FUNDAMENTAL JUSTICE: THE SCOPE AND APPLICATION OF SECTION 7 OF THE CHARTER

John D. Whyte*

I Introduction

It is an inevitable feature of constitutional documents which protect human rights against encroaching state action, that the perplexities and ambiguities presented by their language are such that the interpretive enterprise is marked with uncertainty. Furthermore, the passing months and years of interpretive experience do not significantly lessen the extent to which clear ideas of the meaning of the text remain elusive. Rights are constitutionally entrenched by reference to political activities (speech, exercise of religious belief and voting) and political values (equality, justice and fairness), both of which are identified in bold, even resounding, language. The reality of the difficult reconciliation between these values and activities and the needs of the activist state often goes unmentioned in the constitutional text, as in the amendments to the *United States Constitution,* or is represented in the text by words which offer virtually no guide, as in section 1 of the *Canadian Charter of Rights and Freedoms.*

At the time of entrenchment it is, of course, clearly understood that some large and indeterminate part of our public life has been delegated to the judicial branch. That branch has been entrusted with giving proper content to the rights which have been recognized in gross, and allowing that degree of limitation on rights which properly permits governmental programs to go forward unhampered by individual claims.[1] It is hoped that the contours of rights and limitations will become clearer as decisions flow forth. But, in fact, little ever becomes clearer; the closing off of one conception of right or limitation by the recognition of another merely deflects attention to elaborating the meaning or boundary of the chosen conception.[2] In any event, even if some day we can come to understand more clearly what our *Charter* means, or even if some day we have a more definite sense of what meanings Canadian courts will stipulate for the various sections, the first eighteen months decidely have not been the time frame within which that understanding and that sense have been developed.

On the other hand, in fairness to our pre-proclamation commentators, the dilemmas posed by the *Charter* (or, at least by section 7 of the *Charter*) have not been vastly multiplied through placing section 7 in the crucible of litigation experience. The major interpretative problems that section 7

* Professor, Faculty of Law, Queen's University.

1. This tension between individual rights and governmental programs is described in R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977) at xi: "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them".

2. For example, the development of the "clear and present danger" limitation to free speech in the United States. See *Schenck* v. *United States* 249 U.S. 47 (1919). Instead of clarifying the limits of protected speech, this doctrine gave rise immediately to new debate over the meaning of the standards of certainty and imminence which had been established. See *Abrams* v. *United States* 250 U.S. 616 (1919).

poses were recognized before April 17, 1982. The debate about meaning has not moved to new, unexpected possibilities. Neither has the jurisprudence foreclosed any of the applications thought to be possible.[3] The result is that the issues which require exploring in an examination of section 7 are, in the context of our *Charter* literature, old issues.

In this paper I intend to focus on two major questions which have been recognized since the introduction of the forerunner to the *Charter* in October, 1980. First, when section 7 says that persons[4] are not to be deprived of certain rights "except in accordance with the principles of fundamental justice", what standards are suggested by the phrase "fundamental justice" for reviewing the governmental conduct[5] which deprives? Second, what is the range of interests protected by section 7? The phrase "life, liberty and security of the person" is used to identify the interests, but is this to be narrowly understood to mean only those interests which are undermined through criminal and penal processes, or does it reach certain economic losses and burdens on property interests that are the result of public administration as it is more generally understood?

II Fundamental Justice

(a) The constitutional text

Turning to the first issue, concern over the uncertain meaning of "fundamental justice" was expressed very soon after the entry of this phrase into the constitutional revision process. During the federal-provincial constitutional talks in the summer of 1980,[6] the language chosen to describe the basic legal right against the loss of life, liberty or security of the person was that there could be no such deprivation "except by due process of law". Lawyers representing some of the eleven governments raised the concern that courts would read this phrase as guaranteeing substantive due process. Notwithstanding the oxymoronic quality of this notion, these lawyers could point to the history of the development of substantive due process in American constitutional law[7] as a foreshadowing of the development of a similar expansion of judicial review in Canada beyond what would be necessary for the constitutional protection of minimal procedural standards. Indeed, that history might lead them to

3. For speculative analysis of the *Charter*, see P. Hogg, *Canada Act, 1982, Annotated* (Toronto, 1982) and D. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (Toronto, 1982).

4. An unexplored issue in this paper is whether s. 7 confers rights on corporations as well as natural persons. This question was treated in *Southam Inc.* v. *Hunter* (1982), 136 D.L.R. (3d) 133 (Alta Q.B.) and in *Re Balderstone and the Queen* (1982), 143 D.L.R. (3d) 671 (Man. Q.B.). The assumption of this paper is, contrary to *Southam* and *Balderstone*, that s. 7 rights are *not* enjoyed by corporate persons.

5. S. 32 of the *Charter* states that the *Charter* applies to Parliament and the government of Canada and the legislature and government of each province in respect of all matters respectively within their authority.

6. Drafts presented by the Government of Canada at meetings of the Continuing Committee of Ministers on the Constitution held in July and August, 1980, in Toronto, Vancouver and Ottawa used this phrase. See, e.g., Canadian Intergovernmental Conference Secretariat (C.I.C.S.) Document 830-84 /004.
The description of events of these meetings are from the personal recollection of the author.

7. This has been fully described in L. Tribe, *American Constitutional Law* (Mineola, N.Y. 1978) 427-455; and J. Ely, *Democracy and Distrust* (Cambridge, Mass., 1980) 14-21.

apprehend what they consider to be the most sinister form of review of all — review by courts of the ethical propriety of legislation. This somewhat traumatized reading of "due process of law" was fueled by reference to American cases from the first three decades of this century,[8] a period of full scale substantive review under the due process clause of the Fourteenth Amendment.[9] In particular, government lawyers brought forth *Lochner* v. *New York*[10] to perform its totemic task; the mere mention of the name of the case, which invalidated maximum hours of labour legislation, drove all decent democrats scurrying for language that raised no possibility of substantive review. Indeed in this period, the Supreme Court of the United States did apply the *U.S. Constitution,* (including the Fourteenth Amendment) to strike down progressive and redistributive social and economic legislation. The due process clause supported the judicial program of protecting freedom to contract and preventing deprivations of common law liberty, most notably the liberty to enjoy property without confiscation through regulatory burdens imposed by the state.

What seems to have been ignored in this desperate desire not to create a "Lochnerized" judiciary is that since the 1930's the Supreme Court of the United States has abandoned aggressive applications of the due process clause. Since *West Coast Hotel* v. *Parrish*[11] in 1937, American courts have asked whether the restraining regulation is "reasonable in relation to its subject and ... adopted in the interests of community".[12] This represents an attitude of deference based on the courts' minimal requirement that burdens on interests be rationally related to legislative programs.[13]

In any event, as a consequence of this fear of substantive due process, the federal government's version of the *Charter of Rights* which was prepared for the First Ministers' Conference in September, 1980[14] altered the language of what is now section 7 to state that life, liberty and security of the person were not to be deprived "except in accordance with the principles of fundamental justice". This language again appeared in the version of the *Charter* which was presented on October 2nd, 1980, as part of the resolution introduced in the House of Commons requesting, in effect, the British Parliament to enact amendments to the *British North America Act.*[15] Although there were no formal or public intergovernmental meet-

8. Professor Laurence Tribe has identified the period of full scale substantive due process review to be the period between the Supreme Court decisions in *Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897) and *West Coast Hotel* v. *Parrish,* 300 U.S. 379 (1937). See Tribe, *supra,* n. 7, at 434-435.

9. *United States Constitution,* Amendment XIV: "nor shall any State deprive any person of life, liberty or property, without due process of law;...".

10. 198 U.S. 45 (1905).

11. *Supra,* n. 8.

12. *Ibid.,* at 392.

13. See Tribe, *supra* n. 7 at 454-455.

14. Federal-Provincial Conference of First Ministers on the Constitution, *Revised Discussion Draft: The Canadian Charter of Rights and Freedoms* (Sept. 8-12, 1980), C.I.C.S. Document 800-14 /064.

15. This was the opening act in the attempt by the Government of Canada to patriate the constitution unilaterally (i.e. without provincial concurrence). On the evening of October 2, 1980, Prime Minister Trudeau announced on a national telecast that when the Resolution had been approved by the House of Commons and Senate it would be forwarded to Great Britain for formal enactment.

ings following the collapse of the First Ministers' meeting on September 13, 1980 and the subsequent announcement of unilateral patriation, some governments expressed concern about this language. It was suggested that since the concluding phrase of section 7 was devoid of any apparent connotation of a procedural standard, the risks of open-ended legislative review were compounded by the proposed language.

The first formal expression of concern over this section came during the proceedings of the Special Joint Committee of the Senate and House of Commons which was established to examine the Resolution intended to be sent to Britain. The most dramatic aspect of the Committee's consideration of section 7 was the nearly successful attempt to have "enjoyment of property" added to the section. (The "property" issue or, more accurately, the debate over the questions of privilege and rules of order which this issue gave rise to, took up most of the three days which were devoted to section 7.) But, at the very end of its deliberations on this section the committee spent about one hour discussing the scope of review which would be assigned to the courts by the concluding words.[16]

It is worth looking at this debate. For one thing the position resolutely put forward by federal Department of Justice lawyers has been both academically and judicially recognized[17] and represents the dominant reading of the section. In the second place the debate reveals the basis for the restricted meaning which federal officials advanced.

Mr. Barry Strayer, who was then the Assistant Deputy Minister of Public Law in the Department of Justice, advanced his view of section 7 in these words:

> ... it was our belief that the words 'fundamental justice' would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question....[18]

In response of the suggestion of Svend Robinson, M.P., that fundamental justice might well have a component of substantive review, Justice officials replied there was no distinction between the principles of fundamental justice and the rules of natural justice.[19] The Honourable David

---

16. Even this hour seemed excessive to some members of the Committee. The Chairman, Serge Joyal, M.P., within ten minutes of the commencement of the discussion, began to worry. He said, "It is no longer an expression of views of honourable members on the merits of the amendment but more a discussion ... on the wording and significance of natural justice as opposed to, or as a complement to, fundamental justice... The Chair is certainly agreeable to receiving a question but not to allow such a debate because we would be taking, I would say, a sideline..." Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, No. 40 (Tuesday, January 27, 1981) at 46:34. Moments later the Honourable John Fraser, M.P. prefaced his comments with "I realize we cannot go on forever on this". *Ibid.* at 46:37.

    The Minutes of the Committee's proceedings bring to mind Professor Harry Eckstein's characterization of British politics: "In essence the British invest with very high affect the procedural aspects of their government and with very low affect its substantive aspects; they behave like ideologists in regard to rules and like pragmatists in regard to policies. Procedures to them are not merely procedures, but sacred ritual". Eckstein, "The Theory of Stable Democracy" in *Division and Cohesion in Democracy* (Princeton, 1966), Appendix B, 265.

17. See, for example, Hogg, *supra*, n. 3, at 28-29. Cases relying on this testimony include *R.* v. *Holman* (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.) at 389-390 and *Re Mason and The Queen* (1983), 35 C.R. (3d) 393 (Ont. H.C.).

18. Minutes, *supra*, n. 16, at 46:32.

19. *Ibid.*, 46:33 (Reply of Mr. Fred Jordan, Senior Counsel, Public Law, Department of Justice).

Crombie, M.P., also pressed Mr. Strayer on the meaning of the proposed section 7. His dialogue with Mr. Strayer concluded with this exchange:

> Mr. Crombie: Natural justice and fundamental justice do not deal with substantive matters, only procedural fairness,that is the difference between those two and due process?
> Mr. Strayer: Yes.[20]

It appears that the reason for the government's confidence that fundamental justice precluded judicial review of the substance or policy of enactments is that the phrase is used in section 2(e) of the *Canadian Bill of Rights*[21] and in that context it clearly means, and has been held to mean, that the process by which governmental decisions are made must accord with the procedural standards which have come to be encapsulated within the concept of the "rules of natural justice".[22] Members of the Joint Committee were referred to the treatment of section 2(e) by Fauteux, C.J. in *Duke* v. *The Queen* in which he said that that section requires that a "tribunal which adjudicates upon [a person's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case".[23]

The lessons to be drawn from the *Canadian Bill of Rights* were referred to by Mr. Strayer in responding to Mr. Crombie's questions:

> It is interesting that this question was debated in 1960 when the Canadian Bill of Rights was before Parliament as to whether to include the term 'fundamental justice' or 'natural justice'. They finally settled on 'fundamental justice'. But one of the leading commentators on the Bill of Rights, Professor Tarnopolsky, reviewing the debate at that time and the jurisprudence since has said that it appears to him that the two terms are essentially the same.[24]

In fact this was unconvincing testimony with which to have settled the concerns of committee members. The text of section 2(e) of the *Canadian Bill of Rights* states that no law of Canada "shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations". In this clause the "fundamental justice" phrase is placed so squarely in the context of procedural guarantees that it is inconceivable that a substantive standard was intended. Section 7 of the *Charter* does not create that same context. Furthermore, the limited scope for enforcement of the *Canadian Bill of Rights* described in the opening phrases of section 2 suggests that the judges were asked to implement the protections of that document through more interstitial and less direct means than they are invited to employ under the bold direction of section 24 of the *Charter* to grant remedies which "the court considers appropriate and just in the circumstances". This difference suggests that traditional interpretative

20. *Ibid.*, at 46:42.
21. R.S.C. 1970, Appendix III.
22. For a description of this concept see Evans (ed.), *de Smith's Judicial Review of Administrative Action* (4th ed.) (London, 1980) at 156-158. The concept has received statutory recognition in Canada in the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.) s. 28(1)(a).
23. (1972), 28 D.L.R. (3d) 129 at 134 (S.C.C.).
24. Minutes, *supra*, n. 16, at 46:38.

devices, such as the set of presumptions in favour of fair procedures known as the rules of natural justice, were appropriate for the direction in section 2 of the *Bill of Rights* merely to "construe and apply" legislation to fit the *Bill's* standards. More fundamental enquiries into the merits of the political aims of a challenged law are not suggested by the language of the *Bill of Rights*.

There is, admittedly, one sense in which the reference to the language of section 2(e) of the *Bill of Rights* might tell us something about the meaning of fundamental justice. The drafters of that section were, as suggested in the testimony of Mr. Strayer, talking about the rules of natural justice as a term of art with a relatively fixed and limited meaning. By using, in that context, the phrase "in accordance with the principles of fundamental justice" they may have established a phrase equivalent to, and subject to the same limitations as, the phrase "rules of natural justice". However, this argument is not weighty. "Fundamental justice" has never been considered to be a term of art, as has the "rules of natural justice", nor is it, on its face, uniquely suggestive of procedural concerns. It is ambiguous terminology in section 2(e), as it is in section 7, but the ambiguity is controlled in the former context by directly relating it to the right to a fair hearing. The careful control of the phrase in section 2(e), rather than leading to the inference that it has become an equivalent term of art, leads to the inference that it is indeterminate in meaning.

It is noteworthy that when Department of Justice officials were casting about in the *Bill of Rights* jurisprudence for a glimpse of how *Charter* language might be interpreted, their anxieties that the original "due process" language might be given an open-ended reading were not quieted by the Supreme Court's leading judgment on the due process clause in the *Canadian Bill of Rights*, the majority judgment of Laskin, J. as he then was, in *Curr.* v. *The Queen*.[25] In that case the accused, who was charged with failure to provide a breath sample as required under the *Criminal Code*,[26] argued, among other things, that that requirement interfered with his rights under section 1(a) of the *Canadian Bill of Rights* to security of the person and "the right not to be deprived thereof except by due process of law". In amplifying on this claim, counsel for the accused argued that section 1(a) established a substantive, or what Mr. Justice Laskin described as a qualitative, standard for reviewing legislation. Laskin J. did not accept the argument and he expressed considerable scepticism about viewing section 1(a) as incorporating a substantive standard. He noted that the English antecedents to the due process clause related to procedural requirements only.[27] Furthermore, he noted that the substantive due process argument advanced in the case revealed no "objective and manageable

25. (1972), 26 D.L.R. (3d) 603.
26. This offence is now found in s. 235 of the *Criminal Code*, R.S.C. 1970, c. C-34 as am.
27. *Supra*, n. 25, at 612.

standards by which a Court should be guided''[28] and that the Court ought not enter ''the bog of legislative policymaking in assuming to enshrine any particular theory ... which has not been plainly expressed in the Constitution''.[29] These seem to be strong indicators that ''due process'' would not lead to substantive control by Canadian courts and, perhaps, ought to have led the drafters of the *Charter* to choose the linguistically clearer ''due process'' wording. However, this case was not referred to in testimony given to the Committee.

There is a sense in which it was rational not to view Mr. Justice Laskin's judgment as irreversible authority for giving a united meaning to the ''due process'' clause. In the first place he did not *directly* hold that section 1(a) does not include substantive review. Second, twice in his judgment Laskin J. referred to the need for judicial deference in applying more statutory standards, (as contrasted with constitutional standards), to Parliamentary measures which are otherwise competently enacted.[30] The deference to Parliament advocated in this case became a hallmark of the Supreme Court of Canada in applying the provisions of the *Canadian Bill of Rights*.[31] It is expressed in the *Curr* case in these words:

> The very large words of s. 1(a) ... signal extreme caution to me when asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major rôle is played by elected representatives of the people.[32]

Those responsible for advising on the language of the *Charter* knew that, with the coming into force of the *Constitution Act, 1982*, the constitutional focus would shift from the federally divided sovereignity of the democratic, representative institutions to the constitutional limitation of powers. There has, of course, been much written about the likely impact of the shift produced by the constitutional entrenchment of basic civil liberties. Almost all of it speaks of an inevitable self-confidence on the part of the judiciary in evaluating legislation under the *Charter's* diverse set of standards.[33] These sorts of predictions, to a large extent borne out in the first eighteen months of *Charter* jurisprudence,[34] were so widely shared that interpretations, such as Mr. Justice Laskin's in *Curr*, based on judicial deference were seen to provide only a weak guide to the meaning of the *Bill of Rights'* phrases.

Finally, in examining how the words of section 7 were perceived prior to April 17, 1982, the obvious point should be made that the phrase

28. *Ibid.*, at 614.

29. *Ibid.*, at 615.

30. *Ibid.*, at 613-614 and 615-616. The same idea was expressed by Laskin C.J. in his dissenting (but not on this point) opinion in *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616 at 632-633.

31. See, for example, the dissenting opinions of Cartright and Abbott JJ. in *R.* v. *Drybones* (1969), 9 D.L.R. (3d) 473 at 476 and 477, respectively; the majority opinion of Ritchie J. in *Attorney General of Canada* v. *Lavell* (1973), 38 D.L.R. (3d) 481 at 489-490; and the majority opinion of Martland J. in *R.* v. *Burnshine* (1974), 44 D.L.R. (3d) 584 at 592.

32. *Supra*, n. 25 at 615-616.

33. See, for example, Russell, "The Effect of a Charter of Rights on the Policy-Making rôle of Canadian Courts" (1982), 25 Canadian Public Administration 1.

34. See, for example, judgments of Deschênes, C.J. in *Quebec Association of Protestant School Boards* v. *Attorney General of Quebec* (1982), 140 D.L.R. (3d) 33 at 52-53, and Cattanach J. in *Operation Dismantle* v. *The Queen (The "Cruise Missile" Case)* (judgment delivered September 27, 1983).

"the principles of fundamental justice" unequivocally connotes substantive standards. This is especially true in light of the political rhetoric and political philosophy of the last half-century. It might be argued that at some point in our political culture the idea of doing justice to persons meant only dealing with their claims in a procedurally fair way. However, the rapid growth of the activist, redistributive state has been accompanied by a language of political justification based on justice. Moreover, the program of state redistribution has been followed by an explanatory philosophy which has explicitly explored this political behaviour in terms of the idea of justice.[35] The simple fact of the matter is that it has become, (if it was not always so), counter-intuitive to think of the principles of fundamental justice as being procedural standards. It is now commonplace to think of the state's imposition of burdens and benefits (relating to, among other things life, liberty and security of the person) as either promoting social justice or, on the contrary, as being fundamentally unjust.

(b) Canadian Cases

What have Canadian Courts done with the question of the scope of review under section 7? The Supreme Court of Canada has issued conflicting messages during its first encounters with the section. Although the Court has yet to decide a case based on section 7, it has referred to the issue on at least two occasions.

In *Westendorp* v. *R.*[36] the accused was charged under a Calgary anti-prostitution by-law. She sought to impugn that by-law on the ground that its infringement of her liberty did not accord with the principles of fundamental justice. The argument was substantive in the sense that her counsel argued, wrongly on the facts,[37] that the by-law created a status offence and that the punishment of persons for what they are rather than for what they do, or cause to happen, is fundamentally unjust. During argument in the Supreme Court counsel for Westendorp abandoned the section 7 argument under heavy questioning from the bench.[38] Nevertheless in his judgment for the Court, Laskin C.J.C. reported that the argument had been made. He said:

> It appeared in the course of argument that counsel for the appellant sought ... to infuse a substantive content into s. 7, beyond any procedural limitation of its terms... In the

35. See, for example, J. Rawls, *A Theory of Justice* (Cambridge, Mass., 1972); B. Ackerman, *Social Justice in the Liberal State* (New Haven, 1980), and M. Walzer, *Spheres of Justice* (New York, 1983).

36. (1983), 32 C.R. (3d) 97 (S.C.C.).

37. S. 6.1(2) of by-law 9022 of the City of Calgary states "No person shall be or remain on a street for the purpose of prostitution." Notwithstanding the proscription is phrased in terms of "being" on a street, the offence does require proof of a purposive presence on the streets and is not a status offence. If the penal purpose could be imputed on proof of some other prior state of affairs (for example having been a prostitute) the provision would, of course, be a status offence but the by-law contains no such imputing section.

38. Much of the questioning was based on Mr. Chief Justice Laskin's view that counsel could not present an argument based on the *Charter's* provisions until after he had argued that the by-law was beyond the province's legislative competence. (Report of counsel appearing in the case.)

It is not clear why this order of constitutional argument was thought to be required, but this view is expressed in the judgment. "[Counsel sought] to rely on s. 7 to challenge the validity of the by-law provision without accepting as a necessary basis for the s. 7 submission that it could apply only if the by-law was to be taken as valid under the distribution of powers between the legislating authorities". *Ibid.* at 100.

> result, counsel for the appellant abandoned the challenge under the Canadian Charter of Rights and Freedoms.[39]

The passage is ambiguous. It could mean that a substantive argument (which is more than a procedural argument) had been made or it could mean that an argument which goes beyond the limits of the text had been made. The latter interpretation is supported by the Chief Justice's comment from the bench that section 7 was procedural only.[40] But this, of course, is not legally relevant since this utterance is not reflective of the Court's view.

This apparent reluctance to find a substantive content in section 7 might be compared with the decision of a panel of the Supreme Court, (which included the Chief Justice), to grant leave to appeal to a person convicted of having intercourse with a female under the age of fourteen.[41] This is a crime of absolute liability by virtue of the provisions of section 146(1) of the *Criminal Code* which state that a person committing the act is liable, whether or not he believes that the female is fourteen years of age or more. A person convicted under this section is liable to imprisonment for life. The argument of the accused is that it does not accord with the principles of fundamental justice to make a person liable to a serious term of imprisonment without any proof of intent or, more accurately, knowledge of the inculpating circumstance. According to press reports Laskin C.J.C. stated from the Bench that there could be no doubt at all about the necessity of bringing the case up for argument before the Court.[42] While this decision (or utterance) is again not legally relevant, it is significant that the Court's consent jurisdiction was not exercised to forestall an argument which can be based on nothing other than a substantive notion of due process. In the Ontario Court of Appeal the argument of the accused failed on its merits. That court declined to decide whether substantive review was permitted by section 7.[43]

The most notable instance of an affirmative finding that section 7 entails an enquiry into the substantive justice of challenged legislation is *Reference Re Section 94(2) of Motor Vehicle Act*,[44] a decision of the British Columbia Court of Appeal. Section 94 of British Columbia's *Motor Vehicle Act*[45] provides that it is an offence to drive a motor vehicle while one's driver's licence is suspended. Section 94(2) provides:

> Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

39. *Supra*, n. 36, at 100.
40. Report of counsel appearing in the case.
41. *Stevens and Villeneuve* v. *The Queen*, leave to appeal granted June 6, 1983. See Bulletin of Proceedings taken in the Supreme Court of Canada, June 10, 1983, 556.
42. *The Whig Standard* (Kingston) June 7, 1983, p. 24. Perhaps Mr. Chief Justice Laskin's apparent enthusiasm to deal with this case stems from a desire to issue an opinion on the question of whether s. 7 allows substantive review.
43. *R.* v. *Stevens* (1983), 145 D.L.R. (3d) 563 (Ont. C.A.).
44. (1983), 33 C.R. (3d) 22 (B.C.C.A.).
45. R.S.B.C. 1979, c. 288, re-enacted by S.B.C. 1982, c. 36, s. 19.

The Court of Appeal, in considering the justice of such a provision, was much influenced by the opinion of Dickson J. in *R.* v. *City of Sault Ste. Marie*.[46] In that case a distinction was made between offences of strict liability, (in respect of which an accused may mount a defence based on his reasonable belief in a mistaken set of facts which if true would have rendered the conduct innocent), and absolute liability offences where it is not open to the accused to exculpate himself in any way once the proscribed circumstances have been proven. As to the latter category of offences, Dickson J. observed that they violate fundamental principles of penal liability[47] and, later, quoting from an article by Professor F.B. Sayre,[48] characterized them as "fundamentally unsound". The Court of Appeal, no doubt moved by these claims of a "fundamental" defect, as well as by the mandatory minimum punishment of seven days' imprisonment, found section 94(2) to be "inconsistent with the principles of fundamental justice".[49] As the necessary precondition to its holding, the Court found that the constitutional standard of section 7 "is not restricted to matters of procedure but extends to substantive law".[50]

The judgment reveals no protracted intellectual wrestling over the introduction of substantive review. Perhaps, to the Court of Appeal, the words too clearly encompass standards of substantive justice to warrant an investigation into whether this notion of section 7 accords with the new constitutional purposes that can be discerned from the introduction of entrenched rights. Nor is there extensive reasoning directed to defining what exactly the fundamental justice standard means in relation to criminal offences, or what the conclusion might mean for other public welfare offences. The Court was careful to lay down no general claim that absolute liability offences were fundamentally unjust. This one was; but some others might be in aid of public interests which require absolute liability. On the other hand there is a hint of the view that *Sault Ste. Marie's* recognition of a lower class of public welfare offences might adequately satisfy any public interest in the less costly and expedited administration of provincial offences.[51]

The holding and the paucity of reasoning in this case lend credibility to concerns about the rise of substantive review based on the lack of clear standards and the inevitable slide into the courts' substitution of their own policy preferences for legislative policies. Perhaps, however, this would not be a completely intolerable situation. Courts by such a process would not become super-legislatures. In the first place, courts cannot become policy initiators. In the second place, interferences will not be triggered by mere judicial disagreement but doubtlessly will be limited to situations

46. (1978), 40 C.C.C. (2d) 353 (S.C.C.).
47. *Ibid.* at 363.
48. F.B. Sayre, "Public Welfare Offenses" (1933), 33 Columbia L. Rev. 55 at 82.
49. *Supra*, n. 44, at 30.
50. *Ibid.*
51. This point is only implicit in the judgment. It is also suggested in D. Stuart, "Annotation" (1983), 33 C.R. (3d) 22.

in which legislatures have advanced policies raising real questions about the legitimacy of the burdens imposed on the interests of individuals in life, liberty, and security of the person. Third, judges are acting within the legal process and are ultimately constrained by legal argument. In other words, although we have now only the dimmest appreciation of the standards entrenched through section 7, in time legal standards will develop. These sources will not likely be clear but they will force judges to entertain only certain types of arguments; courts will be distinguishable from political fora by the limited range of sources available for decision-making. In the meantime, judges, in giving content to a substantive interpretation of section 7, must at least root their decisions in some historical standard of legislative decency. For instance, in the *B.C. Reference* case the Court of Appeal related its conclusion to the dominant norms of criminal law. This sort of standard, although imprecise, at least causes the inquiry to be focused on the external record as opposed to personal preferences. This is the type of source in constitutional adjudication which has been described by Mr. Justice Rand as "the norm of living tradition".[52]

The Attorney General of British Columbia argued that if section 94(2) violated section 7 of the *Charter* it was a permissible infringement under section 1 as being a reasonable limit which can be demonstrably justified in a free and democratic society. The Court spent little time with this argument before rejecting it. In this they were right. It seems improbable that a Court would hold a provision to be substantively unjust but demonstrably justified. If a provision relating to penal offences or one that is otherwise detrimental to a person's security is found to be justified in the political context in which it is enacted it would also be, in that context, just. In short, it would seem that section 7 is one of the provisions of the *Charter* which should be applied without recourse to section 1; the sort of derogation contemplated by section 1 properly forms part of the initial process of defining "fundamental principles of justice". It is a possible interpretation (but not a compelling one) that section 1 could reasonably be used if it were limited to justifying temporary, emergency legislation. In this situation the Crown would argue that the law created an unjust burden on a person, but must nevertheless be borne because the exigencies of the moment make legislative adjustment impossible or too costly.

Finally the *B.C. Reference* case raises the issue of the distinction between procedural standards and substantive standards. It might be argued that the preoccupation with substantive justice expressed in the case is misplaced. The challenged provision was procedural in the sense that the process by which guilt was determined was strictly prescribed so as to disallow any enquiry into what the accused actually knew or reasonably could have known. The legislation does not let an accused answer the case against him as fully as we generally consider appropriate in penal provi-

52. I.C. Rand, "Except by Due Process of Law" (1961), 2 Osgoode Hall L.J. 171 at 190, cited by Paradis Prov. Ct. J. in *R.* v. *Campagna* (1982), 141 D.L.R. (3d) 485 at 495-496 (B.C. Prov. Ct.).

sions. However, this procedural characterization of the issue distorts the legislative strategy behind such charges. There is a difference between setting out how an enquiry into facts will be conducted (which is a procedural provision), and imposing a substantive burden (e.g. imprisonment) on a defined class of persons for the benefit of the wider society. Under B.C.'s legislation the class which must suffer imprisonment are persons who drive while their driving privileges are suspended. There are different, and presumably greater, public benefits that flow from the choice of this class of persons as opposed to a more limited class of persons in respect of whom carelessness about driving without a licence can be proven. In the first place greater care in finding out about the status of a driving licence will likely be taken by a person who has received some slight intimation (from his own conduct or otherwise) that his licence has been suspended. Furthermore, there is clearly the benefit of cheaper prosecutorial costs in obtaining easier convictions through a scheme which punishes the entire class of persons who drive while suspended regardless of their knowledge or carelessness. In this light, then, this legislation is comparable to any legislation which imposes costs on particular classes of persons. Other examples of legislative schemes which impose burdens on classes of persons are those schemes which limit the commercial development of marshlands or other wildlife habitats, or permit welfare administrators to remove from welfare rolls persons charged with a criminal offence. Section 94(2) and these examples raise the question under section 7 of whether the legislature, in placing a burden on certain persons for a general benefit, is making a just allocation of deprivations and benefits. In other words, a challenge under section 7 to this type of legislative scheme gives rise to substantive review.

However, having argued that the *B.C. Reference* case raises a substantive challenge it should be acknowledged that the distinction between procedural and substantive review is not easy to draw; nor is the test for substantive review — whether the legislative scheme imposes burdens on a particular class of persons, — particularly helpful. Most, if not all, procedural shortcuts could be characterized as burdening some class of affected persons and the conclusion that a challenge is substantive rather than procedural will be a product of how the legislative provisions are described. This difficulty in working out a test which will permit a genuine classification of the two sorts of review is a powerful argument against the claim that section 7 should be available to control procedural injustices only.[53]

The same legislative provision that was considered in the *B.C. Reference* was also considered seven months earlier in the B.C. Provincial

53. In L.H. Tribe, "Structural Due Process" (1975), 10 Harvard C.R.-C.L.L. Rev. 269, the limitation on power produced by substantive review is described to be "constraints upon the policies government may seek to implement" and the limitation on power produced by procedural review to be "constraints upon the methods by which governmentally chosen policies may be enforced to the detriment of particular individuals" (at 269). These categories do not lead to self-evident application. In fact, when one realizes that Tribe's definition of procedural review looks very much like my test for substantive review (does the policy impose a burden on particular classes of persons?) it becomes apparent that there is no easy way out of this particular taxonomic thicket.

Court in *R.* v. *Campagna*.[54] Paradis, Prov. Ct. J., came to the same conclusion as that reached by the Court of Appeal. There are no significant differences in the reasoning in the two opinions except that Paradis, Prov. Ct. J., was not bothered by the procedural/substantive distinction. Instead, without scrutinizing what values section 7 might have incorporated, he concluded with an instance of *a fortiori* logic:

> If it can be said that absolute liability offences in themselves "violate fundamental principles of penal liability", one which causes a minimum term of imprisonment must be said to be in violation of principles of fundamental justice.[55]

The Ontario Court of Appeal has also spoken on the issue of the scope of the section 7 standard in *Re Potma and the Queen*[56]. This case raised the question of whether an accused's inability to conduct her own analysis of breathalyzer test ampoules deprived her of her rights under sections 7 and 11(d) of the *Charter*.[57] This was analagous to the unsuccessful challenge to the breathalyzer law under the *Canadian Bill of Rights* in *Duke* v. *The Queen*.[58] Robins J.A., speaking for the Court of Appeal, seemed to answer crisply the suggestion that sections 7 and 11(d) of the *Charter* might have altered the nature of the task of judicial review. He said that the considerations applicable to the accused's challenge to the breathalyzer law "are no different now than they were before the *Charter*".[59] He went on to say:

> The concepts of 'fundamental justice' and 'fair hearing' relevant here are the same whether considered under ss. 7 and 11(d) of the *Charter*, under s. 2(e) and (f) of the *Bill of Rights*, or under the common law. In so far as this case is concerned, while the *Charter* accords recognition to the well-established rights asserted by the appellant, it effects no change in the law respecting those rights....
>
> ... 'Fundamental justice', like 'natural justice' or 'fair play', is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure.[60]

However, this conclusion as to the scope of section 7 needs to be examined in light of the nature of the accused's claim. Her argument was that the unavailability of the ampoules for analysis by her analysts deprived her of an essential component of her right to answer the case against her. In other words her argument was one of procedural unfairness, as was the similar argument in *Duke* v. *The Queen*. Accordingly, Robins J.A. would seem to have been correct in saying that in relation to this particular claim nothing has changed with the enactment of the *Charter*. His statement that section 7 is a guarantee of procedural rights was appropriate for the issue before him and does not reflect at all on whether, for him, section 7 might

54. *Supra*, n. 52.
55. *Ibid.*, at 496.
56. (1983), 41 O.R. (2d) 43 (C.A.).
57. S. 11(d) provides: "Any person charged with an offence has the right... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independant and impartial tribunal".
58. *Supra*, n. 23.
59. *Supra*, n. 56, at 52.
60. *Ibid.*

have a substantive content in a case in which such a claim would be relevant.[61]

In a recent Ontario case, *Re Mason and the Queen*,[62] Ewaschuk J. unequivocally declared that section 7 does not guarantee substantive due process.[63] The authority for this conclusion was the now familiar evidence of Barry Strayer before the Special Joint Committee. The clear expression of judicial opinion in this case is, however, not authoritative since the applicant's claim was rooted firmly in *audi alteram partem*, one of the major aspects of the procedural rules of natural justice. (The applicant's mandatory supervision had been revoked through the deciding vote of a member of the National Parole Board who was not present at the hearing.) Unfortunately, Ewaschuk J. did not adopt the Ontario Court of Appeal's policy of not speaking to the question of substantive review before substantive review was clearly in issue.

One further case which touched on the procedural/substantive debate was *R.* v. *Gustavson*[64] in which a claim of substantive injustice was dealt with on the merits without preclusion of the substantive argument. The Attorney General of B.C. had applied under section 688 of the *Criminal Code* to have Gustavson declared a dangerous offender and sentenced for an indeterminate period. Gustavson did not make the substantive argument (as he might have done) that indeterminate sentences are fundamentally unjust. Rather, he argued that the discretion given to the courts to sentence for an indeterminate period once a person has been found to be a dangerous offender led to unequal treatment of persons of the same class (i.e. dangerous offenders). The resulting discrimination between members of the class was fundamentally unjust. McKenzie J. had little trouble in rejecting this argument on the ground that a legislative grant of discretionary authority did not create inequalities so long as the discretion was exercised in a non-arbitrary or non-capricious way. In other words, the proper exercise of discretionary power based on rational criteria will lead to the different treatment of dangerous offenders but not to unequal treatment. What is significant in the case is Mr. Justice McKenzie's acceptance that "the right to equality before the law is a fundamental principle of justice".[65] The equal treatment aspect of legislative schemes clearly is a matter of substantive evaluation; it entails asking whether the classes created in legislation are appropriate for the purposes of the scheme and are otherwise fair. These are not procedural questions.

61. The same point can be made about the judgment in *U.S.A.* v. *Yue* (1983), 40 O.R. (2d) 780 (Ont. Co. Ct.). The adoption of the *Bill of Rights* jurisprudence in a case which was based on a purely procedural defect (evidence at an extradition hearing was by affidavit only) does not represent authority for the view that s. 7 does not allow substantive review.

62. *Supra*, n. 17.

63. "It is also undoubted that s. 7 was intended to guarantee procedural due process (*i.e.*, natural justice) and not substantive due process...". *Ibid.*, at 397.

64. (1982), 143 D.L.R. (3d) 491 (B.C. S.C.).

65. *Ibid.*, at 495. Presumably McKenzie J.'s view that equality is "a fundamental principle of justice" is the same thing as viewing equality to be "a principle of fundamental justice".

(c) The case for substantive review

It is now appropriate to address the question whether it would (as provincial premiers and the federal Department of Justice lawyers seemed to think in 1980 and 1981) be unfortunate for Canadian public life if judges were to construe section 7 as giving them the power to undertake substantive review.

I take the position that reading section 7 to include substantive review would not, in spite of the imprecision of "fundamental justice", disrupt our prevailing democratic values but would, in fact, enhance them. The short reason for this view is that the courts' enquiry into the substantive justice of legislative measures would buttress the goal of fair representation in democratic policy formation. The instances in which section 7 arguments of a substantive sort would prevail would be when policies have identified a class of persons to be burdened for the good of all in a manner which either ignores that class' other fundamental rights, or places a disproportionate cost on a minority group not capable of getting its interests attended to appropriately in the political process. In this way application of the substantive justice standard would drive legislators and policy makers to consider carefully the appropriate bearers of the burdens of their programs. This, it seems to me, enhances the quality of representation of persons in the political process.

It might be argued that almost all of the terms used in this justification for substantive review lack precision, reveal no clear standards and present the danger of the court transcending the limits appropriate to its rôle. However, the constitutional mandate to make legislative programs fit a theory of just burdens is precise in the sense that it causes the court to direct its enquiry to a specific question and presents a specific principle to be pursued. When the "principles of fundamental justice" are seen as capable of being related to a theory of just burdens it is not true that courts are simply reviewers of legislative policy choices; instead they review a finite, but fundamental, aspect of public policies.

In the limited space available I want to suggest a more developed series of justifications for applying a substantive justice concept. First, we should understand the *Charter* in its totality to be about protecting the fundamental interests — speech rights, democratic rights, the right to equal treatment, etc. — of minorities. This is not to say that judges applying the *Charter* must not act to protect Charter rights when they can see that a majority of persons are actually inhibited in relation to a right by the challenged legislation. But it does mean that the purpose of the *Charter* is to protect (for a time, at least[66]) some interests against the majority's wishes. Since the substantive concept of section 7 focuses on the unjust

66. The rights of the *Charter* can always be legislatively overridden through the enactment of a *non obstante* clause under s. 33 of the *Constitution Act, 1982*.

treatment of minorities in the setting of policies, the substantive concept is perfectly consonant with the underlying rationale of the *Charter*.

Second, the substantive concept of fundamental justice could be a valuable aid in controlling abuse of discretion by boards, tribunals and other governmental agencies. As more and more of the important decisions affecting our vital interests are made by quasi-judicial bodies,[67] it becomes increasingly important that these bodies make consistent decisions and do not resort to factors inappropriate to their task. It is, of course, true that jurisdictional review already controls any situation where a board might take account of wrong factors. But it is less clear that any requirements for consistency and neutrality are capable of being tested under this rubric.[68] Clearly these values would be included in the concept of substantive justice. The concern over achieving neutrality in public administration is likely to become more acute if the Minister of Justice's circulated amendment[69] to section 96 of the *Constitution Act, 1867* is adopted. Under the proposed amendment, provinces would be permitted to assign to boards every adjudicative task, (except judicial review), required for the administration of provincial legislation or common law within the provincial heads of power.[70] The potential for a vast increase in the adjudication of rights by the executive branch enhances, at least for those who are nervous about government boards and officials, the argument for an overarching standard of fairness to be applied to this administration. The unexplained assumption behind this justification for substantive review is that the interests protected by section 7 — life, liberty and security of the person — may be affected by provincial executive administration. This assumption is correct to the extent that personal security can be read expansively to include interests necessary to protect basic human dignity and essential economic interests. This is an issue which is considered later in this paper.

Third, the substantive justice concept is useful in the difficult task of giving recognition to unarticulated rights. Admittedly this function is highly

67. An early identification of the vital significance of administrative regimes (non-courts) to people's lives and their security of the person is found in Reich, "The New Property" (1964), 73 Yale L.J. 733.

68. See, generally, Mullan, "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision-Making" (1982), 27 McGill L.J. 250. In his conclusion Professor Mullan expresses little enthusiasm for a general theory of substantive review of administrative action: "... it has the potential to be positively dangerous to the satisfactory resolution of the proper rôle of the courts in their relations with the administrative process. ...As a criterion for judging the end result of an administrative process it is either unnecessary because of the existing scope of review for abuse of discretion, or overbroad in that it lacks deference to the judgment of the statutory decision-maker..." (at 297). However, earlier in dealing with the particular question of judicial review on the basis of inconsistency, he agrees that "such a basis of relief should find its place in the Canadian law of judicial review of administrative action..." (at 285). This, however, is not in conflict with his overall antipathy to substantive review since review for inconsistency need not necessarily be seen as within the rubric of substantive review. Mullan does, however, recognize that such review can also logically be described as substantive (at 280).

69. The Honourable Mark MacGuigan, *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals* (Ottawa, 1983).

70. The text of the proposed amendment is:

> 96B. (1) Notwithstanding section 96, the Legislature of each Province may confer on any tribunal, board, commission or authority, other than a court, established pursuant to the laws of the Province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the Province.
>
> (2) Any decision of a tribunal, board, commission or authority on which any jurisdiction of a superior court is conferred under subsection (1) is subject to review by a superior court of the Province for want or excess of jurisdiction.

controversial. For some, judicial enforcement of values not clearly identified in the constitutional text simply compounds the problem of judicial legislation.[71] The late Professor Alexander Bickel of Yale claimed that the hardest question of American constitutional law is identifying, under the due process clause and other clauses, "which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts?".[72] Is this a question which the Canadian *Charter* invites judges to face? The probable answer is "yes". It seems logical to recognize that the rights which were clearly listed in the *Charter* in 1982 simply are not likely to be exhaustive of all the fundamental values which our polity hopes will be respected even in the face of momentary urges by the majority to discount them. If, as I have claimed, the *Charter of Rights* is at heart designed to protect minorities, the book is not likely closed on the interests of minorities which ought not to be liable to impairment by the legislatures or Parliament. This view is strengthened by the presence of the *Charter's* override clause,[73] since that clause permits legislative bodies' wishes to prevail over the vital interests of minorities if those bodies conclude that this is necessary in the circumstances.

Furthermore, section 26 of the *Charter* expressly provides a guarantee for rights and freedoms not explicitly mentioned,[74] so the idea of residual rights is not an invention. The question is whether, in light of section 26, there is any need to involve section 7 in protecting these rights. I think there is. Section 26 on its face provides courts with no guidance about which claims ought to be recognized. Section 7 does provide a degree of guidance — the court may entertain those claims which are based on the idea of fundamental justice, in the sense of the just distribution of burdens and benefits, and which are directed to preserving life, liberty and security of the person. Furthermore section 26 can be read as being necessarily dependent on locating the right which is sought to be vindicated in some other constitutional provision. (It must certainly be the case that the rights referred to in section 26 cannot be merely statutory rights).

The history of using a substantive justice standard in the United States[75] has, predictably enough, been the subject of serious criticism in terms of both judicial craftsmanship and democratic theory.[76] The recent decision of Cattanach J. in the "*Cruise Missile*" case[77] has raised anew the similar debate, in which Canadian politicians intensively engaged just a few years

71. See, in the United States context, Ely, *supra*, n. 7, chapter 3 "Discovering Fundamental Values", 43-72.

72. A. Bickel, *The Least Dangerous Branch* (Indianapolis, 1962) c. 55, quoted in Ely, *supra*, n. 7, at 43.

73. S. 33, *Constitution Act, 1982*.

74. S. 26, *Constitution Act, 1982* provides: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada".

75. In recent years the two most famous instances have been *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (right to privacy in relation to contraception) and *Roe* v. *Wade*, 410 U.S. 113 (1973) (right to privacy extended to encompass a woman's decision to terminate her pregnancy within a limited period).

76. Professor Philip Bobbitt describes the reaction to *Roe* v. *Wade* as "universal disillusionment" P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, 1982) 157. At 269 n. 3 he cites a number of critical articles.

77. *Supra*, n. 34.

ago: is it more consonant with our political culture, and are the people of Canada better served, when the final resolution of conflict over values is made at the political level? On one side of the debate are those who believe that an appropriate mode for the defence of equality and liberty is the rigourous and illuminating process of legal reasoning over constitutional ethics. Professor Archibald Cox, an apologist for court-administered justice, tells us that the court can be "the voice of the spirit, reminding us of our better selves".[78] He adds:

> ... it provides a stimulus and quickens moral education. But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decision must be already in the nation.[79]

On the other side are those who argue that there is all the difference in the world between the judges' capacity to reason about ethical issues and the discovery of truth about ethical issues — or the discovery of the legally correct answer. In the absence of right answers there can be no justification for a judicially administered substantive justice standard.[80] As John Hart Ely has argued since "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles" there is no basis in democratic theory "to overturn the decisions of our elected representatives".[81]

This cursory examination of one of the important debates in recent Canadian history does not do justice to its complexity. What is clear is that this debate bears on the most prudent way to read section 7. There is an irony here. In deciding whether to interpret the section to permit substantive review judges will have to choose between competing fundamental conceptions — the idea that judges are well suited to be the ultimate arbiters of the "most perfect" resolution of individual and state interests, or, alternatively, the idea that in this morally confusing world the only safe course is for the state to be governed by the people and their representatives. In making the choice between these different conceptions of the democratic political order, judges cannot avoid the task that those who argue for a restrained interpretation of section 7 want judges never to assume.[82]

III Security of the Person

The second issue to be dealt with in this paper is the meaning of "security of the person", the interpretative problem being to identify the sorts of interests which fall within that phrase. There is no reason to believe

78. A. Cox, *The Role of the Supreme Court in American Government*, (New York, 1976) 117. A similar idea is expressed by Professor Michael Perry in "Noninterpretive Review of Human Rights: A Functional Justification" (1981), 56 N.Y.U.L. Rev. 278: "Such review is an enterprise designed to enable the American polity to live out its commitment to an ever deepening moral understanding and to political practices that harmonize with that understanding" (at 294).

79. *Ibid.*

80. This point is elaborated in Dworkin, *supra*, n. 1, at 82-90.

81. Ely, *supra*, n. 7, at 54.

82. "Judicial authority to determine when to defer to others in constitutional matters is a procedural form of substantive power; judicial restraint is but another form of judicial activism" Tribe, *supra*, n. 7, at iv.

that "security of the person" is restricted to those invasions of personal integrity traditionally inflicted by the criminal justice system. The appearance of section 7 in the "Legal Rights" portion of the *Charter* might suggest that it be directed only to criminal and penal processes, but the words of the section clearly override any such contextual connotation.[83] The rights referred to in section 7 arise in respect of any invasions of personal security (however defined) regardless of whether the process causing it is criminal or civil, judicial or administrative. In the absence of structural limitations the question posed by "security of the person" is whether the phrase includes such things as livelihood, property, family and other relationships, patterns of daily life,[84] and generally matters which are essential to a person's capacity to act as an autonomous being.

"Security of the person" was considered in *The Queen* v. *Fisherman's Wharf*[85] a remarkably early use of the *Charter* by Dickson J. of the New Brunswick Court of Queen's Bench. The question was whether the collection provisions of the provincial retail sales tax legislation[86] permitted the formation of a lien on all property used in the business of a taxpayer, including that property which was owned by third parties. The defaulting taxpayer was a restaurant and its cooking appliances, (and other equipment), were owned by others and held under lease, loan, conditional sales contract and licence. The claim of the various owners of the equipment was that the legislation did not allow a lien to be established on their property. Dickson J. agreed. He gave ten reasons for this conclusion. One, (the ninth), was that to interpret the legislation otherwise would violate section 7's protection of "security of the person" which he said "must be construed as comprising the right to enjoyment of the ownership of property which extends to 'security of the person' ".[87] Unfortunately, Dickson J. did not elaborate on the sort of property which relates to personal security. Nor, on the particular facts of the case before him, did he show how the property belonging to the propane distributor, the dairy, the bottling company and the cigarette distributor related to their "security of the person". It can be assumed, of course, that this was property from which these companies produced their income and the loss of the property would negatively affect their earning capacity. From this it might be inferred that any property loss which causes a decrease in income is property which relates to security of the person. This view seems extravagant. A more

83. During the summer of 1980 lawyers representing some provinces tried to discover language that would explicitly restrict the operation of legal rights, including what is now s. 7, to criminal and penal processes. There was not wide-spread support for this enterprise.

84. See, M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto, 1983) 250 (para. 296).

85. (1982), 135 D.L.R. (3d) 307.

86. *Social Services and Education Tax Act*, R.S.N.B. 1973, c. S-10, s. 19(1) (rep. and sub. S.N.B. 1979, c. 67, s. 8).

87. *Supra*, n. 85 at 315. On appeal to the New Brunswick Court of Appeal sub-nom. *The Queen in right of New Brunswick* v. *Estabrooks Pontiac Buick Ltd., The Queen in right of New Brunswick* v. *Fisherman's Wharf Ltd.* (1982), 144 D.L.R. (3d) 21, LaForest J.A., speaking for the Court, implicitly rejected Dickson J.'s conclusion on the *Charter*: "The courts should not, for example, place themselves in the position of frustrating regulatory schemes or measures obviously intended to reallocate rights and resources simply because they affect vested rights. For legislation almost inevitably affects vested rights...
...It is probably to avoid difficulties of this kind that the security of property was not expressly protected by the *Canadian Charter of Rights and Freedoms*" (at 31).

plausible view of the outer edge of section 7 is that state action which deprives a person of all (or a substantial portion) of his or her capacity to produce an income could be seen as invading security of the person. Such action would include the removal of a person from the welfare scheme, the confiscation of property (tools, equipment, etc.) essential to a person's work, or the cancellation of a licence which is essential to the pursuit of one's occupation (taxi driver, lawyer or stationary engineer).

The *Fisherman's Wharf* decision is, however, correct in opening up section 7 to protect economic rights. One of the reasons this would seem to be a correct reading is that "security of the person" may be presumed to include rights not comprised in the ideas of "life" and "liberty". It must include some of the conditions of living beyond liberty. Assuming that the *Charter* is dedicated to granting rights over matters of fundamental importance, "security of the person" will include conditions necessary for life, such as food and shelter. Hence governmental actions which take away shelter and food, (or the capacity to obtain shelter and food), would be subject to court review under section 7. Since any substantial income loss affects the capacity to meet bodily needs, it would seem likely that economic interests, such as property and jobs, are protected against deprivation except, of course, when imposed in accordance with principles of fundamental justice.

It could be argued that section 7 should be given a more limited meaning — a meaning which does not include interests derived from property. It could relate only to interests of social interaction such as bodily integrity, privacy, association and equality. While the latter two are covered elsewhere in the *Charter,*[88] the former two are clearly aspects of security of the person. However, there seems to be no compelling reason to view security of the person as being exhaustively defined by reference to privacy and bodily integrity and not as encompassing economic aspects of personhood. The concept of person includes such things as autonomy, self-direction and social activism (in the sense of being one who interacts). This means that not only bodies, and physical and social choices, should be protected from "unjust" interference, but one's ability to function with a degree of self-direction should be as well. A pre-condition of that self-direction is the ownership of (or at least the power to control) property.

A further argument for reading section 7 as providing constitutional protection for persons' livelihoods has been advanced by Professor Bryan Schwartz.

> ...the ability to carry on the economic activity of one's choice may be essential to a person's conception of how to live 'the good life'. It may be vital to a person that he be able to work as a farmer, a lawyer or a musician. It may be no less important to one person that he be permitted to practice his vocation as a tailor than to another that he be allowed to publish his poetry. Few doubt that it is unacceptable that a person not be able to work at his profession because that person be black or Jewish or a woman. I see no

88. Freedom of association is protected in s. 2(d) and the right to equal protection of the law is granted in s. 15(1).

> reason to protect economic opportunity only from discriminatory attacks and not from tyrannical restrictions which affect everyone equally.[89]

To the argument that the democratic process can be trusted in matters of economic regulation (even though not trusted to sustain free speech and freedom of religion or to refrain from discriminating against racial minorities) Schwartz argues that legislative "ganging up" is not confined to ideological, cultural, religious or racial minorities. He observes that money has a lot of power in a democratic system, and that power is quite capable of being directed to creating laws which are unjustifiably oppressive to groups on simple economic grounds.[90] A legislative or regulatory arrangement which precludes entry to professional or economic activity based not on factors of competence, but in order to avoid a harmful effect to those already certified, is one example.

Perhaps the most compelling argument for viewing "security of the person" as a protection of vital economic interests is the simplest argument. Since the idea of section 7 is primarily to protect minorities against the imposition of an unjust burden or cost flowing from a public welfare scheme it makes no real sense to exclude economic interests from the list of values to be protected. Admittedly the framers of the *Charter* did not include "enjoyment of property" in section 7, which would have placed economic burdens clearly under the protection of the *Charter*. But the phrase "security of the person" connotes the notion of interests central to personal integrity. Economic interests can, in many circumstances, be seen as indispensable to the dignity and integrity of individuals and the capacity of individuals to pursue their own ideas of the good life.

In other words, once we have accepted, through the inclusion of section 7 in the *Charter*, that personal interests cannot be put aside for the public good in ways which are substantively unjust, then it is hard to make the case that economic interests are less weighty or less the object of majority oppression against the central attributes of personhood than are other interests. In fact, to consider economic interests as less vital, less central to a person's conception of himself or his idea of the good life is exactly the sort of state determination of value which the *Charter* is designed to place beyond state power. The idea of the liberal state is to put questions of ultimate value, and debate over those questions, outside state prescription — to leave them forever the subject of political dialogue. Discounting economic interests as interests to be protected against intrusions amounting to fundamental injustice is the perfect expression of the illiberalism which the *Charter* is designed to forestall.

89. Schwartz, "The Charter and Economic Regulation", unpublished paper 13 (to be published 1983 Pitblado Lecture Series).

90. *Ibid.*, at 14-15.