that, potentially, the criterion for determining whether a rule accords with fundamental justice is the existence of the rule itself.

Existing law relative to the matter in question is not the only place the courts have looked to determine the principles of fundamental justice. They have also referred to other *Charter* rights,[48] to the broad philosophy of the *Charter*, to broader ethical concerns,[49] to "public opinion,"[50] and, probably, to their own intuitions.

Having thus indicated where the courts have been looking for criteria for defining "principles of fundamental justice," I want now to move on to the closely related question of the kinds of criteria they have been identifying and using.

The base criterion for determining the minimal content of offences might be described as "moral proportionality." Certainly, this is the criterion which seems to emerge from such core cases as the *Motor Vehicle Reference* and *Vaillancourt*. To the extent that such cases invoke basic tenets, or common law principles, they do so in so far as these are seen to embody more fundamental notions.

One must start with the *Motor Vehicle Reference*. Lamer J. said that "[a] law that has the potential to convict a person who has not really done anything wrong

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[45]*Supra,* note 15 at 331.

[46]*Supra*, note 22.

[47]*Ibid.* at 160.

[48]See *Motor Vehicle Reference*, *supra* note 15, and *Morgentaler* v. *R.*, *supra*, note 14, *per* Wilson J. at 494: "I believe, therefore, that a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elswehere in the Charter cannot be in accordance with the principles of fundamental justice."

[49]Again, see the *Motor Vehicle Reference*, *ibid.*, and Wilson J. in *Morgentaler*, *ibid.*, at 495-96, referring to C.E.M. Joad, *Guide to the Philosophy of Morals and Politics.*

[50]See *Kindler*, *supra* note 42 at 19, 20 (*per* McLachlin J.).

offends the principles of fundamental justice... ."[51] In other words, "it has from time immemorial been part of our system of laws that the innocent not be punished."[52] This principle is a part of our law and may be found there, but its source ultimately lies beyond that, upon "belief in the dignity and worth of the human person."[53] Lamer J. does not detail exactly how the principle is derived from the belief, and I am not sure that it is unproblematical, but I shall not pursue it here.

It is worth noting that we do encounter it elsewhere. For example, in *Hess*, where Wilson J. says that our law's "profound commitment to the principle that the innocent should not be punished ... stems from an acute awareness that to imprison a 'mentally innocent' person is to inflict a grave injury on that person's dignity and sense of worth."[54] I am not sure that this statement explains why such punishment is unjust.

In *Vaillancourt*, Lamer J. saw punishing the "morally innocent" as inconsistent with fundamental justice, and suggested that "as a general rule, the principles of fundamental justice require proof of a subjective *mens rea with respect to the prohibited act* ... ."[55] I have emphasized the latter words to highlight the distinction between the prohibited act, and the consequences flowing from such an act (and, for that matter, the circumstances surrounding the act). To say that there must be subjective *mens rea* with respect to the prohibited act is not to say that the same is true with respect to consequences. However:

> ... there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime.[56]

For such crimes a "special mental element" gives rise to "moral blameworthiness," which alone can justify the stigma and sentence attached to conviction.[57]

There is an ambiguity here. *Vaillancourt* involved the offence of murder defined in terms of consequences, that is, causation of death. Was Lamer J. saying that, for all crimes, subjective *mens rea* with respect to the prohibited act is

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[51] *Supra*, note 15 at 300.

[52] *Ibid.* at 318.

[53] *Ibid.*

[54] *Supra*, note 25 at 340, 342.

[55] *Supra*, note 10 at 325.

[56] *Ibid.*

[57] *Ibid.* at 326.

required, but where the definition of the offence includes consequences, only some offences will require subjective *mens rea* with respect to that act? Or was he saying that whether an offence is defined in terms of an act alone, or an act plus consequences, there are only some offences which require a minimum mental element? *R.* v. *Peters*,[58] a case involving the offence of "wilfully setting fire to anything that is likely to cause" certain specified things to catch fire, seems to support the former view.

McEachern C.J.B.C. saw *Vaillancourt* and related cases as "requiring subjective foresight of consequences as an element of *mens rea* in some serious criminal offences."[59] Other cases are less explicit, but tend to involve offences in which some notion of consequences is present.[60] Lamer C.J.C. himself, in the later case of *R.* v. *Wholesale Travel*,[61] does not insist on the distinction in evaluating a *Competition Act* offence that was not defined in terms of consequences.

Lamer J., as he was then, pursues his general theme in such cases as *Martineau* and *Logan*. In the former, he says, that "[t]he essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender,"[62] and "[t]he effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender... ."[63]

Note the importance that Lamer J. attaches to stigma. In *Logan*, he said that the stigma attaching to a particular offence is the primary criterion in determining whether a minimum degree of *mens rea* is required, the available penalties being only "a secondary consideration."[64] This emphasis raises certain difficulties, not the least of which is why stigma should be so critical in deciding whether justice requires a minimum degree of moral blameworthiness. For, as McIntyre J., dissenting in *Vaillancourt* said, "[t]he principal complaint ... is not that the accused

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[58](1991), 11 C.R. (4th) 48 (B.C.C.A.).

[59]*Ibid.* at 53. See also *R.* v. *Durham* (1991), 6 C.R. (4th) 178 (Ont. Gen. Div.).

[60]See, for example, *R.* v. *Finlay*, *supra*, note 30, and *R.* v. *Gingrich* (1991), 6 C.R. (4th) 197 (Ont. C.A.). In the latter, Finlayson J.A. said that "this element of moral blameworthiness, by itself, does not engage the concept of a subjective intent for every criminal act" (at 208). However, this was said in the context of considering criminal negligence, which is criminal only by virtue of its consequences.

[61](1991), 8 C.R. (4th) 145 (S.C.C.).

[62]*Supra*, note 22 at 139.

[63]*Ibid.* at 138.

[64]*Ibid.* at 178. "It should be noted that, as a basis for a constitutionally-required minimum degree of mens rea, the social stigma associated with a conviction is the most important consideration, not the sentence."

should not have been convicted of a serious crime deserving of severe punishment, but simply that Parliament should not have chosen to call that crime 'murder'."[65] This sentiment was echoed by L'Heureux-Dubé, also dissenting, in *Martineau* where she stated:

> "If the apprehension is that the offenders in question will suffer from their 'murderer' label, I suspect that they will fare little better as 'manslaughterers'."[66]

Another difficulty is determining just what qualifies as sufficient "stigma" to elevate an offence to one of the "only ... very few" offences requiring a minimum *mens rea*. For example, in *R.* v. *Durham,* Moldaver J. expressed this uncertainty in regard to the offence of storing firearms in a careless manner:

> I must confess that I have some difficulty determining just what criteria ought to be considered in deciding the nature and degree of the stigma that might flow from a conviction under s. 86(2) ... Indeed, my uncertainty extends beyond s. 86(2) into the realm of each and every other criminal offence ... It would appear that the concept is rooted in some form of public consensus but I am not at all certain whether this consensus depends on the status of the offender or the status of the offence or both ... .[67]

If Moldaver J. is right, this suggests a curious way in which public opinion would feed into the notion of fundamental justice. It would be the touchstone for measuring stigma and thus the sanctions to which a convicted person might be exposed. In this sense, justice would vary with the public consensus.

A more fundamental difficulty is whether stigma is an appropriate criterion for determining what the *mens rea* must be. If the principle is that a person should be convicted only where he or she is morally blameworthy, and moral blameworthiness is equated in some way with subjective awareness, should we not say that justice requires that before he or she can be convicted of any offence, he or she must have subjective *mens rea* with respect to all the elements of the *actus reus* of the offence? For example, Cairns Way has noted that stigma attaches to any criminal offence.[68] Conviction entails attributing guilt for particular forbidden conduct, with whatever stigma attaches. Arguably, that stigma should attach only where there is corresponding moral fault.

Before concluding this section, I want to consider the Supreme Court's

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[65]*Supra*, note 10 at 315.

[66]*Supra*, note 22 at 163.

[67]*Supra*, note 59 at 192. Compare McEachern C.J.B.C.'s admission in *Peters, supra*, note 57 at 54 to "some difficulty distinguishing levels of social stigma attached to theft as compared with other offences ... ." In *Finlay, supra*, note 30, the Saskatchewan Court of Appeal found that sufficient stigma attached to a s. 86(2) conviction to require a minimum *mens rea*.

[68]"Constitutionalizing Subjectivism: Another View" (1990) 79 C.R. (3d) 260.

developing conception of substantive justice as it appears in certain other contexts.

One of these is the first-degree murder situation. First-degree murder carries with it greater punishment and greater stigma. In *Luxton* v. *R.*, Lamer C.J.C. said:

> The decision of Parliament to elevate murders done while the offender commits forcible confinement to the level of first degree murder is consonant with the principle of proportionality between blameworthiness of the offender and the punishment.[69]

The greater moral blameworthiness lies in the fact that there is not only murder, but the commission of another offence. A variation on the first-degree murder theme occurred in *R.* v. *Collins*,[70] where the aggravating factor was the status of the victim, a police officer. The Ontario Court of Appeal held that s. 7 would not be violated if a special *mens rea* were read into the offence:

> ... if s. 214(4)(a) is interpreted to require proof of such knowledge [that the victim is a police officer] before the murder can be classified as first degree murder, then a heavier sentence can be justified on the basis of added moral culpability or as an additional deterrent on the grounds of public policy.[71]

Again, s. 7 dictates what the substantive basis for the particular criminal liability must be. Here, there must be a *mens rea* corresponding to an aggravating circumstance. In passing, I would note that Goodman J.A. uses the word "justified" ambiguously. If the justification is "moral culpability," then the word suggests "justice" in the sense that the Supreme Court has been developing; if the justification is "deterrence on the grounds of public policy," then either the definition of justice is being expanded, or the court is talking about something else. I shall refer to this point later.

The issue also has other dimensions which arise from "moral incapacity": situations like intoxication and insanity. The former was addressed in *Bernard*. Dickson C.J.C., joined in dissent by Lamer J. and, on these points, by La Forest J., would have overruled the Court's decision in *Leary* v. *R.*,[72] partly on the basis

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[69](1990), 79 C.R. (3d) 193 (S.C.C.). Compare *Arkell* v. *R.* (1990), 79 C.R. (3d) 207 (S.C.C.), in which Lamer C.J.C. sees the greater moral blameworthiness as residing in the perpetrator's "illegally dominating" another person (at 214).

[70]*Supra*, note 30.

[71]*Ibid.* at 265.

[72][1978] S.C.R. 29.

of s. 7.[73] He quoted from his dissent in *Leary*:

> The notion that a court should not find a person guilty of an offence against the criminal law unless he has a blameworthy state of mind is common to all civilized penal systems. It is founded upon respect for the person and for the freedom of human will. A person is accountable for what he wills. When, in the exercise of the power of free choice, a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by the criminal law, he must accept the sanctions which that law has provided for the purpose of discouraging such conduct. Justice demands no less.[74]

Here, albeit in a pre-*Charter* context, the explicit link between guilt based on a blameworthy state of mind and justice is made. Incidentally, this account adds an element to the "worth of the person-justice" connection by specifying the importance of the will.[75] If we postulate that the will, or the power of choice, is important to what we are as persons, then justice can perhaps be explained in terms of attaching consequences only to the exercise of that human faculty. This does not, of course, necessarily answer the question of whether the will is to be identified with positive awareness or advertence.

Dickson C.J.C. then goes on to argue that, by in effect imposing "a form of absolute liability on intoxicated offenders," *Leary* is "entirely inconsistent with the basic requirement for a blameworthy state of mind as a prerequisite to the imposition of the penalty of imprisonment" enunciated in such cases as the *Motor Vehicle Reference* and *Vaillancourt*.

The judges upholding the *Leary* rule (McIntyre, Beetz, Wilson, L'Heureux-Dubé), implicitly accepted the s. 7 "moral blameworthiness" concept, but held that it does not offend the rule. McIntyre J. stated that "the morally innocent ought not to be convicted" and this principle is a "fundamental premise," an "essential principle of criminal law." He found that the principle was consistent with the *Leary* rule. Thus, he says: "the *Leary* rule recognizes that accused persons who have voluntarily consumed drugs or alcohol, thereby depriving themselves of self-control, leading to the commission of a crime, are not morally innocent, and are indeed criminally blameworthy."[76] In other words, the rule does not offend the "will" principle enunciated by Dickson C.J.C. It recognizes the will of the offender, but says that, if the offender exercises his will so as to deprive himself

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[73]Here, of course, the operation of the *Charter* is rather different from the usual case. What is in issue is not a statutory provision, but a common law "rule."

[74]*Supra,* note 72 at 34.

[75]This term is, of course, ambiguous, in that one of its meanings involves voluntariness in the sense of control and thus relates to the *actus reus*. The context here suggests that Dickson C.J.C. was using "will" in the broader sense of control based on awareness.

[76]*Supra*, note 26 at 152.

of further freedom of will, it is not unjust to hold him accountable for resulting behaviour.

A response to this might be to insist that justice requires not only the operation of the will principle, but also the presence of proportionality. How can the willed/knowing act of becoming intoxicated be proportioned to the wide range of consequences that may ensue? McIntyre J. might reply that the *Leary* rule, by offering a formula permitting differential treatment for different kinds of consequences, is fair in this regard. What McIntyre J. does say suggests that he may have fallen into the kind of tautology mentioned earlier; the rule, "intrudes upon the security of the person only in accordance with sound principle and within the established boundaries of the legal process."[77] But he seems to define those boundaries in terms of the rule itself. His position makes it unnecessary for him to embark on a s. 1 analysis, which arguably might be the appropriate locus for justification of the *Leary* rule.

I find Wilson J.'s opinion rather incoherent. She seems to say that the *Leary* rule is not inconsistent with s. 7 because it does not relieve the Crown of proving intent. But, in a sense, it does. If the trier of fact doubts that there was such intent *because the accused was intoxicated*, the lack of intent becomes irrelevant. Wilson J. also addresses the point raised by McIntyre J., but does not really resolve it:

> It does not follow from [the *Motor Vehicle Reference* principle], however, that those who, through the voluntary consumption of alcohol or drugs, incapacitate themselves from knowing what they are doing fall within the category of the "morally innocent" deserving of such protection. This is not to say that such persons do not have a right under s. 7 ... of the Charter to be protected against punishment that is disproportionate to their crime and degree of culpability ... They do ... .[78]

The other kind of "moral incapacity" that I wish to mention is insanity. In *R. v. Chaulk*[79] one of the issues was the meaning of "wrong" as used in the former s. 16(2). Perhaps because the Court was considering not the constitutionality of the statutory provision, but simply its own previous interpretation of the provision, the *Charter* was not explicitly invoked. However, some of what was said is reminiscent of my analysis so far. Lamer C.J.C. said:

> The rationale underlying the defence of insanity in Canada ... rests on the belief that persons suffering from insanity should not be subject to standard criminal culpability with its resulting punishment and stigmatization. This belief, in turn, flows from the principle that individuals are held responsible for the commission

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[77] *Ibid.*

[78] *Ibid.* at 159.

[79] *Supra*, note 27.

> of criminal offences because they possess the capacity to distinguish between what is right and what is wrong.[80]

This language suggests the potential relevance of s. 7 to the insanity issue. For example, if Parliament were to enact a law saying that insanity is no defence to a criminal charge, or even that a person may not invoke the insanity defence if he or she, in spite of mental disorder undermining his or her power of moral discernment, knew the act was illegal, a s. 7 challenge could be mounted. Another dimension to the insanity issue which I will examine later is the fact that, though not held criminally responsible because of the mental disorder, the accused might nevertheless be subject to confinement on other grounds.

Other dimensions of the general issue are raised by so-called "regulatory offences." In the *Motor Vehicle Reference,* it was decided that absolute liability was inconsistent with imprisonment. Again, such a bald assertion conceals an ambiguity. It was imprisonment, (or the possibility of imprisonment), that engaged s. 7 in the first place: imprisonment provided the requisite infringement of the right to liberty. Arguably, if the penalty had been only a fine, s. 7 would not have been engaged. Thus, strictly speaking, the Court did not decide whether absolute liability *per se* violates a principle of fundamental justice.[81] Nor did it decide whether strict liability coupled with imprisonment does.[82]

More recently, in *R.* v. *Wholesale Travel Group,*[83] the second question seems to have been answered. Specifically addressing the issue of whether s. 7 requires proof of a greater degree of fault than negligence in situations where a penalty of imprisonment might be imposed, Cory J. (L'Heureux-Dubé J. concurring) said, "I am of the view that with respect to regulatory offences, proof of negligence satisfies the requirement of fault demanded by s. 7."[84] Similarly, Lamer C.J.C., (Sopinka J. concurring), noting that the concept of fault comprehends negligence as well as intention,[85] found that the former would suffice for some offences, even where imprisonment might ensue.

The rationales of the two judges were, however, somewhat different. Cory J. emphasized the distinction between regulatory offences and true crimes because

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[80]*Ibid.* at 42. Compare McLachlin J., who refers to the "fundamental conviction that criminal responsibility is appropriate only where the actor is a discerning moral agent" (at 80).

[81]Although Lamer J. expressed the opinion that it does, "in penal law" (*supra*, note 15 at 321). See also the pre-*Charter R.* v. *Sault Ste. Marie*, in which Dickson J. said that absolute liability "violates fundamental principles of penal liability," and Brudner, *supra*, note 27 at 772.

[82]This issue is examined by Brudner, *ibid.*

[83]*Supra*, note 61.

[84]*Ibid.* at 176.

[85]*Ibid.* at 203.

"[r]egulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests ... [i]t follows that regulatory offences and crimes embody different concepts of fault."[86] Lamer C.J.C., on the other hand, observing that the principles of fundamental justice do not "take on a different meaning simply because the offence can be labelled as 'regulatory',"[87] relied on a "stigma" analysis. He noted that "while a conviction for false/misleading advertising carries some stigma, in the sense that it is not morally neutral behaviour, it cannot be said that the stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction for theft."[88] While I am not undertaking a detailed analysis of s. 7 in relation to regulatory offences in this paper, I do wish to note the issue as one other dimension of the inquiry to which different members of the Supreme Court have diverse approaches.

One last case that raises yet another dimension of the issue "what is fundamental justice?" is *Kindler*.[89] Focusing as it does on extradition, it may not be "substantive"[90] in the sense I have been considering. However, it does involve questions of "just punishment." One way of characterizing the case is to say that it involves a ministerial decision, pursuant to an act of Parliament, having penal consequences (albeit at a remove from the Canadian criminal process). In this context, a s. 7 analysis would entail answering the question, "is the death penalty just?" It may be that an affirmative answer could, in terms of some moral theory, be coherently given to that question. What is interesting about *Kindler* is that some members of the Supreme Court appear to have given such an answer, based on very dubious criteria. McLachlin J., positing as the test whether the imposition of the death penalty by a foreign state will "sufficiently shock ... the Canadian conscience," states that "there is no clear consensus in this country that capital punishment is morally abhorrent and absolutely unacceptable."[91] And La Forest J. says that "we are trying to assess the public conscience."[92]

These statements are a departure from the approaches to defining principles

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[86]*Ibid.* at 161. See also Brudner, who attempts a principled distinction between regulatory offences and true crimes (*supra*, note 27 at 763).

[87]*Ibid.* at 207. La Forest J. seemed to straddle the positions of Cory J. and Lamer C.J.C. on this point, ultimately favouring the former.

[88]*Ibid.* at 204.

[89]*Supra*, note 42.

[90]Note, however, that La Forest J. does say that the case raises a question whether the principles of fundamental justice "were violated in substantive aspects" (*ibid.* at 26).

[91]*Ibid.* at 20.

[92]*Ibid.* at 26.

of fundamental justice seen elsewhere. Sopinka J., (dissenting), seems justified in complaining that "[p]rinciples of fundamental justice are not limited by the public opinion of the day."[93]

The foregoing leaves many unanswered questions: Why do only some offences require a special *mens rea*? Which are they? How can so rhetorical a concept as stigma be a measure of "justice"? When will some kind of general "moral blameworthiness" or moral abdication suffice as the *mens rea* for specific offences? Does the fact that an offence is only "regulatory" make a difference? Should only "regulatory" offences be susceptible to the negligence standard? In what circumstances will "public opinion" be an acceptable touchstone of "fundamental justice"? I am not sure that this is an exhaustive list, and I do not propose to examine these questions in detail; I list them simply to indicate that problems are unresolved.

There is one point that I would like to develop further. To what extent have the courts, especially the Supreme Court, been introducing notions of expediency, or what might be called "pragmatic proportionality," into their considerations of the principles of fundamental justice? Another way of putting this is to ask how they have been dealing with the s. 7 issue in relation to s. 1 of the *Charter*. My provisional answer is that they have not been immune to conflating or confounding the two issues. The result has been a certain muddying of the notion of "justice."

One possible explanation for this might be courts' reluctance to find that circumstances which violate principles of fundamental justice may nevertheless be "justified." Wilson J. explicitly advanced this view in the *Motor Vehicle Reference*:

> If ... the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the inquiry, in my view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society."[94]

She subsequently retreated from this position in *Hess*,[95] but her retreat was rather reluctant. She stated that "s. 1 of the Charter is not itself devoid of values."[96] Elsewhere, one encounters the view that, "[t]he situations in which a breach of s.

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[93]*Ibid.* at 65. See also A. Manson, "*Kindler* and the Courage to Deal with American Convictions" (1992) 8 C.R. (4th) 68.

[94]*Supra*, note 15 at 325. Brudner, *supra*, note 27, appears to agree with this position: "nothing unjust can be a reasonable limit on the just" (at 773).

[95]*Supra*, note 25 at 348.

[96]*Ibid.*

7 can be justified under s. 1 will be exceedingly rare."[97]

Whatever the explanation, one does encounter s. 7 arguments that sound strangely like s. 1 reasoning. Thus, in *Beare*, (again, admittedly, not a "substantive" case), La Forest J. said that "one must have a sense of proportion." After all, "the common law permitted a number of other, in my view more serious, intrusions on the dignity of an individual or persons in custody in the interest of law enforcement."[98] Surely the question of whether a measure is necessary for effective law enforcement is a s. 1 question. In *Lyons*, La Forest J., upholding the indeterminate preventive detention provisions of the *Code* on the basis that "*future* violent acts can quite confidently be expected" of certain offenders, said that, "[i]n such circumstances it would be *folly* not to tailor the sentence accordingly."[99] I would have thought that the notion of "folly" went to prudential considerations, not to considerations of "justice."[100] In *Wholesale Travel*, Cory J. explicitly stated that:

> Had it been necessary to consider the matter the same reasons I have set forth in finding that neither s. 7 nor s. 11(d) are necessarily infringed by strict liability offences would have led me to conclude that strict liability offences can be justified under s. 1 of the *Charter*.[101]

In finding strict liability not to offend s. 7, he said, among other things, that "[i]t is absolutely essential that governments have the ability to enforce a standard of reasonable care in activities affecting public welfare."[102] I am not sure how this engages the concept of justice, although I can see how it might be pragmatically necessary. Again, in *Kindler*, McLachlin J., invoking judicial assertions that, "[s]ome pragmatism is involved in balancing between fairness and efficiency,"[103] and looking not only at public attitudes but also at the possibility that "Canada might become a safe haven for criminals,"[104] found that s. 7 was not violated. It seems that such consequentialist arguments properly fall under s. 1.

Even Wilson J. has not been entirely consistent in her understandings of justice

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[97]*Kindler*, *supra*, note 42 at 66 (*per* Sopinka J., dissenting).

[98]*Supra*, note 38 at 111.

[99]*Supra*, note 28 at 25.

[100]Compare *Beare*, in which La Forest J. defended statute-conferred discretion as not violating principles of fundamental justice on the basis that "[a] system that attempted to eliminate discretion would be unworkably complex and rigid" (*supra*, note 38 at 116). Again, does "workability" go to "justice" or to something else?

[101]*Supra*, note 61 at 186.

[102]*Ibid.* at 176-77.

[103]*R.* v. *Jones*, [1986] 2 S.C.R. 284 at 304, *per* La Forest J.

[104]*Supra*, note 42 at 22.

in these contexts. In the *Motor Vehicle Reference*, she said that a finding of a s. 7 infringement probably precluded a s. 1 inquiry. This might imply that state interests would have to be considered as part of the fundamental justice inquiry. However, in *Hebert*, she observed:

> In deciding whether or not the authorities have offended fundamental justice ... it is ... essential to focus on the treatment of the accused and not on the objective of the state. It would ... be quite contrary to a purposive approach to the s. 7 right to inject justificatory considerations for putting limits upon it into the ascertainment of its scope or content.[105]

And, in *Hess*, she wrote:

> I noted in connection with my s. 7 analysis that the criminal law has come to recognize that punishing the mentally innocent with a view to advancing particular objectives is fundamentally unfair. It is to use the innocent as a means to an end.[106]

These comments were made in relation to an argument that the "no *mens rea*" component in old s. 146(1) was important as a deterrent. However, earlier, in the *Motor Vehicle Reference*, Wilson J. had seemed to accept that punishment in some circumstances could have a utilitarian dimension and still accord with s. 7. For example, one of the reasons that she regarded a "mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence" as "excessive and inhumane" was that it "is not required to reduce the incidence of the offence."[107]

What are we to make of all this? One response would be to insist on the strict approach to fundamental justice which appears in Lamer C.J.C.'s opinions, and in such writers as Brudner and Code.[108] On this basis, we might insist on subjective fault for all elements in at least criminal offences. If we were to justify, in terms of justice, a lesser requirement, we would have to devise an account in which simple negligence, for example, could be shown to entail fault. Otherwise, departures would have to be justified in terms of pragmatic or utilitarian concerns pursuant to s. 1.

Similarly, as Code argues, the only "just" basis for imposing a sentence would be the backward-looking one of "desert."[109] If some other basis were to be invoked, it would have to be justified in terms of social utility, again pursuant to

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[105]*Supra*, note 31 at 191.

[106]*Supra*, note 25 at 346.

[107]*Supra*, note 15 at 333.

[108]W.E. Brett Code, "Proportionate Blameworthiness and the Rule Against Constructive Sentencing" 11 C.R. (4th) 40.

[109]*Ibid.* at 42.

s. 1. Thus, when La Forest J. in *Lyons* couples punishment and prevention as penological objectives, saying that, "in the interests of protecting the public" some offenders "ought to be sentenced according to considerations which are not entirely reactive or based on a 'just deserts' rationale,"[110] he is arguably conflating two fundamentally different kinds of concerns.

Again, this strict approach would entail that any circumstance that negated *mens rea* (notably intoxication) would, as a matter of fundamental justice, have to be recognized as providing a defence, as in justice relieving of criminal liability. Thus, the majority in *Bernard* would be wrong. This would not preclude the possibility of limiting the availability of the defence on the basis of s. 1 considerations. Such an approach is exemplified in Lamer C.J.C.'s opinion in *R.* v. *Penno*.[111]

Further, if a person is found to be not criminally responsible because he or she was suffering from a mental disorder rendering him or her incapable of moral discernment, it would be unjust to confine that person to what is in effect indeterminate incarceration. That person does not deserve to lose his or her liberty. But as a matter of social utility, for the protection of society or for the protection of the person, such confinement may be justifiable under s. 1.

Such an approach would insist on a separation of the s. 7 and s. 1 inquiries. It is exemplified by Lamer J.'s saying in the *Motor Vehicle Reference* that, in this context, absolute liability offends s. 7, "irrespective of the requirement of public interest."[112] It is also found in Wilson J.'s comments in *Hebert*, quoted above.

Another approach, one exemplified in many Supreme Court opinions, is to balance social interests with the moral proportionality issue at the stage of determining whether s. 7 is violated. At least one judge, La Forest J., has said that this is *the* approach. In *Penno*, he refers to a list of other cases standing for "the need to recognize that the 'principles of fundamental justice' encompass the public's interest, as represented by the state, as well as the interests of the accused."[113] As I have shown, McLachlin J. follows this approach in *Kindler*.

Stated in these terms, I have some difficulty in reconciling this with notions of fundamental justice. At the same time, I am cognizant that focusing exclusively on the accused, "what has he done that justifies this treatment," may leave out of

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[110]*Supra*, note 28 at 24.

[111]*Supra*, note 26.

[112]*Supra*, note 15. He goes on to say that "it might only be salvaged for reasons of public interest under s. 1," where questions of "administrative expediency" may apply.

[113]*Supra*, note 26 at 121.

account factors that may be very relevant to an adequate appreciation of justice. I am thinking of what might be generally described as "justice for the victim." I shall not explore this issue here, but I raise it as a possible focus for developing an alternative concept of "justice" in the s. 7 context. More broadly, an adequate account of justice might require a much more subtle and far-reaching inquiry into the social contexts of criminality than a narrowly focused attempt to equate moral blameworthiness, (defined in terms of subjective awareness), with penal, (or other), consequences for the accused.