Reading: R. v. Malmo-Levine; R. v. Caine *(Law and morality: readings in legal philosophy)*

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of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences ...

READING QUESTIONS ON MILL

1 How broadly or narrowly must harm be construed for Mill's view to provide a defence of liberty?
2 What implications does Mill's focus on social injustice, rather than the injustice of the state, have for the liberal claim that the state should be neutral?
3 How are Mill's views about freedom of expression related to his understanding of individual autonomy?

R. v. Malmo-Levine; R. v. Caine [2003] 3 SCR 571

This case raised the issue of whether the criminalization of the simple possession of marihuana for personal use violates s. 7 of the *Charter*.

Gonthier and Binnie, JJ. writing for the majority:

In these appeals, the Court is required to consider whether Parliament has the legislative authority to criminalize simple possession of marihuana and, if so, whether that power has been exercised in a manner that is contrary to the *Canadian Charter of Rights and Freedoms*. The appellant Caine argues in particular that it is a violation of the principles of fundamental justice for Parliament to provide for a term of imprisonment as a sentence for conduct which he says results in little or no harm to other people. The appellant Malmo-Levine puts in issue the constitutional validity of the prohibition against possession for the purpose of trafficking in marihuana ...

The evidentiary issue at the core of the appellants' constitutional challenge is the "harm principle," and the contention that possession of marihuana for personal use is a "victimless crime." The appellants say that even with respect to the user himself or herself there is no cogent evidence of "significant" or "non-trivial" harm ...

There is no doubt that Canadian society has become much more sceptical about the alleged harm caused by the use of marihuana since the days when Emily Murphy, an Edmonton magistrate, warned that persons under the influence of marihuana "los[e] all sense of moral responsibility ... are immune to pain ... becom[ing] raving maniacs ... liable to kill ... using the most savage methods of cruelty" (*The Black Candle* (1922), at pp. 332–33). However, to exonerate marihuana from such extreme forms of denunciation is not to say it is harmless ...

The trial judge noted that the 1994 Hall Report identified three traditional "high risk groups" (at para. 46):

(1) Adolescents with a history of poor school performance;
(2) Women of childbearing age; and
(3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies.

The inclusion of "women of childbearing age" may have to be reconsidered in light of more recent studies casting doubt on marihuana as a potential source of birth defects. However, given the immense importance of potential birth defects for all concerned, and the widely recognized need for further research, we have to accept that on this point as on many others "the jury is still out." ...

SECTION 7 OF THE *CHARTER*

The appellant Malmo-Levine argues that smoking marihuana is integral to his preferred lifestyle, and that the criminalization of marihuana in both its possession and trafficking aspects is an unacceptable infringement of his personal liberty.

The appellant Caine, on the other hand, takes aim at the potential for imprisonment for conviction of possession of marihuana, and argues that imprisonment for such an offence is not in accordance with the principles of fundamental justice. If the penalty falls, he says, the substantive offence must fall with it.

These "liberty" interests are, of course, very different. We propose therefore first to identify the s. 7 "interest" properly at stake, then secondly to discuss the applicable principles of fundamental justice. Thirdly we will examine whether the deprivation of the s. 7 interest thus identified is in accordance with the principles of fundamental justice relevant to these appeals. As will be seen, we find no s. 7 infringement.

It will therefore not be necessary to move to s. 1 to determine if an infringement would be justified in a free and democratic society.

We say at once that the availability of imprisonment for the offence of simple possession is sufficient to trigger s. 7 scrutiny: *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486. However, Malmo-Levine's position (which is supported by the intervener British Columbia Civil Liberties Association) requires us to address whether broader considerations of personal autonomy, short of imprisonment, are also sufficient to invoke s. 7 protection ...

While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, "basic choices going to the core of what it means to enjoy individual dignity and independence" (*Godbout*, *supra*, at para. 66).

In our view, with respect, Malmo-Levine's desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection. There is no free-standing constitutional right to smoke "pot" for recreational purposes.

The appellants also invoke their s. 7 interest in "security of the person." In *Morgentaler*, *supra*, Dickson, C.J. accepted that "serious *state-imposed* psychological stress" (p. 56 [emphasis added]) would suffice to infringe this interest. The appellants, however, contend that use of marihuana is non-addictive. Prohibition would not therefore lead to a level of stress that is constitutionally cognizable. A very different issue would arise if the marihuana was required for medical purposes, but neither appellant uses marihuana for such a purpose.

The availability of imprisonment is a different matter. We have no doubt that the risk of being sent to jail engages the appellants' liberty interest. Accordingly, it is necessary to move to the next stage of the s. 7 analysis to determine what are the relevant principles of fundamental justice and whether this risk of deprivation of liberty is in accordance with the principles of fundamental justice.

The appellants accept that Parliament may act to avoid harm to others without violating principles of fundamental justice. They focus on the alleged absence of such harm, and contend that it is a denial of

fundamental justice to deprive them of their liberty where such denial does not enhance a legitimate interest of the state. To hold otherwise, they say, would require the courts to endorse the arbitrary or irrational use of the criminal law power, contrary to the principles of fundamental justice. As Sopinka, J. stated in *Rodriguez*, *supra*, at p. 594:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

The appellants' s. 7 arguments have several branches predicated on the requirement of harm. First, they argue that the only permissible target of the criminal law is harm to others; in their view, the criminal law cannot prohibit conduct that harms only the accused. Second, they argue that, in any event, marihuana is not a harmful substance, so that the prohibition of simple possession is arbitrary or irrational. Third, they argue that the criminalization of cannabis possession has adverse consequences, both for those users who are charged and convicted and, because of the disrespect engendered by the law, for the administration of justice generally, that are wholly disproportionate to the societal interests sought to be served by the prohibition ...

The appellant Malmo-Levine further submits that any harm-based analysis should focus on the healthy user who engages in harm-reduction strategies. He argues that the Court of Appeal erred "when they characterized the harms that may come with cannabis use as inherent, instead of a product of mis-cultivation, mis-distribution and mis-use" ...

We wish to be clear that we do not accept Malmo-Levine's argument that Parliament should proceed on the assumption that users will use marihuana "responsibly." We accept his point that careful use can mitigate the harmful effects, but it is open to Parliament to proceed on the more reasonable assumption that psychoactive drugs will to some extent be misused. Indeed, the evidence indicates the existence of both use and misuse by chronic users and by vulnerable groups who cause harm to themselves.

Malmo-Levine's related argument, that the pleasure of a large number of people should not be curtailed because of (he says) relatively minor harm to a minority, is similarly misplaced under s. 7. Utilitarian arguments that urge a cost-benefit calculation of alleged benefit to the

many versus alleged harm to the few, to the extent such arguments are relevant under the *Charter*, belong in s. 1. The appellants must first of all establish a violation of their s. 7 rights. Only if they are able to do so is the government then required to show that the purported limitation is demonstrably justified in a free and democratic society.

The appellants contend that unless the state can establish that the use of marihuana is harmful to others, the prohibition against simple possession cannot comply with s. 7. Our colleague Arbour, J. accepts this proposition as correct to the extent that "the state resorts to imprisonment" (para. 244). Accordingly, a closer look at the alleged "harm principle" is called for.

... It is agreed by all parties that the *existence* of harm, especially harm to others, is a state interest sufficient to ground the exercise of the criminal law power. The appellants' contention, however, is that the *absence* of demonstrated harm to others deprives Parliament of the power to impose criminal liability. That is what they call the "harm principle" ...

What is the "harm principle"? The appellants rely, in particular, on the writings of the liberal theorist, J.S. Mill, who attempted to establish clear boundaries for the permissible intrusion of the state into private life:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant ...

Thus Mill's principle has two essential features. First, it rejects paternalism – that is, the prohibition of conduct that harms only the actor. Second, it excludes what could be called "moral harm." Mill was of the view that such moral claims are insufficient to justify use of the criminal law. Rather, he required clear and tangible harm to the rights and interests of others ...

Mill's statement has the virtues of insight and clarity but he was advocating certain general philosophic principles, not interpreting a constitutional document. Moreover, even his philosophical supporters have tended to agree that justification for state intervention cannot be reduced to a single factor – harm – but is a much more complex matter. One of Mill's most distinguished supporters, Professor H.L.A. Hart, wrote:

> Mill's formulation of the liberal point of view may well be too simple. The grounds for interfering with human liberty are more various than the single criterion of "harm to others" suggests: cruelty to animals or organizing prostitution for gain do not, as Mill himself saw, fall easily under the description of harm to others. Conversely, even where there is harm to others in the most literal sense, there may well be other principles limiting the extent to which harmful activities should be repressed by law. So there are multiple criteria, not a single criterion, determining when human liberty may be restricted.

... The appellants submit that the harm principle is a principle of fundamental justice for the purposes of s. 7 that operates to place limits on the type of conduct the state may criminalize ... However, we do not agree with the attempted elevation of the harm principle to a principle of fundamental justice. That is, in our view the harm principle is not the constitutional standard for what conduct may or may not be the subject of the criminal law for the purposes of s. 7.

In *Re B.C. Motor Vehicle Act*, *supra*, Lamer, J. (as he then was) explained that the principles of fundamental justice lie in "the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system" (p. 503). This Court provided further guidance as to what constitutes a principle of fundamental justice for the purposes of s. 7, in *Rodriguez*, *supra*, *per* Sopinka, J. (at pp. 590–91 and 607):

> A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified

with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.

...

While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people.

The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder *only*": *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that 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.

(a) Is the Harm Principle a Legal Principle?

In our view, the "harm principle" is better characterized as a description of an important state interest rather than a normative "legal" principle. Be that as it may, even if the harm principle could be characterized as a legal principle, we do not think that it meets the other requirements, as explained below.

(b) There Is No Sufficient Consensus That the Harm Principle Is Vital or Fundamental to Our Societal Notion of Criminal Justice

Contrary to the appellants' assertion, we do not think there is a consensus that the harm principle is the sole justification for criminal prohibition. There is no doubt that our case law and academic commentary are full of statements about the criminal law being aimed at conduct that "affects the public," or that constitutes "a wrong against the public welfare," or is "injurious to the public," or that "affects the community." No doubt, as stated, the *presence* of harm to others may justify legislative action under the criminal law power. However, we do not think that the *absence* of proven harm creates the unqualified barrier

to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused ...

Several instances of crimes that do not cause harm to others are found in the *Criminal Code*, RSC 1985, c. C-46. Cannibalism is an offence (s. 182) that does not harm another sentient being, but that is nevertheless prohibited on the basis of fundamental social and ethical considerations. Bestiality (s. 160) and cruelty to animals (s. 446) are examples of crimes that rest on their offensiveness to deeply held social values rather than on Mill's "harm principle" ...

The appellants also rely on a 1982 report by the Law Reform Commission of Canada entitled *The Criminal Law in Canadian Society* which concludes, at p. 45, that the criminal law "ought to be reserved for reacting to conduct that is seriously harmful." This seems, on its face, to support the harm principle. However, the report goes on to state, at p. 45, that such harm

> ... may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values – those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians.

Such a definition of "harm" is clearly contrary to Mill's harm principle as endorsed by the appellants.

(c) Nor Is There Any Consensus That the Distinction between Harm to Others and Harm to Self Is of Controlling Importance

... [W]e do not accept the proposition that there is a general prohibition against the criminalization of harm to self. Canada continues to have paternalistic laws. Requirements that people wear seatbelts and motorcycle helmets are designed to "save people from themselves." There is no consensus that this sort of legislation offends our societal notions of justice. Whether a jail sentence is an appropriate penalty for such an offence is another question. However, the objection in that aspect goes to the validity of an assigned punishment – it does not go to the validity of prohibiting the underlying conduct ...

(d) The Harm Principle Is Not a Manageable Standard Against Which to Measure Deprivation of Life, Liberty or Security of the Person

Even those who agree with the "harm principle" as a regulator of the criminal law frequently disagree about what it means and what offences will meet or offend the harm principle. In the absence of any agreed definition of "harm" for this purpose, allegations and counter-allegations of non-trivial harm can be marshalled on every side of virtually every criminal law issue ...

... In the present appeal, for example, the respondents put forward a list of "harms" which they attribute to marihuana use. The appellants put forward a list of "harms" which they attribute to marihuana prohibition. Neither side gives much credence to the "harms" listed by the other. Each claims the "net" result to be in its favour.

In the result, we do not believe that the content of the "harm" principle as described by Mill and advocated by the appellants provides a manageable standard under which to review criminal or other laws under s. 7 of the *Charter*. Parliament, we think, is entitled to act under the criminal law power in the protection of legitimate state interests other than the avoidance of harm to others, subject to *Charter* limits such as the rules against arbitrariness, irrationality and gross disproportionality, discussed below ...

Arbour, J. (dissenting in Caine):

... We are asked to address, directly for the first time, whether the *Charter* requires that harm to others or to society be an essential element of an offence punishable by imprisonment. In a landmark 1985 case, Lamer, J. (as he then was) said : "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter*" (*Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, at p. 492 ("*Motor Vehicle Reference*")). In my view, a "person who has not really done anything wrong" is a person whose conduct caused little or no reasoned risk of harm or whose harmful conduct was not his or her fault. Therefore, for the reasons that follow, I am of the view that s. 7 of the *Charter* requires not only that some minimal mental element be an essential element of any offence punishable by imprisonment, but also that the prohibited act be harmful or pose a risk of harm to others. A law

that has the potential to convict a person whose conduct causes little or no reasoned risk of harm to others offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter*. Imprisonment can only be used to punish blameworthy conduct that is harmful to others ...

It is a fundamental substantive principle of criminal law that there should be no criminal responsibility without an act or omission accompanied by some sort of fault. The Latin phrase is *actus non facit reum, nisi mens sit rea* or "[t]he intent and the [a]ct must both concur to constitute the crime" ... Legal causation, which seeks to link the prohibited consequences to a culpable act of the accused, also reflects the fundamental principle that the morally innocent should not be punished (see *R. v. Nette*, [2001] 3 SCR 488, 2001 SCC 78, at para. 45). In determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred from his or her conduct. As I said in *Nette*, *supra*, at para. 47, "[w]hile causation is a distinct issue from *mens rea*, the proper standard of causation expresses an element of fault that is in law sufficient, in addition to the requisite mental element, to base criminal responsibility." This inquiry seeks in fact to determine whether blame can be attributed to the accused and is illustrative of criminal law's preoccupation that both the physical and mental elements of an offence coincide to reflect the blameworthiness attached to the offence and the offender ...

What exactly is wrong or blameworthy in a given criminal offence is rarely an object of debate and is usually described by the harm or risk of harm associated with the conduct. Indeed, harm is so intrinsic to most offences that few would contest, for example, the harm to others associated with murder, assault, or theft. Murder affects the fundamental right to life; assault affects the victim's security and dignity; and theft affects the victim's material comfort and, in certain circumstances, his or her right to security, dignity and privacy ...

... [H]arm or the risk of harm is a determinative factor in the assessment of the seriousness or wrongfulness of prohibited conduct. Harm associated with victimizing conduct, i.e., conduct which infringes on the rights and freedoms of identifiable persons, is the most obvious, and the concern usually is with how much the person has been harmed. This, in turn, is likely to dictate the extent of punishment or the difference in the labelling of an offence, as well as the level of *mens rea*

necessary to establish culpability. Other forms of conduct cause harm that is more diffuse, where no identifiable persons have had their rights or freedoms infringed by the conduct; the harm there is collective and it is the public interest that is adversely affected. Finally, other conduct is even more distant from this notion of harm, and the prohibition of that conduct is aimed at advancing public interests distinct from the protection of individuals or society ...

I am of the view that the principles of fundamental justice require that whenever the state resorts to imprisonment, a minimum of harm to others must be an essential part of the offence. The state cannot resort to imprisonment as a punishment for conduct that causes little or no reasoned risk of harm to others. Prohibited conduct punishable by imprisonment cannot be harmless conduct or conduct that only causes harm to the perpetrator. As Braidwood, J.A. said in Caine, "it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others" (para. 134) ...

READING QUESTIONS ON *MALMO-LEVINE*

1 What are the Majority's reasons for rejecting the harm principle as a principle of fundamental justice? How does Arbour, J. respond? What do you think she might say in answer to the Majority's objection that the harm principle is not a manageable legal standard?
2 Would the Majority really disagree with Arbour, J.'s claim that "a person who has not really done anything wrong" cannot justly be imprisoned? How might they understand the idea of a legal "wrong," in such a way as to accept this claim and yet reject the harm principle? Do you think we should understand the idea of a legal wrong in this way, or in the way that Arbour, J. conceives of it?

R. v. Labaye [2005] 3 SCR 728, 2005 SCC 80

This case examines the relevance of consent to the state's power to criminalize conduct.