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A SECOND CHANCE FOR THE HARM PRINCIPLE IN SECTION 7? GROSS DISPROPORTIONALITY POST-*BEDFORD*

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INTRODUCTION

For what purposes can the state legally imprison its citizens? This basic question has been the source of rich legal scholarship, from Jon Stuart Mill's harm principle to the storied debate between Sir Patrick Devlin and H.L.A. Hart over the place of legal moralism.[1] The Canadian judiciary has not escaped the question. In the 2003 *R v Malmo-Levine* ("*Malmo-Levine*") decision, the Supreme Court of Canada ("SCC") rejected the notion of the harm principle as a principle of fundamental justice and, thus, a source of protection under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[2] In a powerful dissent, Justice Arbour found that the state cannot resort to imprisonment for acts that do not cause or risk harm to others. In subsequent decisions, the Court has identified and elaborated on both the recognized principles of fundamental justice[3] and the appropriate frameworks for assessing harm.[4] This paper will argue that the gulf between the majority and Justice Arbour's dissent in *Malmo-Levine* can best be addressed by adopting a harm sub-rule within the fundamental principle of justice barring 'grossly disproportionate' laws. This harm sub-rule will put forward that a criminal law will be found to be grossly disproportionate where the punishment is imprisonment and the object of the law does not include the prevention of non-trivial harm or risk of harm to others. This paper will begin by examining the Court's exploration of the harm principle in *Malmo-Levine*, as well as its characterization of gross disproportionality in *Bedford*. The proposed sub-rule will then be presented, and the case will be made that its adoption would serve to clarify the values guiding the application of the gross disproportionality principle and also address the core of Justice Arbour's concern in *Malmo-Levine*. Finally, possible counter arguments will be considered, as well as the special circumstance of morality based crimes.

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1 John Stuart Mill, *On Liberty* (Boston: James R Osgood and Company, 1871) at 7-32; Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); HLA Hart, "Immorality and Treason", *The Listener* (30 July 1959) 162 at 162-63.

2 *R v Malmo-Levine*, 2003 SCC 74 (available on CanLII) [*Malmo-Levine*]; *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, s 7.

3 *Canada (AG) v Bedford*, 2013 SCC 72 (available on CanLII) [*Bedford*].

4 *R v Labaye*, 2005 SCC 80 (available on CanLII) [*Labaye*].

PART I. *MALMO-LEVINE*: THE DEBATE OVER THE HARM PRINCIPLE AS A PRINCIPLE OF JUSTICE

The harm principle, famously put forward by John Stuart Mill, states that "[t]he 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."[5] *Malmo-Levine* was a case concerning the criminalization (including the possibility of imprisonment) of marijuana possession. In the case, the appellant argued that the harm principle was a principle of fundamental justice protected by section 7 of the *Charter*. The majority rejected this claim, *inter alia*, finding that the harm principle was too ambiguous to be used in a precise manner.[6] Justice Arbour, however, found the harm principle to be a principle of fundamental justice, stating that "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."[7] Further, Justice Arbour, going *beyond* Mill's classical conception of the harm principle, found that in order for criminalization to be justified "[t]he harm or risk of harm to society caused by the prohibited conduct *must outweigh* any harm that may result from enforcement."[8] Thus the decision revealed not a gap, but rather a gulf between Justice Arbour and the majority on an issue of critical importance to Canadian criminal law.

PART II. *BEDFORD* AND THE GROWTH OF GROSS DISPROPORTIONALITY?

While the majority in *Malmo-Levine* clearly rejected the idea of the harm principle as a principle of fundamental justice, the past two decades have seen the organic evolution of the concepts of arbitrariness, overbreadth, and gross disproportionality as principles of fundamental justice. These principles were most recently clarified by the SCC in the 2013 *Bedford* case. The Court found that arbitrariness applies to a situation where there is no rational connection between the effect and the object of a law,[9] while overbreadth occurs where a law goes too far and interferes with actions that have no connection to its objective.[10] The third principle, which is the focus of this paper, is the concept of gross disproportionality. In *Bedford*, the Court found that the gross disproportionality principle would be violated where a law deprived an individual of life, liberty, or security of the person "in a manner that is grossly disproportionate to the law's objective. The law's impact on the s.7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms."[11] The proportionality assessed is thus between a law's purpose and its impact.

While the *Bedford* decision clarified these emergent principles of fundamental justice, they are still relatively new and will arguably continue to develop. Alana Klein noted just prior to the *Bedford* decision that "[w]e are in the early days of the development of the principles of fundamental justice that relate to the means-ends fit, or proportionality, of government action."[12] Thus there is value in exploring just how these principles might further evolve and, specifically, if the inclusion of some variant of the harm principle might fit well within an expanded principle of gross disproportionality.

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5 Mill, *supra* note 1 at 23.

6 *Malmo-Levine*, *supra* note 2 at para 127.

7 *Ibid* at para 244.

8 *Ibid* at para 249 [emphasis added].

9 *Bedford*, *supra* note 3 at para 98.

10 *Ibid* at para 101.

11 *Ibid* at para 109.

12 Alana Klein, "The Arbitrariness in 'Arbitrariness' (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013) 63 SCLR (2d) 377 at 387.

A. Further Exploration of Gross Disproportionality

In *Bedford*, the Court found that the concept of gross disproportionality was best captured by the hypothetical example of a law "with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk."[13] By providing this example, the Court affirmed that it has a role to play in weighing the purpose of a law against the direct impact of its enforcement, not just in terms of possible collateral harm such as the effects of the prostitution laws in *Bedford*, *but also with regard to the direct harm of imprisonment itself*. Thus, while recent jurisprudence has focused on gross disproportionality in the context of section 7 security of the person challenges (including the *Bedford* case itself),[14] with the 'sidewalk spitter' example, the Court confirmed that the gross disproportionality principle also properly applies to section 7 liberty challenges.

Note that the majority in *Malmo-Levine* had previously questioned whether punishment could properly be considered under section 7. The majority found that the issue of punishment (and specifically imprisonment) should be considered under section 12 of the *Charter,* which protects against cruel and unusual treatment or punishment, and not section 7, which addresses fundamental principles of justice.[15] Justice Arbour, however, rejected the decision of the majority, finding that a consideration of imprisonment as punishment was required for a proper section 7 analysis.[16] By providing the 'sidewalk spitter' scenario in *Bedford* as *the* example of gross disproportionality, the Court confirmed that imprisonment can properly be considered under section 7, and not only section 12.

In terms of exploring the potential application and expansion of the gross disproportionality principle, it is also worth emphasizing that the Court has recently affirmed not only the existence of the principle in theory, but also a willingness to find it in practice. In *Bedford*, the Court described gross disproportionality as reserved for "extreme" cases where the law's effects are "totally out of sync" with its objectives.[17] Yet the Court considered the principal of gross proportionality in relation to two of the three statutory sections under review (the prohibition on bawdy-houses and the prohibition on communicating in public for the purposes of prostitution) and found *both* provisions to be grossly disproportionate.[18] Similarly, in *Canada (AG) v PHS Community Services Society*, the Court found the federal government's refusal to exempt an existing safe injection site from drug possession laws to be grossly disproportionate, as the risk of harm from disease and death to injection drug users was grossly disproportionate to the objectives of drug possession laws, public health, and safety.[19] Thus, per the Court's decisions in *Bedford* and *PHS*, while the threshold to engage the gross disproportionality principle may be high, the Court seems willing to apply it in practice.

Again, the Court's willingness to invoke gross disproportionality in these two cases is particularly noteworthy, as they were both in the context of security of the person challenges. This means that in each case, the Court was weighing statutory objectives against an *increased risk* of harm (such as increased risks posed by not allowing sex workers to operate in a fixed indoor location), as opposed to *certain* harm (such as imprisonment). Given this fact, one would expect the Court to be equally willing to

13 *Bedford*, *supra* note 3 at para 120.

14 See *Bedford*, *supra* note 3; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 (available on CanLII) [*PHS*].

15 *Malmo-Levine*, *supra* note 2 at paras 158, 160-61.

16 *Ibid* at para 260.

17 *Bedford*, *supra* note 3 at para 120.

18 *Ibid* at paras 129-36, 146-60.

19 *PHS*, *supra* note 14 at paras 131, 133.

find gross disproportionality in challenges to liberty interests in which a statute would not only increase the risk of a harm, but rather *specify and ensure* such a harm through imprisonment (as in the 'sidewalk spitter' imprisoned for life example).

B. Clarifying Grossly Disproportionate: A Proposed Harm Sub-rule

As previously noted, the Canadian legal system appears to be in a phase of development of those emergent fundamental principles based on proportionality: arbitrariness, overbreadth, and gross disproportionality. The legitimacy of these evolving principles may be at risk, however, if their application appears arbitrary or uncertain. Klein suggests that "[i]f proportionality is to retain legitimacy among the principles of fundamental justice, courts may need to be more explicit about the values that guide its application."[20] Given this context, one way for the law to adapt, in order to address Justice Arbour's core concerns in *Malmo-Levine* while also providing valuable clarification on the values guiding gross disproportionality moving forward, would be to build into the principle of gross disproportionality a basic form of the harm principle. The Court could accomplish this by determining that a criminal law will be found to be grossly disproportionate where the punishment is imprisonment and the object of the law does not include the prevention of non-trivial harm or risk of harm to others.

Admittedly, this proposed sub-rule is neither as expansive nor as robust as the version of the harm principle advocated by Justice Arbour in the *Malmo-Levine* dissent. The *de minimis* harm requirement in the harm sub-rule would not require that harm to society *outweigh* any harm from enforcement, as Justice Arbour proposed. Instead, rather than identifying and quantifying the harm a law seeks to address and then weighing that against the aggregate harm the enforcement of the law would cause, the revised test would simply require a (fairly low) threshold of harm in order to justify imprisonment. While not capturing the full extent of Justice Arbour's submissions in the dissent, the revised test would arguably address the very core of her concern that "it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others."[21]

C. A Middle Ground: Revised Test Fits Well with 'Grossly Disproportionate' Principle Norms and Legitimacy

The principle of gross disproportionality can comfortably accommodate the inclusion of this harm sub-rule. As the Court noted in *Bedford*, the purpose of the principle is to ensure that the connection between the impact of the law and its object is not "entirely outside the norms accepted in our free and democratic society."[22] Justice Arbour's core concern in *Malmo-Levine*—that it is common sense that you don't jail someone for something that poses no harm to others—is precisely the type of societal norm which gross disproportionality is designed to protect. The fundamental balancing nature of gross disproportionality remains in place—purpose versus impact. The harm sub-rule is simply a shortcut which would state that, in order for the severe impact of imprisonment not to be found disproportionate to the objective, the objective must include the prevention of harm or risk of harm to others.

Further, the sub-rule would seem to have support from a number of other justices in *Malmo-Levine*. While Justice Arbour was the only judge in *Malmo-Levine* to find the harm principle to be a principle of fundamental justice, two others dissented from the majority decision. The dissenting opinion of Justice Deschamps, echoed by Justice

20 Klein, *supra* note 12 at 397.

21 *Malmo-Levine*, *supra* note 2 at para 244, quoting Justice Braidwood in *R v Malmo-Levine*, 2000 BCCA 335 at para 134 (available on CanLII).

22 *Bedford*, *supra* note 3 at para 120.

LeBel, found the impugned law unconstitutional on the basis that "the harm caused by using the criminal law to punish the simple use of marihuana far outweighs the benefits that its prohibition can bring."[23] Specifically, the dissenting judges questioned whether marihuana use caused harm or risk of harm to others:

> On the whole, with a few exceptions, moderate use of marihuana is harmless. Thus, it seems doubtful that it is appropriate to classify marihuana consumption as conduct giving rise to a legitimate use of the criminal law in light of the *Charter*.[24]

While both Justice Deschamps and Justice LeBel treated this disproportionality analysis not as a separate doctrine but rather as a test for arbitrariness,[25] the SCC's subsequent jurisprudence, including *Bedford*, has clarified that gross disproportionality exists as a stand-alone doctrine.[26] Thus, the dissenting opinions' focus on the relationship between non-trivial harm required and gross disproportionality broadly corresponds with the proposed sub-rule.

Finally, the proposed sub-rule would fit well in relation to the other principles of fundamental justice. In keeping with the 'purpose versus impact' analysis at the core of the gross disproportionality principle, the proposed sub-rule would only find a law to be grossly disproportionate if the *object* of the law did not include the prevention of non-trivial harm. Thus if the Government passed a criminal law with the express object of preventing harm to others, but in practice the conduct criminalized posed no harm whatsoever, such a law would *not* be captured by the gross disproportionality doctrine. This law would, however, likely be found unconstitutional for violating the fundamental principle against arbitrariness, as it would lack "a real connection on the facts to the purpose the [law] is said to serve."[27]

PART III. ADDRESSING COUNTER-ARGUMENTS

Critics may respond that no variant of the harm principle should be imported into the grossly disproportionate principle for the very reasons that the majority in *Malmo-Levine* found the harm principle not to be a principle of fundamental justice. These criticisms will be dealt with in turn.

First, the majority in *Malmo-Levine* found that there was not a sufficient consensus that the harm principle is the sole justification for "criminal prohibition," noting the widespread acceptance of paternalistic laws such as those that require individuals to wear seatbelts.[28] In response, note how this question is different from the one which Justice Arbour repeatedly emphasizes in her dissent: is there sufficient consensus that the harm principle is applicable to the highest form of restriction of liberty, namely, *imprisonment*?[29] The proposed harm sub-rule would deal exclusively with issues of imprisonment.

Secondly, the majority in *Malmo-Levine* also found that the harm principle was not a manageable standard against which to measure deprivation of life, liberty, or security of the person:

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23 *Malmo-Levine*, *supra* note 2 at paras 280, 301.
24 *Ibid* at para 295.
25 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2014) at para 47.16, n 269.
26 *Ibid* at para 47.16.
27 *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 134 (available on CanLII).
28 *Malmo-Levine*, *supra* note 2 at paras 115, 124.
29 *Ibid* at paras 244-46.

> Harm, as interpreted in the jurisprudence, can take a multitude of forms, including economic, physical and social (e.g., injury and/or offence to fundamental societal values). 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.[30]

Despite these concerns, there is ample evidence that nuanced assessments of harm are possible, and in fact already play a role in section 7 analyses. While the majority in *Malmo-Levine* rejected the harm principle as a fundamental principle of justice under section 7, in part due to its ostensibly unmanageable character, elsewhere in that very decision the majority applied a nuanced assessment of harm.

In fact, in this very same case (*Malmo-Levine*), beyond the issue of whether the harm principle was a fundamental principle of justice, the Court also considered whether the legislation violated the then-nascent section 7 principle of gross disproportionality. While the majority found the legislation was not grossly disproportionate, they did so largely on harm-based considerations. Specifically, the court found that "given the findings of harm flowing from marihuana use […] we do not think that the consequences in this case [including imprisonment] trigger a finding of gross disproportionality."[31] The 'findings of harm' the majority referenced included not only harm to users themselves, but also the potential harm to others of marihuana use associated with operating machinery, or with marihuana trafficking.[32]

Ultimately, then, the majority partially grounded its finding that there was no gross disproportionality on the fact that the conduct prohibited (marijuana possession) caused harm to others. While Justice Arbour did not address the doctrine of gross disproportionality and instead focused solely on the harm principle as a stand-alone principle of justice, it is clear from her dissent that she did not agree with the majority's finding that the law prevented harm to others. However, this disagreement between the judges surrounding the existence of harm does not show that harm itself is an unmanageable standard, but rather demonstrates that an assessment of harm is to some degree *already embedded* in the gross disproportionality test. The fact that there exist different perspectives as to what constitutes harm results inevitably from the application of law to fact. Roslyn Levine notes of the majority's decision that "[t]he Court's section 7 analysis made little real room for state interests that comprise pure, positive state action to improve social well-being, rather than support the reduction of apprehended harm."[33] In other words, despite the majority's concern that 'harm' was not a manageable standard as a principle of fundamental justice, the assessment and weighing of harms remains a key component of the principle of gross-disproportionality.

Similarly, in describing and applying the gross disproportionality principle in *Bedford*, the Court clearly identified and weighed different harms. For instance, in assessing the constitutionality of the legislative provision concerning communicating in public for the purposes of prostitution, the Court concluded that "[t]he provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution."[34] In this case the Court

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30 *Ibid* at paras 128-29.

31 *Ibid* at para 174.

32 *Ibid* at paras 135-36.

33 Roslyn J Levine, "In Harm's Way: The Limits to Legislating Criminal Law" (2004) 24 SCLR (2d) 195 at 208.

34 *Bedford, supra* note 3 at para 159.

identified the negative impact (i.e. the harm) of the law on the safety and lives of street prostitutes and asked if it was grossly disproportionate to the purpose of the law—to prevent the risk of nuisance, arguably a minimal form of harm to society. Through the gross disproportionality principle, then, the Court was already deeply engaged in an assessment and weighing of harms and risks.

Thus, rather than further confusing the situation with the imposition of an unmanageable standard, the addition of the harm sub-rule could serve to clarify the values underpinning the gross disproportionality principle and would, to some degree, make its application more straightforward and predictable. Levine notes that "[t]he harm principle may be outwardly invisible, but it still stalks the Charter's liberty right."[35] This paper advocates that the best way for the law to move forward is not to try to eliminate this invisible but omnipresent principle, but rather to illuminate it.

PART IV. SPECIAL CIRCUMSTANCE: MORALITY BASED CRIMES

In the case of *Malmo-Levine* as well as *Bedford*, the object of the law has been either health or public order, and the degree of harm caused has been assessed in relation to these legislative purposes. But what about those situations where the object of the law is a moral purpose? What if Parliament were to pass legislation criminalizing an act, under penalty of imprisonment, on the sole ground that the activity was a moral danger to Canadian citizens? In her vigorous defence of the harm principle as a fundamental principle of justice in *Malmo-Levine*, Justice Arbour did not directly address the issue of whether legislation on moral grounds would suffice as a justification to resort to imprisonment. She neglected to do so on the basis that no such moral purpose was claimed by the state in that case.[36] She did, however, allude to the fact that any such claim might centre on whether the conduct that allegedly offends morality could be said to harm others or society as a whole.[37] One way to address this issue for the purposes of the proposed harm sub-test would be the importation of the *R v Labaye* ("*Labaye*") test.

In *Labaye*, the SCC moved away from a *morality*-based assessment of the *Criminal Code of Canada* provision against "indecent" criminal conduct and towards a *harm*-based rationale.[38] The Court found that in order to establish indecent criminal conduct, the Crown must demonstrate that two requirements have been met:

> 1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:
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> (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or
>
> (b) predisposing others to anti-social behaviour; or
>
> (c) physically or psychologically harming persons involved in the conduct, and
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> 2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.[39]

35 Levine, *supra* note 33 at 208.
36 *Malmo-Levine*, *supra* note 2 at para 243.
37 *Ibid*.
38 *Labaye*, *supra* note 4.
39 *Ibid* at para 62 [emphasis in original].

This test is sufficiently rigorous that it would serve as an appropriate vehicle to determine if a law with an ostensibly moral purpose were in violation of the proposed sub-test: that the object of the law must include the prevention of non-trivial harm or risk of harm to others in order for imprisonment to not be found to be grossly disproportionate. The moral objective would only be found to be valid if the conduct at issue were found to cause harm or present a risk of harm in line with the *Labaye* test. While purists will no doubt argue that the true Mill's harm principle would never permit the state to imprison an individual for undermining societal values, in practice the question of when, if ever, barring allegedly 'immoral' behavior could be said to prevent society as a whole from harm is sure to arise. The *Labaye* test serves as a valuable tool to address this challenge.

CONCLUSION

This paper has suggested that the gross disproportionality principle should evolve to include a sub-rule which encapsulates a variant of the harm principle: the object of a law must include the prevention of non-trivial harm or risk of harm to others in order for the punishment of imprisonment to not be found grossly disproportionate. The sub-rule seeks to legally ground Justice Arbour's core concern in *Malmo-Levine*—that it is common sense you don't go to jail unless there is the potential that your activities will cause harm to others. The introduction of such a rule would no doubt spark a vigorous debate within the Canadian judiciary as to what particular conduct constitutes harm to others beyond a *de minimis* standard. Rigorous judicial engagement with this question should be welcomed, as it will serve to ensure that individuals are not deprived of liberty in a manner that violates our most fundamental norms.