

The Redistributive Potential of Section 7 of the Canadian *Charter*: Incorporating Socio-economic Context in Criminal Law and in the Adjudication of Rights

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This article contrasts two series of arguments put forward by litigators for including social and economic context in the adjudication of rights protected by section 7 of the *Canadian Charter of Rights and Freedoms*, in order to assess the impact of 25 years of *Charter* litigation on the rights of the poor in the wake of the *Re BC Motor Vehicle Act*. The first series of arguments focuses on the inclusion of poverty and social disadvantage in the definition of principles of fundamental justice relevant to the determination of criminal responsibility and in sentencing. The second series of arguments articulates a broader conception of the right to life, liberty and security of the person. In light of the mitigated results obtained for the poor in both cases, this article discusses whether the problem lies in the constitutional nature of *Charter* litigation itself or in the ideological nature of social and economic arguments.

Cet article met en opposition deux séries d'arguments présentés par des avocats en vue d'intégrer le contexte social et économique à l'adjudication de droits protégés par l'article 7 de la *Charte canadienne des droits et libertés* et ce, en vue d'évaluer l'incidence des 25 années de litiges relatifs à la *Charte* à propos des droits des pauvres dans la foulée de l'arrêt *Renvoi sur la Motor Vehicle Act (C-B)*. La première série d'arguments met l'accent sur l'inclusion de la pauvreté et la condition sociale défavorable à la définition des principes de justice fondamentale pertinents aux fins de déterminer la responsabilité pénale et la peine subséquente à imposer. Dans la seconde série d'arguments, on formule une conception élargie du droit à la vie, à la liberté et à la sécurité de la personne. À la lumière des résultats mitigés obtenus en faveur de la pauvreté dans les deux cas, cet article s'interroge à savoir si le problème réside dans la nature constitutionnelle des litiges portant sur la *Charte* ou dans la nature idéologique des arguments sociaux et économiques.

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I. INTRODUCTION

Since the adoption of the *Canadian Charter of Rights and Freedoms*,¹ criminal lawyers, scholars and social activists have attempted several strategies for including much-needed social and economic context in the adjudication of rights. While we often hear about lawyers' and scholars' efforts to achieve redistribution in the context of section 15 of the *Charter*, we sometimes forget that section 7 has also held—and under certain circumstances may arguably hold—great promise for incorporating social context and for ensuring the rights of poor people.

In this article, I will discuss the redistributive potential of section 7 by examining two series of strategies that have been used. Part II examines the first series of strategies. These strategies asserted that relevant social and economic factors, including poverty or other social disadvantage, should be considered in assessing an offender's culpability and in sentencing decisions because it affects his or her ability to choose. These strategies were primarily used during the first ten years of *Charter* optimism, as the terms "principles of fundamental justice" began to be defined. Such strategies encountered very limited success and, in some cases, have led to significant regression when compared to the pre-*Charter* context. Yet, interestingly, some small gains were made outside the ambit of the *Charter*, particularly in the context of sentencing decisions.

In Part III, the second series of strategies are examined. These strategies were those used in *Gosselin v Quebec (Attorney General)*² and in more recent lower court cases such as *Victoria (City of) v Adams*³ and *Bedford v Canada (Attorney General)*,⁴ in which lawyers have put forward a broader conception of the right to life, liberty

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin* cited to SCR].

3 2009 BCCA 563, 313 DLR (4th) 29 [*Adams CA* cited to DLR]; *Victoria (City of) v Adams*, 2008 BCSC 1363, 299 DLR (4th) 193 [*Adams SC* cited to DLR].

4 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford* cited to OR], aff'd 2012 ONCA 186, 109 OR (3d) 1.

and security of the person, in an attempt to generate redistributive outcomes. While this line of argument was rejected by a majority of the Supreme Court of Canada in *Gosselin*, it has led to victories in several lower court cases. Such gains, however, were the result of a compromise on the part of lawyers who chose to argue that section 7 protected individuals against state interference to their right to life, liberty and security of the person, rather than promoting a positive conception of these rights, which could potentially create obligations on the state. In the concluding section, I discuss the minimal results obtained for disadvantaged groups and ask whether the problem with the adjudication of social rights lies in the constitutional nature of *Charter* litigation itself or in the ideological nature of social and economic considerations.

II. SOCIAL CONTEXT AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

The adoption of section 7 of the *Charter*, which provides for the right not to be deprived of one's life, liberty and security, except in accordance with the principles of fundamental justice,⁵ held great promise for substantive criminal law. Lawyers have been quick to argue that the principles of fundamental justice should include principles such as *mens rea*, moral blameworthiness and proportionality of punishment in the hope that subjective considerations could be introduced in the assessment of culpability (in *mens rea* and in defences), or in sentencing.

A. *Mens rea*

The Supreme Court of Canada indicated the potential of section 7 in *Reference Re Section 94(2) of the Motor Vehicle Act*,⁶ when it raised the concept of *mens rea* to the level of a constitutional imperative. Justice Lamer (as he then was) stated that a minimum standard of fault was required whenever a liberty interest was threatened and declared that the combination of imprisonment and absolute liability constituted a violation of section 7.⁷ At the time, everything seemed possible—including a move towards considering relevant social and economic context related to race, gender and class in assessing an offender's moral culpability.

Enthusiasm was short-lived, however, when Justice Lamer suggested only one year after the Court struck down the *Criminal Code*⁸ provisions on constructive murder in *R v Martineau*,⁹ that "the Constitution does not always guarantee the 'ideal,'"¹⁰ but, rather, imposed minimum standards of moral fault. Moreover, what appeared to be a lower limit or a minimum threshold ended up becoming a ceiling

5 *Supra* note 1, s 7.

6 [1985] 2 SCR 486, 24 DLR (4th) 536 [*Motor Vehicle Reference* cited to SCR].

7 *Ibid* at 515.

8 RSC 1985, c C-46.

9 [1990] 2 SCR 633, 58 CCC (3d) 353.

10 *R v Lippé*, [1991] 2 SCR 114 at 142, 128 NR 1, Lamer CJC.

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on the *mens rea* required for several criminal offences. With the Court's decision in *R v Creighton* and its companion cases,¹¹ many scholars realized there had been important drawbacks from the pre-*Charter* context.¹² First, the terminology had changed. Whereas in *R v Sault Ste Marie*¹³ the Court spoke in terms of the presence or absence of *mens rea*, in *Creighton* the Court drew a distinction between "objective" and "subjective" *mens rea*.¹⁴ This semantic shift was not trivial. Even more importantly, the common law tradition of adopting a subjective approach to *mens rea* for criminal offences¹⁵ came to an abrupt end. Justice McLachlin (as she then was), rallying the majority,¹⁶ stated that section 7 did not require subjective standards of fault for all criminal offences and that absolute symmetry between the *mens rea* and the prohibited consequences was not a principle of fundamental justice.¹⁷ Instead, a low-level objective fault requirement was found constitutionally sufficient for a broad range of crimes,¹⁸ other than those falling within the extremely limited group of offences for which subjective awareness was deemed necessary to reflect social stigma and proportional punishment.¹⁹ Further weakening the most basic principles of criminal law, the Court held that not only was it acceptable to convict someone on the mere basis of negligence, but that the assessment of the offender's capacity to comply with the reasonable person standard should exclude any consideration of

11 [1993] 3 SCR 3, 105 DLR (4th) 632 [*Creighton* cited to SCR]; *R v Gosset*, [1993] 3 SCR 76, 105 DLR (4th) 681 [*Gosset*]; *R v Finlay*, [1993] 3 SCR 103, 105 DLR (4th) 699 [*Finlay*]; *R v Naglik*, [1993] 3 SCR 122, 105 DLR (4th) 712 [*Naglik*].

12 Don Stuart, "The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumph of Pragmatism and Law Enforcement Expediency" (1993) 15 CR (4th) 88; Anne-Marie Boisvert, "Les exigences constitutionnelles en matière de faute pénale : un bilan critique" (1994) 73 Can Bar Rev 161; David M Paciocco, Book Review of *The Charter's Impact on the Criminal Justice System* by B Jamie Cameron, ed, (1996-97) 28:1 Ottawa L Rev 249; Anne-Marie Boisvert, "La constitutionnalisation de la *mens rea* et l'émergence d'une nouvelle théorie de la responsabilité pénale" (1998) 77 Can Bar Rev 126 [Boisvert, "La constitutionnalisation de la *mens rea*"].

13 [1978] 2 SCR 1299, 85 DLR (3d) 161 [*Sault Ste Marie*]. See also *R v Pappajohn*, [1980] 2 SCR 120, 111 DLR (3d) 1; *R v Sansregret*, [1985] 1 SCR 570, 17 DLR (4th) 577.

14 Boisvert, "La constitutionnalisation de la *mens rea*", *supra* note 12 at 139.

15 This approach is embodied in *Sault Ste Marie*, *supra* note 13. See generally Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed (Toronto: Carswell, 2001) at 160-62; Boisvert, "La constitutionnalisation de la *mens rea*", *supra* note 12 at 133 (suggests that this approach is quite recent and refers to Toni Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 UTLJ 75).

16 It is interesting to note that the composition of the Supreme Court of Canada changed considerably from *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399 [*Vaillancourt*] (Dickson CJC, Beetz, Estey, Chouinard, McIntyre, Lamer, Wilson, Le Dain, and La Forest JJ) to *Martineau*, *supra* note 9 in 1990 (Dickson CJC at time of hearing, Lamer CJC at time of judgment, Wilson, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ) and to *Creighton*, *supra* note 11 in 1993 (Lamer CJC, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci, Major and McLachlin JJ).

17 *Creighton*, *supra* note 11 at 53-59.

18 *R v Hundal*, [1993] 1 SCR 867, 79 CCC (3d) 97 [*Hundal*]; *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595 [*DeSousa*].

19 This includes murder, attempted murder and theft: see *Vaillancourt*, *supra* note 16; *Martineau*, *supra* note 9; *R v Logan*, [1990] 2 SCR 731, 73 DLR (4th) 40; *R v Jackson*, [1993] 4 SCR 573, 87 CCC (3d) 56. This does not include unlawful acts causing bodily harm: see *DeSousa*, *ibid*; dangerous driving: see *Hundal*, *ibid*; manslaughter: see *Creighton*, *supra* note 11; failing to provide the necessities of life: see *Naglik*, *supra* note 11; and careless use of a firearm: see *Gosset*, *supra* note 11 and *Finlay*, *supra* note 11.

his or her personal characteristics including age, race, gender, lack of experience, not to mention poverty or class.²⁰

By excluding subjective factors and social context from the assessment of moral culpability, there are at least two things that the Court did not do, despite purporting to have done so. First, comparing the offender's behaviour with that of a reasonable person, who does not share any of his or her personal characteristics, did not set a neutral or universal standard.²¹ On the contrary, while pretending to introduce an objective standard, the Court actually obscured gender, race and class biases. As feminists and critical race theorists have convincingly argued, the semantic shift that has occurred over the last thirty years in legal doctrine from the "reasonable man" standard to that of the "reasonable person" has not changed the fact that the reasonable person has historically, and is still today, often thought to be a man.²² Also, the "reasonable person" is a man of a particularly rare kind, one might add, who is tall, strong, fearless and not too emotional, embodying an ideal of perfection that almost no one—man or woman—could possibly match. But more than being gender biased, the "reasonable person" is generally understood to come from a white middle class background.²³ As such, the "reasonable person", as judges generally understand the concept, is unlikely to have had many encounters with the criminal justice system. This is mostly because of the systemic discriminating effects of dominant conceptions and *Criminal Code* definitions of "crime," and prevailing law enforcement strategies that tend to focus on street-level crimes most likely to be committed by the poor, and by other disadvantaged groups.²⁴ Also, the reasonable person is not likely to know anything about the difficulties of poverty or street life and the constraints it imposes on one's life and ability to choose.²⁵

In fact, in most criminal law cases, including several of the Supreme Court of Canada's landmark decisions dealing with criminal responsibility, the offenders came from impoverished socio-economic backgrounds.²⁶ For instance, in *Naglik*, one

20 *Creighton*, *supra* note 11 at 63.

21 *Ibid* (Justice McLachlin, as she then was, reasoned that the minimum standards of conduct prescribed by criminal law should apply universally to all individuals regardless of their different personal situations including whether a person is "rich and poor, wise and naive" at 63).

22 For an excellent overview of the literature on this question: see Mayo Moran, "The Reasonable Person: A Conceptual Biography in Comparative Perspective" (2010) 14:4 *Lewis & Clark L Rev* 1233. See also Ronald KL Collins, "Language, History and the Legal Process: A Profile of the 'Reasonable Man' (1976-1977) 8 *Rutgers-Camden LJ* 311; Dolores A Donovan & Stephanie M Wildman, "Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation" (1980) 14:1 *Loy LA L Rev* 435; Wendy Parker, "The reasonable person: a gendered concept?" (1993) 23:2 *VUWLR* 105.

23 Stanley Meng Heong Yeo, "Ethnicity and the Objective Test in Provocation" (1987-1988) 16 *Melbourne ULL Rev* 67

24 Sonia N Lawrence & Toni Williams, "Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing" (2006) 56:4 *UTLJ* 285 (argues against the specious association between criminality and minorities, in particular Black people).

25 For a full discussion of the potential impact of poverty on criminal responsibility, see Marie-Eve Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) 55:4 *McGill LJ* 771 [Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders"].

26 See *Vaillancourt*, *supra* note 16; *Martineau*, *supra* note 9; *Naglik*, *supra* note 11; *R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687 [Ruzic].

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of the companion cases to *Creighton*, Mrs. Naglik, a poor, young, single mother with limited educational opportunities, parental skills and support, was convicted of failing to provide the necessities of life to her baby while the Court failed to pay any attention to these important facts.²⁷ In setting such an artificial and unrealistic standard, more stringent than the civil liability standard, the Court failed to promote a higher sense of personal responsibility, and actually went on to punish blameless people.

Second, the exclusion of social context or subjective factors from moral culpability did not give greater importance to victims' rights, voices and concerns. In the years that followed the courts' increased acceptance of negligence-based liability, some scholars embraced this shift, arguing that victims of crime did not care whether they were harmed intentionally by the accused, instead insisting upon the importance of promoting equality values.²⁸ Unfortunately, this discourse perpetuated the false assumption that the rights of the accused are, or should be, opposed to victims' rights. In fact, both groups have more in common than we often like to think. First, they are both interested parties to a conflict that has historically been taken away from them by the state for economic and political reasons.²⁹ As Nils Christie convincingly suggests, conflicts underlying criminal offences are today taken away from both offenders and victims by "professional thieves" such as lawyers, judges, social workers and criminologists in the criminal justice system.³⁰ Both parties (victims and offenders) are only *represented* (and of course, not to the same extent) and are not given a fair opportunity to tell their stories or to decide for themselves how they would like the conflict to be resolved. Penal abolitionists, restorative justice scholars and activists have since suggested other more "civilized" (understood both as in civil liability and as in civility) means of addressing the harm caused by one person to another in the context of an offence.³¹ Such proposals seem to acknowledge that individuals, individuals' rights and society (which is an entity often confused with victims in the criminal law context) do not exist separately and independently, as the political theory of liberalism would often like us to believe.³² In the

27 *Naglik*, *supra* note 11.

28 See Rosemarie Cairns Way, "Culpability and the Equality Value: The Legacy of the *Martineau* Dissent" (2003) 15:1 CJWL 53; Brian Rolles, "The Golden Thread of Criminal Law: Moral Culpability and Sexual Assault" (1998) 61:1 Sask L Rev 87. For a more nuanced feminist voice understanding the tension between the claims for equality and for repression, see John McInnes & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 UBC L Rev 341.

29 I borrow here from Nils Christie's concept in his seminal article, "Conflicts as Property" (1977) 17:1 Brit J of Crim 1. However, this is also in line with the origins of the criminal justice system which moved from a conflict-resolution system based on revenge and compensation controlled by tribes and clans to one controlled by the King and based on fault and penance: see Theodore FT Plucknett, *A Concise History of the Common Law*, 5th ed (London: Butterworth, 1956).

30 Christie, *supra* note 29 at 3-5.

31 Dennis Sullivan & Larry Tiff, *Restorative Justice: Healing the Foundations of Our Everyday Lives* (Monsey, NY: Willow Tree Press, 2001); Christa Pelikan & Thomas Trenczek, "Victim Offender Mediation and Restorative Justice: The European Landscape" in Dennis Sullivan & Larry Tiff, eds, *Handbook of Restorative Justice: A Global Perspective* (London: Routledge, 2006) 63 at 65.

32 Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 2002) ch 7.

meantime, however, the offender is not asked to respond to his or her victims' needs or to see how such needs are directly connected to the offender's own needs, but to mount a defence against the punitive arsenal of the state. Yet, such rulings have helped promote a repressive law and order agenda while purporting to speak on behalf of victims.³³

There is one thing that lawyers have learned from the courts' decisions on *mens rea*—namely that they should perhaps reconsider relying on section 7 to advance socio-economic arguments and, instead, should consider doing so while relying on well-grounded common law principles not entrenched in the *Charter*. Let us now turn to the attempts made by defence lawyers to factor social context in the assessment of offenders' culpability outside of the ambit of the *Charter* in two distinct areas: defences and sentencing.

B. Defences

In contrast to its approach to *mens rea*, the Supreme Court of Canada has unanimously held that the reasonableness requirement for every defence—in the context of necessity, duress or self-defence—should be assessed while considering the particular circumstances and the personal characteristics of the accused.³⁴ In other words, the offender's conduct should be compared to that of a reasonable person who shares some, but not all,³⁵ of the offender's strengths and weaknesses.

Despite some interesting developments, this has not allowed lawyers to go much further in considering poverty as a contextual factor. The Supreme Court of Canada has made this clear by referring repeatedly to the English case of *London Borough of Southwark v Williams*,³⁶ and emphasizing the importance of “strictly control[ing] and scrupulously limit[ing]”³⁷ the scope of the necessity defence. In that case, the owner of a building brought an application to expel the accused, a homeless married man with two children, as well as other homeless individuals who were squatting on the premises as a result of the “extreme housing shortage...”³⁸ in London, England. The accused admitted that he had no right to be in the house, but requested that his behaviour be excused or justified on the basis of necessity. He argued that the reasonable person in his situation would also have committed criminal trespass. Lord Davies, after “experiencing a feeling of

33 André Jodouin & Marie-Ève Sylvestre, “Changer les lois, les idées, les pratiques: réflexions sur l'échec de la réforme de la détermination de la peine” (2009) 50:3-4 C de D 519 at 569.

34 *R v Hibbert*, [1995] 2 SCR 973 at paras 56-61, 40 CR (4th) 141. See also *R v Hill*, [1986] 1 SCR 313, 27 DLR (4th) 187.

35 *R v Tran*, 2010 SCC 58, [2010] 3 SCR 350 (in which the Court held that “the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*” at para 34).

36 [1971] Ch 734, [1971] 2 All ER 175 (CA), (*sub nom Southwark London Borough Council v Williams*) [*Southwark* cited to All ER].

37 *R v Latimer*, 2001 SCC 1 at para 27, [2001] 1 SCR 3 [*Latimer* cited to SCR]; *Perka v R*, [1984] 2 SCR 232, 13 DLR (4th) 1.

38 *Southwark*, *supra* note 35 at 176.

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deep depression,³⁹ rejected the defence, arguing that if unchecked, the defence of necessity could “very easily become simply a mask for anarchy.”⁴⁰ In his concurring opinion, Lord Denning added that “if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass If homelessness were once admitted as a defence to trespass, no one’s house could be safe. Necessity would open a door which no man could shut.”⁴¹

Thus, despite theoretically providing an avenue for including more social context into determining the moral culpability of an offender, the doctrine of defences is largely limited by political and moral choices related to the criteria for their application.⁴² For instance, the requirement that there be urgency and imminence to support a defence of necessity explicitly excludes “an obstinate and long-standing state of affairs,”⁴³ which puts aside any consideration of chronic and structural poverty in cases where, for instance, homeless squatters occupy private property or regulated public spaces.

The courts’ reluctance to admit any social or economic context in the assessment of moral culpability can be explained in various ways.⁴⁴ First, the manner in which the criminal law responsibility doctrine is structured can hardly accommodate varying degrees of blame and culpability, which are inherent in any moral argument and consideration of social context. Rather, the doctrine is structured around dichotomies: someone is blameless or blameworthy, guilty or not guilty, etc. Furthermore, the courts do not seem prepared to consider the idea that poverty could mitigate responsibility in any meaningful way within existing criminal law doctrine. Judicial reasoning largely proceeds from a series of assumptions about human beings as free and rational agents who should be held responsible for their actions.⁴⁵ I shall come back to these arguments in the conclusion, but I will first turn to developments in the area of sentencing.

C. Sentencing

Sentencing is another area, largely left outside the ambit of *Charter* arguments, where lawyers have claimed some space for including social and economic context. Specifically, lawyers and scholars have suggested that social disadvantage should be

39 *Ibid* at 180.

40 *Ibid* at 181.

41 *Ibid* at 179.

42 Alan Norrie, “Simulacra of Morality? Beyond the Ideal/Actual Antinomies of Criminal Justice” in Antony Duff, ed, *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998) 101; Mark Kelman, “Interpretative Construction in the Substantive Criminal Law” (1980-1981) 33 *Stan L Rev* 591; Sylvestre, *supra* note 25 at 779-80.

43 *Latimer*, *supra* note 36 at para 38.

44 I have discussed this at length in Sylvestre, “Rethinking Criminal Responsibility for Poor Offenders,” *supra* note 25 at 782-87.

45 *Ibid* at 784 (such assumptions are inherent in the political theory of liberalism that underlies criminal law doctrine).

considered as a mitigating factor. The Supreme Court of Canada set high expectations in *R v Gladue*⁴⁶ for aboriginal offenders, holding that sentencing judges should take into account the “unique systemic or background factors”⁴⁷ related to colonisation and years of dislocation including poverty, unemployment, lack of opportunities, lack of education, substance abuse and community fragmentation, that might have contributed “in bringing the particular aboriginal offender before the courts.”⁴⁸ The Court also suggested a similar approach to the types of sentencing procedures and sanctions that could be appropriate, given the offender’s aboriginal background and heritage.⁴⁹

However, there was no cause for celebration as such an innovative approach did not seem to change the corresponding sentence for Ms. Gladue, although it arguably prevented an increase in the severity of her sentence. More importantly, in *R v Wells*,⁵⁰ a decision rendered one year later, the Court made it clear that systemic factors would have little or no impact in cases where offenders are convicted of serious and violent crimes.⁵¹

Nonetheless, defence counsel in cases such as *R v Borde*⁵² and *R v Hamilton*⁵³ have successfully argued that the principle of restraint⁵⁴ in sentencing and the

46 [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue* cited to SCR].

47 *Ibid* at para 66.

48 In saying this, the Court referred both to the relationship between systemic factors and the perpetration of an offence and to systemic discrimination in the criminal justice system: see *ibid* at paras 66-68.

49 *Ibid*.

50 2000 SCC 10, [2000] 1 SCR 207.

51 *Ibid* at para 42 (referring to *Gladue*, *supra* note 46 at para 79). For an interesting critique, see René Pelletier, “The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons” (2001) 39:2-3 *Osgoode Hall LJ* 469. But see *R v Amitook*, 2006 QCCQ 2705, 3 CNLR 249 (in which systemic factors were favourably considered); *R v M (B)*, 2003 SKPC 83, (*sub nom R v BM*) 234 Sask R 244 (Sask Prov Youth Ct) (where the sentencing judge took into consideration the offender’s background, which included poverty, a traumatic family setting and evidence of Fetal Alcohol Spectrum Disorder) and *R v Ladue*, 2011 BCCA 101, 271 CCC (3d) 90, rev’d 2012 SCC 13 (the Court of Appeal held that the sentencing judge had failed to give sufficient weight to the appellant’s Aboriginal background in the context of the violation of a long-term offender order. This decision was recently confirmed by the Supreme Court of Canada).

52 (2003), 63 OR (3d) 417, 172 CCC (3d) 225 (Ont CA) [*Borde* cited to OR] (*Borde* was a young Black male who plead guilty to aggravated assault and other offences. At sentencing, his lawyer submitted evidence of mitigating personal circumstances including poverty, a mother who suffered from mental illness, multiple stays in foster homes, substance abuse and unemployment, as well as evidence of the existence of systemic racism and discrimination against African-Canadian communities in Ontario and in the Canadian criminal justice system).

53 (2003), 172 CCC (3d) 114, 8 CR (6th) 215 (Ont Sup Ct), aff’d 72 OR (3d) 1 (Ont CA) (*Hamilton* and *Mason* were two poor Black single mothers with limited education and employment opportunities who pleaded guilty to importing cocaine from Jamaica into Canada. The sentencing judge, Justice Hill, provided on his own initiative evidence on systemic discrimination against African-Canadian offenders in the criminal justice system and found that such factors including poverty, racism and single motherhood was related to the commission of the offence and should be considered in the sentence. The Court of Appeal accepted that social context could be used as mitigating factors but found that Justice Hill had made some errors including in playing the role of an advocate for the offenders).

54 See *supra* note 8 at s 718.2(e) (“with particular attention to the circumstances of aboriginal offenders”).

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principle of proportionality in punishment—both enshrined in the *Criminal Code*—suggest that systemic and background factors should be considered in sentencing poor black offenders with limited education and employment opportunities.⁵⁵ Despite minimal results for the defendants thus far, these decisions can be clearly understood as “extending a *Gladue*-like approach to other socially disadvantaged groups,”⁵⁶ including, but not limited to, black offenders.⁵⁷ However, these decisions have also created a series of significant limitations. First, judges were careful to emphasize that such systemic considerations will be relevant “only insofar as they played a part in the commission of the offence.”⁵⁸ Second, the Ontario Court of Appeal relied on *Wells* to remind offenders that such factors will generally not generate different results in cases of violent and serious crimes.⁵⁹ Courts have thus favoured an assessment of the gravity of the offence over examining the degree of responsibility aspect of the proportionality principle.⁶⁰ Ultimately, courts and advocates have left it in the hands of sentencing judges who, should they be inclined, can decide to exercise their discretion in favour of poor or disadvantaged offenders.⁶¹

Some critics have argued that the progressive potential of considering social context in sentencing is overestimated given that it is largely based on the stereotype that poor and minority offenders are more likely to commit crimes. Instead they suggest that sentencing decisions should consider discriminatory law enforcement practices, which make it more likely for some individuals or groups to end up in the criminal justice system.⁶² I agree with such criticisms, but I do not think that there is any contradiction in accepting that poverty can have an impact on the range of choices that are available to individuals in any given situation while acknowledging that there is a great deal of racism in law enforcement decisions. In that sense, it is still worth pursuing both lines of argument.

55 Dale E Ives, “Inequality, Crime and Sentencing: *Borde, Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law” (2004) 30:1 Queen’s LJ 114.

56 *Ibid* at 132.

57 H Archibald Kaiser, “*Borde* and *Hamilton*: Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence” (2003) 8 CR (6th) 289. See also *R v White*, [2010] OJ No 3618 (QL) (Ont Ct J); *R v Grant*, [2005] OJ No 6129 (QL), CarswellOnt 3555 (WL Can) (Ont Sup Ct) (where the reasoning in *Hamilton* was followed).

58 Ives, *supra* note 54 at 131; *Borde*, *supra* note 51 at para 27.

59 This second limitation was determinant in *Borde*, *ibid*.

60 Anne-Marie Boisvert & André Jodouin, “De l’intention à l’incurie: le déclin de la culpabilité morale en droit pénal canadien” (2002) 32:1 RGD 759 at 781-89.

61 *Supra* note 8 at s 718.2(2) (short of mandatory minimum sentences, the punishment to be imposed is in the discretion of the court). See *R v Douglas* (2002), 162 CCC (3d) 37, (*sub nom R v Verdi-Douglas*) 49 CR (5th) 188, Fish J (QCCA) [*Douglas* cited to CCC] (in practice, such discretion is often circumscribed by joint submissions. In that respect, trial judges are subject to stringent criteria. They should not “reject jointly proposed sentences except if it is ‘unreasonable’, ‘contrary to the public interest’, ‘unfit’, or ‘would bring the administration of justice into disrepute’” at para 43); *R v Cerasuolo* (2001), 151 CCC (3d) 445, 149 OAC 114 (Ont CA).

62 Lawrence & Williams, *supra* note 24 at 330-31.

Interestingly, attempts to introduce social and background considerations in sentencing have not been raised in the context of section 7 of the *Charter*. It is indeed quite remarkable that section 7 has not attracted more litigation in the area of sentencing. This can partially be explained by the fact that in the early *Charter* years, the Supreme Court of Canada was very quick to stress that, “[w]hile section 7 sets out broad and general rights...,”⁶³ which could sometimes overlap or extend over other *Charter* rights, it could not be read to “impose greater restrictions on punishment than s[ection] 12—for example by prohibiting punishments which were merely excessive...”⁶⁴ If it were to do so, the Court suggests that section 12 of the *Charter*, which was to be limited to grossly disproportionate punishment, would not serve any practical purpose. Since *Smith*, appellate courts have upheld all mandatory minimum sentences challenged under the section 12 protection against cruel and unusual punishment, and they have considerably limited the scope of this provision.⁶⁵ In doing so, they have accepted further restrictions to judicial discretion, reducing the space for considering social and economic context in sentencing. The time has perhaps come to reconsider these precedents. First, the Supreme Court has often stated that *Charter* provisions should be “mutually reinforcing,”⁶⁶ that the scope and meaning of section 7 “should be allowed to develop incrementally...”⁶⁷ and that the content of section 7 was “not limited to the sum of s[ections] 8 to 14 of the *Charter*.”⁶⁸ Moreover, recent legislative amendments, including those proposed in Bill C-10⁶⁹ to increase or impose mandatory minimum penalties for certain sexual offences with respect to children and drug offences, may also force the courts to review some of these principles. A recent decision of the Ontario Superior Court in *R v Smickle*⁷⁰ is a sign that the things may start to change. In this case, Justice Molloy held that the hybrid scheme for the offence of possession of a loaded firearm contrary to section 95(2) of the *Criminal Code* is arbitrary and violates s 7 of the *Charter* because of the two year gap between the sentences that can be

63 *R v Smith*, [1987] 1 SCR 1045 at 1107, 40 DLR (4th) 435 [*Smith*].

64 *Ibid.*

65 See *R v Luxton*, [1990] 2 SCR 711, 112 NR 193; *R v Goltz*, [1991] 3 SCR 485, 131 NR 1; *R v Morrissey*, 2000 SCC 39, [2000] 2 SCR 90; *Latimer*, *supra* note 36. See also Kent Roach, “Searching for *Smith*: The Constitutionality of Mandatory Sentences” (2001) 39:2-3 Osgoode Hall LJ 367 at 368-69. For another important limitation to section 12 jurisprudence, see *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 (where a constitutional exemption was not considered to be an appropriate remedy for a s 12 violation. As a result, a provision which imposes a mandatory minimum sentence should be decided based on whether it is constitutional).

66 *Gosselin*, *supra* note 2 at para 144, L’Heureux-Dubé J. See also *R v Lyons*, [1987] 2 SCR 309 at 326, 44 DLR (4th) 193; *R v Tran*, [1994] 2 SCR 951 at 976, 117 DLR (4th) 7.

67 *Gosselin*, *ibid* at para 79. See also *Gosselin*, *ibid* at para 82 (where McLachlin CJC states that the scope of section 7 has not been exhaustively defined).

68 *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 169 [*Malmo-Levine*].

69 Bill C-10, *Safe Streets and Communities Act*, 1st sess, 41st Parl, 2011 (as passed by the House of Commons 5 December 2011).

70 2012 ONSC 602, [2012] OJ No 612.

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imposed on summary conviction and on indictment (the latter provides for a mandatory minimum sentence).⁷¹ In addition to arbitrariness and judicial discretion, the principle of proportionality of punishment, often considered to be one of the main sentencing principles⁷² could arguably be recognized as a principle of fundamental justice,⁷³ opening the door for greater recognition of social context in sentencing.⁷⁴

III. SOCIAL CONTEXT AND THE RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON

The second series of strategies used to realize the redistributive potential of section 7 are those which suggest that we adopt a broader conception of the right to life, liberty and security of the person to include social and economic rights.⁷⁵ This trend has taken place in the context of the limited gains made by lawyers to have poverty, extreme poverty, homelessness or socio-economic deprivation recognized as an analogous ground of discrimination under section 15 of the *Charter*. For example, in *R v Banks*,⁷⁶ one of the latest appellate court decisions to address the issue, the Court of Appeal for Ontario faced a constitutional challenge to the Ontario *Safe Streets Act*,⁷⁷ which prohibited aggressive panhandling and solicitation of a captive audience. Juriansz JA held that the proposed group of “poor who beg” or “beggars” referred to an activity rather than to “an immutable or constructively immutable personal quality that [could] only be changed at a ‘great personal cost’.”⁷⁸ Further, he mentioned that the appellants were right in avoiding reference to poor people as an analogous group, as they had argued in lower courts. In his opinion, poverty was an amorphous category composed of different individuals.⁷⁹ This issue, however, has

71 *Ibid* at paras 90-96.

72 *R v Proulx*, 2000 SCC 5 at para 54, [2000] 1 SCR 61; Julian V Roberts & Andrew von Hirsch, “Legislating the Purpose and Principles of Sentencing” in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 48 at 54.

73 See for instance the opinion of Gonthier and Binnie JJ in *R v Malmo-Levine*; *R v Caine*, *supra* note 69 at para 168, suggesting that the principle of gross disproportionality is protected under section 7 of the *Charter*.

74 The success of such an argument, insofar as the principle of proportionality of punishment is concerned, would largely depend on its primary objectives. As suggested elsewhere, it could include moderation and individualized treatment, but also severity and parity: see Jodouin & Sylvestre, *supra* note 32 at 533-39.

75 Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38:2 UBC L Rev 539.

76 *R v Banks* (2005), 248 DLR (4th) 118, 192 CCC (3d) 289 (Ont Sup Ct), aff’d 2007 ONCA 19, 84 OR (3d) 1, Juriansz JA, leave to appeal to SCC refused, (2007), 376 NR 394 [*Banks* cited to OR].

77 SO 1999, c 8, as amended by SO 2002, c 17.

78 *Banks*, *supra* note 75 at paras 98-100 (refers to *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1).

79 *Banks*, *supra* note 75.

not definitely been settled by the courts.⁸⁰ While not completely giving up equality rights claims,⁸¹ lawyers have increasingly turned to section 7 for adjudicating social rights.⁸²

In *Gosselin*, the appellants argued that the right to security protected by section 7 of the *Charter* should include an obligation on the state to provide a minimum level of social assistance to its citizens in order to meet their most basic needs.⁸³ Framed in this way, the argument appeared somewhat counterintuitive⁸⁴ to a majority of the

80 See *Masse v Ontario (Ministry of Community and Social Services)* (1996), 134 DLR (4th) 20, 35 CRR (2d) 44 (Ont Div Ct), leave to appeal to CA refused, Admin LR (2d) 87 at n 1; leave to appeal to SCC refused, 39 CRR (2d) 375 (in which the Court refused to recognize welfare recipients as a “discrete and insular minority” where reductions in the level of welfare were challenged at 71) [*Masse* cited to DLR]; *Polewsky v Home Hardware Stores Ltd* (1999), 68 CRR (2d) 330, 40 CPC (4th) 330 (Ont Sup Ct) (Gillse J rejected a challenge under s 15 of the *Charter* by a would-be Small Claims Court plaintiff to the absence of a provision in the *Courts of Justice Act*, RSO 1990, c C 43, giving a judge discretion to waive filing fees for impecunious litigants because, “[t]he poor in Canadian society are not a group in which the members are linked by shared personal or group characteristics” at 346); *Federated Anti-Poverty Groups of British Columbia v Vancouver (City of)*, 2002 BCSC 105, 40 Admin LR (3d) 159, Taylor J (the Courts respectively upheld a Vancouver by-law prohibiting aggressive panhandling and solicitation of a captive audience); *Toussaint v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146 at para 59, 417 NR 356 (the Court held the failure of the government to enact regulations to waive the fees for foreign nationals living in poverty did not violate s 15 of the *Charter* because poverty was not an analogous ground) and *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17 at paras 42-44, 275 NSR (2d) 214 (the Court held that the failure of the government to provide affordable power rates for poor consumers did not infringe their s 15 *Charter* right because poverty was not an analogous ground). But see *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 (the majority of the Court did not consider it necessary to examine Sharpe JA’s decision to refuse to recognize agricultural workers as such a group in a case challenging their exclusion from the right to bargain collectively under the *Labour Relations Act*, SO 1995, c 1, while L’Heureux-Dubé J, concurring, would have held that the occupational status of agricultural workers constituted an analogous ground); *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (Ont CA) (the Court accepted that membership in the group of “sole support mothers on welfare” could be considered grounds for a claim of discrimination because of the definition of “spouse” in a regulation under the *Family Benefits Act*, RSO 1990, c F.2 (RRO 1990, Reg 366), and that such a claim could be partly founded on the enumerated ground of sex and partly on an analogous ground); application for leave to the Supreme Court of Canada granted on March 20, 2003, but Ontario decided not to pursue its appeal in September 2004. See also Martha Jackman and Bruce Porter, “Justiciability of Social and Economic Rights in Canada, in M Langford, ed, *Social rights jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 209.

81 See e.g. *Tanudjaja v Canada*, Toronto No. CV-10-403688 (Ont Sup Ct) (Notice of Application, filed May 26, 2010, online: <<http://www.socialrights.ca>>) [*Tanudjaja*] (the applicants argue that the social condition of homelessness should be recognized as an analogous ground). See also *Tanudjaja*, *ibid* (Evidence, affidavit by Marie-Eve Sylvestre), online: Social Rights in Canada. A Community-University Research Alliance Project (CURA) <<http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html>>.

82 See Margot Young, “Context, Choice, and Rights: *PHS Community Services Society v Canada (Attorney General)*” (2011) 44:1 UBC L Rev 221 [Young, “Context, Choice, and Rights”] (“Section 7 [is] increasingly the site of contestations over social and economic entitlements” at 236); Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality, and Citizenship” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77.

83 *Gosselin*, *supra* note 2.

84 See Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) at 27 (who argues that the Court’s understanding of rights is shaped by those who mobilize disproportionate attention).

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Supreme Court, who suggested that section 7 had merely been interpreted as restricting the state's ability to deprive individuals of their rights, and not as creating positive obligations on the state to ensure that each person enjoys such rights.⁸⁵ In dissent, Justice Arbour argued that section 7 "c[ould] impose on the state a positive duty to act."⁸⁶ In her opinion, nothing in the wording of section 7 and in particular the words "deprived of" impeded such an interpretation.⁸⁷ Furthermore, she stated that not only did the Charter recognize the existence of positive rights—including the right to vote, the right to a trial by jury, language rights and the right to equality,⁸⁸—but also that, in the past, the Court had explicitly recognized that section 7 included positive obligations.⁸⁹

Regardless that the opinion of Justice Arbour was, in many ways, cause for celebration for social rights activists, it should still be criticized insofar as it reproduces, and therefore legitimizes, the negative-positive rights framework at the core of the majority's reasoning. The classical distinction between positive and negative rights has been widely condemned by the legal community and in academic literature, which convincingly argues that rights are indivisible and interdependent and that all types of rights require some kind of obligation on the state in order to be meaningful.⁹⁰ Yet, the distinction is still deeply ingrained in legal consciousness and discourse. Furthermore, as demonstrated by the approach taken in *Gosselin*, the great majority of judges tend to think that the question of whether section 7 includes a positive obligation on the state has yet to be decided.

Cognizant of this unfortunate reality, recent cases have played on safer grounds and retreated to a negative rights framework. This was the case in *Adams*, where the British Columbia Supreme Court held that the general prohibition imposed by the City of Victoria against erecting temporary shelters in public spaces to protect one's self from the elements, even where there was a shortage of shelter opportunities, violated an individual's section 7 right to life, liberty and security of the person and could not be justified by section 1.⁹¹ Justice Ross emphasized that, "the analysis adopted in the present case is the traditional analysis,"⁹² referring to negative rights of non-interference. Indeed, as she explained, the parties did not go as far as to require the City to provide alternative shelter or housing for homeless people, but only to allow

85 *Gosselin*, *supra* note 2 at paras 81-82, McLachlin CJC.

86 *Ibid* at para 323.

87 *Ibid* at para 321.

88 *Ibid* at para 320.

89 *Ibid* at paras 324-29.

90 See Lucie Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne* (Bruxelles: Editions Bruylant, 1995); David Robitaille, "Les droits économiques et sociaux dans les relations État-particuliers après trente ans d'interprétation : normes juridiques ou énoncés juridiques symboliques ?" (2006) R de B 455 (Numéro thématique hors série); Margot Young, "Rights, the Homeless, and Social Change: Reflections on Victoria (City) v. Adams (BCSC)", Case Comment (2009-2010) 164 BC Studies 103 at 106 [Young, "Reflections"] (refers to Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in Justice Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously*, (Canada: Canadian Institute for the Administration of Justice, 2010) 279).

91 *Adams SC*, *supra* note 3. See also Young, "Reflections", *ibid*.

92 *Adams SC*, *supra* note 3 at para 78.

them to erect temporary shelters to ensure their own security and minimize health risks.⁹³ However, in rendering her decision, Justice Ross also looked extensively at Canada's international obligations with respect to housing as an interpretative tool.⁹⁴

A similar scenario arose in *Bedford*,⁹⁵ where the Ontario Superior Court held that sections 210, 212(1)(j) and 213(1)(c) of the *Criminal Code*, prohibiting most, but not all, aspects of adult prostitution in Canada,⁹⁶ forced sex workers to work in unsafe conditions. For example, in the case of street prostitution, the places and ways that sex work could be practiced with lower risks of violence, such as indoor venues with protection for sex workers and client screenings, were limited. These limits imposed by the state through the *Criminal Code* violated the applicants' right to liberty and security of the person without sufficient justification.⁹⁷ Finally, in *Canada (Attorney General) v PHS Community Services Society*,⁹⁸ the Supreme Court of Canada found that the Minister of Health's decision to deny an exemption under section 56 of the *Controlled Drugs and Substances Act (CDSA)*⁹⁹ to Insite, a health care facility that provided a supervised safe injection site located in Vancouver's Downtown Eastside where the potentially life-threatening hazards associated with drug consumption and injection could be reduced, infringed the Plaintiffs' rights to life, liberty and security of the person and was not in accordance with the principles of fundamental justice. Without such an exemption, both the staff and the clients at Insite could be found in violation of sections 4(1) and 5(1) of the CDSA which prohibit the possession and trafficking of illegal drugs.¹⁰⁰

These cases certainly represent great victories for social rights adjudication in this country. Yet, in light of the limited negative rights framework chosen by the applicants in these cases, the question now is whether the right to security protected under section 7 can be a complement to section 15 or whether it will merely become a pale substitute for equality. More importantly, while this strategy has paid off in these three cases, will such a narrow construction discourage future arguments from including social and economic rights under section 7? Many scholars and activists have already started to express concerns that this might be the case.¹⁰¹

In the *Adams* cases, there was the spectre of the right to housing behind the health concerns for the homeless sleeping in public spaces. Avoiding this issue made it possible for the British Columbia Supreme Court to rule as it did in *Johnson v Victoria (City of)*,¹⁰² a follow-up case to *Adams*. Indeed, after the *Adams* cases, the City of Victoria

93 *Ibid* at para 119.

94 *Ibid* at para 85-99.

95 *Supra* note 4.

96 *Ibid* at paras 6-7.

97 *Ibid* at paras 3, 281, 359-62.

98 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community Services Society*].

99 SC 1996, c 19.

100 *PHS Community Services Society*, *supra* note 97 at para 136. In grounding its decision on the Minister's discretion, the Supreme Court reversed the Court of Appeal decision, 2010 BCCA 15, 314 DLR (4th) 209), which had found that subsections 4(1) and 5(1) of the CDSA violated section 7 of the *Charter*.

101 See e.g. Young, "Reflections", *supra* note 89 at 111-12. See also Porter, *supra* note 81 at 88.

102 2010 BCSC 1707, 222 CRR (2d) 351, Bracken J [*Johnson* cited to CRR].

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neither addressed the issue of homelessness nor did it dramatically increased funding for shelters in the City. Instead, the City modified its by-law to prohibit the erection of shelters except in the evenings¹⁰³ and in some designated public places,¹⁰⁴ which was in accordance with the Court of Appeal ruling that the first by-law was “overbroad because it [was] in effect at all times, in all public places in the City.”¹⁰⁵ As a result, Mr. Johnson was ticketed for erecting a temporary shelter during the day, at a time when daily drop-in centres were available. While the court in *Johnson* found an infringement of the section 7 right of homeless people to erect temporary shelters since such a right “[wa]s not limited to certain hours of each day...,”¹⁰⁶ it also held that the restrictions imposed by the by-law were justified under section 1. This leaves the door open for future cases where homeless people can be affected by severe weather conditions during the day. Thus, the fact that the argument in the *Adams* cases was so narrowly constructed and did not impose any positive obligation on the state in favour of the homeless makes the issue an easy problem for the City to circumvent.

In *Bedford and PHS Community Services Society*,¹⁰⁷ there are some important socio-economic considerations that underlie the security concerns for sex workers. Some of the considerations include: the right to work; the right to income or to refuse to stay poor, despite objections to the commodification of women’s bodies,¹⁰⁸ and the prevailing views of society on the limited range of options available to some, but not all, of those women;¹⁰⁹ and, the right not to be arrested, convicted and incarcerated because one is effectively poor.¹¹⁰

103 City of Victoria, revised by-law No 09-014, *Parks Regulation Bylaw, Amendment Bylaw (No. 1)* (5 February, 2009) (“subject to subsection (b), except between the hours of 7:00 o’clock p.m. of one day and 7:00 o’clock a.m. of the next day” at s 16A(2)(a)).

104 *Ibid* at s 16A(2)(b).

105 *Adams CA*, *supra* note 3 at para 116.

106 *Johnson*, *supra* note 101 at para 53.

107 *Downtown Eastside SexWorkers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439, 324 DLR (4th) 1 (deciding on the issue of standing only and returning the case for adjudication before the Supreme Court of British Columbia).

108 The commodification critique, a term originally coined by Karl Marx, suggests that certain human attributes should be incommensurable or excluded from exchange and market regulation since this would be contrary to an understanding of human dignity or flourishing. See Katharine Silbaugh, “Commodification and Women’s Household Labor” (1997) 9:1 *Yale JL & Feminism* 81 at 84; Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, Mass: Harvard University Press, 1993). See also Kimberly D Krawiec, “The Dark Side of Commodification Critiques: Politics and Elitism in Standardized Testing” (2011) 35 *Wash UJL & Pol’y* 349 (where she discusses different conceptions of commodification in the literature and responds to Silbaugh, *ibid*).

109 See e.g. Prabha Kotiswaran, “Born unto Brothels: Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area” (2008) 33:3 *Law & Soc Inquiry* 579 (presenting the sex work market, in one of India’s biggest red-light areas, as structured by different stakeholders negotiating in the shadow of criminal law with a different range of options depending on the context).

110 John Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada” (2000) 6:9 *Violence Against Women* 987; Lisa E Sanchez, “Enclosure Acts and Exclusionary Practices: Neighborhood Associations, Community Police, and the Expulsion of the Sexual Outlaw” in David Theo Goldberg, Michael Musheno & Lisa C Bower, eds, *Between Law and Culture: Relocating Legal Studies* (Minneapolis: University of Minnesota Press, 2001) 122.

If and when the Supreme Court of Canada strikes down the provisions prohibiting most aspects surrounding prostitution, one can hope that the government will not simply come up with new, better tailored prohibitions against sex work, prompting the question of whether this type of work should be criminalized in Canada at all. This is particularly troubling given that evidence shows that those who are charged with offences such as communication are predominately poor women engaging in street prostitution.

For these reasons, it may be worthwhile, although admittedly more risky, to return to a *Gosselin*-like strategy, which will be attempted in two forthcoming cases. In *D(P) v British Columbia*,¹¹¹ the applicant, who is an immigrant woman of East Indian descent, will argue that the failure of the British Columbia government to provide legal counsel and secure effective access to justice infringed her right to security and liberty of the person under section 7.¹¹² The case of *Tanudjaja*,¹¹³ brought forward by the Social Rights Advocacy Centre and the Centre for Equality Rights in Accommodation in Ontario, is also promising. In *Tanudjaja*, the applicants, who are homeless individuals, will argue that the failure of the federal and Ontario governments to implement effective strategies for reducing homelessness and inadequate housing violates their right to life and security of the person, and are seeking a national housing strategy as a remedy. In addition to arguing that the social condition of homelessness is an analogous ground of discrimination under section 15 of the *Charter*, they will argue that governmental inaction is arbitrary, disproportionate to any government interest, unfair to the applicants and in violation of norms of international law.¹¹⁴ This line of argument has great potential for revealing the social and economic rights that are, at times, hidden behind security considerations. It will present an interesting challenge to the courts and will hopefully lead to positive results for homeless people.

IV. CONCLUSION

Returning to the initial question of what, if any, is the redistributive potential of section 7 of the *Charter*, we must conclude that the answer is not straightforward. On one hand, most efforts to include socio-economic considerations in the assessment of criminal responsibility have failed. Small victories were made, but mostly outside

111 2010 BCSC 290, 210 CRR (2d) 1 [*DP* cited to CRR] (reasons on the interlocutory injunctive relief only). See also *Mendoza (Guardian ad litem of) v Community Living British Columbia*, 2009 BCSC 932, 2009 CarswellBC 1806.

112 See generally *Mendoza*, *ibid* at para 64 (in this case, the argument under section 15 of the *Charter*, according to which, absent state-funded legal counsel women upon separation did not have equal access to the benefits of the law on the basis of sex and poverty, was considered to have the strongest foundation. Ultimately, the interlocutory injunction was dismissed based on the balance of inconvenience, but the case is still proceeding).

113 *Supra* note 80.

114 *Ibid.*

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the ambit of *Charter* litigation. Yet, there may still be some hope for including social context in sentencing decisions if the courts are to recognize the principles of proportionality of punishment and judicial discretion as principles of fundamental justice under section 7. If these arguments are to succeed, discourse about universality of standards, victims' rights and the separation between individual and society that underlie the criminal responsibility doctrine should be openly challenged.

On the other hand, the second line of arguments emphasizing a broader conception of the right to life, liberty and security of the person appears more promising. Provided that we are able to address some of the substantive questions raised by section 7 and are able to overcome the artificial and ideologically oriented distinction between negative and positive rights, this line of argument may offer some redemption to *Charter* litigation and advance the rights of poor people.

In this respect, we might want to consider combining these two lines of argument and to push for a broader conception of the principles of fundamental justice. The result in *Johnson* might have been different if the both courts in the *Adams* cases had referred to principles of fundamental justice with a little more political bite than overbreadth or arbitrariness.¹¹⁵ In the meantime, however, the focus on a negative rights framework to accommodate judicial consciousness may be counter-productive to achieving redistribution in the long run and will continue to raise question of whether the best opportunity to include social and economic context lies within the ambit of the *Charter* at all.

Arguably, *Charter* arguments have to be compared to other arguments that can possibly be raised more effectively when separated from constitutional pressure. In the criminal law context, such arguments must be weighed against the very real possibility of losing ground through constitutionalizing such a principle. In the past, criminal lawyers have painfully discovered that the process of constitutionalizing basic criminal law principles, such as *mens rea*, has often made them more vulnerable. David Paciocco once suggested that courts seemed reluctant to recognize some criminal law principles as constitutional principles because of the fear that doing so would make the system too rigid.¹¹⁶ As a compromise position, Paciocco argued, judges can accept the principle, but will largely soften its content.¹¹⁷ Anne-Marie Boisvert has also observed that the important drawbacks in the jurisprudence on *mens rea* can be explained by the fact that the courts have had a new role to play since the adoption of the *Charter* in balancing competing interests rather than primarily protecting individuals against the state.¹¹⁸

115 See generally *R v Malmo-Levine*, *supra* note 67 (a recent example of an attempt to broaden principles of fundamental justice in which the Court held that the harm principle was not a principle of fundamental justice. Despite the disappointing result for the parties, this is exactly the kind of innovative argument that is needed).

116 Paciocco, *supra* note 12 at 250.

117 *Ibid.*

118 Boisvert, "La constitutionnalisation de la *mens rea*", *supra* note 12 at 137.

This may be exemplified in a comparison of how the harm principle is treated in the Supreme Court of Canada's constitutional jurisprudence with its treatment of the same principle in a criminal law case which relies instead on common law principles. In *Malmo-Levine*,¹¹⁹ which challenged provisions prohibiting the possession of marijuana under the *Narcotic Control Act*,¹²⁰ the appellant suggested that the harm principle, according to which the absence of demonstrated harm to others deprived Parliament of the power to create a criminal law offence, should be recognized as a principle of fundamental justice for the purposes of section 7, independently from its recognition in the context of the division of powers.¹²¹ The majority rejected the argument on the basis that there was insufficient consensus that the harm principle was vital or fundamental to criminal justice and this was not a manageable judicial standard against which to measure deprivation of life, liberty or security of the person.¹²²

Two years later in *R v Labaye*,¹²³ the majority of the Supreme Court relied on harm-based justifications to find the owner of a Montreal "swinging" club which allowed adults to meet for group sex not guilty of keeping a common bawdy-house for the practice of acts of indecency contrary to section 210(1) of the *Criminal Code*. According to the Chief Justice, harm, including harm to others, is at the centre of the two requirements necessary for establishing criminal indecency,¹²⁴ and in that case the Crown did not show beyond a reasonable doubt that the appellant's conduct harmed or presented a risk of harm to others or to society.¹²⁵ One can only speculate as to the reasons why the Supreme Court decided to admit the harm principle in *Labaye* as a common law standard while rejecting it in *Malmo-Levine* as a principle of fundamental justice,¹²⁶ but we cannot exclude that this might be justified by the potentially rigid nature of constitutional arguments.

Yet, as other rights critics have suggested, there might be something else at play that has to do with the nature of social and economic arguments, rather than the constitutional nature of *Charter* rights. Indeed, rights have been traditionally framed within the political theory of liberalism with a decisively individualistic focus, whereas poverty and social class raise structural questions of social interaction.¹²⁷ Moreover, rights are grounded in unquestioned assumptions about individuals'

119 *Supra* note 67.

120 RSC 1985, c N-1, s 4(2).

121 *Malmo-Levine*, *supra*, note 67 at para 110.

122 *Ibid* at paras 123-34.

123 2005 SCC 80, [2005] 3 SCR 728 [*Labaye*].

124 *Ibid* at para 62.

125 *Ibid* at para 70.

126 This could also be explained by the nature of the facts and the interests at stake in both cases. While the majority in *Labaye* does not refer to the Court's precedent in *Malmo-Levine*, the dissenting judges (Bastarache and LeBel JJ.) do remind us that this issue was properly considered in that case: see *ibid* at para 104.

127 Petter, *supra* note 83.

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liberty, equality and rationality (choice) that should be challenged.¹²⁸ Such critiques should not turn us away from rights-based arguments, but rather should be used to strengthen our claims for positive state obligations and greater recognition of social context. However, these critiques should also make us realize that, given the ideological nature of rights and *Charter* adjudication, it might be worth diversifying our tools and strategies in the hope that one day, the courts will live up to the legacy of the *Motor Vehicle Reference*.

128 See Sylvestre, *supra* note 25. See also Young, “Context, Choice and Rights”, *supra* note 81 at 248-54 (insists that *Charter* rights should not depend on the presence or absence of choice).