Canadian Fundamental Justice and American Due Process:

Two Models for a Guarantee of Basic Adjudicative Fairness

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This paper traces how the Supreme Courts of Canada and the United States have each used the basic guarantee of adjudicative fairness in their respective constitutions to effect revolutions in their countries' criminal justice systems, through two different jurisprudential models for this development. It identifies a relationship between two core constitutional structures, the basic guarantee and enumerated rights, and shows how this relationship can affect the degree to which entrenched constitutional rights actually protect individuals. It explains that the different models for the relationship between the basic guarantee and enumerated rights adopted in Canada and the United States, an "expansive view" and a "narrow view" respectively, changed the degree to which entrenched rights protected individuals. It offers an historical context for these developments, and gives a comparison between a heretofore unexamined parallel in the jurisprudential developments surrounding the basic guarantee in both countries. It then suggests how these different models for the relationship between the fundamental constitutional structures protecting individual rights in the criminal process will respond to the most significant threats to individual rights from the political branches in decades, as a result of the global war on terrorism.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in

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> accordance with the principles of fundamental justice.[1]
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> [No state shall] deprive any person of life, liberty, or property, without due process of law.[2]

The world is becoming "juridified." An increasing number of countries are entrenching[3] guarantees of individual rights in constitutional texts that must be interpreted and enforced by an independent judiciary. This has prompted a debate as to whether this is good or bad.[4] Some argue that the process of juridification, or the "judicialization of politics,"[5] is ultimately anti-democratic, because it gives primacy to courts and judges, rather than the political branches.[6]

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[1]CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

[2]U.S. CONST. amend. XIV.

[3]*See* Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637, note 13 (1991). (Defining this use of the term, and distinguishing entrenched rights from those immunized from constitutional amendment. "Entrenchment" here is used simply to mean constitutionalization, either through placing the right in a constitutional text or judicially giving it constitutional status, or otherwise placing the right beyond removal or change through the ordinary political process.)

[4]*See* Mark Tushnet, *Skepticism About Judicial Review - A Perspective From the United States,* Geo. Univ. Law Ctr. 2000 Working Papers Series, 6 Working Paper No. XXXXXX; available at http://papers.ssrn.com/paper.taf?abstract_id=XXXXX. (noting U.S. experience with judicial review in name of fundamental human rights is "significantly shorter and more ambiguous than one might have thought").

[5]Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, Research Paper No. 03-02 (February 2003), available at http://ssrn.com/abstract_id=380283, at 4 (citing Mark Tushnet and Jeremy Waldron).

[6]Mark Tushnet, *Taking the Constitution Away from the Courts*, chs. 6-7 (1999); Mark Tushnet, *Scepticism about Judicial Review: A Perspective from the United States*, Sceptical Essays on Human Rights 359 (2001); *See* MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA 2d ed., (1994). (For a Canadian perspective on how the Charter has been anti-democratic in form and content because it allows judges to cloak ideological choices beneath mantle of neutral interpretation of the law); James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 MODERN LAW REVIEW 204, 207 (March 2002). (James Tully has described the problem of constitutionalism gaining priority over democracy this way: "If the principle of constitutionalism gains priority over the principle of democracy, so the constitution is the foundation of democratic rights and institutions but is not itself subject to democratic deliberation, then the association [between democracy and constitutionalism] is illegitimate.")

Others argue that juridification enhances democracy, by protecting minorities and individual rights, and providing a counterweight to the political branches.[7]

Overlooked in this debate is that *how* rights are entrenched, and when similarly entrenched how courts *enforce* them, can be as important as *whether* they are entrenched at all in determining how effectively they actually protect individuals. Comparing the operation of constitutions, as opposed to simply comparing their texts, is a tricky business. Even when constitutions have very similar rights entrenched in very similar ways, varying judicial approaches to their enforcement can make for dramatically different degrees of protection for individuals.

The Canadian Charter of Rights and Freedoms and the United States Constitution both entrench protections for individuals in the criminal process through combining an open-ended basic guarantee of adjudicative fairness[8] ("fundamental justice" in Canada and "due process" in the United States) with specific enumerated procedural rights (counsel, search and seizure, etc.).[9] The Supreme Courts of both countries have used this combination to revolutionize their country's criminal justice system,[10] yet have done so by creating very different

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[7]Oliver Gerstenberg, *Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism*, 8 EUR. L. J. 172 (March 2002). (A recent description of the European version of this debate, arising from the developing notion of a "constitution" of Europe under which the European Court of Justice must determine EC Member States' derogations from the principles of free trade and movement in order to maintain a decent standard of living for disadvantaged groups, is this: "We seem to be left with an unattractive choice between either the concern that constitutionalism will take over too much of the terrain that belongs to democratic government, assuming substantive moral or political values come to be judicially recognised and enforced – or endorsing a chastening of constitutional aspiration through a relaxation of participatory and substantive protective standards, *i.e.* a variety of 'economic constitutionalism.'")

[8]*Supra* notes 1and 2. (This cumbersome phrase is meant to convey simply that the guarantee is a generalized one (rather than a guarantee of a specific right or privilege), that it ostensibly involves the judiciary rather than other branches of government, and that it conveys some sense of a goal of equity.)

[9]CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 8-14; U.S. CONST. amends. IV-VI and VIII.

[10]*See* §§ III.A. & B., infra.

models of the relationship between these two types of constitutional protections. This paper compares the models of this relationship established in both countries, traces how these different models affect jurisprudential development, and suggests how these models will affect future development of the protections.

Adoption of these different models matters, and more than just to academics. Both countries have recently enacted legislation that significantly impacts, and undeniably restricts, individual rights by expanding government authority as part of the war on terrorism.[11] The Supreme Courts of both Canada and the United States will inevitably test these laws against the requirements of each constitution's basic guarantee of adjudicative fairness and various enumerated rights. When these tests come, their outcomes will be determined by the different models each court has developed for the relationship between the two types of constitutional protections.[12] The model adopted in Canada, in which the basic guarantee of fundamental justice is viewed expansively, could be much more effective at openly identifying these restrictions and ensuring these individual protections are maintained, although certain structural features of the Charter permit the Court to avoid this role if it so chooses. The United States Supreme Court, because it has adopted a narrow model of due process, will find the task of identifying constitutional violations from the new restrictions much more difficult, although violations it does identify are more likely to translate into actual protections.

How well entrenched rights actually protect individuals is a function not only of their text (which can readily be compared here) and the judicial interpretations given them, but also of the entire constitutional structure within which they exist. While the Supreme Court of Canada has adopted an "expansive" model for interpreting the relationship between its constitution's basic guarantee and the enumerated rights, it has done so within a constitutional framework

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[11]*See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); *See* The Domestic Security Enhancement Act of 2003 ("Patriot II"). (For the Canadian response) *See* Anti-Terrorism Act ("Bill C-36", Bill C-36 received royal assent December 18, 2001). Canada Gazette, Par II, Vol. 136, Extra (07-24-2002). *See* §§V.A. & V.B., infra.

[12]*See* §§ II.A. & II. infra.

that is one of judicial "penultimacy" rather than supremacy. In other words, while it is the constitutional task of the Canadian Supreme Court to say what the "law" guaranteed by the Charter of Rights and Freedoms is, and the Court has undertaken this task with remarkable gusto, it lacks the final say as to what the law under the Charter is, because of parliament's ability to override its constitutional decisions.[13] The United States Supreme Court, by contrast, says what the "law" guaranteed by the Constitution is in a way that cannot be legislatively overridden,[14] yet it has created a model for interpreting the basic guarantee that is very narrow with respect to its capacity to enhance or expand rights.[15]

These basic structural differences between the Canadian and United States constitutions complicate the analysis, and could ultimately lead to no greater protection in Canada for individual rights than in the United States. Nevertheless, the limited model of this relationship, adopted in the United States, gives deference to the

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[13]*See* § V.A., infra. (The two provisions that are most significant in this regard may be secs 1 and 33. Section 1 provides a means for the Court to find that a law violates a right protected in the Charter, but hold that the violation is nevertheless justified. Sec. 33, the "notwithstanding" clause, enables the legislature to override a decision of the Supreme Court of Canada interpreting the Charter for a renewable five year period. Although the Charter of Rights and Freedoms is the supreme law of the land in Canada (sec. 52), this structure, that allows the national legislature to override the decisions of the Court, has been characterized as one of judicial "penultimacy" rather than judicial "ultimacy" as in the United States.); *See* Perry, op cit. note __, at 46-47.

[14]*See* Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 183-97 (2d Ed. 1986); John Ely, DEMOCRACY AND DISTRUST. (The democratic tension between the popular, majoritarian judgments of legislatures, crafted through the political process into statutes, and the judicial review of these judgments by courts applying constitutional principles that supercede the political process has long been studied in the U.S.); *See* Michael Mandel, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (2d ed. 1994). (The enactment of the Charter in Canada has prompted similar study in Canada. Arguing that the Charter enables both the left and the right to present political issues to the Supreme Court, which can then decide them under the rubric of "principles" enshrined in the Charter).

[15]*See* Cass R. Sunstein, ONE CASE AT A TIME 5-6 (1999). (Some applaud this interpretive tradition of "judicial minimalism." Describing "decisional minimalism" as "democracy-promoting" and sensible in cases with "a constitutional issue of high complexity").

political branches, and if the political branches in the United States respond to perceived external threats with dramatic changes in the scope of protections for individual rights, a U.S. Supreme Court that has adopted this limited model will likely make little difference.[16] If the United States Supreme Court is serious about exerting the sort of influence it has expressed in other areas concerning structural constitutional issues,[17] the approach adopted by the Supreme Court of Canada bears study.

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[16]*See*, *e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (U.S. citizen held in military detention, captured abroad during military operation, and deemed "enemy combatant" by President, not entitled to hearing in habeas corpus petition to test government's factual allegations concerning basis for his detention); Khaled A. F. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (aliens captured abroad during combat and held in military custody outside the U.S. not entitled to habeas corpus or other access to federal court for relief from terms of their confinement). *But see*, Padilla ex rel. Newman v. Rumsfeld, 243 F.Supp.2d 42 (S.D.N.Y. 2003)(alleged enemy combatant entitled to consult with counsel in responding to government's claim that its declaration of his involvement with plot to detonate "dirty" radioactive bomb in New York City satisfied "some evidence" standard necessary to demonstrate his detention not arbitrary).

[17]*See e.g.* Bush v. Gore, 531 U.S. 98 (2000); *See* Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. AND LEE L. REV. ___, ___ (2002) (For a thorough analysis of the renewed readiness of the Rehnquist Court to "say what the law is,". Explaining Court's recent holdings invalidating Congress' exercise of section 5 powers under the 14th amendment and holdings restricting deference to decisions of administrative agencies as "broader assertions of the Court's power to interpret the constitution").

I. Basic Guarantees, Enumerated Rights and Judicial Authority

What is the relationship between a constitution's basic guarantee of adjudicative fairness and specific enumerated procedural rights? Over the past twenty years, there has been a dramatic increase in the number of written constitutions that guarantee individual rights through entrenched protections[18] with judicial review. [19] Many of these have included entrenched procedural protections of the individual subjected to the criminal process.[20]

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[18]*See* Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637, note 13 (1991) ("Entrenchment" here is used simply to mean constitutionalization, either through placing the right in a constitutional text or judicially giving it constitutional status, or otherwise placing the right beyond removal or change through the ordinary political process. Defining this use of the term, and distinguishing entrenched rights from those immunized from constitutional amendment). *see* Mark Tushnet, *Skepticism About Judicial Review - A Perspective From the United States*, Geo. Univ. Law Ctr. 2000 Working Papers Series, 6 WorkingPaperNo.XXXXXX;availableathttp://papers.ssrn.com/paper.taf?abstract_id =XXXXX.(As to the lack of benefit from judicially "entrenched" rights through judicial review in the American experience).

[19]Since 1980, nearly thirty countries have either adopted a written constitution which defines individual rights (South Africa), added specific protections for individual rights to such a constitution (Canada), or acceded to an international arrangement which provides a judicial authority for protecting textually defined individual rights (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, enforced by the European Court for Human Rights).

[20]*See*, *e.g.*, South African Constitution, §§ 12(1) (no arbitrary detention), 12(2) (bodily and physical integrity), 14 (search and seizure), 35 (fair trial); *See also*,

The Canadian and American approaches to entrenchment of procedural protections for the individual in the criminal process both include a basic guarantee of adjudicative fairness and enumerated rights. Basic guarantees are those principles that establish minimum thresholds for fairness in a process of adjudication,[21] but do not themselves prescribe the mechanism by which this result is to be achieved.[22] Enumerated rights, by contrast, are those specific guarantees of particular procedures in particular circumstances.[23] In constitutional terms, basic guarantees establish ends (fairness), but not means, while enumerated rights set forth means, but not ends.

Although enumerated rights afford particular procedures, in general they do not necessarily guarantee any particular quality of results.[24] The results are only those "guaranteed" indirectly, as

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Jonathan H. Siegelbaum, *The Right Amount of Rights: Calibrating Criminal Law and Procedure in Post-communist Central and Eastern Europe*, 20 B.U. INT'L. L. J. 73 (2002); Emmanuel Gross, *The Magna Carta of the Defendant According to the New Bill of Rights in Israel – A Comparative Study*, 8 PACE INT'L. L. REV. 91 (1996).

[21]§7 of the Canadian Charter of Rights and Freedoms and the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution are examples.

[22]For example, in the U.S., under the general circumstances that a state seeks to deprive one of life, liberty or property, it must afford due process. This guarantee provides a measure of procedural quality without regard to the procedural components. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Lisenba v. California, 314 U.S. 219, 236, (1941). In Canada, under the general circumstances that a person is deprived of life, liberty or security of the person, this must be done in accordance with the principles of fundamental justice.

[23]U.S. Const., Amend. VI. (In the United States, in the particular circumstance of a criminal prosecution, the accused has the right to the assistance of counsel for his defense. However, outside this particular circumstance, even though a process may have the same consequences (incarceration), the same procedure (counsel) is not afforded); CHARTER, sec. 11(c). (In Canada, in the particular circumstance that a person is "charged with an offense," such person has a right (among other things) "not to be compelled to be a witness in proceedings against that person in respect of the offence." However, when a person is not so charged, even though their compelled testimony may yield derivative incriminating evidence that may be used against them, the same procedural protection (against incrimination) is not provided); *Thompson Newspapers Ltd.*, [1990] 77 C.R. (3d) 129 (S.C.C.) (although the basic guarantee of fundamental justice was held to prevent this) (Wilson, J.).

[24]A few enumerated processes have inherent guarantees of qualitative aspects, either explicitly or through judicial interpretation. In Canada, for example, §11(d)

necessary consequences from employing the particular procedure (*e.g.*, counsel, silence, etc.) that is enumerated. By and large, the rights guarantee or regulate concrete actions or entities (a trial, counsel, a search, a warrant, etc.), which may have qualitative components (*e.g.*, a trial must be "speedy," counsel must be "effective," a search must be "reasonable," a warrant must be based upon "probable cause"), but are not themselves qualitative measures.

While both of these types of entrenched protections are enforced through judicial review, basic guarantees carry much greater potential for the exercise of judicial authority than do enumerated rights because of their "fundamental" nature. Basic guarantees may be "fundamental" in either of two different senses. First, they may be fundamental as basic, or essential, requisites of any process that will be constitutional. In this sense, they are requirements that an individual may always identify as a basis for relief[25] (*i.e.*, to be

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guarantees any person charged with an offense the right "to . . . a fair and public hearing by an independent and impartial tribunal." In the United States, the right to counsel, guaranteed by the Sixth Amendment to the U.S. constitution, has been held a right to effective counsel. Strickland v. Washington, 466 U.S. 668, 685 (1984) (recognized that the Sixth Amendment right to counsel exists, and is needed, in order "to protect the fundamental right to a fair trial . . . . [t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.") Similarly, the Fourth Amendment requires that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

[25]For example, in the U.S. all aspects of the criminal process must satisfy the requisites of "due process," even when they are in the main governed by some enumerated right. Thus the U.S. Supreme Court has held that confessions and identifications must satisfy both the applicable enumerated right and the basic guarantee. *See* Colorado v. Connelly, 479 U.S. 157 (1986)(considering and rejecting claim that notwithstanding a valid Miranda waiver under fifth amendment's privilege against self incrimination there is also a violation of due process) and Stovall v. Denno, 388 U.S. 293 (1967) (although identifications typically governed by 6th amendment right to counsel, which did not attach prior to indictment, due process still required that under the totality of the circumstances identification not be unnecessarily suggestive and conducive to irreparable misidentification). Abusive conduct by the police, even if it does not violate some enumerated right, may always violate the basic guarantee. Dickerson v. United States, 530 U.S. 428, 442 (2000) (noting federal cause of action for police misconduct). In Canada, "[w]here the issues before the courts involve a liberty and security interest, s. 7 is engaged and requires that the proceedings be conducted fairly. Accordingly, although the

constitutional, any process must satisfy the basic guarantee, although if enumerated rights apply it must also satisfy these), even in the absence of an applicable enumerated right.[26] Second, they may be fundamental as the most important requirement that any process must satisfy in order to be constitutional. In this sense, they are the chief requisite for the constitutionality of a process, and so they can also be superior to enumerated provisions (*i.e.*, they represent overarching principles), such that even if the applicable enumerated rights are not violated, the process may still violate the basic guarantee.[27] The difference between these two senses of "fundamental" suggest different models for the relationship between the basic guarantees and the enumerated rights.[28]

These senses in which basic guarantees are "fundamental" can increase opportunities for the exercise of judicial authority in at least three ways. First, because the basic guarantee is a qualitative measure, the claim that a law or rule violates something "fundamental" to the constitutional structure can apply to an infinite range of situations. Enumerated rights can address violations of the specific process enumerated (*e.g.*, the right to counsel in a criminal prosecution may address a criminal prosecution that occurred without counsel), but they cannot apply beyond the enumerated scope of the right (*e.g.*, the right

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committal hearing is not a trial, it must conform with the principles of procedural fairness that govern all judicial proceedings in this country, particularly those where a liberty or security interest is at stake." United States of America v. Cobb, [2001] 1 S.C.R. 587, ¶32 (extradition hearing, even though not criminal proceeding, must comport with fundamental justice because it involves deprivation of liberty and security of the person).

[26]*See, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (counsel not guaranteed by 6th amendment in parole or probation revocation hearings, but due process may require counsel in particular revocation hearings to guarantee the effectiveness of other rights guaranteed at the hearing); *Evitts v. Lucey*, 469 U.S. 387 (1985) (counsel required by due process on direct appeal as of right, even though the existence of a direct appeal as of right is not constitutionally required); *Powell v. Alabama*, 287 U.S. 45 (1938) (counsel required by due process, although at the time not the 6th amendment, under the circumstances of capital trial, in which defendants denied chance to retain counsel and denied meaningful representation by appointment of entire bar, as a matter of fundamental fairness).

[27]*See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (For example, in the U.S due process, not the compulsory process clause, required in camera review for disclosure of victim's counseling records to defense).

[28]*See* §§II.A. and II.B., infra.

to counsel is inapplicable to a non-criminal action). Because basic guarantees afford a quality of process, rather than any particular process, their scope of application is effectively unlimited (*e.g.*, the absence of counsel in any process, even a non-criminal one, may result in a process that does not satisfy the basic guarantee).

Second, because "basic guarantees" are abstractions, they inherently carry much wider interpretive potential than do enumerated procedural protections.[29] For example, the right to counsel in a criminal prosecution may require interpretation of the meaning of "counsel" or "criminal prosecution." This interpretation may draw upon history or custom, as well as bodies of theory such as politics, economics or philosophy, but it ultimately refers to something concrete – albeit changing – "counsel" and "criminal prosecution." Basic guarantees are concepts, that may have reference to historical or customary notions, and may be informed by theories of politics, economics or philosophy, but they are ultimately abstractions – and thus susceptible to a wider range of interpretation than concrete entities such as "counsel" or "criminal prosecution."

Finally, because basic guarantees represent ideas that are "fundamental," in the sense of either most important or essential, they can always be a source for invalidating a rule or law. This authority could be limited somewhat depending upon the relationship between enumerated rights and the basic guarantee. For example, if the basic guarantee is understood to mean nothing more than simply adherence to the enumerated rights, than its utility as a source for exercising

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[29]This point is hardly new, but its significance can be lost amid claims that everything in the constitution is equally indeterminate. *See* Frank B. Cross, *Institutions And Enforcement of The Bill of Rights*, 85 CORNELL L. REV. 1529, 1540 (2000).

> Concepts such as due process, liberty, equal protection, and freedom itself are not self-defining but inevitably require value judgments. The technical formalism of legal analysis cannot resolve those value judgments. John Hart Ely has noted that constitutional provisions such as the ban on cruel and unusual punishment, the privileges and immunities clause and other language are "difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it." (Citations omitted.)

judicial authority will be limited to cases in which no enumerated right applies. But to the extent that the basic guarantee means anything more than simply adherence to the enumerated rights, it is always a basis for exercising judicial authority.

Moreover, this "fundamental" nature of basic guarantees, combined with their greater interpretative possibilities as abstractions, carries with it the potential for substantive, rather than simply procedural, review. Since basic guarantees reflect overarching principles, they might be violated by a process that otherwise provides enumerated procedural protections.[30] This greater potential for the exercise of judicial authority gives basic guarantees particular significance in measuring the judicial role in a given constitutional structure. Since these two types of protections may overlap in particular cases,[31] it is the relationship between them – when does

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[30]The archetypal American constitutional example of this might be Brown v. Board of Educ. of Topeka. Here a basic guarantee (equal protection), was found to have been violated by a practice (racial segregation) that contravened no enumerated right, and had been previously upheld by the Court. Nevertheless, even theories of constitutional jurisprudence that limit judicial authority to invalidate legislation can accommodate this use of the basic guarantee. *See, e.g.*, Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 46 WAYNE L. REV. 1305, 1392-1397 (2000) ("interpretivist" defense of Brown); *See* K. Michael Stephens, *Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms*, 13 NAT'L. J. CONT. L. 183 (2002). (For an originalist challenge to the Supreme Court of Canada's current interpretation of section 7).

[31]*See, e.g.*, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(d). (For the guarantee of "fair and public hearing" to one charged with an offense. This protection is sometimes placed in §11(d)); *see* R. v. Corbett, [1988] 64 C.R. (3d) 1 (S.C.C.), (and sometimes in §7); *see* R. v. Stinchcombe, [1991] 8 C.R. (4th) 277, 285 (S.C.C.) (Government has broad constitutional duty to disclose all relevant information to the defence, as right to make full answer and defence is "one of the pillars of criminal justice on which we depend to ensure that the innocent are not convicted."); Thompson Newspapers Ltd., [(1990] 76 C.R. (3d) 129, 238 (S.C.C.) (La Forest, J.). (The explicit overlap has been recognized: anything protected by the right to a fair hearing would "in any event be protected under s. 7 as an aspect of the principles of fundamental justice."); *See* also R. v. Seaboyer, [1991] 2 S.C.R. 577, 603 (holding provisions of rape shield statute that absolutely precluded introduction of complainant's prior sexual conduct, even to explain alternative source of injuries, deprived defendant of liberty without fundamental justice because they contradicted fundamental principle that innocent person not be convicted).

one, or the other, or both apply, and which trumps the other – that ultimately defines both the judicial role and the effective meaning of the protection.

II. Two Models for the Relationship between the Basic Guarantee and Enumerated Rights

When these protections overlap in any particular case, the relationship between them can follow either of two very different analytic models. In one model, the basic guarantee has a limited role, in which it is principally a "gap-filler" for issues not addressed by the enumerated rights, or a back-stop for egregious cases. In the other model, the basic guarantee has an expansive role, infusing all the enumerated rights and possessing the ability to supersede them, providing protections even when the applicable enumerated rights would afford none.

A. The Limited Model of the Basic Guarantee of Adjudicative Fairness

The basic guarantee can be understood as "fundamental" in the sense that it is an essential prerequisite for any constitutional process.

The sections which follow s. 7, like the right to a fair trial enshrined in s. 11(d), reflect particular principles of fundamental justice: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. Thus the discussion of s. 7 and s. 11(d) is inextricably intertwined.

In the United States, confessions jurisprudence is one example of these overlapping protections. Confessions that are the product of custodial interrogation must be preceded by warnings that the suspect may remain silent, consult counsel, at government expense if the suspect cannot afford counsel, and that statements given will be used against him, pursuant to the Fifth Amendment's privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436 (1966). Interrogations that follow these warnings and a valid waiver of the rights they afford, however, still may not involve police coercion such that it overbears the will of the suspect. *Miller v. Fenton*, 474 U.S. 104, 109 (1985) ("certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned."). Non-violation of the enumerated right, in short, does not necessarily make the confession valid; it may still be obtained in violation of the basic guarantee.

Thus a criminal defendant may always claim that the process they received violated the basic guarantee, but with respect to any applicable enumerated rights, their claim will fail so long as they received whatever process the enumerated right afforded. "Fundamental," understood in this sense, carries with it no greater test than that the defendant received whatever the applicable enumerated rights guaranteed. The basic guarantee may invalidate a process when no enumerated rights apply,[32] or in particularly egregious cases,[33] but these are the exceptions.[34] This is the "limited" model of the basic

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[32]*See*, *e.g.*, Taylor v. Kentucky, 436 U.S. 478, 486 (1978) (For example, the generalized guarantee may provide a right to a specific remedy where no enumerated right is implicated. Presumption of innocence, though not enumerated as a specific right in the constitution, is a basic requirement of due process in a criminal trial, and jury must be so instructed. Pre-indictment identification cases, or identification practices in which the right to counsel does not apply such as photographic identifications, are other examples of this overlap in which the basic guarantee can fill in for inapplicable enumerated rights.); Neil v. Biggers, 409 U.S. 188 (1972) (holding unnecessarily suggestive pretrial photo identification which does not violate right to counsel, because it occurred prior to indictment, might nevertheless violate due process if it created a very substantial likelihood of misidentification); *See* also United States v. Marion, 404 U.S. 307 (1971) (holding preindictment delay does not violate Sixth Amendment right to speedy trial, but could violate due process if delay caused substantial prejudice to defendant).

[33]The pre-incorporation cases involving the rights to counsel and invalidating coerced confessions are examples of this. *See* Powell v. Alabama, 287 U.S. 45 (1932) (due process requires capital defendant be given opportunity to obtain counsel and appointment of counsel, even though right to appointed counsel under the Sixth Amendment had not been identified or incorporated, because this was "a capital case, where defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like"); Brown v. Mississippi, 297 U.S. 278 (1936) (complex of values in due process precludes use of defendant's statements extracted through beating); Rogers v. Richmond, 365 U.S. 534 (1960) (statement obtained after police fooled defendant into thinking they were forcing his sick wife to come in for questioning violated due process even though it might have been reliable).

[34]*See* Dowling v. United States, 493 U.S. 342, 352 (1990) ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly."); *See* also Colorado v. Connelly, 479 U.S. 157 (1986) (noting even statements that were not product of defendant's free choice admissible so long as police not involved, and that statements of questionable reliability nevertheless admissible as "this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment.").

guarantee.[35]

In the United States, for example, the U.S. Supreme Court has held that the right to counsel in a criminal case (enumerated in the Sixth Amendment) exists because counsel is an attribute of a criminal process that is fair -- a right protected by the basic guarantee.[36]

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[35]The Court has noted this most clearly in Medina v. California:

> [There are] many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution. *See*, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (due process right to trial transcript on appeal); Brady v. Maryland, 373 U.S. 83 (1963) (due process right to discovery of exculpatory evidence); Sheppard v. Maxwell, 384 U.S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); Chambers v. Mississippi, 410 U.S. 284 (1973) (due process right to introduce certain evidence); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process right to hearing and counsel before probation revoked); Ake v. Oklahoma, 470 U.S. 68 (1985)(due process right to psychiatric examination when sanity is significantly in question).

505 U.S. 437, 454 (1992)(O'Connor, J., concurring in judgment).

[36]"In a long line of cases . . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland v. Washington, 466 U.S. 668, 684 (1984). As does the U.S. Supreme Court in Strickland, the Supreme Court of Canada finds that "the right to effective assistance of counsel . . . is seen as a principle of fundamental justice. . . derived from the evolution of the common law, s. 650(3) of the Criminal Code of Canada and ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms." B. (G.D.), [2000] 1 S.C.R. 520, 530-531.

The Supreme Court of Canada cited Strickland in adopting a standard that an ineffectiveness claim required both assistance that fell below the standard of reasonable professional assistance and a resulting miscarriage of justice. This appears at first glance identical to the standard in Strickland that a defendant must prove that the representation both fell below the standard of reasonable professional assistance and there is a reasonable probability that, but for counsel's errors, the outcome would have been different. 466 U.S. at 694. Note, however, that the Canadian Supreme Court explains that "[m]iscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised." B. (G.D.), [2000] 1 S.C.R. at 532. Thus, deficient performance of counsel and procedural unfairness alone may be sufficient to make out a violation of the right to counsel in Canada. DON STUART, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW 175, note 815 ("This 'or' seems to allow for remedies where there was no prejudice.")

However, in situations in which the enumerated right to counsel is applicable, the basic guarantee has little significance – because the constitution "defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."[37] Whether the right to counsel applies in a given situation controls the scope of the right, and can naturally affect its meaning. Thus the Court has had to interpret what is a "criminal prosecution,"[38] and what constitutes "counsel." It is only, however, when the enumerated right does not apply (*i.e.*, when the Sixth Amendment has been held not to require counsel, such as before or after the criminal prosecution itself), that the basic guarantee becomes significant.[39] The basic guarantee then fills the gap for establishing a minimum standard of fairness required in order to satisfy the constitution.[40]

B. The Expansive Model of the Basic Guarantee of Adjudicative Fairness

The basic guarantee can also be understood as "fundamental" in the sense that it is overarching or the most important of all constitutional requirements. In this sense, even if the applicable enumerated rights have been satisfied, there may still be a violation of the basic guarantee. This is the interpretation that the Supreme Court

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[37]Id.

[38]The Court has identified only proceedings that result in a deprivation of liberty as ones to which the Sixth Amendment can apply.

[39]For cases "before" the prosecution, *See* United States v. Marion, 404 U.S. 307 (1971) (Sixth amendment's speedy trial right does not apply prior to indictment, but due process can limit preindictment delay); For cases "after" the prosecution, *See* Evitts v. Lucey, 469 U.S. 387 (1985) (due process requires counsel in first level appeals as of right); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process may require counsel in parole and probation revocation hearings); Ross v. Moffitt, 417 U.S. 600 (1974) (due process does not require counsel for defendant seeking discretionary review).

[40]*See* United States v. Wade, 388 U.S. 218 (1967) (Sixth amendment right to counsel applied only to critical stages of criminal prosecutions); Ross v. Moffitt, 417 U.S. 600 (1974) (due process does not require provision of counsel for discretionary appellate review of a criminal conviction, because grant of discretionary appellate review is based upon factors unrelated to correct adjudication of guilt); Pennsylvania v. Finely, 481 U.S. 551 (1987) (due process does not require provision of counsel for defendant's state post-conviction collateral challenge).

of Canada has given the Charter of Rights and Freedoms' basic guarantee of fundamental justice.[41]

In Canada, for example, the enumerated rights that protect an accused person from being compelled to incriminate themselves apply only to testimonial compulsion.[42] Thus they were inapplicable when an arrestee was questioned by a police officer posing as another inmate.[43] However, the principle of fundamental justice was held to embrace a right to silence on the part of the defendant, "as an integral element of our accusatorial and adversarial system of criminal justice."[44] The Court finds that there must be a right to silence, because of the wide range of other existing procedural guarantees that must be premised upon it, including pre-Charter cases, and its common law recognition, but since this "right" clearly applies only to testimonial compulsion, then the "right" to silence implicated by the practice at issue must be a right to silence protected as a principle of fundamental justice.[45]

In considering a fundamental justice challenge, the Supreme Court of Canada follows what it has described as a "purposive" approach,[46] in which it attempts to carry out the purpose of the Charter

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[41]R. v. Hebert, [1990] 2 S.C.R. 151, 163. ("[A] fundamental principle of justice under s. 7 may be broader in scope than a particular legal rule, such as the confessions rule, is that it must be capable of embracing more than one rule and reconciling diverse but related principles. Thus the right of a detained person to silence should be philosophically compatible with related rights, such as the right against self-incrimination at trial and the right to counsel.").

[42]Charter, §11(c) ("Any person charged with an offence has the right . . . (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;") and §13 ("A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.")

[43]R. v. Hebert, [1990] 2 S.C.R. 151, par. 19.

[44]Id, par. 20.

[45]Id.

[46]Reference Re Section 94(2) Motor Vehicle Act (B.C.), 2 S.C.R. 486 (1985). (The Supreme Court of Canada has also followed a "purposive" approach with respect to some enumerated rights.) *See* Hunter v. Southam, [1984] 41 C.R.(3d) 97 (S.C.R.), (interpreting section 8's guarantee that "Everyone has the right to be secure against

"to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."[47] Under this approach, the Court asks whether the practice at issue contradicts a "basic tenet of [the] legal system."[48] If it does, then the fact that it satisfies existing law, or does not violate an enumerated right, does not preclude its failing as a matter of fundamental justice.[49] The basic guarantee thus always carries the ability to expand the scope of a protection, even if the enumerated rights offer no further protections.

III. The Relationship between the Protections in Canada and the United States

Despite adopting such different models for the relationship between the basic guarantee and the enumerated rights, the Supreme Courts of Canada and the United States followed a pattern of development of the guarantee of basic adjudicative fairness that was similar in three respects.[50] First, in both cases there was an initial period of debate about the guarantee's meaning. During this period,

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unreasonable search or seizure," the Court held that a search of a newspaper by a federal officer, appropriately (thought not judicially) authorized by federal statute, violated section 8. The Court held that section 8 implicitly required some minimum standard of prior judicial authorization, based upon objective grounds that had been established by oath.); *See* STUART, CHARTER PRINCIPLES, at 5, op cited at note ___.

[47]Hunter v. Southam, [1984] 41 C.R.(3d) 97, 156 (S.C.R.).

[48]Id.

[49]R. v. Hebert, [1990] 2 S.C.R. 151, 163-64. ("The final reason why a principle of fundamental justice under s. 7 may be broader than a particular rule exemplifying it lies in considerations relating to the philosophy of the Charter and the purpose of the fundamental right in question in that context. The Charter has fundamentally changed our legal landscape. A legal rule relevant to a fundamental right may be too narrow to be reconciled with the philosophy and approach of the Charter and the purpose of the Charter guarantee."); *See* § V.A., infra. (It is also possible that the restriction on a right which violates fundamental justice might be "saved" under the savings provision of §1.)

[50]The length of this development was quite different in the two countries. In the United States, it dates roughly from 1884, with the Court's decision in Hurtado v. California, 110 U.S. 516, to its development of selective incorporation in the 1960's. In Canada, much of what took seventy-five or eighty years in the United States appears to have occurred in less than two decades.

each Court addressed preliminary issues concerning the scope of the guarantee and its relationship to specific rights. For example, each court addressed whether the basic guarantee enabled it to engage in substantive, rather than only procedural, review of legislation.[51] Each court also addressed whether the existence of a specific right, already entrenched in the constitution, superceded any effect of the general guarantee in the area covered by the specific right, and both courts held that it did not.[52] In Canada, this initial period of debate

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[51]With respect to substantive review under the Charter, compare Latham v. Canada (Solicitor General), 39 C.R. (3d) 78 (Fed. T.D. 1984) (rejecting view that § 7 required substantive review) with B.C. Motor Vehicle Reference, 48 C.R. (3d) 289 (S.C.C. 1985) (holding § 7 required both procedural and substantive review, and rejecting such a distinction). The Canadian debate erupted in the scholarly literature almost immediately. *See* L. Tremblay, *Section 7 of the Charter: Substantive Due Process?*, 18 U.B.C. L. REV. 201 (1984); P.J. Monahan & A. Petter, *Developments in Constitutional Law: The 1985-86 Term*, 9 SUP. CT. L. REV. 69 (1987); R.A. MacDonald, *Procedural Due Process in Canadian Constitutional Law: Natural Law and Fundamental Justice*, 39 U. FLA. L. REV. 217 (1987); B. Chapman, *Criminal Law Liability and Fundamental Justice: Toward a Theory of Substantive Judicial Review*, 44 U.T. FAC. L. REV. 153 (1986). The U.S. Supreme Court's earliest holding that due process had some independent meaning beyond simply following the rules was clear after Hurtado, id., described as the case "that made judges [via the due process clause] censors over what was 'fundamental' in a judicial procedure." David P. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 368 (1985), cited in Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS UNIV. L. J. 303, 346 (2001).

[52]For Canada, *See* R. v. Hebert, [1990] 77 C.R. (3d) 145 (S.C.C.) (pretrial right to silence held protected by §7 despite existing protections in § 11(c) against compelled testimony by accused and § 13 against incrimination of witness with evidence form another proceeding). For the United States, the Supreme Court had suggested in Hurtado v. California, 110 U.S. 516 (1884) that due process might not overlap with specific protections in enumerated rights, but this "suggestion was short-lived, however, and the Court eventually found within the Fourteenth Amendment due process various rights also protected by specific Bill of Rights guarantees." §2.4 LAFAVE, ET AL, CRIMINAL PROCEDURE 56 (3d ed. 2000). The Court readily extended due process protection to prohibit practices in the judicial process that did not obviously conflict with any specific enumerated right. *See* Moore v. Dempsey, 261 U.S. 86 (1923), and Tumey v. Ohio, 273 U.S. 510 (1927) (compensation for trial judge only when criminal defendants are convicted violates due process). For a comparatively recent example of this, *See* Taylor v. Kentucky, 436 U.S. 478, 486 (1978) (presumption of innocence, though not enumerated as a specific right in the constitution, is a basic requirement of due process in a criminal trial, and jury must

concerning the substantive reach of the guarantee lasted only a few years,[53] while in the U.S. it lasted several decades.[54]

Second, after this initial period of debate, both courts used the basic guarantee to implement specific rights in the criminal justice system. In Canada, this involved the implementation of textually "entrenched"[55] rights,[56] while in the U.S. this involved first the judicial entrenchment of rights (*i.e.*, their incorporation and thus guarantee of permanent applicability to the states) and then their implementation. After judicial entrenchment of a right in the U.S., the significance of the basic guarantee was then reduced to those situations that fell between existing enumerated rights.[57] While the mechanics differed somewhat given the different degree to which specific rights were entrenched, both Courts used the broad guarantee of basic adjudicative fairness to substantively change an entire area of law - notwithstanding that the area arguably had already been largely codified though enumeration of specific rights.[58]

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be so instructed).

[53]B.C. Motor Vehicle reference, settled the matter in Canada within three years of the Charter's adoption. In the United States, *See* Hurtado v. California, 110 U.S. 516 (1884).

[54]Hurtado v. California, 110 U.S. 516, 120 (1884). (Made this clear, as it involved determining whether the right to a grand jury indictment – protected in federal cases by the fifth amendment – existed in state cases. The Court found that the existence of the right to an indictment in the same amendment as the right guaranteeing due process must have meant that due process did not necessarily require a grand jury indictment – "lest why else include the guarantee of an indictment when due process was already ensured?").

[55]*Supra* note ___ (defining use of "entrenchment").

[56]The Canadian Charter of Rights and Freedoms was entrenched by the Constitution Act (enacted by the Canada Act of 1982 (U.K.), c. 11, Sched. B) on April 17, 1982.

[57]*See* Medina v. California, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring in judgment) (noting instances Court has required procedures that were neither required at common law nor explicitly commanded by the text of the Constitution, such as right to trial transcript on appeal, discovery of exculpatory evidence, protection from prejudicial publicity and courtroom disruptions, right to introduce certain evidence, right to hearing and counsel before probation revoked, and right to psychiatric examination when sanity is significantly in question).

[58]Alan W. Mewett & Shaun Nakatsuru, 21 AN INTRODUCTION TO THE CRIMINAL PROCESS IN CANADA (4th ed.2000). ("[I]t is clear that section 7 has enormous

Third, despite considerable initial concerns by the political branches in both countries that the basic guarantee of adjudicative fairness would be used to change social or economic policy, this has not been the most significant impact of the use of the guarantee in either country.[59] Instead, in both countries it is the criminal justice system that has been the subject of the most significant reform efforts through use of the broad guarantee.[60]

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potential in enabling the courts to control not only the substance of criminal legislation but also many aspects of investigation and procedure beyond those specifically set out in the Charter.").

[59]Obviously there were no articulated concerns by the drafters of the American constitution that the Supreme Court would use due process to effect substantive control of policy, as there was then even no established principle of judicial review. But *See*, The Federalist, No. 78, ("The interpretation of the laws is the proper and peculiar province of the courts. . . . If there should happen to be an irreconcilable variance between [the constitution and a legislative enactment], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."); Clinton Rossiter, ed. (1961), 467. There was, however, significant political reaction to the U.S. Supreme Court's use of substantive due process to control economic policy in the start of the New Deal era. *See*, e.g., Daniel Farber, *Who Killed Lecher*, 90 GEO. L. J. 985 (2001) (reviewing WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995)).

Sujit Choudhry, *The Lecher Era and Comparative Constitutionalism* 31-36, Univ. of Toronto Public Law and Legal Theory Research Paper No. 02-22, http://ssrn.com/abstract_id=363220,. (With respect to the Supreme Court of Canada's substantive use of fundamental justice in connection with economic matters, analyzing both the Charter framers' fear that the Court would use the Charter to undertake substantive review of legislative policy choices (which it did), and that it would extend the reach of this review to regulation of economic activity as a form of "liberty" (which it did not)); *See* also Irwin Toy v. Quebec [1989] 1 S.C.R. 927, para. 95 (holding only natural persons, not corporations, are entitled to sec. 7's protection of fundamental justice for deprivation of "liberty," and that economic "liberty" implicit in non-penal regulation was not meant to be guaranteed by sec. 7, but that economic aspects of "security of the person" might be reached by the guarantee).

[60]There are of course exceptions to this generalization. In the U.S., the political branches responded to the Court's use of the broad guarantee as a means of resistance to economic reform during the New Deal (through the early incarnation of substantive due process) with the Court-packing plan. In both countries, abortion is an area of social policy that the Court has addressed through the use of the broad

Given the respective differences in constitutional and federal structures, as well as the different historical contexts in which they took place, these processes naturally happened differently in the two countries.[61] In the United States, where the Supreme Court had recently undergone a basic challenge from the executive (Roosevelt's court packing plan) to its use of a substantive guarantee to measure the wisdom of policy (substantive due process), and where a federal structure gave primary authority over criminal matters to subnational jurisdictions (the states), the Court used the guarantee of basic adjudicative fairness as a substitute for specific rights that had not been entrenched. The only "entrenched" rights at the time had not yet been applied to the states or incorporated, thus they were only entrenched for the comparatively small number of criminal cases in federal court. In the United States, the guarantee of basic adjudicative fairness was a substitute for rights that had not been textually entrenched.[62] The guarantee was so broad and essentially ill-defined

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guarantee. In both countries, it has been judicially protected as a matter of the substantive version of the basic adjudicative guarantee. In the U.S., Roe v. Wade is generally seen as a decision implementing substantive due process, albeit under the rubric of "privacy." In Canada, Morgentaler is a decision involving substantive limits under fundamental justice. Both cases, though, do involve criminal statutes.

[61]The limits to comparative assessments inherent in the differing structures of the two countries' constitutions, particularly the Canadian internal checks of secs. 1 and 33, have been noted by Canadian jurists.

> Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.

R. v. Keegstra, 1[1990] C.R. (4th) 129, 166 (S.C.C.) (Dickson, Ch. J.) (Canadian constitution's concern for equality and multiculturalism, and international commitments to eliminate hate propaganda, make limits on such speech constitutional in Canada where they would not be in the U.S.).

[62]The U.S. Supreme Court did implement these rights in a very narrow context that ostensibly avoided the interpretive tensions noted above when it invalidated certain practices under its "supervisory authority over the administration of justice in the federal courts." In a small number of cases that involve the mechanics of federal trial court procedures, the U.S. Supreme Court has held that it can apply what appears to be a broad, but non-constitutional, guarantee of adjudicative fairness. *See*, *e.g.*, McNabb v. United States, 318 U.S. 332 (1943) (six hour delay in taking suspects before federal magistrate violated federal statutory requirement that arrestee

that it could be used to remedy a wide variety of deficiencies in the procedural fairness of state criminal proceedings.[63] Its very breadth and malleability, however, was its ultimate undoing, and the Court finally adopted a method of judicial entrenchment of specific rights through "selective incorporation" for the reform of the nation's criminal justice system.[64]

In Canada, the Court was given the authority to enforce a package of textually entrenched rights along with a basic guarantee of adjudicative fairness.[65] This was done with very significant concern that the Court would use this to effect just the type of substantive review of legislative policy (and explicitly legislative policy about economic and social regulation) that led to Roosevelt's court-packing plan in the United States.[66] Notwithstanding this concern, the Court promptly took the guarantee of basic adjudicative fairness and used it to measure the constitutionality, through substantive review, of a wide

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be promptly brought to the nearest judicial officer, and required exclusion of resulting confessions lest they "stultify the policy which Congress has enacted into law"). These supervisory authority rulings have extended to procedural standards in contempt proceedings , procedures for jury selection, rules concerning discovery and disclosure and rules concerning the permissible scope of cross examination. The Court has more recently curtailed its use of its supervisory authority, at least where there is no applicable federal statute, and its exercise is sought in order to enforce a judicial rule of procedure. *See* United States v. Williams, 504 U.S. 36 (1992) (rejecting dismissal of indictment for prosecutor's failure to present substantial exculpatory information to the grand jury, as matter either of supervisory authority of lower federal courts or "common law" of the Fifth amendment's right to independent grand jury).

[63]*See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS UNIV. L. J. 303, 346 (2001) ("*Hurtado* often is described as the launching pad for the flexible, evolving conception of due process that later came to dominate the application of due process in both its procedural and substantive context.")

[64]*Id*. at 383. (This criticism is much like that leveled currently at the Supreme Court of Canada from some commentators.); *See* K. Michael Stephens, *Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms*, 13 NAT'L. J. CONST. L. 183, 218 (2002); Choudhry, *supra* note __.

[65]*See* CHARTER, §§ 7 (basic guarantee) and 8-14 (enumerated legal rights).

[66]*See* § III.A., infra.

variety of criminal laws and procedures.[67]

Unlike the United States Supreme Court, the Supreme Court of Canada had explicit tools for reforming the criminal justice system in the textually entrenched specific rights already applicable to all criminal proceedings (*i.e.*, applicable without the need for any sort of "incorporation"). The significance of this authority for reform is even greater in Canada than in the U.S., as criminal matters (including the definition of crimes and their prosecution) are virtually all subject to national rather than provincial control.[68] Even though these procedural rights were already explicitly entrenched in the constitution, the Court has aggressively used the guarantee of basic adjudicative fairness to further expand these procedural rights.

Although there has been considerable critical discussion about the Supreme Court of Canada's readiness to evaluate the wisdom of matters of "policy," there has been relatively little criticism of its use of the broad procedural guarantee to refashion rules of substantive criminal law (both legislative and common law) and criminal procedure. The Supreme Court of Canada has in essence held that the enumerated rights are non-exclusive illustrations of the potentially

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[67]*Id* (cases court has used f/j to refashion crim justice system).

[68]Substantive criminal law in Canada is Federal Law, according to the Constitution Act, 1867. §91(27) gives the Federal Legislature power to make laws in relation to: "The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." This has been done fairly recently. "In Canada, since 1982, the criminal law has been codified in one federally-enacted Criminal Code." HOGG, *supra* note 11 at 398; *See also*, Criminal Code of Canada 9[8]. "Notwithstanding anything in this Act or any other Act, no person shall be convicted . . . a) of an offence at common law, b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada. . . ."

Although federally-created, the criminal law is enforced and prosecuted by the provinces, and judged by provincial judges in provincial courts. *See* Constitution Act, 1867. 91(14). The rules of criminal procedure and evidence used in these courts, however, are federal, pursuant to 91(27). While substantive federal American criminal law exists, American criminal law is both substantively and procedurally overwhelmingly state law.

infinite number of ways in which the basic guarantee might be violated. In American terms, it would be as if the United States Supreme Court had started with the procedural rights that it struggled for decades to decide to incorporate already incorporated, and then proceeded to use the "independent potency" of the due process clause to further measure what these rights meant.

A. The Genesis and Development of Canadian "Fundamental Justice"

At its inception, the Canadian overarching guarantee of "fundamental justice" in section 7 of the Charter of Rights and Freedoms was drafted with a wary eye toward the American experience with "due process."[69] In 1982, fearful of judicial "activism," and grounded in the English constitutional tradition of parliamentary supremacy, the framers of Canada's modern constitution sought to enact a package of individual rights – including a right to over-arching fairness in adjudication – that would protect individual liberties dramatically better than had Canada's old "Bill of Rights," yet that would not establish a Supreme Court unequivocally superior to the legislature.[70]

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[69] *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 746-748 (2d ed. 1985). *See also* John D. Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter*, 13 MAN. L. J. 455, 456-59 (1983)(detailing testimony of Federal Department of Justice lawyers and questions by members of Parliament).

> How on earth do *Lecher* and natural justice bear on the meaning of the term "principles of fundamental justice" in s. 7? Both were part of the stock of common knowledge of the lawyers who participated in drafting s. 7, and of the lawyers and judges who sought to interpret it. It is reasonably apparent the drafters felt an acute need to avoid the dangers represented by *Lecher*." They tended to assume, often expressly, that 'fundamental justice' meant only procedures, the only alternative was 'substantive review' and *Lecher*. P. MACKLEM, ET AL, CANADIAN CONSTITUTIONAL LAW 902 (2d ed. 1997).

[70] Frederick Vaughn, *Judicial Politics in Canada: Patterns and Trends*, 5 CHOICES 1, 11-12 (no. 1, June 1999), (IRPP), *available at*, http://www.irpp.org (last visited September 3, 2003). ("There can be no mistake about it, the new Charter of Rights and Freedoms was a considerably more powerful instrument than the old Bill of Rights, for the Charter was constitutionally entrenched, becoming a formal part of 'the fundamental law of the land,' and gave judges the power to declare offending

The Charter, unlike Canada's Bill of Rights, explicitly placed certain guarantees in the text of the constitution, and authorized their judicial protection against encroachment by the provincial, as well as the national, governments.[71] One part of this package of protections for the individual was a set of "legal rights,"[72] deprivations of which were permissible, under section 7, only in accordance with the principles of "fundamental justice."

Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." One of eighteen "legal rights" in the Charter,[73] section 7 has been described as

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acts and procedures 'unconstitutional'.").

[71]Section 52(1) of the Charter of Rights and Freedoms provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of this inconsistency, of no force or effect." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §52(1). Section 24(1) of the Charter provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." *Id*. §24(1). The Canadian Supreme Court has interpreted the Charter to have expanded its authority of judicial review. *See* Attorney General of Quebec v. Quebec Ass'n. of Protestant School Boards, [1984] 2 S.C.R. 66, 68.

[72]The "legal rights" include protections against unreasonable search or seizures, *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms),§ 8; against arbitrary detention or imprisonment, *See id.* at § 9; to notice of the reasons for arrest, the right to counsel and judicial determination of the validity of detention , *See id.* at §10; to notice of the offense, trial within a reasonable time, to be protected from compelled self-incrimination, to be presumed innocent, to not be denied reasonable bail without just cause, to a jury trial in serious cases, to protection against ex post facto laws and double jeopardy, *See id.* at §11; not to be subjected to cruel and unusual treatment and punishment, *See id.* at §12; not to have one's testimony used to incriminate oneself in another proceeding, *See id.* at §13; and to an interpreter, *See id.* at § 14.

[73]In addition to "legal rights," the Charter also guarantees "fundamental freedoms" (which are comparable to those guaranteed in the 1st Amendment to the U.S. Constitution), *id*. § 2(a-d), "democratic rights," (voting rights and limits to the continuation of a Parliament), *id*. §§ 3-5, "mobility rights," (rights to travel and pursue employment throughout the country), and "equality rights" (comparable to equal protection, but with much broader classifications).

"the most elegant but mysterious provision"[74] of the Charter. The drafters of the Charter feared, however, that section 7, ostensibly a declaration of the right to basic procedural fairness, would instead place too much authority in the hands of judges, and could create substantive judicial review of the wisdom of all legislation, akin to the substantive due process jurisprudence of the U.S. Supreme Court epitomized by the "totemic"[75] *Lecher v. New York*.[76] Skeptical legislators feared that the breadth of its language would enable the Canadian Supreme Court to implement substantive review of the policy choices in legislation under the guise of reviewing legislation's constitutionality.[77] As the Canadian Supreme Court explained in the "bold and striking reasons for judgment"[78] in an early opportunity to analyze section 7:

> [T]here has prevailed in certain quarters an assumption that all but a narrow construction of s. 7 will inexorably lead the courts to 'question the wisdom of enactments,' to adjudicate upon the merits of public policy. From this have sprung warnings of the dangers of a judicial 'super-legislature' beyond the reach of Parliament, the provincial legislatures and the electorate.[79]

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[74]E. Colvin, *Section Seven of the Canadian Charter of Rights and Freedoms*, 68 CAN. BAR. REV. 560, 560 (1989).

[75] John D. Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter*, 13 MAN. L. J. 455, 457 (1983)("[G]overnment lawyers brought forth *Lecher v. New York* 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").

[76]198 U.S. 45 (1905).

[77]*See* Reference Re Section 94(2) Motor Vehicle Act (B.C.) [1985], 2 S.C.R. 486, 504-505 (quoting testimony of Department of Justice Federal Civil Servants before Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, that fundamental justice was not meant to include both the procedural and substantive components of American due process but only procedural due process or, in terms of Canadian administrative law, "natural justice").

[78]DAVID C. MCDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 143 (1989).

[79]*See* Reference Re Section 94(2) Motor Vehicle Act (B.C.) [1985], 2 S.C.R. 486, 497.

It is no coincidence that section 7 is similar to the guarantees in the U.S. Constitution, that no person shall be deprived of "life, liberty or property, without due process of law,"[80] although of course it does not protect property.[81] Despite this similarity, the Canadian legislature took pains to distinguish section 7 in at least one other very important way. As Professor Hogg has observed, "[t]he legislative history clearly discloses an intention on the part of the framers to avoid substantive judicial review."[82] "It is plain," Hogg has noted, "from the testimony before the Special Joint Committee on the Constitution that the reason why the phrase 'due process' was not used in section 7 was to make clear that the American cases applying the concept of 'substantive due process' were not to be followed in Canada."[83]

Despite these early concerns, section 7 has not, in fact, had a significant impact on either economic[84] or social regulation at all.[85] Its

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[80]U.S. CONST., amends. V, XIV.

[81]The Canadian guarantee, unlike the United States' provision, includes protection for security of the person. Unlike the U.S. guarantee, it does not protect "property." The significance of these differences, in particular the absence of the property protection in the Charter, was made clear in Irwin Toy v. Quebec, [1989] 1 S.C.R. 927, para. 95, supra note ___.

[82]HOGG, *supra* note __at 747.

[83]HOGG, *supra* note __at 748.

[84]*See* Choudhry, op cit. note ___, at 36, noting "clear, albeit infrequent, signals from the Supreme Court rejecting a constitutionalized economic libertarianism."

[85]The obvious exception to this point is arguably abortion. In Morgentaler, Smoling and Scott v. The Queen, [1988] 1 S.C.R. 30, four members of the Court concluded that national legislation imposing criminal penalties for doctors who performed abortions and women who sought them - unless a hospital therapeutic review committee had determined that continuing the pregnancy would endanger the life or health of the woman - violated section 7. Their opinions found that the law impermissibly infringed the security of the person (*not* liberty) by delaying a woman's ability to obtain safe and effective medical treatment, and by offering both the woman and the doctor at best an illusory defense through the sanction of ill-defined, standardless and often non-functioning "therapeutic review committees."; *See* 1. S.C.R. at ___ (Opinion of Dickson, C.J.), and 1 S.C.R. at ___ (Opinion of Beetz, J.). (These opinions also both held that the law did not satisfy the "savings clause" of section 1. Both took pains to explain, however, that their decision was not about the lawfulness or desirability of abortion per se, and did not take any position on the existence of a right to "privacy," "liberty," or "abortion."); *See* id *at* ___. (As such, these opinions arguably are narrow judgments concerning the scope of a

real bite as a guarantee of the rights of individuals has been in the area of criminal law and procedure. It has become, according to one commentator, "the most powerful vehicle for the establishment of new protections for the accused in the criminal law."[86] As one commentator has explained:

> [T]he Canadian Charter of Rights and Freedoms, in the hands of the Supreme Court, has been a powerful instrument of criminal law reform. While there are those who might doubt that the reform has been "radical," it is hard to deny that the Charter has had a significant impact in the areas of substantive criminal law, criminal procedure, and criminal evidence.[87]

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criminal sanction and its terms (here its defense)).

From another perspective, these opinions are either an effort to reach the right to abortion, or a futile attempt to avoid doing so, under the guise of measuring a criminal statute. *See* 1 S.C.R. at ___ (Opinion of McIntyre, dissenting) (citing Holmes' opposition to the use of substantive due process in issues of minimum wage, etc.), and 1 S.C.R. at ___ (Opinion of Wilson, J.) (holding determination of right to abortion essential to evaluating whether the law violates section 7). Both of these positions have in turn been criticized, the former for its shoddy use of history, the later for its too casual acceptance of the American model of "privacy," without recognizing either its precarious jurisprudential position or the controversy concerning it. Lorraine Eisenstat Weinreb, *The Morgentaler Judgment: Constitutional Rights, Legislative Intention and Institutional Design*, 12 U. TORONTO LAW J. 1, 50 (1992).

[86]DON STUART, 47 CHARTER JUSTICE IN CANADIAN CRIMINAL LAW (3d ed. 2001).

[87]Dennis Klinck, *The Charter and Substantive Criminal "Justice,"* 42 U. N.B. L. J. 191 (1993). *See also*, ROBERT J. SHARPE & KATHERINE E. SWINTON, THE CHARTER OF RIGHTS AND FREEDOMS CH. 14 (1998) ("The Charter of Rights and Freedoms has had a profound impact in the area of criminal law.") *c.f.*, Robert Harvey & Hamar Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter*, 24 OTTAWA L. REV. 39, 92 (1992) ("It seems beyond debate that the most striking result of the Supreme Court of Canada's Charter jurisprudence has been its willingness to create a constitutional doctrine of mens rea.").

Some scholars suggested quite early that the differences between American and Canadian forms of federalism, and particularly the national authority over criminal in Canada, would preclude the necessity of raising criminal law questions into constitutional ones. *See* Martin L. Friedland, *Criminal Justice and the Charter*, 13 MAN. L. J. 549, 551 (1983) ("[I]n Canada [maintenance of criminal law rules] can be done directly [through ordinary rules of law] because the criminal law is a federal

Since 1982, the Supreme Court of Canada has embarked on an ambitious program of both substantive and procedural reform of the criminal justice system.[88] As comparative scholars have noted, whatever one's opinion about the appropriateness of a court's constitutional review of substantive criminal law, it is undeniable that such a review has happened in Canada. As Professors Harvey and Foster have noted, "it seems important to emphasize that the Supreme Court of Canada's decision to do so [*i.e.*, undertake constitutional review of substantive criminal law] was exactly that: a decision."[89]

A quick catalogue of the significance of two decades of fundamental justice review for the Canadian criminal justice system illustrates its dramatic impact on the substantive criminal law through the demise of the felony-murder (or "constructive murder") rule[90] and the imposition of a minimal requirement of some degree of mens rea – even negligence – for so called "regulatory offenses."[91] Noteworthy decisions include permitting a defendant to introduce evidence of intoxication as a defense even in general intent offenses,[92] and

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responsibility."). *See also*, PETER W. HOGG, CANADA ACT 1982 ANNOTATED 28 (1982); T. J. Christan, *Section 7 of the Charter of Rights and Freedoms: Constraints on State Action*, 22 ALBERTA L. REV. 222, 229 (1984).

[88] Frederick Vaughn, *Judicial Politics in Canada: Patterns and Trends*, 5 CHOICES 1, 17 (no. 1, June 1999), (IRPP), *available at*, http://www.irpp.org (last visited August 31, 2000). ("In many respects, the Charter has provided judges at all levels of the Canadian judiciary with a new set of tools with which to make a difference in criminal matters, even to prompt major changes in criminal procedure. But no level of the judiciary has responded to this new challenge more enthusiastically than the Supreme Court of Canada, especially in the early years.").

[89]Robert Harvey & Hamar Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter*, 24 OTTAWA L. REV. 39, 95 (1992).

[90]R. v. Vaillancourt, 2 S.C.R. 636, 47 D.L.R. (4th) 399 (1987) (holding absent proof of moral blameworthiness, a person cannot be convicted of murder; fundamental justice requires proof beyond a reasonable doubt of the objective foreseeability that one's conduct could cause death); *See also*, R. v. Martineau, [1990] 2 S.C.R. 633.

[91]R. v. Wholesale Travel Group, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (holding fundamental justice requires some degree of fault in order to punish, even for "regulatory offenses," but this is satisfied by negligence - even where a violation carries the possibility of imprisonment).

[92]R. v. Daviault, [1994] 3 S.C.R. 63 (permitting evidence of voluntary intoxication in general intent offenses only when intoxication was sufficient to preclude defendant's

invalidating rules that had limited a defendant's ability to introduce evidence of intoxication to rebut proof that he possessed the required mental state for a crime.[93] In the area of criminal procedure, they include decisions recognizing that, as a proposition of fundamental justice, criminal defendants have a right to discovery of the prosecution's case (and of anything that might assist the defense),[94] and a right to be advised of their right to counsel before potentially incriminating evidence (breathalyzer samples) is obtained from them.[95] They also include decisions that fundamental justice protects an incarcerated defendant's right to remain silent (after invocation of this right) when questioned either by police officers posing as inmates[96] or by inmates acting as agents of the police.[97] Other procedural holdings of note include decisions that fundamental justice is violated by automatic commitment of insanity acquitees without a separate hearing,[98] by the prosecution's raising of the insanity defense against the defendant's objection,[99] and by a presumption that a criminal defendant was sane – although the last provision was "saved" by section 1.[100]

Fundamental justice, in short, has had a profound effect on the Canadian criminal justice system. This is not the specific effect that the framers of the Charter feared fundamental justice would cause, but a look south, and into the history of constitutional jurisprudence of due process in criminal cases in the United States, might have suggested this development.

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forming the requisite mental state).

[93] R. v. Robinson, [1996] 1 S.C.R. 683.

[94] R. v. Stinchcombe, [1991] 3 S.C.R. 326.

[95] R. v. Therens, [1985] 1 S.C.R. 613.

[96] R. v. Hebert, [1990] 2 S.C.R. 151.

[97] R v. Broyles, [1991] 3 S.C.R. 595.

[98] R. v. Swain, [1991] 1 S.C.R. 933, 944.

[99] *Id.* at 946.

[100] R. v. Chaulk,[1990] 3. S.C.R. 1303 (holding presumption of sanity violates section 7 and 11(d), yet is saved by section 1).

B. A Very Short History of Fundamental Fairness and American Due Process

Before most trial-related rights guaranteed by the U.S. federal constitution had been held applicable to the states in criminal proceedings, the absence of a guarantee in state criminal justice was often challenged as a federal "due process" violation. These challenges arose under one of two theories of "fundamental fairness." First, the absence of a guarantee could be alleged to violate a right which was either conceptually "fundamental." Under this concept of fundamental fairness, the guarantee was necessarily incorporated into the state system, because no civilized justice system could be imagined without it. A fundamental guarantee was then "of the very essence of a scheme of ordered liberty."[101] A guarantee might also be required by fundamental fairness for historical reasons, because it protects against actions that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples toward those charged with the most heinous offenses."[102] Both of these concepts of fundamental fairness were case-specific, and focused on determining whether, under the totality of the circumstances in a particular case, the proceedings had been fundamentally unfair.[103]

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[101]*Compare*, Palko v. Connecticut, 302 U.S. 319 (1937) (holding prohibition on double jeopardy not a requirement of due process), *with* Powell v. Alabama, 87 U.S. 45 (1932) (holding due process, under fundamental fairness analysis, requires criminal defendants to be given opportunity to obtain counsel and appointment of counsel in a capital case, even though right to appointed counsel under the Sixth Amendment had not been identified or incorporated). Justice McDonald has suggested that the better analogy for §§ 8-14 of the Charter is in fact that they represent a non-exhaustive, illustrative list of a "scheme of ordered liberty." DAVID C. MCDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 106 (1989).

[102]Malinski v. New York, 324 U.S. 401, 416 (1945).

[103]*See, e.g.,*§2.4 LAFAVE, ET AL, CRIMINAL PROCEDURE 57 (3d ed. 2000). After the abandonment of fundamental fairness in favor of selective incorporation, some criticized the new doctrine as lacking this necessary flexibility. *See, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968) (Harlan, J., dissenting) ("In short, neither history, nor sense, supports using the Fourteenth Amendment to put the states in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.")

Under a second theory of "fundamental fairness" analysis, a state action could be challenged because it violated the "independent potency" of the Due Process Clause,[104] not because it involved the absence or violation of a textual guaranty, but because it was simply an action so horrendous as to "shock the conscience."[105] The theory that the Due Process Clause of the Fourteenth Amendment had some "independent potency" to invalidate a state rule – although presented as a very narrowly used power[106] - was vigorously criticized as a substantive, rather than a procedural judgment, and in the most extreme cases no more than the dangerously elastic,[107] substantive political judgments of the judge rendering the decision.

The basic guarantee in the United States was used not to give meaning to and expand the enumerated rights, as it was in Canada, but

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[104]*See* Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

> The [Fourteenth] Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the federal government.

[105]Rochin v. California, 342 U.S. 165 (1952) (holding that involuntary stomach pumping of defendant in order to obtain incriminating evidence constitutes a federal due process violation).

[106]The Court in *Rochin* stated that:

> "[I]n reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent basis of challenging State criminal justice, 'we must be deeply mindful of the responsibilities of the States for the enforcement of criminal law, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes.'" *Id*. at 168.

[107]*See, e.g.*, *Adamson*, 332 U.S. at 69 (Black, J., dissenting) ("This decision reasserts a constitutional theory . . . that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of that at a particular time constitutes "civilized decency' and 'fundamental liberty and justice.'"); *See also*, *Rochin*, 342 U.S. at 177 (Black, J., concurring) ("I long ago concluded that the accordion like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.").

simply to entrench them. Due process was ultimately a determinant or a trigger for incorporating a right, by a finding that the right was "fundamental." After this finding, however, due process was of relatively little importance in determining the scope or meaning of the right. It was only in those areas that seemed to fall between enumerate rights, or outside of them, that fundamental fairness still had significance.

IV. Incorporation through Fundamental Fairness and the Meaning of Fundamental Justice

At first glance, the debate concerning which state criminal procedures violated the U.S. Constitution's guarantee of "due process," and whether a particular guarantee has been "incorporated" (*i.e.*, applied to the states), would seem irrelevant in Canada,[108] as Canadian substantive criminal law is exclusively federal,[109] and the procedural rights applicable in the Canadian criminal process have all been "incorporated" through their entrenchment in the Charter of Rights and Freedoms. In both the Canadian and U.S. contexts, however, the debate concerned the application of a basic guarantee of adjudicative fairness that transcends a specific procedural guarantee.

The debate over the application to the states of specific guarantees in the Federal Constitution,[110] like the inquiry concerning

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[108]Canada, like the United States, is a federal, as opposed to a unitary, nation. *See* HOGG, *supra* note 11 at 92. ("It is fair to conclude that the unitary elements of the Canadian Constitution are quite unimportant in relation to the federal elements, and that the Canadian Constitution is federal under any reasonable definition of that term.")

[109]See note ___ (about 39).

[110]The incorporation debate is typically framed in terms of theories of total incorporation, fundamental fairness and selective incorporation.

> Over the years, essentially three different positions have been advanced within the Court on this issue: (1) the total incorporation position, advanced in numerous dissents, but never adopted by the Court majority; (2) the fundamental fairness position, consistently supported by a majority prior to 1960; and (3) the selective incorporation doctrine that has prevailed as the majority view since the mid-1960s.

fundamental justice, was a debate about whether there was some fundamental substantive requirement of fairness in the adjudication of criminal cases beyond that implemented by some or all of the textual guarantees, such that even a procedure which satisfied the specific textual guarantees could nevertheless violate this requirement.[111] The American debate between justices Black and Frankfurter concerning the meaning of due process was really a debate about whether to adopt a limited model of the relationship between the basic guarantee of adjudicative fairness and the enumerated rights (as Black sought) or an expansive model of this relationship (as Frankfurter sought). While the American debate over "total incorporation" or "fundamental fairness" has been effectively mooted by the U.S. Supreme Court's adoption of "selective incorporation" to apply to the states those guarantees found to be "fundamental,"[112] the terms of this debate

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§2.2 LAFAVE, ET AL, CRIMINAL PROCEDURE 51 (3d ed. 2000).

[111]*Compare Adamson*, 332 U.S. at 59 (Frankfurter, J., concurring) (arguing that a state constitutional rule that permitted a prosecutor to comment on defendant's failure to testify could violate due process, even though the privilege against compelled self-incrimination did not apply to states, but did not because such a procedure was not fundamentally unfair and did not violate the independent potency of due process), *with Rochin*, 342 U.S. 165 (1952) (Frankfurter, J.) (holding involuntary stomach pumping of defendant did not violate prohibition on unreasonable search and seizure or privilege against self-incrimination, as neither had been applied to the states, yet was fundamentally unfair so violated due process).

The Supreme Court of Canada has held that a fundamental justice challenge may be brought under sec. 7 to protect a pretrial right to silence, even where sec. 11(c) already protect against the accused being compelled to testify and sec. 13 protect a witness from being incriminated by evidence used in another proceeding. R. v. Hebert, 77 C.R. (3d) 145 (S.C.C.). While secs. 11(c) and 13might have been read to be the extent of the Charter's reach with respect to protection from interrogation, in Hebert the Court went further, and noted that "a fundamental principle of justice under s.7 of the Charter may be broader and more general than the particular rules which exemplify it."; *Id.* at ___; *See also* Thompson Newspapers, [1990] 76 C.R. (3d) 129 (S.C.C.), and Lyons., [1987] 61 C.R. (3d) 1, 42 (S.C.C.) (right to jury.....).

[112]Among those guarantees selectively incorporated are the Fourth Amendment's protection against unreasonable searches and seizures, *see* Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963) (the Eighth Amendment's prohibition on cruel and unusual punishment); *see* Robinson v. California, 370 U.S. 660 (1962). (The various Sixth Amendment guarantees are incorporated; assistance of counsel); *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (the right of confrontation); *see* Pointer v. Texas, 380 U.S. 400 (1965) (the right to a speedy

mirrored the Canadian arguments.

The American debate over fundamental fairness as a means of incorporating basic rights parallels differing interpretations of the "principles of fundamental justice" in section 7 of the Charter. The two principal views concerning the meaning of "fundamental justice" could be summarized as the view that it is synonymous with "natural justice" or that it provided something more. "Natural justice," a principle of Canadian administrative law, is essentially a requirement of adjudicative fairness encompassing both a right of the affected party to be heard by the adjudicative body, and that the body be an impartial and independent one. The other view is termed a "purposive" analysis of fundamental justice, because it seeks to identify and implement the purposes of the Charter.

Stated generally, the purposive view is that fundamental justice encompasses more than just a right to participate in a fair and unbiased adjudicatory proceeding, and that it includes more than just the specific procedural rights which are themselves guaranteed in §§ 8-14 of the Charter. Instead, the principles of fundamental justice under this view, set forth in one of the first cases interpreting section 7, are found in "the basic tenets and principles, not only of our judicial process, but also of other components of our legal system."[113] It is the purposive view that the Supreme Court of Canada adopted early and

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trial); *see* Klopfer v. North Carolina, 386 U.S. 213 (1967) (the right to a jury trial); *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (the right to compulsory process); *see* Washington v. Texas, 386 U.S. 213 (1967). The Fifth Amendment's privilege against self-incrimination, *see* Malloy v. Hogan, 378 U.S.1 (1964), and prohibition on double jeopardy have been incorporated. *See* Benton v. Maryland, 395 U.S. 784 (1969). The only unincorporated trial rights in the bill of rights are the Eighth Amendment's prohibition against excessive bail, and the Fifth Amendment's requirement that infamous crimes be prosecuted by indictment. That the debate about what rights are incorporated has ended does not in any sense mean that the debate about their scope or meaning has ended, it simply is no longer a matter of what is "fundamentally fair."

[113]*Compare*, Reference Re Section 94(2) Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486, 512, *with Palko*, 302 U.S. at 328 (holding the Fourteenth Amendment due process inquiry requires asking whether a state procedure "violates those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

has maintained.[114]

While many of the principles of fundamental justice under this view may be procedural, as one scholar has explained, "[*In Re B.C. Motor Vehicle Act* the Court] made clear that 'fundamental justice' in section 7 is not limited to procedural justice, but extends to matters of substance."[115] Some are substantive limitations upon the government's ability to criminalize conduct, for example the government's ability to criminalize and penalize with imprisonment following conviction for an "absolute liability" offense (*i.e.*, one requiring no criminal mental state, and admitting no defense of reasonable mistake).

The significance of the jurisprudential direction the Supreme Court of Canada took in rejecting the "fundamental justice as natural justice" view can hardly be overstated.[116] The "fundamental justice as natural justice" view is similar to the American notion of due process espoused by U.S. Supreme Court Justice Hugo Black. According to Justice Black, "due process" required no particular procedural protections beyond those applicable in the specific constitutional guarantees, and provided only a "right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws."[117] Thus, state practices which were contrary to traditional rules of American criminal procedure – but which did not violate any particular guarantee in the Bill of Rights – did not violate

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[114]*See* Vincent M. Del Buono, *The Implications of the Supreme Court's Purpose Interpretation of the Charter*, 48 C.R. (Articles) (3d) 121 [19??].

[115]Dennis Klinck, *The Charter and Substantive Criminal "Justice,"* 42 U. N.B. L. J. 191, 193 (1993).

[116]One scholar has put the significance of the decision this way:

> The rejection of the equation between 'natural justice' and the 'principles of fundamental justice' is of momentous consequence. It means that the phrase 'the principles of fundamental justice is not a term of legal art referable to a precise meaning known in law. Rather, the phrase describes a method of analysis that will serve to define it on a case-by-case basis. David M. Paciocco, CHARTER PRINCIPLES AND PROOF IN CRIMINAL CASES 108 (1987).

[117]Duncan v. Louisiana, 391 U.S. 145 (1968) (Black, J., concurring).

due process, so long as they were applied even-handedly.[118] For example, applying this view to a Canadian fundamental justice analysis, the fact that the British Columbia Motor Vehicle Act imposed conviction and mandatory imprisonment for driving on a suspended license, without regard to whether the driver knew her license had been suspended or even reasonably believed that it had not been suspended, would not necessarily violate fundamental justice, so long as the rule had been properly and previously enacted, and was applied in a fair and unbiased manner. The fact that the common law had long traditionally considered mens rea to be an element of any offense would not be dispositive under the "natural justice" view.

In contrast, the "purposive" view of fundamental justice, that gives it a meaning independent from that of the specific guarantees in sections 8-14,[119] is much more like the fundamental fairness theory of due process. It involves appeal to the "basic tenets of [one's] legal system,"[120] which are simultaneously widely held (so perhaps majoritarian) yet also (as doctrine, or even dogma) elusive and difficult to challenge. Under the purposive view, adopted by all the members of the Canadian Supreme Court in *Reference Re: Section 94(2) Motor Vehicles Act (B.C.)* an absolute liability offense violates fundamental justice because - as enacted with mandatory imprisonment - it necessarily deprived one of liberty.

Why is it permissible for the Court to apply the basic guarantee of adjudicative fairness in the case of an absolute liability offense that violates no specific entrenched right? Because both the "purposive view" of fundamental justice and the fundamental fairness interpretations of due process reflected an expansive view of the relationship between the basic guarantee and the enumerated rights.[121]

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[118]*See, e.g.*, In re Winship, 397 U.S. 358 (1970) (Black, J., dissenting) (arguing that proof of guilt beyond a reasonable doubt was not a constitutional prerequisite of due process).

[119]R. v. Hebert, 2 S.C.R. 151 (1990) (holding it is incorrect to assume fundamental rights guaranteed by the charter are cast forever in the strait-jacket of the law as it stood in 1982, so a fundamental principle of justice may be broader and more general than the particular rules which exemplify it).

[120] Reference Re Section 94(2) Motor Vehicle Act (B.C.), 2 S.C.R. 486, 498 (1985).

[121]*Cf.* Reference Re Section 94(2) Motor Vehicle Act (B.C.), 2 S.C.R. 486, 498

This expansive view necessarily means greater opportunity for the exercise of judicial authority.

Did the framers of section 7 simply err about their ability to control judicial readiness to engage in normative review of the wisdom of policies or laws? They were not wrong; they simply were focused on an inapplicable analogy. The *Lecher*-era debate about "substantive due process" was inapplicable to the Canadian guarantee of "fundamental justice" because the constitutional principles at issue involved different legal relationships. Although both fundamental justice and substantive due process at first glance involve restrictions on the government's authority to force people to change their behavior, this oversimplifies how the doctrines impact both individuals and different types of government authority.

Substantive due process was a jurisprudence that limited the political branches' ability to affect relations *between* individuals, rather than between the state and an individual. That is, while *Lecher* itself involved directly the ability of the state to enforce wage and hour legislation against individuals (employers), the larger significance of the doctrine of substantive due process is that it indirectly precluded the political branches from regulating a large array of social and economic relationships between individuals (such as between employers and employees).[122] It was a theory that certain areas of interaction between private parties were beyond the purview of state regulation - and were even constitutionally protected from this regulation. As such, *Lecher* has come to be seen essentially as protection for an economic or political status quo, because it cordoned off areas of behavior between individuals from government regulation.

The principle of fundamental justice, by contrast, concerns the

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(1985).

[122]The source of *Lochner's* insulation of private relationships from state intervention has recently been subject to debate. Traditional critics, following Holmes' dissent, find the source in laissez-faire economics and Social Darwinism. Modern revisionists place its source in less intellectually odious, Jacksonian anti-class legislation impulses. *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 20-21, Stanford Public Law and Legal Theory Working Paper Series, Research Paper No. 52, available at http://papers.ssrn.com/abstract=390460.

relationship between the *state* and the individual, rather than relations *between* individuals. Seen from this perspective, the debate concerning the incorporation (*i.e.*, application to the states) of the specific procedural guarantees in the U.S. bill of rights through the fundamental fairness theory of due process[123] is much more apt to the Canadian experience than that over "substantive due process" as applied to social or economic regulation. Seen from the perspective too, this debate may also portend more accurately the fate of "fundamental justice" in the hands of the Canadian Supreme Court, and may explain why fundamental justice has had such significant jurisprudential impact in the area of criminal justice – and much less jurisprudential significance elsewhere. Criminal justice is perhaps the area of law epitomizing the essential relation between the state and the individual: it is the area under which the state can restrict the most basic aspects of autonomy, such as life, liberty, personal security and property.

V. How Will Each Model Fare in the New Reality?

How will the Supreme Courts of Canada and the United States assess the legality of the increased restrictions on individual liberties resulting from the global war on terrorism?[124] Neither Court has

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[123]Professor Paciocco presciently concluded in 1987 that "I would maintain that it is in the [American] incorporation doctrine cases that we can find the most guidance from American jurisprudence." David M. Paciocco, CHARTER PRINCIPLES AND PROOF IN CRIMINAL CASES 182-83 (1987).

[124]These challenges include, in the United States, the effects of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), and in Canada the effects of the Anti-Terrorism Act (Bill C-36). On the PATRIOT Act, *see generally*, Charles Doyle, *The USA PATRIOT Act: A Legal Analysis* (April 15, 2002), Cong. Res. Svc. Rept. No. RL31377. On Bill C-36, *see generally*, RONALD J. DANIELS, PATRICK MACKLEM, & KENT ROACH eds, THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL (TORONTO, 2001). These questions are not unique to either the U.S. or Canadian legal systems. *See*, *e.g.*, Elena Katselli & Sangeeta Shah, *September 11 and the UK Response* in *Current Developments: Public International Law*, 52 INT'L. & COMP. L. QTRLY. 245, 253 (2003) (describing Crime and Security Act 2001, Part 4 of which provides Home Secretary's issuance of certificate based upon reasonable belief that foreign national is a threat to national security and suspected terrorist,

considered these restrictions as yet.[125] If, as government officials have argued,[126] the requirements of this conflict are outside the bounds of traditional criminal law enforcement,[127] and demand some new framework that is neither wholly criminal nor wholly military, oriented as much to intelligence surveillance as to criminal investigation, then the enumerated rights triggered in criminal prosecutions arguably do not apply to these situations.[128] The permissibility of these new restrictions will ultimately then be judged against the basic guarantee

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which permits preventative detention, in contravention to European Convention on Human Rights and International Covenant on Civil and Political Rights).

[125]The U.S. Supreme Court has not yet been presented with an opportunity to undertake such review. The Canadian response, Bill C-36, became law in December 2001, and as of August 2002 one commentator opined "we are likely still years away from Charter challenges to it." Karl Roach, *Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism*, 47 MCGILL L. J. 893, 912 (2002).

[126]*See* generally Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 308-313 (2003) (contrasting various statements of presidents and public officials made before September 11th, 2001, suggesting terrorist activities were principally criminal actions, with post-September 11th actions of military and intelligence agencies, treating them otherwise).

[127]*See* Lorraine E. Weinrib, *Terrorism's Challenge to the Constitutional Order*, in RONALD J. DANIELS, PATRICK MACKLEM, & KENT ROACH eds, 93 THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL (TORONTO, 2001) (Bill C-36 "reflects the fact that the standard approaches to criminal activity – deterrence, detection and punishment – will not satisfy the government's commitment, in concert with other western countries, to prevent further attacks and ultimately dismantle these groups.")

[128]The application of enumerated rights in these situations may depend upon several facts, including whether the person claiming the right is a U.S. citizen or resident alien, and whether the right is sought to be applied to domestic or foreign law enforcement actions. Compare United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment inapplicable to searches and seizures of foreign persons outside the U.S.) and Johnson v. Eisentrager, 339 U.S. 763, 785 (1950) (Fifth and Sixth amendment trial protections inapplicable to enemy aliens fighting U.S.) with Reid v. Covert, 354 U.S. 1 (1957) (U.S. citizens tried abroad by the military entitled to Sixth amendment jury trial right). These cases have recognized that the basic guarantee, due process, applies in *all contexts*. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (recognizing Fifth amendment privilege against compelled self-incrimination as "fundamental"); Reid v. Covert, 354 U.S. 1, 53 (1957) (Frankfurter, J., concurring) (jury trial for civilian dependent of military personnel abroad in capital case a fundamental right).

of adjudicative fairness,[129] which will make critical the relationship between the basic guarantee and the enumerated rights.

A. Canadian Response to the New Reality

1. Section 1 of the Charter

Before reviewing the possible ways in which these arguments might develop, one key structural difference between the Canadian and American guarantees must be highlighted. As noted earlier, the Canadian Charter provides a mechanism by which violations of rights it guarantees may nevertheless be found justifiable and upheld. The "savings clause" of section 1 provides that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[130] This section requires both procedural and substantive review of governmental justifications for infringements of Charter rights. The

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[129]The impact of some of the new restrictions have already been judged, at least initially, against the basic guarantee. For example, the U.S. government's contention that certain U.S. citizens detained on U.S. soil were not entitled to basic constitutional protections such as the right to counsel, because they were "enemy combatants," was initially rejected under the basic guarantee. *See* Hamdi v. Rumsfeld, 294 F.3d 598, 602 (4th Cir. 2002) ("[T]he district court ordered that "Hamdi must be allowed to meet with his attorney because of fundamental justice provided under the Constitution of the United States."). *See* also Padilla ex rel. Newman v. Rumsfeld, 243 F.Supp.2d 42, 54 (S.D.N.Y. 2003) ("Arbitrary deprivation of liberty violates the Due Process Clause, which applies to all 'persons' within the United States . . . [t]he purpose of the 'some evidence' standard is to assure that the executive has not arbitrarily deprived a person of liberty. . . . [n]o court of which I am aware has applied the 'some evidence' standard to a record that consists solely of the government's evidence, to which the government's adversary has not been permitted to respond.") (citations omitted).

U.S. courts have previously relied on the basic guarantee to evaluate the constitutionality of procedures that, under the limited model, have been held to fall outside the scope of an enumerated right. *See* Untied States v. Barona, 56 F.3d 1087, 1091-96 (9th Cir. 1995) (extraterritorial searches against U.S. citizens that adhered to the host country's laws and did not "shock the conscience" were "reasonable" and so satisfied Fourth amendment).

[130] CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

"prescribed by law" clause of section 1 has been held a requirement of procedural regularity,[131] while the "demonstrably justified" clause imposes a substantive proportionality review.

The Supreme Court of Canada has developed a two part means-ends test for section 1 arguments offered by the government (*i.e.*, the claim that a law which infringes a Charter right is nevertheless justified under section 1) in connection with the Court's substantive review. First, with respect to the ends for which the Charter right is restricted, the "objective of the law limiting the Charter right or freedom must be of sufficient importance to warrant overriding it."[132] Second, with respect to the means by which the right is restricted, these must be:

> proportional to the objective and the effect of the law – proportionate, in short, to the good which it may produce. Three matters are considered in determining proportionality: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as reasonably possible; and there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.[133]

The "savings" clause in section 1 of the Charter thus functions as the converse of the basic guarantee in the United States constitution. Whereas due process, under the United States constitution, functions as a case-specific standard that can *invalidate* a law or a process, section 1, by contrast, functions as a case-specific (or context-specific) standard that can *validate* or justify a violation of enumerated rights.

There is no textual or functional analogue in the United States

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[131]*See* R. v. Therens, [1985] 1 S.C.R. 613, par 60 ("limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements . . . . [or] from the application of a common law rule").

[132]R.J.R. MacDonald Inc. v. A.G. of Canada, [1995] 3 S.C.R. 199, 329-330, citing R. v. Oakes, [1986] 50 C.R. (3d) 1 (S.C.C.).

[133]Id.

Constitution to this mechanism of both recognizing and justifying an infringement.[134] In order to reach a result that ends justify means which would appear in conflict with a constitutional guarantee, the U.S. Supreme Court must find either that a right has not been violated[135] or that it is inapplicable in a given situation.[136] The Canadian structure is thought – at least by Canadian jurists – to permit more coherent development of rights jurisprudence, with allowance for exceptional circumstances through section 1.[137] It is certainly possible

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[134]There are of course means-ends analyses, routinely applied in challenges under the equality guarantee (equal protection) and the guarantee of substantive due process. *See, e.g.*, Lawrence v. Texas, ___U.S.___, (2003) (invalidating sodomy statutes, as applied to all persons – homosexual and heterosexual – because of fundamental right of privacy, and noting "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects"). The court may also find, however, that even if a fundamental right is implicated by a law or practice, the law or practice simply does not violate the right. *See*, *e.g.*, Sell v. United States, ___U.S.___, (June 16, 2003) (fundamental right to liberty includes freedom from involuntary medication, but involuntary psychoactive medication of a criminal defendant to render them competent to stand trial does not violate this liberty interest if, "taking account of less intrusive alternatives, it is necessary significantly to further important government interests"). Proportionality review in general appears a virtually universal phenomenon. *See* David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 136-37 (1996).

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[136]*See*, *e.g.*, Chavez v. Martinez, ___ U.S. ___, 123 S.Ct. 1994 (2003) (police officers' questioning of plaintiff, following their shooting of him, was clearly coercive and so violated fifth amendment's privilege against self incrimination, but privilege inapplicable in civil context).

[137]One member of the Canadian Supreme Court, in comparing the U.S. and Canadian Constitutions, has described section 1 as the most significant difference between the documents. Hon. Claire L Heureux-Dubé, *Two Supreme Courts: A Study in Contrast in* THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 158 (Marian C. McKenna, ed. 1993). As to section 1's effect on the task of evaluating the constitutionality of limits on freedoms, Justice L Heureux-Dubé has explained:

> This section is of vital importance because it means that in Canada we are able to give an extremely wide interpretation to the enumerated rights as a substantive matter and then engage in the process of determining whether any limitation on that right may subsequently be justified by the party seeking to encroach upon it. The Americans, of course, find themselves without any such clause and have been forced to limit their rights at the level of the right itself. This results in radically different reasoning processes.

that even if the Supreme Court of Canada finds the Canadian response works a deprivation of Charter rights in violation of fundamental justice, it may nevertheless find that the new reality of preventing an increased threat of terrorism is a sufficient end, and that the means are proportional to this end, to satisfy section 1.[138] To date, the Court has been extremely reluctant to find violations of fundamental justice "saved" under section 1,[139] and criminal procedure is an area in which the Supreme Court of Canada has explained it has special institutional competence.[140]

Id. As one commentator has explained: "This formal difference between the American Bill of Rights and the Canadian Charter does not make the American Jurisprudence irrelevant, of course, but it does require the Canadian courts to develop their own patterns of reasoning , which must take account not only of the guaranteed rights but also of the limitation clause of s. 1." Peter W. Hogg, CONSTITUTIONAL LAW OF CANADA 2d Ed. 680 (Toronto, Canada: 1985).

[138]Ziyaad E. Mia, *Terrorizing the Rule of Law: Implications of the Anti-terrorism Act*, 14 NAT'L. J. CONST. L. 125, 149 (2001) ("Despite the fact that the [Anti-Terrorism Act] will likely violate Charter rights and hence erode the rule of law, courts may be inclined to be more deferential to the state in circumstances of a perceived threat to 'national security.'") Even if the Court invalidates a restriction on Charter rights, and finds that it is not "saved" by section 1, Parliament could still override this judgment under section 33. *See* note ___.

[139]*See* notes ___ infra.

[140]The Canadian Supreme Court has identified criminal procedure matters, since they involve the relationship between the individual and the state, as ones within special institutional competence of courts to decide. *See* Irwin Toy v. Quebec, [1989] 1 S.C.R. 927, para. 80.

> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed *whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions*: *See* Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245, at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or

2. Bill C-36

The Canadian response to the new reality is the Anti-Terrorism Act (Bill C-36)[141] which, according to the government of Canada, includes "measures to deter, disable, identify, prosecute, convict and punish terrorists."[142] Unlike the American response, the legislative consideration of Bill C-36 included scholarly participation and testimony, and the legislation itself was the subject of extensive academic debate.[143]

Bill C-36 impacts protections for individuals in the criminal process in at least three significant ways. First, it creates a definition of "terrorism" that can be applied to a group or individual by executive decision, with limited ability to effectively challenge this determination in court. Designation as a "terrorist" or engaging in "terrorist activities" then triggers special government powers and creates new offenses. The special government powers include authority to prohibit financial interaction with a group engaging in terrorist activities, and to seek forfeiture of its property. The new offenses include knowingly participating, or contributing to – either directly or indirectly – such a group's activities,[144] or instructing anyone to carry out any activity for the benefit of a terrorist group.[145]

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the distribution of scarce government resources.

(Emphasis supplied.)

[141]Bill C-36 received royal assent December 18, 2001. Canada Gazette, Part II, Vol. 136, Extra (07-24-2002)

[142]Department of Justice (Canada), *Anti-Terrorism Act* Receives Royal Assent (December 18, 2001) (http://canada.justice.gc.ca/en/news/nr/2001/doc_28215.html)

[143]*See* Stephen J. Toope, *Fallout from '9-11': Will a Security Culture Undermine Human Rights?*, 66 SASK. L. REV. 281 (2002); Kent Roach, *Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism*, 47 MCGILL L. J. 893, 912 (2002); Various Authors, Special Notes on Bill C-36, 60 U. TORONTO FAC. L. Rev. 65 (2002); Irwin Cotler, *Terrorism, Security and Rights: The Dilemma of Democracies*, 14 NAT'L. J. CONST. L. 13 (2001), all reprinted in, RONALD J. DANIELS, PATRICK MACKLEM, & KENT ROACH eds, THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL (TORONTO, 2001).

[144]Bill C-36, §83.18(1) CRIMINAL CODE OF CANADA.

[145]Bill C-36, §83.21(1) CRIMINAL CODE OF CANADA.

Second, the law establishes a procedure for investigative hearings, at which testimony may be compelled (although neither it nor its fruits can be used against the testifying witness, except for a perjury prosecution), involving terrorists or suspected terrorists. Third, the law creates a mechanism for warrantless preventive arrests of suspected terrorists. These preventive arrests, combined with a scheme of "release upon condition," could easily result in preventive detention without charge. The legislation also adds a variety of investigative powers involving electronic surveillance and financial disclosure.[146]

Many of Bill C-36's provisions are keyed to its definition of terrorism, which provides two bases for finding someone a "terrorist" or engaging in "terrorist activity."[147] Under the first branch of the definition, an act that is an offense against any of ten international agreements constitutes terrorism.[148] Under the second, and far more controversial, branch of the definition, any act or omission committed anywhere in the world, done at least in part for a political, religious or ideological purpose, objective or cause, with the intent of intimidating someone with respect to their security, or to compel a person or government to do or refrain from any act, may be a terrorist act.[149] In order for such acts to qualify as "terrorist" activities, they need to have intentionally caused death or serious bodily harm by violence, endangered a life, caused serious risk to the public's health or safety, substantial property damage, or:

> cause[d] serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in [death or serious bodily harm by violence, endangered a life, caused serious risk to the public's health or safety].[150]

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[146]Bill C-36, ___ (Electronic surveillance),

[147]Bill C-36, §83.01(1)(a) & (b) CRIMINAL CODE OF CANADA.

[148]Bill C-36, §83.01(1)(a)(i-x) CRIMINAL CODE OF CANADA.

[149]Bill C-36, §83.01(1)(b)(i)(A) & (B) CRIMINAL CODE OF CANADA.

[150]Bill C-36, §83.01(1)(b)(ii)(E) CRIMINAL CODE OF CANADA.

In addition to this broad definition of terrorist activity, a group may be designated a "terrorist group" through an executive decision that provides only a very narrow opportunity for judicial challenge. A "terrorist group" may thus be either an entity that has as one of its purposes or activities facilitating any terrorist activity, or simply one that is "listed" by the Governor in Council upon the recommendation of the Solicitor General.[151] Listing is an executive decision[152] that can be reviewed after the fact by a judge, upon a listing entity's application within 60 days.[153]

The procedure by which the judge reviews challenges to the listing is significantly different from a full criminal trial. It is private, not public, and may be conducted in the absence of the listed entity and its counsel, if disclosure of the information would injure national security.[154] While the judge must provide the listed entity a reasonable opportunity to be heard,[155] and with a summary of the information upon which she is relying and the reasons for the decision,[156] she need not disclose any information that would endanger national security or endanger any person,[157] and may consider any information in making her decision, including information that would be inadmissible under Canadian law.[158] She need only find that the designation is "reasonable."[159]

This provision received criticism from academics,[160] bar

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[151]Bill C-36, §83.01(1) CRIMINAL CODE OF CANADA.

[152]Bill C-36, §83.05(1) CRIMINAL CODE OF CANADA.

[153]Bill C-36, §83.05(5) CRIMINAL CODE OF CANADA.

[154]Bill C-36, §83.05(6)(a) CRIMINAL CODE OF CANADA.

[155]Bill C-36, §83.05(6)(c) CRIMINAL CODE OF CANADA.

[156]Bill C-36, §83.05(6)(b) CRIMINAL CODE OF CANADA.

[157]*Id.*

[158]Bill C-36, §83.05(6.1) CRIMINAL CODE OF CANADA.

[159]Bill C-36, §83.05(6)(d) CRIMINAL CODE OF CANADA.

[160]Don Stuart, *The Anti-Terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System*, 14 NAT'L. J. CONST. L. 153 (2000-01) ("The fatal flaw in Bill C-36 is its definition of "terrorist activity" in section 83.01. It decides who can be charged as a terrorist and against whom extensive new investigative powers can be exercised.").

organizations,[161] and some members of Parliament,[162] as being susceptible to use against those engaged in legitimate dissent, protest or strike. Section (b)(ii)(E) was challenged as "particularly problematic in that it might catch unlawful activity – such as a wildcat strike or demonstration – that is not terrorist conduct, even though there may be a 'serious disruption of an essential service, facility or system.'"[163] The provisions authorizing executive listing of entities, it has already been argued, to the extent that it is "based merely on reasonable grounds rather than proof in a court of law [,] . . . surely violates presumption of innocence and fair trial guarantees under section 11(d) of the Charter."[164] Moreover, because many of the new terrorism offenses are inchoate activities, involving financing or facilitating preparations for actual offenses, they may face challenge under section 7 as being so vague they fail to provide a defendant adequate notice or to effectively limit the exercise of discretion by law enforcement, or that they are overbroad given the goal of curbing terrorism.[165]

The second significant aspect of the bill is its authorization of "preventive arrests." These may be based on reasonable grounds to suspect terrorist activity will be carried out and that arrest is necessary to prevent it, which may be made without a warrant.[166] While Canadian police could already arrest someone they had reasonable

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[161]Canadian Bar Association, "Submission on Bill C-36 Anti-terrorism Act" (October 2001) (available at http://www.cba.org/cba/pdf/submission.pdf).

[162]Irwin Cotler, *Terrorism, Security and Rights: The Dilemma of Democracies*, 14 NAT'L. J. CONST. L. 13, 34-36 (2000-2001). Cotler is a Liberal M.P.

[163]Canadian Bar Association,"Submission on Bill C-36 Anti-terrorism Act" 19 (October 2001) (available at http://www.cba.org/cba/pdf/submission.pdf). This was also noted as potentially "vulnerable to a challenge under section 15 of the Charter which prohibits various grounds of discrimination." *Id.*

[164]Don Stuart, *The Anti-Terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System*, 14 NAT'L. J. CONST. L. 153, 156 (2000-01).

[165]Kent Roach, *The Dangers of a Charter-Proof and Crime-Based Response to Terrorism*, in RONALD J. DANIELS, PATRICK MACKLEM, & KENT ROACH eds, THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 162-63 (TORONTO, 2001).

[166]Bill C-36, §83.3 CRIMINAL CODE OF CANADA.

grounds to believe had committed or was "about to commit an indictable offence,"[167] Bill C-36's preventive arrest provision does not require that the offense be imminent. Persons subject to these arrests must be brought before a provincial judge within twenty-four hours or as soon as possible, and may be detained for no more than an additional forty-eight hours,[168] unless an information has been laid against them, in which case they are subject to setting of bail conditions, which may include preventive detention.

Perhaps most significantly, persons subject to preventive arrest may be released with conditions set by the court, which can last up to twelve months.[169] Failure to agree to these conditions, or to abide by them, can result in continued detention.[170] In other words, a person suspected of planning to commit a terrorist act at some undetermined point in the future may be jailed for up to a year if they refuse or fail to abide by conditions of release. These may include prohibitions on possession of certain lawful weapons, and "any other reasonable conditions . . . that the provincial court judge considers desirable for preventing the carrying out of a terrorist activity."[171]

Third, Bill C-36 provides for "investigative hearings," to which persons may be summonsed and ordered to testify.[172] Application for orders to gather information through an investigative hearing must be approved by the Attorney General,[173] and require a showing that a terrorism offense has been committed and that information concerning it or the whereabouts of its perpetrators is likely to be revealed by the order, or there are reasonable grounds to believe a terrorism offense will be committed, that a person has direct and material information concerning the offense or the whereabouts of someone who may commit one, and reasonable attempts to obtain this information have

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[167]§ 495(1) CRIMINAL CODE OF CANADA.

[168]Bill C-36, §83.3(6) CRIMINAL CODE OF CANADA.

[169]Bill C-36, §83.3(8), (10) & (11) CRIMINAL CODE OF CANADA.

[170]Bill C-36, §83.3(9) CRIMINAL CODE OF CANADA.

[171]Bill C-36, §83.3(8)(a) CRIMINAL CODE OF CANADA.

[172]Bill C-36, §83.28 CRIMINAL CODE OF CANADA.

[173]Bill C-36, §83.28(3) CRIMINAL CODE OF CANADA.

failed.[174]

The preventive arrest and investigative hearing provisions both pose a "risk of prejudice to the right to remain silent, as guaranteed under section 7 of the Charter."[175] They have been characterized as "[e]specially troubling . . . extraordinarily un-Canadian powers to detain without charge and to compel testimony . . . ."[176] The preventive arrest provisions have been alleged to violate several enumerated Charter rights,[177] including the right not to be arbitrarily detained, to be informed promptly of the reason for the detention, to be informed of the specific offense and to have the detention validated through a habeas corpus action. While the Supreme Court of Canada might examine the provisions of Bill C-36 in the context of other criminal proceedings, it might also recognize special problems presented by terrorism – and still find that some of these provisions violate fundamental justice under an expansive model. Two recent cases in which the Court considered challenges under fundamental justice, one involving alleged terrorism and the other murder, suggest this.

In United States v. Burns and Rafay,[178] and Suresh v. Canada (Minister of Citizenship and Immigration),[179] the Court recently held that fundamental justice prohibited extraditions of defendants facing a potential death penalty or torture. The Court expressly decided both of these cases as matters of fundamental justice, specifically rejecting the

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[174]Bill C-36, §83.28(4)(a) & (b), CRIMINAL CODE OF CANADA.

[175]Irwin Cotler, *Terrorism, Security and Rights: The Dilemma of Democracies*, 14 NAT'L. J. CONST. L. 13, 45 (2000-2001).

[176]Don Stuart, *The Anti-Terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System*, 14 NAT'L. J. CONST. L. 153, 159(2000-2001).

[177]Ziyaad E. Mia, *Terrorizing the Rule of Law: Implications of the Anti-terrorism Act*, 14 NAT'L. J. CONST. L. 125, 134 (2001) ("At a minimum, the 'preventive arrest' provisions in the Anti-terrorism Act violate all of the aforementioned Charter rights."

[178]1 S.C.R. 283 (2001) (extradition to U.S. without assurances that death penalty would not be sought violated fundamental justice because of demonstrated potential for miscarriages of justice).

[179]1 S.C.R. 3 (2002) (extradition to country in which petitioner would face torture violated fundamental justice).

arguments in one that the extradition would violate Section 12 of the Charter, guaranteeing "the right not to be subjected to any cruel and unusual treatment or punishment."[180] It articulated an extraordinarily expansive notion of fundamental justice, in that it exceeded the nation's borders. In both cases, the alleged violation of fundamental justice (the potential imposition of the death penalty or the use of torture in the demanding country) would be committed outside Canada by non-Canadians. The Court rejected the argument that fundamental justice did not require looking beyond the actions of the Canadian government to an entirely foreseeable consequence" of its "necessary participation."[181] It reached these conclusions despite the fact that the petitioner in *Suresh* was alleged to be a member of a terrorist organization.[182]

Suresh also suggests how the Supreme Court of Canada might consider some of the provisions in Bill C-36. While clearly advancing an expansive notion of the basic guarantee, by holding that extradition to a country in which a petitioner would face torture was a violation of fundamental justice, the Court actually upheld the authority of the government to find the petitioner a danger to Canadian security and deport him -- after a procedure that afforded him greater procedural protections. The Court did not find that the petitioner was entitled to a full judicial hearing, but rather that he was entitled under the principles

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[180]Burns at Par. 57. ("The degree of causal remoteness between the extradition order to face trial and the potential imposition of capital punishment as one of many possible outcomes to this prosecution make this a case more appropriately reviewed under s. 7 than under s. 12. It must be kept in mind that the values underlying various sections of the Charter, including s. 12, form part of the balancing process engaged in under s. 7.")

[181]Suresh, 1 S.C.R. 3, Par. 54 (2002) ("[T]he governing principle was a general one - namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.")

[182]Id., at par. ___.

of fundamental justice to some procedure.[183] The procedure required was at least an opportunity to know the information upon which the government's decision to deport had been made ("subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents"[184]), to be heard, and to challenge the information offered against him.[185] The Court stressed that the process due under the principles of fundamental justice would be highly case-specific.[186]

The expansive model of the relationship between the basic guarantee and enumerated rights could more clearly identify conflicts between Bill C-36 and fundamental justice than the narrow model of this relationship. The Canadian government made much vaunted efforts to "Charter-proof" Bill C-36.[187] These resulted in protections for the individual, such as grants of use and derivative use immunity for testimony given in investigative hearings, and the right to retain and instruct counsel during the hearings.[188] These "Charter-proofing" provisions, that ostensibly provide the enumerated rights, mean that it is ultimately the basic guarantee that will be the measure of Bill C-36's constitutionality. The protections in investigative hearings, for example, mean that it will be very difficult to argue that the right against compelled self-incrimination is violated by the compelled testimony in an investigative hearing.[189] Thus if there is something constitutionally problematic about the process of forcing someone to

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[183]Id., at par. 121.

[184]Id., at par. 122.

[185]Id., par. 122-123.

[186]Id., par. 127. ("If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. This is the minimum required to meet the duty of fairness and fulfill the requirements of fundamental justice under s. 7 of the Charter.")

[187]Kent Roach, *The Dangers of a Charter-Proof and Crime-Based Response to Terrorism*, in RONALD J. DANIELS, PATRICK MACKLEM, & KENT ROACH eds, THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 133-34 (TORONTO, 2001) (citing comments from Minister of Justice).

[188]Id., 135-36.

[189]Id., 136, and see Roach at note 25.

testify under these circumstances about matters that may incriminate them, it will have to be because the entire process somehow violates the basic guarantee.

This type of a test will naturally give rise to a justification under sec. 1. The Supreme Court of Canada has shown great reluctance to uphold under section 1 a law which violated fundamental justice.[190] However, it has identified the types of conditions that might justify under section 1 restrictions in violation of fundamental justice. "[E]xceptional circumstances, such as the outbreak of war or a national emergency, are necessary before such an infringement may be justified."[191]

B. U.S. Response to the New Reality

The legal response to the new reality in the United States is still unfolding, but it includes several components that have a direct impact on procedural protections in the criminal process.[192] The most

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[190]*See* R. v. Ruzic, 1 S.C.R. 687 (2001), Par. 92 (holding section 1did not save statutory definition of duress, which required immediacy of threat and presence of threatener, thereby violating fundamental justice by permitting conviction for acts that were morally involuntary); New Brunswick (Minister of Health & Community Services) v. G. (J.), 3 S.C.R. 46 (1999), Par. 99 (provincial statue that did not provide funding for counsel for indigent parents facing hearing concerning custody order to remove their children violated fundamental justice and was not saved by section 1, even though Charter did not protect parental liberty because removal of one's children threatened psychological security of the person, guaranteed by the Charter, and fair hearing could not be guaranteed without counsel).

[191]R. v. Ruzic, 1 S.C.R. 687 (2001), Par. 92 (holding section 1did not save statutory definition of duress, which required immediacy of threat and presence of threatener, thereby violating fundamental justice by permitting conviction for acts that were morally involuntary). *See also* Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), 2 S.C.R. 486, 518 (1985) ("Section 1may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.")

[192]The response includes executive designations, e.g., Exec. Order No. 13,224 (66 FED.REG. 49,079 (Sept. 23, 2001) (designating certain groups terrorist organizations and "Specially Designated Global Terrorists," subject to blocking of their property under the International Emergency Economic Powers Act, 50 USC § 1701 *et seq.*).

significant of these are the USA Patriot Act[193] and the proposed "Patriot Act II."[194]

The Patriot Act has expanded the government's ability to engage in electronic surveillance and use secret investigative techniques in both traditional criminal law enforcement investigations and intelligence investigations. The Patriot Act also provides more extensive obligations on the part of financial institutions to collect and report to the government information concerning suspicious transactions. Finally, the Act adds definitions for new terrorism-related offenses.

Electronic surveillance and secret search procedures (i.e., without notice to the person searched) for traditional criminal law enforcement investigations have been accorded the highest degree of protection for the individual. They were permissible only pursuant to special warrants under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[195] Similar intrusions for intelligence investigations have carried a lower degree of protection for the individual, on the theory that the national security needs of intelligence investigations are high, and they often result in something other than a traditional criminal prosecution. Electronic surveillance and secret searches undertaken for intelligence investigations are governed under a separate statute, the Foreign Intelligence Surveillance Act of 1978 (FISA).[196] FISA authorizes electronic surveillance[197] and secret (*i.e.*, undisclosed) physical searches,[198] and creates a special (secret) court to hear applications for authorizations to make these intrusions in connection with intelligence investigations.

Authority to engage in electronic surveillance and surreptitious

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[193]Pub. L. No. 107-56, 115 Stat. 272 (2001).

[194]The Domestic Security Enhancement Act of 2003 (Patriot II) has not been formally proposed in Congress, although a Department of Justice version has been leaked to the press. *See*

[195]18 U.S.C. §§ 2510-2522 ("Title III").

[196]50 U.S.C.A. §§ 1801-1811 (West Supp. 2002).

[197]50 U.S.C.A. §§ 1801-1811 (West Supp. 2002).

[198]50 U.S.C.A. §§ 1821-1829 (West Supp. 2002).

searches has generally been subject to three levels of control in the United States, that differ depending upon the degree of intrusiveness of the action and the expectation of privacy that attaches to the communication. The surveillance and search provisions of the Patriot Act affect all three levels of procedural protections afforded individuals in the criminal process. First, the Act expands the communications that are susceptible to the most intrusive forms of electronic surveillance. These communications – private face-to-face conversations, conversations by land-line telephone, and computer communications – are the most highly protected, and may only be eavesdropped upon or intercepted after prior authorization by a judge,[199] upon the request of a high government official,[200] and after finding probable cause that particular communications will be made about a particular enumerated offense.[201] These serious offenses that can trigger a Title III-authorized intrusion. now includes terrorist and computer crimes.[202]

Second, the Act also expands government access to a less-protected category of information, that held by third parties, such as telephone records (but not conversations) and e-mail held in a third party's storage. The Act provides that these materials, including stored e-mail, may be obtained with a search warrant.[203] If the information has been in storage over 180 days, information may be obtained without disclosure of the warrant to the subscriber.[204] Telephone records may also be obtained, pursuant to a warrant, without notice to the subscriber.[205] This information can be obtained upon a showing of "reasonable grounds" to believe the information is relevant and material to an ongoing criminal investigation.[206]

Finally, the Act also expands government authority to obtain

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[199]18 U.S.C. § 2518(1) (2000)
[200]18 U.S.C. § 2516(1) (West Supp. 2003)
[201]18 U.S.C. § 2518(3) (2000).
[202]18 U.S.C. § 2516 (West Supp. 2003)
[203]18 U.S.C. §2703(a).
[204]18 U.S.C. §2703(a) & (b).
[205]18 U.S.C. §2703(c).
[206]18 U.S.C. §2703(d).

communications-related information that is the least-protected: the details concerning to whom and when calls are placed from a specific phone. The Act expands the use of "trap & trace devices" and "pen registers" by permitting their use for email as well as telephones.[207] These devices can be authorized by court order based only upon a showing that "information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation."[208] No revelation to the subscriber is ever permitted unless a court later orders it.[209]

Perhaps most significantly for protection of the individual, the Patriot Act blurs the distinction between traditional law enforcement and intelligence investigations.[210] It does this in two ways. First, it explicitly authorizes any government official to disclose the fruits of electronically intercepted communications to any federal defense, intelligence, law enforcement, national security, immigration or "protective" official, to the extent that the communications include foreign intelligence information.[211] The use that may be made of such information is limited only that which is "necessary to the conduct of that person's official duties."[212] Thus everything that might be learned under the reduced requirements for intelligence gathering, to the extent that it concerns foreign intelligence, may now be used for traditional law enforcement.

Second, the purpose of information gathering in intelligence investigations, through electronic surveillance or secret searches, can now include traditional law enforcement. The Act eliminates the requirement that "*the* purpose for the surveillance is to obtain foreign

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[207]18 U.S.C. §3123(a).

[208]Id.

[209]18 U.S.C. §3123(d).

[210]Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 Notre Dame L. Rev. 307, 313 (2003) ("prior to September 11th we were for the most part dedicated to utilizing the civilian criminal justice system to adjudicate terrorist cases"). The legal responses also includes dramatic changes to the treatment of non-citizens.

[211]18 U.S.C. § 2517(6)-(8) (West Supp. 2003)

[212]Id.

intelligence information," and instead requires only that "*a significant* purpose" of the surveillance or search authorization be obtaining intelligence.[213] This is a significant change, because the few lower courts which have considered challenges to intelligence investigations have upheld them on the basis that their primary purpose was not obtaining information for a criminal prosecution.[214]

The restrictions in the Patriot Act (and the changes in FISA) largely involve intrusions (i.e., surveillance or searches), so will likely be tested under the Fourth Amendment. However, because the restrictions involve intrusions that are arguably not for the purpose of traditional criminal law enforcement, it is the qualitative guarantee (i.e., the right of the people to be secure . . . against unreasonable searches and seizures) that will be most significant.[215] This proportionality consideration, whether the "standards . . . are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens,"[216] is really no different than the basic guarantee of substantive due process.

In the limited model for application of the basic guarantee, since an enumerated right (the Fourth amendment) does apply, no

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[213]50 U.S.C. 1804(a)(7)(B) (Thompson West 2003).

[214]*See* United States v. Pelton, 835 F.2d 1067 (4th Cir.), cert. den. 486 U.S. 1010 (1987); United States v. Ott, 827 F.2d 473 (9th Cir. 1987); United States v. Megahey, 553 F.Supp. 1180 (E.D.N.Y), aff'd 729 F.2d 1444 (1982). *See* Note, *The Fuss over Two Small Words: The Unconstitutionality of the USA Patriot Act Amendments to FISA under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291 (2003).

[215]The notion that some ultimate, substantive judgment must be made about the application of the restrictions imposed under the new reality has appeared in several cases, although not always as an explicit due process or fundamental justice matter. *See* In re Sealed Case, 310 F.3d 717, 742 (Foreign Int.Surv.Ct.Rev., Nov 18, 2002) ("Ultimately, the question [concerning the constitutionality of FISA orders used to obtain information primarily for a criminal investigation] becomes whether FISA, as amended by the Patriot Act, is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens."). *See also* note 129, supra (Re: Hamdi & Padilla cases).

[216]United States v. United States District Court (Keith), 407 U.S. 297, 322-23 (1972) (domestic security needs may permit standards for intrusions that are constitutional yet different from those required in ordinary law enforcement).

further inquiry would likely be held required. Is there ultimately some substantive due process violation in the blending of criminal law enforcement and intelligence? Does due process preclude the deprivation of liberty through means that are traditionally associated with criminal law enforcement (arrest, detention, and incarceration), for the end of combating terrorism, without the venerable constitutional protection of a warrant? The most recent judicial pronouncement on the matter notes that "the constitutional question presented by this case – whether Congress' disapproval of the primary purpose test is consistent with the Fourth Amendment – has no definitive jurisprudential answer."[217] The narrow view of the basic guarantee followed by the U.S. Supreme Court would suggest it does not.

C. The Future

The Canadian and American responses to the new reality are similar in three key respects. First, each country's response involves the criminal justice model (i.e., substantive crimes to deter conduct, with investigative mechanisms to enforce and punish through prosecutions) with aspects of the intelligence or national security model engrafted onto it. In both countries, new substantive terrorism-related offenses have been created, and authority for electronic surveillance and surreptitious searches has been expanded. The responses in both countries also include additional administrative and criminal controls on the financing of terrorism. Whether this approach will be most effective against terrorism is debatable,[218] but what is unquestioned in both countries is that criminal justice matters are at the core of what each country's basic guarantee addresses.[219]

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[217] In re Sealed Case, 310 F.3d 717, 746 (Foreign Int. Surv. Ct.Rev., Nov 18, 2002).

[218] *See, e.g.*, Martin L. Friedland, *Police Powers in Bill C-36*, in RONALD J. DANIELS, PATRICK MACKLEM, & KENT ROACH eds, THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 133-34 (TORONTO, 2001) at 273 ("Bill C-36 gives too much emphasis to prosecution and punishment . . . . Our emphasis should be on discovering and thwarting terrorist activities before they occur.")

[219] The notion that some ultimate, substantive judgment must be made about the application of the restrictions imposed under the new reality has appeared in several cases, although not always as an explicit due process or fundamental justice matter. *See* In re Sealed Case, 310 F.3d 717, 742 (Foreign Int.Surv.Ct.Rev., Nov 18, 2002)

Criminal law enforcement measures thus almost always face scrutiny under the basic guarantee.

Second, each country's response involves an expansion of executive authority at the expense of judicial authority. That is, the executive in each country may now take very significant steps that can result in the seizure of property and detention of individuals – including citizens – that are susceptible to very limited forms of judicial review.[220]

Third, a very significant part of the expansion of the executive authority in both countries is not limited to "the new reality."[221] It is equally applicable to traditional criminal law enforcement activities.[222]

("Ultimately, the question [concerning the constitutionality of FISA orders used to obtain information primarily for a criminal investigation] becomes whether FISA, as amended by the Patriot Act, is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens."). *See also* note 129, *supra* (Re: Hamdi & Padilla cases).

[220]*See* notes ____, supra. A recent example of the breadth and aggressiveness of this expansion of executive authority is the government's decision to effectively eliminate the "wall" between intelligence investigators and criminal investigators, which had -- by Department of Justice policy -- kept information obtained through FISA-authorized intrusions from being regularly shared with criminal investigators. *See* In re Sealed Case, 310 F.3d 717 (Foreign Int.Surv.Ct.Rev., Nov 18, 2002) (holding that PATRIOT Act eliminated requirement in FISA that "significant purpose" of intrusion be foreign intelligence, and that this is constitutionally permissible because FISA order not a "warrant," thus not governed by fourth amendment), *abrogating* In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F.Supp.2d 611, 623 (Foreign Intel.Surv.Ct., May 17, 2002)(denying approval of "minimization procedures" and "wall" that would have permitted criminal prosecutors a "significant role directing FISA surveillances and searches from start to finish in counterintelligence cases having overlapping intelligence and criminal investigations or interests, guiding them to criminal prosecution. The government makes no secret of this policy, asserting its interpretation of the Act's new amendments which 'allows FISA to be used primarily for a law enforcement purpose.'")

[221]*See* 50 U.S.C. 1804(a)(7)(B) (Thompson West 2003) (requiring that intelligence gathering need only be "a significant purpose" of FISA-authorized secret searches or electronic surveillance rather than "the purpose").

[222]*See* notes ___, supra.

Each of these aspects are likely to face challenge under each country's basic guarantee. To the extent that they involve criminalization and the use of the criminal process, they will arguably trigger enumerated criminal procedure rights. But the essential claim that the new reality presents challenges that cannot be met with traditional law enforcement techniques alone will demand a substantive, proportionality judgment, which is ultimately that of the basic guarantee. Whether each court has adopted a narrow or expansive view of this guarantee will largely condition its answer to this question.