

“A Citizen’s Response”
to the Supreme Court of Canada’s Decision
Re the Government’s Right to Criminalize
the Possession of Marijuana (2003):
by
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On December 23, 2003 the Supreme Court of Canada declared that it is not a violation of the *Charter of Rights and Freedoms* for the Government to criminalize the possession of marijuana. I am writing this response, not because I expect the Court to pay the slightest attention to it, but to open a debate with my fellow citizens as to the kind of laws we should be governed by, and our means of holding the Government to its responsibility to enact fair, effective laws. I will first address some specific points of difference with the Court’s judgment, and then discuss three tests which should be applied under Section 1 of *The Charter of Rights & Freedoms* to laws which limit our rights, and inflict harm (punishment) on us.

The point of view of the Court throughout is that of the state, and not the citizen. For example, it writes of the state’s “. . . interest in the avoidance of harm to its citizens” (p.3), rather than of the citizen’s interest in the avoidance of harm from our state, and seems not to have noticed the contradiction in the curious notion that to avoid citizens harming ourselves, the state has the right to inflict harm on us instead.

The Court seems not to take into account who the state (or more accurately, the state’s agent, the Government, through Parliament) is: ordinary women and men elected by their fellow citizens to serve us—not to set themselves up as our moral superiors, nor to punish us for behaviour of which they disapprove. Neither singly, nor together, the state, Parliament, and the Government, are not our parents, our guardians, or our masters; they are our servants, and the primary function of the *Charter of Rights and Freedoms* is to keep them in their place. The *Charter* belongs to us, not to our institutions, and its proper function is not to benefit the Government, but to protect us from its excesses, and to set a standard against which laws which limit our rights can be measured.

In particular, I differ with the Court regarding a) its denial that the ‘harm principle’ is a principle of fundamental justice; b) its standard of ‘gross disproportionality’; c) its denial that the Government’s use of the *Criminal Code* for some recreational drugs

and not others is arbitrary; d) its position that the end justifies the means; and e) its practice of denying citizens access to Section 1 of the *Charter*, unless we can first prove an infringement under other sections.

a) The 'harm principle'

The 'harm principle, as expressed by J. S. Mill in *On Liberty*, and quoted by both the appellant and the Court is "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others". The Court's denies that this is a principle of fundamental justice.

My position is that the question of harm caused to others by the citizen vs. harm inflicted on citizens by the state *is* one of fundamental justice. However, I would not define the principle as broadly as Mill does. The issue is not whether the Government has the right to exercise some power over us; obviously, it does, or it couldn't function at all. The issue is not even whether the Government may use the Criminal Code to deal with some problems; the issue is whether the Government is justified in using the Criminal Code (an especially severe exercise of power) to punish actions which in and of themselves do not harm others in a criminal way. (I will deal with the distinction between criminal and other harm, and related issues, further on.)

But the Court argues that to be a principle of fundamental justice ". . . for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." (p. 34)

I suggest that we have had such a standard for thousands of years: "An eye for an eye, a tooth for a tooth". This means not only that one is allowed to exact an eye for an eye, or a tooth for a tooth, but further, that one cannot exact *more than* an eye for an eye. Since this dictum is found in writings which are part of the heritage of three of the major religious groups in Canada, I suggest there is 'significant societal consensus' that the harm principle *is* one of fundamental justice.

As for providing a manageable standard, take the following illustrative example: A citizen is sitting quietly at home, alone, smoking a joint, harming no one. The police arrive, and 1) break down the door, 2) ransack the house, 3) cart away everything from

pipes to computers, 4) handcuff the citizen's arms behind their back, 5) take them out to the squad car before the eyes of the assembled neighbourhood, 6) lodge the citizen in jail (perhaps 7) for a couple of nights, if the arrest occurs on the weekend, perhaps for even longer, if they can't raise bail), and 8+) begin the long, involved, expensive process which will cost the citizen inordinate amounts of time, energy, money, and reputation, even if they are acquitted, and cost every one of us inordinate amounts of taxes. Harm by the citizen—0; harms to the citizen—7, and counting; harms to society—numerous (these will be discussed later). Although the harms in the example may seem relatively minor (until you actually experience them yourself) they are only the beginning—and already at least a tooth has been taken, for a fingernail paring. Which leads me to my second point,

b) the Court's standard of 'gross disproportionality'.

The Court holds that only harm that is 'grossly disproportional' to the offence is an infringement of the *Charter*. The treatment described above, or much worse, is not 'grossly disproportional' because 'gross disproportionality' to the Court means, "punishments that are more than *merely excessive*" [emphasis added]; punishments ". . . that Canadians would find . . . abhorrent or intolerable". The Court's view seems to be that, 'merely excessive' punishments, and other drawbacks of the law, ". . . are part of the social and individual costs of having a criminal justice system." (p.42)

To some extent, this is true; no system of justice will be perfect, but that does not mean that the costs listed above are unavoidable, or acceptable. At the very least, in order to impose such costs, the Government has a commensurate responsibility to a) provide real benefits for those very real costs beyond merely having 'a justice system', regardless of its actual quality and efficacy; b) not to impose such costs without justifiable reason; and c) to limit those costs as much as possible. We do not live in 'a free and democratic society' if citizens must bear the costs of arrest, imprisonment, legal fees, and on and on, to support bad laws, or an unfair, ineffective justice system.

The Court has set the bar of disproportionality so high that the Government is largely free to harass and punish us for any behaviour of which it disapproves, regardless of the actual efficacy of its laws, or the harm they may inflict on citizens, and society as a whole. I do not accept that the Government should have that kind of power over me, nor do I agree that such power falls ". . . within the broad latitude within which the Constitu-

tion permits legislative action.” (Interesting that here the Court uses “Constitution” and not “*Charter*”). In my reading of Section 1 of the *Charter*, the fact that the Government must ‘demonstrably justify’ the *reasonable* limits it places on us, indicates that its latitude is not broad, but quite narrow. I will return to the requirement of demonstrable justification a little later. [Italics added]

c) arbitrariness

The fact that someone indulging in an equally, or even more, harmful drug (alcohol, for example) is not punished, while someone using marijuana is, is not, in the Court's view, an arbitrary distinction, but merely the Government exercising its right to make criminal law as it sees fit. The Court reasons that criminalizing some drug use, but not others, is not arbitrary because the state has, as mentioned, an interest in “. . . the avoidance of harm to those subject to its laws” (p.3), and “. . . a particular interest in acting to protect vulnerable groups”, (among whom it includes pregnant women, and those with pre-existing diseases), stating that this is, “. . . also consistent with Charter jurisprudence affirming the state's power to intervene to protect children whose lives are in jeopardy and to promote their well-being” (p.38). In the Court's view, we are children upon whom the Government, whenever it apprehends a possible harm to us, has a general right to inflict even more harm to ‘protect’ us. Curious reasoning, to say the least.

We are not children. Pregnant, chronically ill, or not, we are adult citizens who are perfectly capable of deciding for ourselves whether or not to use any particular drug, and do not need the Government acting as our nanny.

Furthermore, in exercising its power to make criminal law, the Government has a responsibility to be fair and consistent. Since smoking tobacco and drinking alcohol are at least as potentially harmful to the user as heroin, cocaine or marijuana, in the absence of any evidence to the contrary (and in the teeth of the evidence that criminalizing drug use in fact encourages it, and supports the profits of organized crime), the decision to criminalize the possession of some recreational drugs and not others *is* purely arbitrary. In denying such arbitrariness, the Court takes the position that

d) the end justifies the means. It declares, “For a law to be classified as a criminal law, it must have a valid criminal law *purpose* backed by a prohibition and a penalty,” (p. 3) and further, that “In particular, criminalization *seeks* to take marihuana out of the

hands of users and potential users to prevent the associated harm and to eliminate the market for traffickers.” (p.38) [emphases added] In other words, the end justifies the means. In fact, as the laws which criminalize drug use amply demonstrate, bad means corrupt laudable ends. Rather than being eliminated, ‘the market for traffickers’, is created by the laws criminalizing possession, cultivation, and distribution. If marijuana (or any other recreational drug) were regulated, licensed, and taxed as alcohol and tobacco are, the only black market would be one created by excessively high taxes. (There is a point beyond which citizens will not be pushed, and when the Government goes beyond this point, all kinds of undesirable consequences, such as black markets, smuggling, and increased violence, occur.)

Unfortunately, the Court does not allow citizens to make such arguments unless and until, we have proven an infringement of our rights under one of the other sections of the Charter, which, as has been shown, is extraordinarily difficult to do, given the Court's standards and its bias towards the state.

e) Access to Section 1

Section 1, in its entirety, reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

This is not some afterthought, tacked on at the end of the *Charter* to be used merely as a defence by the Government; this is the first section, the section which sets a standard for all which follow. It provides that any limits on our rights must be ‘reasonable’—not ‘grossly disproportional’—*reasonable*. And those limits must be ‘demonstrably justified’. The Government not only must have a good purpose in mind, it must also demonstrate that its means, in this case, the Criminal Code, actually delivers the desired results, in the context of ‘a free and democratic society’. Whatever else ‘free’ may mean to citizens, I’m sure most would agree that it begins with the right to be left alone by the Government, except for justifiable cause. (A right which, though not specifically mentioned, is protected by Section 26, which reads, “The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”)

But the Court regards Section 1 merely as a defence to an infringement of other

sections. Braidwood, J. A., of the Court of Appeal, summarized the evidence of the harm caused by the prohibition itself. The Supreme Court states, "In effect, the exercise undertaken by Braidwood, J. A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s.7." (p. 45) However, the Court concludes, since ". . . the accused have not established an infringement of s. 7, there is no need to call on the Government for a s. 1 justifications," (p.4) thus arbitrarily denying us access to the single most important section of our *Charter*, the one which sets the standard for the rest.

This is too limited a view. Section 1 is first and foremost, a standard against which legislation which limits our rights should be judged, prior to any specific infringements of other sections being proved. Regarding recreational drug use, my position is that an infringement of Section 7 does exist, but even if it did not, citizens should be able to challenge laws directly under Section 1, and make the Government demonstrate that such laws are both needed, and effective.

Having discussed some specific points of disagreements with the Supreme Court's decision that the Government has the right to criminalize the possession of marijuana, I will now turn to the tests that should be applied if we were allowed to directly challenge a law under Section 1: Is the law necessary? Is it effective? and Does it cause less harm, to individuals and society, than the harm it is intended to address?

The law must pass all three tests to justify limiting our rights by criminalizing our behaviour. If it does so, then any specific infringements can be dealt with under the appropriate section, and either justified, or corrected; if the law does not pass these tests, then specific infringements don't matter because the entire law would be invalid. This process would enable citizens, the Courts, the Government, and Parliament, to work together to craft laws which do the job intended, without unnecessarily intruding into citizens' lives.

The Proper Role of Government

Where do we draw the line? When is the Government justified in interfering in our private lives? Regarding the use of criminal sanctions, the line should be drawn between those acts which intentionally (or through willful negligence) cause direct harm to

others, and those acts which do not. The peaceful use of, and trade in, recreational drugs is not a real crime (or even a misdemeanour); impaired driving, whether due to drugs, alcohol, or fatigue, is.

The mistaken assumptions underlying the war on drugs are: a) that the Government has the right to inflict harm upon us to save us from harming ourselves, and b) that the best way to deal with an activity the Government deems undesirable is try to eliminate it by making it a criminal offence. But when phony crimes are created, the outlawed activities escape control completely by being driven underground, where they flourish. To enjoy a freer and more manageable society, we need to focus on encouraging responsible use of recreational drugs (which would include, but not be limited to, non-use), instead of enacting, and then trying to enforce, blanket prohibitions.

When the Government uses force to save us from ourselves, it oversteps itself. Citizens wish to engage in various kinds of activities deemed vices by others, and the law, as has been shown over and over again, is powerless to stop us. The Government's proper role is not to act as our protector, or parent, or moral arbiter, but to provide the legal framework within which adults can enjoy the 'vices' of their choice in a peaceful and orderly fashion. The Government's duty is to ensure, among other things, that drugs are pure, accurately measured, and correctly labelled (including appropriate warnings, if any); that games of chance are honest; that prostitutes are of age, and free of disease; that brothels are small, quiet, and co-operatively owned; and that all who profit from such activities pay their fair share of taxes.

Unfortunately, the Supreme Court favours what it sees as the state's ". . . interest in the avoidance of harm to its citizens", as if we belonged to the state, instead of the state belonging to us. It is not the Government's interests, but the rights and interests of citizens that the *Charter* is intended to protect.

The Court would probably argue that the proper venue for protesting the law and trying to change is Parliament and the political process. It is true that this course can and should be pursued; however, the political process works best when the Court is cognizant of the fact that it is often not well-suited to resolving single issues. Quite properly, voters tend to choose their representatives based on a wide range of considerations, and not on one issue alone, which means that, even if they support the legalization of drugs, they

may choose to vote for a non-supporter of that position for other reasons that are more important to them. This is a valid choice on their part (nor would it be good for the country if elections were decided primarily on single issues), but that choice ought not to leave their fellow citizens without recourse against specific laws.

If, in this instance, the Court had chosen to declare that criminalization was unconstitutional, and thrown the problem back to the Government and Parliament for another try at solving it, then citizens would be given a real hearing on this issue in the following election because Parliament would have to address it. However, since the Court ruled that it doesn't infringe the *Charter* for the Government to inflict harm on us when no commensurate harm has been caused, the political process has been defused. Not only will candidates have less incentive to discuss the issue (beyond, perhaps, 'decriminalization' which will do nothing except to whitewash the status quo), they are all too likely to throw the Court's decision in the faces of those who think our Charter rights have been transgressed.

To make the political process truly responsive to citizens, we need a Court that is willing to give our interests at least equal standing with the Government's; not a Court which interprets our *Charter* exclusively from the Government's point of view.

Summary

The Court's decision upholding the Government's right to create victimless crimes reduces us from citizens to children, chastised for 'our own good' by the very people we elect to serve us—our peers, ordinary men and women who have elevated themselves above their station by acting as our nannies. From this falsely superior position, they continue to criminalize drug use, regardless of the inappropriateness and ineffectiveness of their policy, its horrendous cost, and the harm it creates for citizens and society alike. The *Charter* should protect citizens from such legislated abuse, but I no longer believe the Supreme Court can be relied on to uphold the rights of citizens against the desire of the Government to act *in loco parentis*. Loco indeed are the consequences, for we are saddled with laws which create far greater harm than the harm they supposedly address, and no end to this insanity is in sight.