

The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*

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It is an increasingly common feature of modern constitutional instruments for the state's "protective function" to be explicitly affirmed in the constitutional text. Thus, in addition to prescribing individual rights that may not be infringed by state actors—the conventional negative rights guarantees—the constitutions of Germany, South Africa and the European Union also instruct the state to secure individuals against deprivations of their constitutional interests by non-state actors. This paper considers whether, despite the absence of a clear textual basis for the protective function in the Canadian Charter of Rights and Freedoms, the state's obligations under the Charter might nonetheless include a similar duty to secure individuals against deprivations of their constitutional interests by non-state actors. I explore this question using Section 7 of the Charter as a case study, and conclude that there are compelling reasons for recognizing a constitutional basis for this essential task of the state.

Il s'agit d'une caractéristique de plus en plus commune des actes constitutifs modernes que la « fonction protectrice » de l'État soit affirmée explicitement à l'intérieur du texte constitutionnel. Ainsi, en plus de prescrire des droits individuels que les acteurs étatiques ne peuvent pas enfreindre—les garanties traditionnelles liées aux droits négatifs—les constitutions de l'Allemagne, de l'Afrique du Sud et de l'Union européenne enjoignent également l'État à protéger les individus contre les privations de leurs intérêts constitutionnels par des acteurs non étatiques. L'auteur décide si, en dépit de l'absence de fondements textuels clairs pour la fonction protectrice dans la Charte canadienne des droits et libertés, les obligations de l'État selon la Charte peuvent néanmoins inclure un devoir semblable afin de protéger les individus contre les privations de leurs intérêts constitutionnels par des acteurs non étatiques. L'auteur examine cette question à l'aide de l'art. 7 de la Charte dans une étude de cas. Il conclut qu'il existe des raisons impérieuses de reconnaître des fondements constitutionnels pour cette tâche essentielle de l'État.

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Introduction

It is an increasingly common feature of “postwar”¹ constitutional instruments for the state’s “protective function”² to be explicitly affirmed in the constitutional text. Thus, in addition to prescribing individual rights that may not be infringed by state actors—the conventional negative rights guarantees—the constitutions of Germany, South Africa and the European Union³ also instruct the state to secure individuals against deprivations of their constitutional interests by “third parties.”⁴

This paper considers whether, despite the absence of a textual basis for the protective function in the *Canadian Charter of Rights and Freedoms*, the state’s obligations under the *Charter* might nonetheless include a similar duty to secure individuals against deprivations of their constitutional interests by third parties.⁵ I explore this question using Section 7 of the *Charter* as a case

1 See Lorraine Weinrib, “The Postwar Paradigm and American Exceptionalism” in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 84. Here, “postwar” refers to post World War II.

2 One of two terms could be used to describe the concept I discuss in this paper: the “protective function,” as both Michelman and Justice Grimm refer to it (Frank Michelman, “The Protective Function of the State in the United States and Europe: The Constitutional Question” in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 156 [Michelman, “Protective Function”]; Dieter Grimm, “The Protective Function of the State” in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137 [Grimm, “Protective Function”]), or the “duty to protect,” as the concept is described by Forcese (Craig Forcese, “The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad” (2007) 57 UNBLJ 102 at 105). I have opted to use the term “protective function.”

3 Article I of the German Basic Law states that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” See Grimm, “Protective Function,” *supra* n 2 at 137. Section 7 of the *Constitution of the Republic of South Africa*, 1996, No 108 of 1996, as amended by *Constitution of the Republic of South Africa Second Amendment Act*, No 3 of 2003 [*South African Constitution*] provides that “[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights.” Article I of the *European Convention on Human Rights* announces that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ...this Convention.” See *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov 4, 1950, Europ TS No 5; 213 UNTS 221.

4 Thank you to Frank Michelman for helping me to formulate this description with the requisite precision. Tushnet employs the term “third parties” to refer to “nominally private actors”: see Mark Tushnet, “The Relationship Between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, With Reference to Third Party Effect” in András Sajó & Renáta Uitz, eds, *The Constitution in Private Relations* (Utrecht: Eleven International Publishing, 2005) 167. I will use this same term throughout.

5 The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] has been held not to apply “horizontally”; in other words, private individuals do not generally owe constitutional obligations to other individuals: see *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 [*Dolphin Delivery*].

study.⁶ Although the protective function could possibly create obligations under multiple provisions of the *Charter*, I focus on Section 7 because, as Justices Binnie and LeBel noted in *Chaoulli v Quebec (Attorney General)*, “s. 7 protects the most basic interests of human beings.”⁷ Section 7 is also one of the more challenging provisions under which to examine the feasibility of the protective function as a concept in Canadian constitutional law, because Section 7’s “internal limit”⁸ makes a straightforward application of the protective function under this section problematic.

To date, the Supreme Court of Canada has been reluctant to hold that the state is under a general duty to secure individuals against deprivations of their *Charter* interests by third parties.⁹ In *Dunmore v Ontario (Attorney General)*, for example, the Court held that where employees’ Section 2(d) interest in freedom of association¹⁰ would be “substantially”¹¹ impaired by “excluding” a group of individuals from a statutory scheme designed to protect such interests from harm by third parties, the state may be constitutionally obligated to extend some form of protection to that group (though not necessarily inclusion in the scheme itself).¹² Such an obligation, the Court explained, only arose once the legislature has enacted a “protective regime.”¹³ In *BC Health Services and Fraser*, however, the Court appeared to expand this principle, concluding that the state *was* in fact under a general duty to enact some form of scheme to permit workers to bargain collectively.¹⁴ In this paper I suggest that the Court ought to formally recognize the state’s constitutional obligation to protect

When discussing the individual’s interest in being free from deprivations of her liberty by third parties, therefore, it is incorrect to speak of a “right” to be free from such deprivations, unless that right is one that is enforceable against the state: see Grimm, “Protective Function,” *supra* n 2 at 149. One might more accurately be said to have an “interest” in being free from such deprivations.

6 Section 7 of the *Charter*, *supra* n 5 provides that “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.”

7 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 193, dissenting on another point [*Chaoulli*].

8 The concept of “internal limits” is discussed in Stephen Gardbaum, “Limiting Constitutional Rights” (2007) 54 UCLA L Rev 789.

9 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 at para 22 [*Dunmore*].

10 Section 2(d) of the *Charter* provides that “[e]veryone has the right to the following fundamental freedoms ... (d) freedom of association.”

11 *Dunmore*, *supra* n 9 at para 25. In *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 at para 34 [*Fraser*], the Supreme Court refers to “substantial impossibility” as being the relevant standard.

12 *Dunmore*, *supra* n 9 at para 22.

13 *Ibid* at para 20.

14 *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27; *Fraser*, *supra* n 11 at para 37.

individuals against “threats”¹⁵ to *Charter* interests by third parties. Such an interpretation would respond meaningfully to the reality that private actors can pose serious threats to *Charter* interests.¹⁶

In the Section 7 context, the protective function would require the state to secure individuals against deprivations of their interests in life, liberty and security of the person, usually by enacting appropriate legislation.¹⁷ Of course, in many cases, existing law would go a long way toward securing these interests. But where gaps existed, rendering Section 7 interests vulnerable to deprivation by third parties, the government would be constitutionally obligated to respond.

The breadth of obligations potentially created by the protective function may most helpfully be understood by considering a progression of examples of how the state’s protective function might be engaged under Section 7. Most obviously, the protective function would impose a duty on government to prohibit acts of physical violence.¹⁸ Justice Graßhof suggests that the roots of this obligation can be traced to the social contract theory of the state, under which the individual agrees to surrender her right of self-help in return for the state’s protection.¹⁹ Where deprivations of physical security by a third party are concerned, both the nature of the threat (injury to one’s physical person) and the identity of the third party (typically, another individual) are easily conceptualized.

Moving beyond the “classic” example, the protective function might also require the government to respond to systemic threats to constitutional interests by third parties, such as the threat posed by unsafe consumer products. Here too, both the nature of the threat and the identity of the third parties are readily ascertainable, although in this example the “third party” may be an industry as a whole, or at least a cluster of corporate entities. As with any exercise of the protective function, the government would be required to consider whether the subjects of regulation had “competing” *Charter* interests at stake

15 Grimm, “Protective Function,” *supra* n 2 at 145. I will use Justice Grimm’s terminology throughout.

16 This is basis for the recognition of the protective function in German constitutional law: see pages 6–7, *infra*.

17 Grimm, “Protective Function,” *supra* n 2 at 149.

18 Michelman, “Protective Function,” *supra* n 2 at 157.

19 Karin Graßhof, “The Duty to Protect and to Ensure Human Rights under the Basic Law of the Federal Republic of Germany” in Eckart Klein, ed, *The Duty to Protect and to Ensure Human Rights* (Berlin: Berlin Verlag Arno Spitz, 2000) 41. See also Georg Ress, “The Duty to Protect and to Ensure Human Rights under the European Convention on Human Rights” in Eckart Klein, ed, *The Duty to Protect and to Ensure Human Rights* (Berlin: Berlin Verlag Arno Spitz, 2000) 167.

that would have to be “balance[ed]”²⁰ against the interests of those individuals the government sought to protect before reaching firm conclusions on the appropriate scope of regulation. Without delving into the question of whether corporations have *Charter* rights,²¹ it might often be the case that protecting some *Charter* interests would require the curtailing of others. As Justice Grimm explains,

[T]here is not much difference between the duty to respect and the duty to protect fundamental rights when it comes to deciding whether a law is constitutional or not. Since almost every law contains some limitation of a fundamental right and since the justification is almost always the protection of another fundamental right or a constitutionally recognized value, the task of the legislature is to bring competing values into harmony, preserving as much as possible of each of them.²²

Finally, at the outer limits of the doctrine are cases where the threat posed to constitutional interests is both diffuse and remote. An example of such a threat to constitutional interests was at issue in *Operation Dismantle v The Queen*.²³ There, the claimants argued unsuccessfully that their Section 7 *Charter* rights were infringed by the Canadian government’s decision to permit the United States to test cruise missiles in Canada on the theory that this might expose Canada to a greater risk of nuclear war. Neither the nature of the threat nor the identity of the third party is easily described here. Although the threat of nuclear war may be remote, the potential consequences are cataclysmic. In cases such as these, a balancing or proportionality analysis can help to determine the extent of the response required by the state.

I provide a more detailed analysis of these examples in the sections that follow. In the next section of this paper, I explain how the concept of the protective function has developed in Germany. In the three sections that follow, I suggest one way that the government’s protective function might be conceptualized under Section 7 of the *Charter*, and examine the extent to which the existing jurisprudence supports this conceptualization. I conclude by evaluating the merits of interpreting Section 7 of the *Charter* to affirm the government’s protective function.

20 Grimm, “Protective Function,” *supra* n 2 at 149–51. See also the *West German Abortion Decision*, translation reprinted in Vicki C Jackson and Mark Tushnet, eds, *Comparative Constitutional Law*, 2nd ed (New York: Foundation Press, 2006) at 117 [*First Abortion Decision*].

21 See Peter Hogg, *Constitutional Law of Canada*, 5th ed, loose-leaf (consulted on March 13, 2012), (Scarborough: Thomson Carswell, 2006) at 37-1–37-3, 47-5.

22 Grimm, “Protective Function,” *supra* n 2 at 151.

23 *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

Schutzpflicht

The German Constitutional Court first articulated the concept of the protective function, or *Schutzpflicht*, in the *First Abortion Decision*.²⁴ In that case, the Court held that the Basic Law imposed an obligation on the state to secure the foetus against deprivations of its interest in life by the woman by employing the criminal law to prohibit abortion. Although, as Justice Grimm points out, the specificity of court's directive to the legislature proved to be extremely controversial,²⁵ the judgment continues to be regarded as a leading decision on the protective function in Germany.

The protective function emerges from and is grounded in the premise that the Basic Law's guarantees "are not only subjective rights of the individual against the state but also expressions of objective values."²⁶ This concept of "objective values," which was developed by the German Constitutional Court in the earlier case of *Lüth*,²⁷ provides a normative basis for requiring the state to take steps to protect individuals from deprivations of constitutional interests by third parties. It also explains why *Schutzpflicht* can be regarded as the "long forgotten 'other side' of fundamental rights":²⁸

While fundamental rights as negative rights protect individual freedom against the state, the duty to protect derived from fundamental rights is designed to protect fundamental rights against threats and risks stemming not only from the state but from private actors or societal forces or even social developments that are controllable by state action. Today in Germany, duties to protect are considered to be the counterpart to the negative function of fundamental rights.²⁹

Justice Grimm explains that the emergence of the protective function can be attributed in part to a proliferation of technological developments and increased privatization.³⁰ New technologies created new "threats" to constitutional interests, while the process of privatization removed entities delivering core services to the public from the scrutiny of the constitution.³¹ The state's obligation to protect the constitutional interests of individuals from private threats has become an important component of German constitutional law in cases such as this, where the individual can be said to be in a position of

24 *First Abortion Decision*, *supra* n 20. See also Grimm, "Protective Function," *supra* n 2 at 137.

25 Grimm, "Protective Function," *supra* n 2 at 148, 150.

26 *Ibid* at 144.

27 *Ibid* at 144–45.

28 *Ibid* at 145.

29 *Ibid*.

30 *Ibid* at 146–47.

31 Frank Michelman, "W(H)ither the Constitution?" (1999–2000) 21 *Cardozo L Rev* 1063.

weakness vis-à-vis a third party and thus susceptible to the deprivation of constitutional interests by the stronger party.³²

The *First Abortion Decision* demonstrates that in meeting its obligations under the protective function, the state will often be required to “balance” conflicting constitutional interests.³³ Just as the Constitutional Court employs a proportionality analysis to determine whether negative rights violations can be justified, proportionality also guides the Court’s assessment of whether the state has responded appropriately to threats to constitutional interests posed by third parties, having regard to the conflicting interests at stake. In the *First Abortion Decision*, the Constitutional Court noted that the foetus’ interest in life had to be balanced against the pregnant woman’s interest in human dignity and “the free development of her personality.”³⁴ The Court ultimately concluded that while the state was vested with considerable discretion in deciding how best to meet its obligations under the protective function, the state was required to employ the criminal law to prohibit abortion.³⁵ The Court also concluded that exceptions to the general prohibition were permissible where the pregnant woman’s life would be placed at risk, or where “other extraordinary burdens”³⁶ would be visited upon her if she carried the child to term. In subsequent cases, the Court has employed a more restrained form of review, one which examines the reasonableness of the state’s response having regard to “the importance of the right at stake” and “the likelihood and intensity of harm.”³⁷ The *First Abortion Decision* is thus best regarded as an outlier insofar as the intensity of review is concerned.³⁸ In fact, some decisions suggest that in practice, the Constitutional Court will limit its inquiry to “whether the government has taken any action at all which is not evidently ineffective or totally inadequate to provide protection.”³⁹

32 Grimm, “Protective Function,” *supra* n 2 at 147. See also Vanessa MacDonnell & Julia Hughes, “The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law” (2012) at 6 [unpublished, copy with author] [MacDonnell and Hughes, “Protective Function”].

33 *First Abortion Decision*, *supra* n 20 at 117.

34 *Ibid* at 116.

35 *Ibid* at 118.

36 *Ibid* at 119.

37 Grimm, “Protective Function,” *supra* n 2 at 151.

38 *Ibid* at 150. Grimm explains that the protective function “can be fulfilled in various ways, which are all in accordance with the Constitution. It follows that the legislature is free to choose the means to fulfill its duties to protect. The *First Abortion Decision*, *supra* n 20, which had acknowledged this in theory but denied it in practice, obliging the legislature to protect unborn life via criminal law, has been modified by subsequent decisions and was overruled by the *Second Abortion Decision*.”

39 Grafhof, *supra* n 19 at 48. See also the *Chemical Weapons Case*, translated and reprinted in Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC:

A central feature of the protective function is that the obligation to secure individuals against deprivations of their constitutional interests by third parties rests upon the state.⁴⁰ In this way, the protective function can be distinguished from the “direct” horizontal application of the Constitution, which places an obligation on private parties to refrain from violating constitutional guarantees.⁴¹ Gardbaum explains that direct horizontal effect can be distinguished from the protective function on the basis that, while the two “may cover the very same course of conduct,” they “do so by imposing quite different constitutional duties and consequent liabilities.”⁴² In the case of the protective function, the obligation is affirmative in nature and falls to the state,⁴³ whereas it might generally be assumed that private individuals do not have affirmative constitutional obligations, even where the constitution applies horizontally.

Justice Grimm maintains that the protective function and socio-economic rights are also conceptually distinct:

Today in Germany, duties to protect are considered to be the counterpart to the negative function of fundamental rights. This is why the duty to protect cannot be seen as another word for economic and social rights. Economic and social rights as so-called second-generation civil rights allocate material benefits to needy individuals. The duty to protect is a function of first-generation civil rights, traditional liberties. It is concerned about individual freedom instead of welfare, yet not in the vertical, but in the horizontal dimension.⁴⁴

Duke University Press, 1989) 364.

40 Grimm, “Protective Function,” *supra* n 2 at 149. This is consistent with s 32 of the *Charter*, *supra* n 5, which states that “[t]his Charter applies to the Parliament and government of Canada ... and to the legislature and government of each province....”

41 See Stephen Gardbaum, “Where the (State) Action Is” (2006) 4 I-CON 760 at 769 [Gardbaum, “State Action”]. A form of direct horizontal effect exists in South Africa: see *Khumalo v Holomisa*, 2002 (8) BCLR 771 (CC), cited in Frank Michelman, “The Bill of Rights, the Common Law, and the Freedom-Friendly State” (2003–2004) 58 U Miami L Rev 401 at 407, n 27. See also Johan van der Walt, “Progressive Indirect Horizontal Application of the Bill of Rights: Toward a Co-operative Relation between Common-law and Constitutional Jurisprudence” (2001) 17 S Afr J Hum Rts 341 at 350.

42 Gardbaum, “State Action,” *supra* n 41 at 769.

43 Stephen Gardbaum, “The Comparative Structure and Scope of Constitutional Rights” in Tom Ginsburg & Rosalind Dixon, eds, *Comparative Constitutional Law (Research Handbook)* (Cheltenham, UK: Edward Elgar, 2012) 387 at 397. I would note that several provisions of the *Charter*, *supra* n 5 explicitly confer positive rights, the most obvious being minority language rights in s 23. Other examples noted by Arbour J, writing in dissent in *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at para 320 [Gosselin], include “the right to vote (s 3), to trial within a reasonable time (s 11(b)), to be presumed innocent (s 11(d)), to trial by jury in certain cases (s 11(f)), [and the right] to an interpreter in penal proceedings (s 14).”

44 Grimm, “Protective Function,” *supra* n 2 at 145–46.

On the other hand, the *Second Abortion Decision*⁴⁵ demonstrates how one might conceivably identify a link between the protective function and positive rights.⁴⁶ The Constitutional Court held in the *Second Abortion Decision* that the state's duty to secure the foetus against deprivations of its interests in life by the pregnant woman "required" the government to "take steps to prevent situations from arising in which a pregnancy would place unreasonable demands on the woman."⁴⁷ The protective function might, therefore, require the state to provide financial support to pregnant women so that they would not seek out abortions because of the financial cost of child-rearing.⁴⁸ In other words, an obligation to provide social assistance to the pregnant woman might be grounded in the state's duty to protect the foetus.

The state's fulfillment of its protective function can also create socio-economic entitlements where the nature of the threat to constitutional interests has a socio-economic dimension. In these cases, the state's response to the threat brings about a shift in the rights and obligations of the individual and the third party and results in a transfer of wealth.⁴⁹ Such was the case in *Dunmore v Ontario (Attorney General)*,⁵⁰ for example, where the Court suggests that the state has an obligation flowing from the Section 2(d) right to associate to provide labour protection to agricultural workers. Placing agricultural workers in a stronger bargaining position vis-à-vis their employer may well result in an altered "distribution of important goods" between employer and employee.⁵¹ On the other hand, it is also clear that not all exercises of the protective function are socio-economic in nature. There is nothing redistributive about the enactment of a law prohibiting acts of physical violence against an individual, for example.

A Canadian protective function

Before turning to the specific question of what protective obligations Section 7 might possibly impose upon the state, it should be noted that there is no

45 (1993) BVerfGE 88 [*Second Abortion Decision*], available at http://www.bverfg.de/entscheidungen/fs19930528_2bvff000290en.html (last accessed March 13, 2012).

46 Gerald Neuman, "Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany" (1995) 43 Am J Comp L 273, reprinted in Vicki C Jackson & Mark Tushnet, eds, *Comparative Constitutional Law*, 2nd ed (New York: Foundation Press, 2006) 112 at 130.

47 *Ibid* at 132.

48 *Ibid*.

49 See Mark Tushnet, "State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations" (2002) 3 Chi J Int'l L 435 [Tushnet, "State Action and Social Welfare Rights"].

50 *Dunmore*, *supra* n 9.

51 Tushnet, "State Action and Social Welfare Rights," *supra* n 49 at 438.

reason to think that protective obligations could only arise under Section 7. In fact, it seems that some justification would be required for adopting a protective reading of only Section 7 and not other sections of the *Charter*.⁵² For the purpose of this paper, however, I have limited myself to considering what protective obligations might exist where the individual's Section 7 interest in "life, liberty and security of the person" is concerned.

Section 7 provides that "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."⁵³ This text suggests, as noted above, that the *Charter* interests protected by Section 7 are "life, liberty and security of the person." The Supreme Court of Canada has construed these interests narrowly since the coming into force of the *Charter*. The right to life has rarely been invoked by the Court, and liberty and security of the person have been found to be engaged only where state action threatens physical liberty or security, or interferes with "matter[s] of fundamental personal importance."⁵⁴ I will suggest, by contrast, that liberty and security of the person should be defined in a manner that better corresponds to the Supreme Court's exhortation that "the interpretation [of *Charter* rights] should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection."⁵⁵ So conceived, "security of the person" might be defined to include the individual's interest in "physical" and "psychological integrity,"⁵⁶ and liberty might be defined in the manner suggested by Justice Wilson in *R v Jones*:

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric—to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our

52 As I will discuss shortly, the Supreme Court has adopted what might be characterized as a protective reading of other sections of the *Charter*, *supra* n 5, in particular ss 2(d) and 15.

53 The French version of the text provides that "Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale."

54 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras 49, 55 & 81 [*Blencoe*].

55 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 [*Big M Drug Mart Ltd*].

56 Canada, Law Reform Commission, *Working Paper No. 26, Medical Treatment and Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1980) at 6, cited in *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 46, 17 DLR (4th) 422.

own way.” This, he believed, we should be free to do “so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.”⁵⁷

Activities that threatened the individual’s liberty interest might in many cases also threaten her security interest.⁵⁸

The breadth of the definitions of liberty and security of the person I propose suggests that the protective function would be engaged by a wide variety of threats to Section 7 interests. What remains to be considered is how the second clause of Section 7 might “qualify”⁵⁹ or structure the government’s response to threats to Section 7 interests posed by third parties. I am referring here to the portion of Section 7 that reads “...and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

Does this phrase “qualify” the first half of Section 7, or does it have independent significance? I will discuss the conclusion that emerges from the case law shortly. Here I suggest that the “principles of fundamental justice” could serve as a standard against which to evaluate the appropriateness of the government’s response to threats to life, liberty and security of the person by third parties. Although various potential standards could be identified from among the principles of fundamental justice, including “gross disproportionality,”⁶⁰ in my view proportionality is the most appropriate standard. Thus, in responding to threats to Section 7 interests, the government would be required to show that its approach was *proportional* in the sense intended by Section 1 of the *Charter*. Following the German example, a court might inquire into whether the government’s actions were “proportional” having regard to “the importance of the right at stake and the likelihood and intensity of harm.”⁶¹ The onus of establishing that the government’s response was proportional would rest on the government.

The approach I am suggesting would essentially relocate the Section 1 proportionality analysis to the second clause of Section 7. Such a construction would represent a significant departure from the Supreme Court’s existing

57 *R v Jones*, [1986] 2 SCR 284 at para 76, 31 DLR (4th) 569, Wilson J (internal quotation marks omitted). Hogg, *supra* n 20 notes at 47–49 n 38 that only Justice Wilson has “consistently advocated a broad definition of liberty.”

58 Note that I am not suggesting that a different interpretation of “life, liberty and security of the person” should be adopted in the context of the protective function, but rather that the current definitions are generally in need of reform.

59 Peter Hogg refers to the possibility of an “unqualified” s 7 right in Hogg, *supra* n 21 at 47-3.

60 *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 135 [*Malmo-Levine*]; see also *R v Arkell*, [1990] 2 SCR 695 at 704, 59 CCC (3d) 65.

61 Grimm, “Protective Function,” *supra* n 2 at 151.

jurisprudence, but would be very much in keeping with the central role that proportionality plays in Canadian constitutional law. What's more, it might be possible to find support for this position in the Ontario Court of Appeal's recent decision in *Canada (Attorney General) v Bedford*,⁶² which involved a challenge to three provisions of the Criminal Code that deal with prostitution. There, the Court of Appeal applied the principles of arbitrariness, overbreadth and gross disproportionality together in a way that was difficult to distinguish from a Section 1 analysis, with the exception perhaps of the application of the more onerous (and less rational) "gross disproportionality" standard. I will say more about this later. Having now suggested a way that Section 7 might be read to impose a protective function on the state, I turn to the question of whether the existing jurisprudence suggests that this model is feasible.

The Section 7 case law

Section 7: One right or two?

Following the enactment of the *Charter*, debate arose over whether the opening words of Section 7 created a "free-standing"⁶³ right to "life, liberty, and security of the person," or whether Section 7 as a whole embodied one right "not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice."⁶⁴ This debate, which has its roots in the text of Section 7, relates more broadly to the question of whether Section 7 is merely negative in character, or whether it also imposes a positive obligation on the government to secure the life, liberty, and security interests of individuals.⁶⁵ The Supreme Court rather promptly interpreted Section 7 as creating a "single right," but also "[left] open the possibility" in *Gosselin v Quebec (Attorney General)* "that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances."⁶⁶

Gosselin was a challenge to Quebec's social assistance statute, which provided significantly less social assistance to recipients under the age of thirty. Recipients could increase their benefits by enrolling in certain approved work or educational programs. *Gosselin* argued that the statute violated Sections 7

62 *Canada (Attorney General) v Bedford*, 2012 ONCA 186.

63 *Gosselin*, *supra* n 43 at para 386.

64 Further discussion of the two possible interpretations of s 7 can be found in Hogg, *supra* n 21 at 47-2-47-3.

65 For a discussion of the French version of s 7 and its textual implications, see the dissenting reasons of Justice Arbour in *Gosselin*, *supra* n 43 at paras 336-40.

66 *Gosselin*, *supra* n 43 at para 83; Hogg, *supra* n 21 at 47-3.

and 15 of the *Charter* because it failed to provide sufficient welfare benefits “to meet basic needs.”⁶⁷ A majority of the Court concluded that a right to welfare had not been established on the evidence presented.⁶⁸ Justice Arbour, in dissent, adopted a “two rights” reading of Section 7 and would have ordered the government to provide additional welfare benefits to Gosselin and the group of welfare recipients she represented.⁶⁹

Although the “two rights” reading seems superficially appealing, upon further examination it is almost certainly an unsustainable interpretation of Section 7. In the process of advocating for a “two rights” construction of Section 7 in her dissent in *Gosselin*, Justice Arbour exposes what in my view can only be characterized as fatal weaknesses in that approach. The presence of a “free-standing”⁷⁰ right to life, liberty and security of the person would obviate the need for a separate right to be free from deprivations of life, liberty and security of the person except in accordance with the principles of fundamental justice, given that the latter right could easily be subsumed under the former. As Eric Colvin explains,

A free-standing right to life, liberty and security would cover any ground upon which guarantees of due process and fundamental justice might work. The latter guarantees would be otiose. The conjunctive reading of the provision enables this result to be avoided. The cost, of course, is grammatical distortion. There is, however, no easy resolution to the problems presented by these provisions.⁷¹

For this reason, it would appear unwise to build any theory of the protective function on the “two rights” construction of Section 7 proposed by Justice Arbour in *Gosselin*.

That said, recognizing the state’s protective function under Section 7 *might* require the courts to accept a somewhat different variant of “two rights” interpretation of that section. Justice Arbour’s two rights consist of a “free-standing” right to “life, liberty and security of the person,” and a “qualified” right “not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.”⁷² As I noted above, there is a troubling redundancy to this approach. The model I propose would in-

67 *Gosselin*, *supra* n 43 at para 75.

68 *Ibid* at para 83.

69 Hogg, *supra* n 21 at 47-3.

70 *Gosselin*, *supra* n 43 at para 340.

71 Eric Colvin, “Section Seven of the Canadian Charter of Rights and Freedoms” (1989) 68 Can Bar Rev 560 at 563.

72 See Hogg, *supra* n 21 at 47-3.

interpret Section 7 to include two “qualified” rights: first, a right “not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice”; and second, a right “not to have the state fail to secure individuals against threats to constitutional interests by third parties except in accordance with the principles of fundamental justice.”⁷³

The model I propose shares one right in common with both the majority and the dissenting reasons in *Gosselin*: the right “not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.” Evaluating the difference between my “second right” and Justice Arbour’s requires further discussion. One obvious difference is that there is no redundancy in the model I propose. The “burden”⁷⁴ of both the negative right and the protective function falls on the state; however, the nature of the obligation created in each case is distinct, the first being a duty to refrain from violating individual rights and the second being a duty to secure individuals against deprivations of their constitutional interests by third parties. Another difference is that there are no obvious qualifications placed on Justice Arbour’s “free-standing” right to life, liberty and security of the person, whereas the principles of fundamental justice serve as qualifiers for both of the rights I propose. Beyond these two distinctions, however, it is fruitful to inquire into the extent to which there *is*, in fact, a difference between the protective function and the “positive right” described by Justice Arbour.

Justice Arbour’s second right is a right to the basic necessities required to sustain “life, liberty and security of the person.” This right is enforceable against the state, although the state could conceivably implement its obligations in a variety of ways, ranging from the state supplying these benefits directly to enacting legislation that would empower individuals to access basic necessities through wealth transfers in the private market.⁷⁵ This second approach to providing basic necessities overlaps with the protective function in cases where the threat to constitutional interests emanating from third parties has a socio-economic dimension.

There is one important difference between claims to protection with a socio-economic dimension and socio-economic benefits that are provided directly by the state. The protective function requires the state to regulate the conduct of third parties with the goal of reducing threats to constitutional interests. Once the state has legislated, its function is essentially exhausted until

73 Thank you to Frank Michelman for helping me develop these formulations.

74 Hogg, *supra* n 5 at 37–8.

75 Tushnet, “State Action and Social Welfare Rights,” *supra* n 49 at 438, 440.

such point as it determines that the legislation either does not have the desired effect or is no longer adequate.⁷⁶ Where basic necessities are provided directly by the state, on the other hand, the obligation is ongoing.⁷⁷ This makes claims to socio-economic benefits provided by the state qualitatively different than the protective function, even where the state is required to respond to a threat to constitutional interests with a socio-economic dimension.

Why only protect “fundamental”⁷⁸ interests?

A second defining feature of the Supreme Court’s interpretation of Section 7 is its narrow reading of “liberty” and “security of the person.” This reading has greatly circumscribed the reach of Section 7 and has broad implications for the scope of the state’s protective function as I describe it in this paper.

The Supreme Court explained in *Blencoe* that a deprivation of liberty will be made out where the state imposes restrictions on physical liberty or limits an individual’s right to make “fundamental life choices.”⁷⁹ A deprivation of security of the person will similarly be established where there is evidence of “state interference with bodily integrity” or “serious, state-imposed psychological stress” caused by “state interference with an individual interest of fundamental importance.”⁸⁰

There is considerable overlap in these definitions. More striking, however, is the narrow range of state conduct to which Section 7 actually applies in practice. What accounts for this rather dramatic reading down of Section 7? Interestingly, an expansive reading of the section does not appear to have ever been seriously contemplated.⁸¹ Bryden suggests that the Supreme Court’s narrow reading of liberty and security of the person may be the product of its reluctance to read Section 7 as broad authorization to invalidate government

76 For a similar point made in the context of the “progressive realization” of socio-economic rights, see comments by Alex van den Heever in “Sounding Out the Recent Socio-Economic Rights Decisions: A Roundtable Discussion,” 8 May 8 2012, University of the Witwatersrand, Johannesburg; MacDonnell & Hughes, “Protective Function,” *supra* note 32.

77 Of course, regulation requires implementation, which requires the ongoing expenditure of government funds. On this point, see Cass R Sunstein, “State Action Is Always Present” (2002) 3 Chi J Int’l L 465 at 467. But this can be distinguished from the obligation to provide basic necessities to individuals who are unable to obtain them on their own.

78 Frank Michelman, “Residual Freedom and Constitutional Comparison” (2009) at 19–20 [unpublished, copy with author] [Michelman, “Residual Freedom”].

79 *Blencoe*, *supra* n 54 at para 49.

80 *Ibid* at paras 55, 81.

81 Hogg, *supra* n 21 at 47–9.

policy.⁸² A second concern he identifies is that a generous reading of liberty and security of the person might encourage a mass of meritless litigation.⁸³

Hogg argues that a proper interpretation of “life, liberty and security of the person” must account for the fact that Section 7 falls within the “legal rights” section of the *Charter*.⁸⁴ On this view, the content of Section 7 is informed by Sections 8–14 of the *Charter*, which provide a variety of protections for those charged with criminal offences. However, the Supreme Court has consistently rejected the argument that the characterization of Section 7 as a “legal right” is in any way dispositive.⁸⁵ Moreover, the status of Section 7 as a “legal right” does not explain why liberty and security of the person should be limited to matters of “fundamental importance.”⁸⁶

A final common explanation for the Supreme Court’s reading of Section 7 is that liberty has been read narrowly to avoid the experience of the US during the *Lochner* era, during which a raft of worker’s rights laws were invalidated on the ground that the laws violated liberty of contract.⁸⁷ While only slightly more satisfying as a rationale, this explanation suggests at least one logical reason why liberty and security of the person have been given such narrow meanings.

Bryden suggests that the Supreme Court has failed to explain sufficiently why life, liberty and security of the person have been read so narrowly.⁸⁸ I agree. He suggests that this problem could be rectified by restricting Section 7 to cases involving “the administration of justice,” and to “accordingly ease the qualitative restrictions on the types of liberty and personal security interests that deserve protection.”⁸⁹

Before commenting on Bryden’s proposal, further explanation of his remarks is required. Until recently, the Supreme Court had taken the position that Section 7 interests could be engaged outside the criminal law context “at least where there is state action which directly engages the justice system and its administration.”⁹⁰ In the 2005 case of *Chaoulli*, however, a majority of the

82 Philip Bryden, “Section 7 of the *Charter* Outside the Criminal Context” (2005) 38 UBCLR 507 at 511.

83 *Ibid* at 530.

84 Hogg, *supra* n 21 at 47-10.1–47-11.

85 *Chaoulli*, *supra* n 7 at para 198.

86 *Blencoe*, *supra* n 54 at para 49.

87 See Hogg, *supra* n 21 at 47-10.

88 Bryden, *supra* n 82 at 525.

89 *Ibid* at 526.

90 *Blencoe*, *supra* n 54 at para 46 [internal quotation marks omitted].

court dispensed with the requirement of an “adjudicative context”⁹¹ entirely, and in doing so dramatically increased the potential reach of Section 7.

In *Chaoulli*, *supra*, the Supreme Court struck down legislation prohibiting private health insurance for publicly funded health care services. The Chief Justice and Justice Major, writing for three members of the Court, explained that in light of unacceptable wait times in the publicly funded system, the ban on purchasing private health insurance deprived Quebeckers of their security of the person in a manner that was not in accordance with the principles of fundamental justice.

Three justices, writing in dissent, disagreed that the legislation was inconsistent with the principles of fundamental justice. However, they too acknowledged that Section 7 could be engaged by the health care legislation.⁹² The finding of six members of the Court that health care legislation engaged Section 7 was thus a significant (though not unforeseen) departure from the interpretation of Section 7 that had animated the Court’s decisions to that point.

While Bryden is correct, in my view, to suggest that the Supreme Court’s interpretation of Section 7 is unsatisfactory, one might question whether it is possible in practice to give meaningful content to the requirement of “a connection to the administration of justice.”⁹³ It is also questionable whether drawing the line at such cases, if they could in fact be identified, is any more principled than drawing the line at deprivations of liberty or security of the person that limit an individual’s right to make “fundamental life choice[s].”⁹⁴

The reality is that it would not likely be difficult to characterize most cases as having some “connection to the administration of justice.” At the same time, however, it is also possible that significant violations of liberty and security of the person might fall outside this category. Whether the line is drawn at the “administration of justice” or at matters of “fundamental personal importance,”⁹⁵ some amount of state action that would otherwise violate the principles of fundamental justice will not engage Section 7 at all because of how liberty and security of the person have been defined.⁹⁶

91 *Gosselin*, *supra* n 43 at para 78.

92 *Chaoulli*, *supra* n 7 at para 198.

93 I thank Professor Michelman for pointing this out to me.

94 *Blencoe*, *supra* n 54 at para 49.

95 *Ibid* at para 56.

96 See Frank Michelman, “Residual Freedom,” *supra* n 78 at 20.

If liberty and security of the person were defined more broadly, as I have suggested they should be, the state's protective function would be engaged by a broader range of threats to life, liberty and security of the person posed by third parties. One might expect this proposal to be met with some criticism, including that a broader interpretation of liberty and security of the person would allow courts to wield too much power, cause a torrent of litigation, or otherwise "overshoot"⁹⁷ the mark.⁹⁸ Michelman's response might be that judges and courts have ways of controlling "floodgates,"⁹⁹ but that "floodgates" alone are not a reason for reading down life, liberty and security of the person.¹⁰⁰ Interpreting Section 7 restrictively to exclude cases where legitimate constitutional interests are at stake narrows one of the *Charter's* most fundamental guarantees in the name of judicial economy. Michelman would say that there is inherent value in putting the state to the "test of proportional justification"¹⁰¹ when it limits rights (or fails to achieve the right balance in protecting constitutional interests), even in cases where the risk to constitutional interests could be regarded as trifling.¹⁰²

In sum, as currently interpreted, Section 7 would only require the state to exercise its protective function where "fundamental life choices"¹⁰³ (or violations of "bodily integrity"¹⁰⁴) were involved. Although the existing narrow construction of liberty and security of the person is not fatal to the model I have developed here, it would, in practice, significantly limit the scope of the state's protective function.

The principles of fundamental justice

I have suggested that the state's response to threats to constitutional interests by third parties should be evaluated against a standard of proportionality. In *R v Malmo-Levine*; *R v Caine*, however, the Supreme Court concluded that "gross disproportionality," rather than proportionality, was a principle of fundamental justice.¹⁰⁵ The standard of gross disproportionality has its origins in the test for cruel and unusual punishment articulated under Section 12 of the

97 *Big M Drug Mart Ltd.*, *supra* n 55 at 344.

98 See Frank Michelman, "Residual Freedom," *supra* n 78 at 26.

99 *Ibid.*

100 *Ibid.*

101 *Ibid* at 1.

102 *Ibid.*

103 *Blencoe*, *supra* n 54 at para 49.

104 *Ibid* at para 55.

105 *Malmo-Levine*, *supra* n 60 at para 143.

Charter. In *Malmo-Levine*, the Supreme Court applied this standard in the Section 7 context, noting that

[T]he principle against gross disproportionality under s. 7 is broader than the requirements of s. 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under s. 7, as under s. 12, remains one of gross disproportionality.¹⁰⁶

In rejecting proportionality as a principle of fundamental justice in *Malmo-Levine*, the majority noted that it was concerned with maintaining consistency between Sections 7 and 12 and preserving the distinction between the analysis that takes place under Section 7 and the analysis that occurs under Section 1.¹⁰⁷

While “gross disproportionality” may be an appropriate standard for defining cruel and unusual punishment, it loses much of its coherence when employed as a principle of fundamental justice outside the context of assessing the suitability of punishment. The Supreme Court has recognized repeatedly that “proportionality is fundamental to [Canada’s] constitutional system.”¹⁰⁸ For this reason, it is difficult to discern why gross proportionality and not mere proportionality should be recognized as a principle of fundamental justice, particularly since the role of Section 1 is quite limited in Section 7 cases.¹⁰⁹ Recognizing proportionality as a principle of fundamental justice would simply mirror considerations that already govern the sentencing process.¹¹⁰

The Supreme Court has suggested several reasons for maintaining a distinction between Section 7 and Section 1. The Court asserted in *Malmo-Levine* that “the issue under Section 7 is the delineation of the boundaries of the rights and principles in question whereas under Section 1 the question

106 *Ibid* at para 169.

107 *Ibid* at paras 160, 180–83. See also *R v Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321 [*Mills*].

108 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at para 47.

109 *Reference re s 94 (2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at 517–18, 24 DLR (4th) 536 [*Re BC Motor Vehicle Act*].

110 Section 718.1 of the *Criminal Code*, RSC 1985, c C-46 provides that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” In *R v M (CA)*, [1996] 1 SCR 500 at para 41, 105 CCC (3d) 327, the Court noted that “the principle of proportionality in punishment is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may only be imposed on those actors who possess a morally culpable state of mind.” However, the Court also reaffirmed that the relevant standard for assessing cruel and unusual punishment is “gross disproportionality,” and at para 55 citing *R v Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435, cautioned that “[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation.”

is whether an infringement may be justified.”¹¹¹ But Section 7 explicitly permits the state to deprive individuals of life, liberty and security of the person provided that it does so in a manner that is in accordance with the principles of fundamental justice. The Court is therefore tasked with distinguishing between permissible and impermissible deprivations of *Charter* interests both at the Section 7 stage and at the Section 1 stage. The Court’s description of the respective roles of Sections 7 and 1 fails to fully capture the nature of the analysis that takes place under Section 7. Section 7 is twice-qualified, and this accounts for why Section 1 has little role to play in the negative rights context once the state’s actions have been found to violate Section 7.

In the recent decision of *Bedford*, the Ontario Court of Appeal applied the principles of arbitrariness, overbreadth and gross disproportionality in tandem, resulting in an analysis that looked remarkably similar to the analysis in *R v Oakes*.¹¹² Arbitrariness stood in for rational connection, overbreadth for minimal impairment, and gross disproportionality for the final proportionality stage of the inquiry. This decision, which draws on existing legal principles rather than breaking new ground, seems to demonstrate that the Courts may be resisting the adoption of proportionality as a principle of fundamental justice unnecessarily. The presence of gross disproportionality at the latter stage of the analysis seems anomalous given our understanding of the role of proportionality in the *Charter* context.

In any event, it is important to understand that proportionality is a fluid concept. In the context of Section 1, the Supreme Court has applied proportionality in more or less searching a manner depending on the nature of the impugned measure.¹¹³ Thus, in *Irwin Toy Ltd v Quebec (Attorney General)*, the Supreme Court suggested that the state should be permitted some latitude in the proportionality analysis where it “is mediating between the claims of competing groups. ... [T]he choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources.”¹¹⁴ On the other hand, more searching review might well be justified where “the government is best characterized as the singular antagonist of the individual whose right has been infringed.”¹¹⁵

111 *Malmo-Levine, supra* n 60 at para 97, citing *Mills, supra* n 107 at para 66.

112 *R v Oakes*, [1986] 1 SCR 103.

113 See Sujit Choudhry, “So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*’s Section 1” (2006) 34 SCLR (2d) 501.

114 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 993, 58 DLR (4th) 577 [*Irwin Toy*]. See also Choudhry, *supra* n 113.

115 *Irwin Toy, supra* n 114 at 993. See also Choudhry, *supra* n 113.

Choudhry identifies two factors that appear to govern the intensity of review after *Irwin Toy*: “comparative institutional advantage” and balancing “competing interests.”¹¹⁶ These two principles bear directly on our analysis of proportionality in the context of the protective function. In protective function cases, the state will almost always be required to “mediate between the claims of competing groups.”¹¹⁷ This suggests that, in practice, the government’s view of how best to exercise its protective function would not be set aside lightly. Such an approach would mirror the experience in Germany, where Courts tend to be fairly deferential in reviewing the state’s efforts to balance “competing” constitutional interests, which the courts regard as being the “normal tasks of the legislature.”¹¹⁸

As for “comparative institutional advantage,”¹¹⁹ it is not difficult to distinguish between those exercises of the protective function that would institutionally be very difficult for courts to review and those that fall squarely within the expertise of the judiciary. Picking up on the examples described at the outset of this paper, it seems clear that legislatures, and not courts, would be best placed to determine the appropriate response to any threat of nuclear war posed by the testing of cruise missiles in Canada. Conversely, it would be well within the competence of a court to determine whether the prohibitions on physical violence found in the Criminal Code and at common law adequately secured individuals against deprivations of their constitutional interests by third parties.

Taken together, then, these two factors suggest that, in at least some cases, the proportionality standard may approach gross disproportionality in application.

116 Choudhry, *supra* n 113 at 512. Choudhry explains “comparative institutional advantage” as follows: “... [I]n *Irwin Toy*, the Court indicated it would not defer in the criminal justice context, or, for that matter, whenever ‘the government’s purpose relates to maintaining the authority and impartiality of the justice system,’ because of its ‘accumulated experience in dealing with such questions.’ Indeed, the judiciary is a central government actor in the criminal justice system. By contrast, the Court lacks relative expertise vis-à-vis other branches in other contexts, for example labour relations or commercial regulation.”

117 *Irwin Toy*, *supra* n 114.

118 Dieter Grimm, “Canadian and German Constitutional Jurisprudence” (2007) 57 UTLJ 383 at 391.

119 Choudhry, *supra* n 113 at 512.

Can support for the protective function be found in the *Charter* case law?

Having scrutinized the Supreme Court's approach to Section 7 interpretation, I will now consider in a more general way what the Supreme Court of Canada's *Charter* jurisprudence suggests about the feasibility of the protective function as a concept in Canadian constitutional law.¹²⁰ In *Dunmore*, the Supreme Court stated firmly that "the *Charter* does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms."¹²¹ This statement seems to indicate the Supreme Court's unwillingness to interpret the *Charter* to impose protective obligations on the government. However, this statement was qualified considerably in *Dunmore* itself and has perhaps even been overtaken by the Supreme Court's subsequent decisions in *BC Health Services* and *Fraser*. The holding in these cases sheds doubt on the Court's pronouncement that the *Charter* does not impose an obligation on the state to protect constitutional interests.

Dunmore concerned the Ontario government's decision to amend a provincial labour relations statute to remove individuals employed in the agricultural sector from the protection of the Act. A group of individuals affected by the amendments challenged the legislation under Sections 2(d) and 15 of the *Charter*.¹²² The majority concluded that the state was obligated by Section 2(d) to provide some form of protection of freedom of association to persons employed in the agricultural sector, though not necessarily by extending the existing legislation.¹²³ The Court observed that "[t]he distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime contributes substantially to the violation of protected freedoms."¹²⁴

120 Some variant of the protective function appears to have been at work in the s 7 case of *Jane Doe v Metropolitan Toronto Municipality (Municipality) Commissioners of Police* (1998), 160 DLR (4th) 697, 126 CCC (3d) 12 (Ont Gen Div) [*Jane Doe*]. What is particularly interesting about *Jane Doe* is its factual similarity to cases that spawned the concept of the protective function in the European Union and in South Africa (see e.g. *Z and Others v The United Kingdom* (2001), No. 29392/95, 34 EHRR 3, 10 BHRC 384; *Carmichele v The Minister of Safety and Security*, [2001] ZACC 22, [2001] (4) SA 983 (S Afr Const Ct). Although it is not possible to do so in this paper, further consideration of *Jane Doe* through the lens of the protective function could be illuminating.

121 *Dunmore*, *supra* n 9 at para 19.

122 *Charter*, *supra* n 5. Section 15(1) provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

123 *Dunmore*, *supra* n 9 at para 24.

124 *Ibid* para 20. See also *Fraser*, *supra* n 11 at paras 68, 70.

In other words, the Court held that at least where an “underinclusive”¹²⁵ statutory scheme was concerned, the state was constitutionally obligated to secure “excluded”¹²⁶ individuals against threats to *Charter* interests by third parties. Without this protection, individuals employed in the agricultural sector would be vulnerable “not only to a range of unfair labour practices, but potentially to legal liability under common-law inhibitions on combinations and restraints of trade.”¹²⁷

The Court’s holding in *Dunmore* followed upon its earlier reasoning in *Vriend v Alberta*. The applicant in *Vriend* was dismissed from his job because of his sexual orientation. Since sexual orientation was not a “prohibited ground of discrimination”¹²⁸ for the purpose of the provincial human rights Act, however, he was unable to bring a human rights complaint. *Vriend* filed a *Charter* challenge against the provincial government alleging that the government’s failure to include sexual orientation as a “prohibited ground of discrimination” violated Section 15 of the *Charter*.¹²⁹ The Court concluded that the Alberta Government’s omission violated the *Charter*, and ordered that sexual orientation be read into the provincial human rights Act as a “prohibited ground of discrimination.”¹³⁰

The prohibition on underinclusion in *Vriend* flowed from the dignitarian harm that resulted from the state providing a benefit to some and denying it to others on the basis of immutable personal characteristics.¹³¹ In *Dunmore*, however, the Court adopted a different approach. There, the majority explained that

[A]part from any consideration of a claimant’s dignity interest, exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right; it has been held in the s. 2(a) context, for example, that “protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity.”¹³²

125 *Dunmore*, *supra* n 9 at para 22.

126 *Ibid* at para 4.

127 *Ibid* at para 20.

128 *Vriend v Alberta*, [1998] 1 SCR 493 at para 4, 156 DLR (4th) 385.

129 *Ibid* at para 3.

130 *Ibid*. See also Tushnet, “State Action and Social Welfare Rights,” *supra* n 49.

131 *Vriend*, *supra* n 128 at paras 102, 104; *Dunmore*, *supra* n 9 at paras 22, 27–28.

132 *Dunmore*, *supra* n 9 at para 22.

The majority in *Dunmore* thus appeared to suggest that in at least some cases, the enactment of an underinclusive statutory scheme may “creat[e] conditions which ... substantially interfere with a constitutional right.”¹³³ Thus, Vriend’s Section 15 interests were harmed because he was not permitted by the provincial human rights Act to bring a discrimination complaint, and Dunmore’s Section 2(d) interests were harmed because he was not authorized by statute to associate with other employees for labour relations purposes. The analysis in *Dunmore* is clear, then, that dignitarian harm is not the only, or even the primary, rationale for prohibiting underinclusive legislation.¹³⁴ Although the Court strained to deliver its analysis in negative rights terms in *Dunmore*, it might be concluded that the majority is referring to some form of protective function.

Sunstein suggests that the constitutional infirmity in *Vriend* may be that “[t]he state has discriminated, in a sense, against sexual orientation discrimination, by treating it as more acceptable than [other, prohibited forms of discrimination].”¹³⁵ But this only explains underinclusion cases decided under Section 15 of the *Charter*. It does not tell us why the Supreme Court concluded in *Dunmore* that the government’s failure to provide labour protection to agricultural employees violated the freedom of association of those employees. Notably, the Court did *not* conclude that the state discriminated against agricultural employees when it chose not to provide labour protection to them. Rather, it concluded that agricultural employees would be unable to exercise their freedom of association without the state’s help,¹³⁶ and that the state, having created a scheme of protection, was constitutionally obligated to provide some analogous measure of protection to agricultural employees.

Sunstein also suggests that the Court may have viewed *Vriend* as an “easier” case because it involved the addition of a class of beneficiaries to an extant statutory scheme rather than the recognition of an independent duty to enact “protective” legislation.¹³⁷ In cases such as this, it is usually reasonable to conclude that “a judicial decision calling for the extension of [an existing] policy [is unlikely] to endanger extremely important social interests.”¹³⁸ If the

133 *Ibid.*

134 Dignitarian harm would only appear to be the rationale when a statute specifically leaves out a group on the basis of an enumerated or analogous ground, such as Vriend’s exclusion on the basis of sexual orientation, or the exclusion of the applicant in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 on the basis of his disability.

135 Sunstein, *supra* n 77 at 468.

136 *Ibid* at 467.

137 *Dunmore*, *supra* n 9 at para 59.

138 Sunstein, *supra* n 77 at 468.

Court is reluctant to require the state to enact protective legislation because of its view that such decisions are best made by the legislative branch, this reluctance might be significantly attenuated if the state has already signalled that no great harm will result from protecting constitutional interests in that context.¹³⁹ In other words, the state has already, to use the majority's language in *Dunmore*, "weighed the complex values and policy considerations" involved in establishing the "protective regime."¹⁴⁰

This seems to be a plausible explanation for the court's willingness to invalidate underinclusive statutory schemes but not to impose independent obligations on the government to enact "protective regimes." In other words, the Court will recognize the state's obligation to protect constitutional interests only when the state has already enacted a "protective regime" and thus displaced the common law.

A final word on the role of courts in this context. This paper argues that if the *Charter* requires the state to protect the constitutional interests of individuals, actions taken pursuant to that obligation (or the failure to take such action) may be properly subjected to judicial scrutiny. This paper cannot and does not attempt to provide a response to those who object fundamentally to the institution of judicial review. The judiciary has a clear constitutional mandate to interpret the *Charter*,¹⁴¹ and it can plausibly be argued that there is nothing inherently more contentious about what the protective function requires of courts than the standard constitutionality analysis. Moreover, as Michelman points out, judicial review is not an essential feature of the protective function.¹⁴² A constitutional obligation to secure individuals against de-

139 *Ibid.*

140 *Dunmore*, *supra* n 9 at para 57, citing submissions made by the Attorney General for Ontario.

141 See *Re BC Motor Vehicle Act*, *supra* n 109 at 497: "[I]n the context of s. 7, and in particular, of the interpretation of 'principles of fundamental justice,' there 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... This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy."

142 Michelman, "Protective Function," *supra* n 2 at 175-76.

deprivations of their constitutional interests by third parties could exist without vesting the responsibility for “enforcement” with the courts.¹⁴³

Of course, there are good reasons why the government’s chosen means of protecting *Charter* interests should generally be respected by courts, and it is here that the concept of proportionality becomes crucial. Within a certain margin, the government can respond to threats to constitutional interests in whatever manner it sees fit. But where the government’s actions do not satisfy the test of proportionality, they will not be shielded from scrutiny simply because “complex values and policy considerations”¹⁴⁴ are at stake. When constitutional interests are put at risk by the actions of third parties, the state must, as a matter of constitutional obligation, address the threat appropriately.

Here, an analogy might be drawn to the Supreme Court’s decision in *R v Mills*,¹⁴⁵ where the majority refused to strike down amendments to the Criminal Code governing the production of therapeutic records of sexual assault complainants, in spite of the fact that the provisions appeared to be inconsistent with the guidelines for production set out by a majority of the Court in the earlier decision of *R v O’Connor*.¹⁴⁶ In enacting a scheme to regulate production, Parliament was required to reconcile the negative right of the accused to make full answer and defense and the complainant’s negative rights to privacy, equality and security of the person.¹⁴⁷ At points in the judgment, this “balancing” appears to engage only negative rights.¹⁴⁸ At other points, however, the Court seems to be referring to a variant of the protective function, though not necessarily one that is grounded in constitutional obligation.¹⁴⁹ For example, the majority explains that

In the present case, Parliament decided that legislation was necessary in order to address the issue of third party records more comprehensively. As is evident from the language of the preamble to Bill C-46, Parliament also sought to recognize the

143 *Ibid*, citing Lawrence Sager’s work on “underenforced constitutional rights”: *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004) and Lawrence Sager, “The Domain of Constitutional Justice” in Larry Alexander, ed, *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 232.

144 *Dunmore*, *supra* n 9 at para 57.

145 *Mills*, *supra* n 107.

146 *R v O’Connor*, [1995] 4 SCR 411. See also Jamie Cameron, “Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R v Mills*” (2000) 38 *Alta L Rev* 1051 at 1051; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 278–81.

147 *Mills*, *supra* n 107 at paras 62, 85.

148 *Ibid* at paras 61, 62, 85.

149 *Ibid* at paras 58, 59.

prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused. Many of these concerns involve policy decisions regarding criminal procedure and its relationship to the community at large. Parliament may also be understood to be recognizing “horizontal” equality concerns, where women’s inequality results from the acts of other individuals and groups rather than the state, but which nonetheless may have many consequences for the criminal justice system. It is perfectly reasonable that these many concerns may lead to a procedure that is different from the common law position but that nonetheless meets the required constitutional standards.”¹⁵⁰

This statement suggests that the majority may have viewed the amendments as also having a protective element. The majority’s view that courts ought to “consider respectfully” Parliament’s choice of means is consistent with the argument advanced here that courts ought not to lightly displace legislation enacted by Parliament when it is acting in a protective capacity, provided that the measures fall within an acceptable margin.¹⁵¹

The South African experience

The Constitutional Court of South Africa’s decision in *Law Society of South Africa v Minister*¹⁵² illustrates the potential impact of interpreting Section 7 of the *Charter* to affirm the state’s protective function. In *LSSA v Minister*, the Constitutional Court was asked to decide whether the state’s obligation to secure individuals against “all forms of violence from ... private sources”¹⁵³ under Section 12(1)(c) of the *Bill of Rights* was violated by a statute that precluded individuals from pursuing tort remedies to recover damages for losses sustained in motor vehicle collisions where some damages were recoverable from a government-administered Road Accident Fund. In a unanimous decision, the Court concluded that Section 12(1)(c) of the *Bill of Rights*, “viewed in the light of the duty of the state to respect, protect, promote and fulfill [the rights in the *Bill of Rights*],”¹⁵⁴ imposed an obligation on the state to ensure that there existed in South African law some form of redress for deprivations

150 *Ibid* at para 59.

151 *Ibid* at paras 58, 59. In fact, the majority did much more than “consider respectfully” Parliament’s choice of means, going out of its way to find the impugned measures constitutional and at points stretching credulity to do so.

152 *Law Society of South Africa v Minister*, (CCT 38/10) [2010] ZACC 25; 2011 (1) SA 400 (CC) [*LSSA v Minister*].

153 *South African Bill of Rights*, being c 2 of the *South African Constitution*, *supra* n 3 s 12(1)(c).

154 *LSSA v Minister*, *supra* n 152 at para 4, citing the *South African Bill of Rights*, *supra* n 3, s 7(2).

of “bodily integrity”¹⁵⁵ caused by negligent drivers. By precluding individuals from pursuing a tort claim, the Court held, the impugned law infringed Section 12(1)(c). The Court also concluded, however, that the infringement could be justified on the basis that although the law eliminated common law claims, it provided a separate cause of action under the Act, albeit one that in some circumstances would restrict the damage award to something less than the damages that would have been available at common law. The government’s goal of “ensuring that the Fund is inclusive, sustainable, and capable of meeting its constitutional obligations towards victims of motor vehicle accidents”¹⁵⁶ justified the restrictions.

LSSA v Minister built upon the Constitutional Court’s decisions in *Carmichele v Minister of Safety and Security* and *Rail Commuters Action Group v Metrorail*.¹⁵⁷ In *Carmichele*, the Court held that “in some circumstances” the guarantees in the *Bill of Rights* ought to be read to include “a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.”¹⁵⁸ The Court applied this dictum in *Metrorail* and held that certain provisions of a statute governing public transit, “read with the provisions of the Constitution,” required the state to adopt “reasonable measures”¹⁵⁹ to secure passengers on commuter trains against violations of their physical security by other transit users.

The result in *LSSA v Minister* flowed logically from an application of the basic precepts of the protective function. The state regularly enacts laws with the aim not only of securing individuals prospectively against threats to their constitutional interests by third parties, but also to provide modes of redress when those interests are harmed.¹⁶⁰ Just as the state enacts criminal laws and assumes responsibility for prosecuting crime in order to “vindicate”¹⁶¹ the individual’s interest in being free from deprivations of security of the person by third parties, so the state might also choose to establish non-criminal modes of redress, as the South African government did when it created the Road Accident Fund. The question is always whether, in exercising its protective

155 *LSSA v Minister, supra* n 152 at para 75.

156 *Ibid* at para 80.

157 *Carmichele, supra* n 120; *Rail Commuters Action Group v Metrorail*, (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC) at para 71 [*Metrorail*].

158 *Carmichele, supra* n 120 at para 44. See also *Metrorail, supra* n 157 at para 71.

159 *Metrorail, supra* n 157 at para 84.

160 On this point, see the discussion of constitutional remedies in *Metrorail, supra* n 157 at paras 79–81.

161 *LSSA v Minister, supra* n 152 at para 74.

function, the state has acted in accordance with the dictates imposed by the Constitution.

What is somewhat surprising about *LSSA v Minister* is how the Constitutional Court structured its analysis. Contrary to its decision in *Metrorail*, the Court in *LSSA v Minister* framed the issue before the court in terms of a “two stage”¹⁶² infringement and justification analysis: the Court asked whether the elimination of the common-law tort claim violated Section 12(1)(c) of the *Bill of Rights*, and whether such a violation was “reasonable and justifiable” within the meaning of the limitations provision of the *Bill of Rights*.¹⁶³ In *Metrorail*, on the other hand, the court did not identify a specific constitutional violation, but rather concluded that the state was required to take “reasonable measures” to ensure that persons using the South African commuter rail system were secured against threats of violence by third parties. The relevant standard in *Metrorail*, accordingly, was “reasonableness.” This standard has been employed by South African courts in the context of assessing whether the state has met its obligations under the socio-economic rights provisions of the *Bill of Rights*,¹⁶⁴ and is more deferential to government decision-making than the principle of proportionality, which governs the limitations analysis under Section 36 of the *Bill of Rights*. For this reason, some uncertainty remains with respect to the appropriate standard to be applied in protective function cases in South Africa, and how that standard will be applied.

Regardless of whether the relevant limiting principle is proportionality or reasonableness, *LSSA v Minister* provides some idea of how the protective function analysis might be structured under Section 7 of the *Charter*. At the first stage of its analysis, the Constitutional Court defines the range of private conduct that will engage the protective function: Section 12(1)(c) will be “engaged whenever there is an ‘immediate threat to life or physical security’ deriving from any source.”¹⁶⁵ It then accepts that negligent driving constitutes such a threat. By curtailing access to common law damage remedies, the Court holds, the legislation prevents a class of individuals from “recover[ing]

162 *S v Zuma and Others*, (CCT 5/94), [1995] ZACC 1; 1995 (2) SA 642 at para 21.

163 *LSSA v Minister*, *supra* n 152 at para 76.

164 See *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT 32/97) [1997] ZACC 17, 1998 (1) SA 765; *Government of the Republic of South Africa and Others v Grootboom and Others*, (CCT 11/00) [2000] ZACC 19, 2001 (1) SA 46; and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*, (CCT 8/02) [2002] ZACC 15, 2002 (5) SA 721, cited in *Metrorail*, *supra* n 159; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd.* (2011), CCT 37/1, [2011] ZACC 33 at para 83.

165 *LSSA v Minister*, *supra* n 152 at para 58.

damages in order to secure their bodily integrity.”¹⁶⁶ The question, then, is whether the substitution of a statutory cause of action for a common law one is consistent with the state’s protective function. Employing the principle of proportionality, the Court finds here that it is.

A similarly structured analysis might be expected under the *Charter* if the courts were to recognize the protective function. It should be noted, however, that two textual features differentiate the *South African Bill of Rights* from the *Charter* in relevant respects. Section 7(2) of the *Bill of Rights* explicitly affirms the state’s obligation to “respect, *protect*, promote and fulfill the rights in the Bill of Rights,” and Section 12(1)(c) guarantees the individual’s right “to be free from all forms of violence from either public *or private* sources.”¹⁶⁷ The explicit recognition of the protective function in Section 7(2) is significant in that it provides a textual basis for obligations that can only be inferred from the text of the *Charter*. Section 12(1)(c) provides further textual recognition of the state’s protective function, although it does not add a great deal to our analysis given that the protective function by definition requires the state to secure individuals against threats to constitutional interests from “private sources.” Although explicit textual reference to the state’s protective function in the *Bill of Rights* makes recognition of this state function less controversial in South Africa, the absence of such provisions in the Canadian *Charter of Rights and Freedoms* need not preclude us from considering what might be learned

The first step in the protective function analysis that I have proposed is to identify a threat to life, liberty and security of the person. At this stage, the focus is on the threat to constitutional interests posed by a third party. It would seem that the state’s protective function would be easily engaged by the threat to security of the person posed by negligent driving that causes physical injury. A Canadian court might then evaluate the legislature’s statutory exercise of its protective function by asking whether the state had fulfilled its obligations in a manner that satisfied the requirements of proportionality.

In determining whether the rights violation is justified, the government in *LSSA v Minister* engages in a proportionality analysis very similar to what has been proposed in this paper. The Court’s reasoning makes clear that the government has options in terms of how it meets its obligations under the protective function: in this case, the state was justified in curtailing access to

166 *Ibid* at para 75.

167 Emphasis added.

tort law remedies because it had determined that limiting the availability of common-law remedies was necessary to “ensur[e] the Fund [wa]s inclusive, sustainable and capable of meeting its constitutional obligations toward victims of motor vehicle accidents.”¹⁶⁸ If similar considerations were at play in the context of Section 7, it seems to me that a Canadian court might also find that the state had met its obligations under the protective function.¹⁶⁹

One interesting dimension of *LSSA v Minister* is that the case contemplates that in some instances the protective function will be satisfied by providing a mode of redress against the third party who has brought about the deprivation of the individual’s constitutional interest (usually through a common law tort action), and in other cases redress will be sought directly from the state, as was the case in *LSSA v Minister*. As the Constitutional Court of South Africa explained in its judgment,

As elsewhere in the world, statutory intervention to regulate compensation for loss spawned by road accidents became necessary because of an increasing number of motor vehicles and the resultant deaths and bodily injuries on public roads. The right of recourse under the common law proved to be of limited avail. The system of recovery was individualistic, slow, expensive and often led to uncertain outcomes. In many instances, successful claimants were unable to receive compensation from wrongdoers who had no means to make good their debts. On the other hand, it exposed drivers of motor vehicles to grave financial risk. It seems plain that the scheme arose out of the social responsibility of the state. In effect, it was, and indeed still remains, part of the social security net for all road users and their dependants.¹⁷⁰

In other words, there are arguably some social ills for which the only effective solution is for the state to provide a service or remedy, typically funded through some regime of taxation.¹⁷¹

168 *LSSA v Minister*, *supra* n 152 at para 80.

169 Note that in *Morrow v Zhang*, the Alberta Court of Appeal rejected a Section 7 challenge to a regulatory scheme very similar to that described in *LSSA v Minister* on the basis that “tort claims are proprietary in nature and courts have held that the right to sue for damages for personal injury is not protected under Section 7.” It is not clear whether this line of case law would bar a successful protective function claim under Section 7. See *Morrow v Zhang*, 2009 ABCA 215, 307 DLR (4th) 678 at para 25, aff’g 2008 ABQB 98, [2008] 5 WWR 689. See also *Whitbread v Walley* (1988), 51 DLR (4th) 509, [1988] 5 WWR 313 (BCCA), aff’ d [1990] 3 SCR 1273, 77 DLR (4th) 25.

170 *LSSA v Minister*, *supra* n 152 at para 17.

171 In the case of the legislation at issue in *LSSA*, the Fund from which damages were paid was funded by a tax placed on fuel: see *LSSA v Minister*, *supra* n 152 at para 21.

The protective function's impact

One might ask at the end of this discussion whether, presuming the *Charter* were interpreted in the manner proposed, such a development would be desirable or appropriate. As I have noted above, the protective function emerged in Germany in recognition of the fact that private entities can deprive individuals of their constitutional interests in much the same way as state actors can.¹⁷² A similar justification for the protective function exists in the Canadian context. Technological developments and increased privatization will only continue to place pressure on the state to play a role in protecting individuals from deprivations of their constitutional interests by third parties.¹⁷³

At its core, the protective function is concerned with facilitating the exercise of constitutional interests in the face of impediments to their exercise by third parties.¹⁷⁴ To understand the significance of recognizing the protective function as a constitutional obligation better, it is useful to compare the Supreme Court of Canada's narrow approach to life, liberty and security of the person under Section 7 with its more generous interpretation of the equality guarantee in Section 15 of the *Charter*.¹⁷⁵ Since the enactment of the *Charter*, the Supreme Court has consistently refused to adopt a formal interpretation of equality.¹⁷⁶ The Court has recognized that in order for individuals to be fully equal, the state must occasionally take positive steps to ensure that traditionally disadvantaged groups have access to equal opportunities. The *Charter* explicitly sanctions the use of affirmative action measures to promote substantive equality for disadvantaged groups,¹⁷⁷ and the Court has recently given more robust application to this provision.¹⁷⁸

172 See pages 6–7, *supra*; Grimm, “Protective Function,” *supra* n 2 at 145–46.

173 Grimm, “Protective Function,” *supra* n 2 at 146–47.

174 Dieter Grimm, “Human Rights and Judicial Review in Germany” in David M Beatty, ed, *Human Rights and Judicial Review: A Comparative Perspective* (The Netherlands: Kluwer Academic Publishers, 1994) 276 [Grimm, “Human Rights”]; Sandra Fredman, “The Positive Right to Security” in Benjamin J Goold & Liora Lazarus, eds, *Security and Human Rights* (Oxford: Hart Publishing, 2007) at 307; Sandra Fredman, *Human Rights Transformed* (Oxford: Oxford University Press, 2008) at 9.

175 I am referring here to the manner in which the Supreme Court of Canada has defined equality, not the resulting outcomes in any individual case.

176 See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 15 [*Kapp*].

177 Section 15(2) of the *Charter*, *supra* n 5 provides that “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

178 See *Kapp*, *supra* n 176.

By contrast, the Supreme Court has more often than not taken a narrow approach to Section 7. Rather than acknowledging that the right to liberty and security of the person is more than the right not to be deprived of these guarantees by the government, the Supreme Court has pursued a narrow, formalistic approach. There is, of course, a great deal more to liberty and security of the person. As Grimm explains, using “freedom” as a substitute for liberty:

Formally conceived, freedom means the absence of government interference. The individual’s possibility of making use of this freedom is outside the range of constitutional law. In a substantial understanding, freedom includes the possibility of using the freedom.¹⁷⁹

The “substantial understanding” of liberty, as Grimm conceives of it, is rather weightier than how liberty is often characterized in the Canadian jurisprudence.

Adopting a “substantial understanding” of Section 7 would bring it into line with other provisions of the *Charter* that have been interpreted more generously. The Canadian government already exercises a protective function in many aspects of Canadian life. Acknowledging the constitutional basis for the protective function would, of course, represent a new phase in Canadian constitutional law. Although the *Charter* does not explicitly affirm the state’s protective function, the Supreme Court has hinted that in some cases, constitutional interests can only be safeguarded with the assistance of the state. In my view, there are compelling reasons for recognizing a constitutional basis for this essential responsibility of the state.

179 Grimm, “Human Rights,” *supra* n 174.