CONSTITUTIONALIZING CRIMINAL LAW, COLTON FEHR (VANCOUVER: UBC PRESS, 2022)

I. INTRODUCTION: *R. V. BROWN* AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

The Supreme Court released its decision in *R. v. Brown* in May 2022.[1] The appellant had challenged the consistency of section 33.1 of the *Criminal Code* with sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.[2] The Supreme Court held that this provision was an unjustifiable limitation of both *Charter* rights, and accordingly declared the impugned provision invalid.[3]

For the purpose of this book review, the most relevant aspect of *Brown* is the Supreme Court's treatment of section 7, in particular the principles of fundamental justice that were relied upon.[4] The first such principle was "that proof of penal negligence, in the form of a marked departure from the standard of a reasonable person, is minimally required for a criminal conviction, unless the specific nature of the crime demands subjective fault."[5] The second principle of fundamental justice relied on by the Supreme Court was the requirement of voluntariness if one is to be convicted of a crime.[6]

It is notable that both of the principles of fundamental justice applied in *Brown* are "moral philosophical principles,"[7] embodying principles of criminal law theory. Such principles are to be distinguished from the principles of instrumental rationality that have been more prominent in the Supreme Court's recent *Charter* decisions: specifically, the principles against arbitrariness, overbreadth, and gross disproportionality. Indeed, *Brown* was the first Supreme Court decision since 2008 where a criminal law provision was found to be contrary to section 7 of the *Charter* on the basis of a principle of criminal law theory, rather than a principle of instrumental rationality.[8]

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1 2022 SCC 18 [*Brown*].

2 *Criminal Code*, RSC 1985, c C-46; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *Brown*, *supra* note 1 at para 167.

4 The Supreme Court also held that section 33.1 of the *Criminal Code* was contrary to the presumption of innocence as protected by section 11(d) of the *Charter*, by virtue of improperly substituting one fact that does not "inexorably" lead to the other fact: *Brown*, *supra* note 1 at paras 99–105.

5 *Ibid* at para 90, citing *R v Creighton*, [1993] 3 SCR 3 at 61–62; *R v Vaillancourt*, 1987 CanLII 2 at para 28 (SCC); *R v DeSousa*, [1992] 2 SCR 944 at 962.

6 *Brown*, *ibid* at para 96.

7 Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022) at 6. In *Brown*, they are referred to as "substantive and procedural standards for criminal liability that ensure the fair operation of the legal system and which are 'found in the basic tenets of our legal system'" (*Brown*, *ibid* at para 72, citing *Re BC Motor Vehicle Act*, 1985 CanLII 81 at para 31(SCC) [*BC Motor Vehicle*]).

8 In *R v DB*, 2008 SCC 25 at para 69, the Supreme Court had invalidated a reverse onus provision for sentencing certain young persons as adults, on the basis that it was contrary to the section 7 principle "that young people are entitled to a presumption of diminished moral culpability." In *R v Morrison*, 2019 SCC 15 at paras 74–91, the Supreme Court had applied the same principle of fundamental justice related to minimal fault that was applied in *Brown*, *supra* note 1, but the impugned provision was found consistent with section 7.

In his book *Constitutionalizing Criminal Law*, Colton Fehr surveys this apparent turn in the Supreme Court's *Charter* jurisprudence in the criminal law domain. It should be noted that the book was published in 2022, and its analysis reflects jurisprudential developments until around 2020; it therefore pre-dates the *Brown* decision. The potential implications of *Brown* for the argument in *Constitutionalizing Criminal Law* will be addressed below, in Part IV.

Fehr's account naturally begins with the 1985 decision in *Re B.C. Motor Vehicle Act*, where the Supreme Court famously held that the protection of section 7 of the *Charter* extended beyond procedural fairness and included substantive principles of fundamental justice.[9] This approach was surprising to many at the time.[10] When the Supreme Court considered section 7 *Charter* challenges to criminal offences and defences in that decision and in the years that followed, the Supreme Court focused primarily on principles of criminal law theory. The substantive principles of fundamental justice recognized by the Supreme Court included prohibitions of vagueness and of absolute liability offences, and requirements for moral and physical voluntariness and an appropriate level of *mens rea*.[11]

But even as early as its 1988 decision in *R. v. Morgentaler*,[12] the Supreme Court was beginning to assess the criminal law through the lens of arbitrariness, overbreadth, and gross disproportionality. These principles were described and applied rather inconsistently for some time, but they were definitively clarified by the Supreme Court in 2013, in *Canada (Attorney General) v. Bedford*.[13] Since then, these three principles — the so-called "principles of instrumental rationality" — have seemingly come to the forefront of section 7 *Charter* jurisprudence, including in the context of criminal law.[14]

II. *CONSTITUTIONALIZING CRIMINAL LAW*: OVERALL ARGUMENT

Fehr poses four key questions to be addressed. First, "to what extent is there overlap among" the three main pathways for substantively reviewing the *Charter* consistency of criminal law, that is, the section 7 principles of instrumental rationality, the section 7 principles of criminal law theory, and the other enumerated *Charter* rights?[15] Second, if there is such overlap, and the Supreme Court's decisions thus reflect a deliberate (yet usually unacknowledged) choice between different relevant rights and principles, "what are the benefits and detriments of employing each method" for *Charter* review?[16] Third, "is there any utility in preserving all three rationales for constitutionally challenging criminal laws?"[17]

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9 *Supra* note 7.

10 Frank Iacobucci, "Some Reflections on *Re BC Motor Vehicle Act*" (2011) 42:3 Ottawa L Rev 305 at 307; Fehr, *supra* note 7 at 4.

11 Fehr, *ibid* at 3–6.

12 1988 CanLII 90 (SCC).

13 2013 SCC 72 at paras 111–23 [*Bedford*].

14 Fehr, *supra* note 7 at 6, 9, 58. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 ("[o]ver the course of 32 years of *Charter* adjudication, this Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet…. While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence" at para 72 [citations omitted]).

15 Fehr, *ibid* at 6.

16 *Ibid* at 7.

17 *Ibid* at 7.

And fourth, what lessons can be offered to foreign jurisdictions on the basis of the Canadian experience thus far?[18]

Fehr argues that the emphasis on the section 7 principles of instrumental rationality has inappropriately displaced other *Charter* protections: on the one hand, *Charter* rights that have more democratic legitimacy (the enumerated rights under other provisions of the *Charter*), and on the other hand, section 7 principles that have the potential for more internal rigour and are better at facilitating a meaningful dialogue between branches of government (the section 7 principles of criminal law theory). Fehr also argues that the principles of instrumental rationality do not fill any gaps in protection in the sense of addressing any "unjust laws" that could not also be addressed through the analytical framework of other *Charter* rights or section 7 principles of fundamental justice.[19] Perhaps most persuasively, he observes that in its decisions that identified and defined the principles of instrumental rationality, the Supreme Court failed to rigorously apply its well-established test for whether a principle amounts to a principle of fundamental justice. In Fehr's view, this omission has had negative consequences for both the democratic legitimacy of the principles of instrumental rationality and their conceptual coherence as legal principles.

Constitutionalizing Criminal Law is a comprehensive and probing assessment of section 7 of the *Charter* and its impact on criminal law, integrating the author's expertise in both the *Charter* and criminal law policy and theory. As Fehr observes, the principles of instrumental rationality have rapidly become an accepted and central part of the ecosystem when it comes to section 7 of the *Charter*, often seeming to be the "preferred" principles relied on by both claimants and courts.[20] It is both intriguing and useful to take a step back to comprehensively examine the origins and impacts of these principles and question whether this is the "right" path for the constitutional review of criminal law from the standpoint of conceptual coherence and democratic legitimacy. In addition to making a fascinating theoretical contribution to ongoing debates about the status of section 7 analysis, *Constitutionalizing Criminal Law* contains a comprehensive review of the section 7 criminal jurisprudence that will be a useful resource for both academics and practitioners.

Perhaps most notably, this book includes a provocative proposal for the future of section 7 of the *Charter*, and the courts' overall approach to *Charter* challenges implicating substantive criminal law. Fehr argues that the principles of instrumental rationality ought to be discarded altogether, and that the courts should adopt a different approach to considering challenges to substantive criminal law, one that prioritizes consideration of the enumerated *Charter* rights over section 7.[21]

The next part of this review will provide a more detailed outline of Fehr's book, including his proposed approach. Then, the final part of this review will consider the impacts of recent Supreme Court case law on Fehr's argument, along with several questions for further consideration.

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18 *Ibid* at 7–8.
19 *Ibid* at 132, 138–140.
20 *Ibid* at 6–7, 58–59, n 2, 82, 141.
21 *Ibid* at 11–12, 140–41, 170–72.

III. *CONSTITUTIONALIZING CRIMINAL LAW*: OUTLINE

The first chapter of *Constitutionalizing Criminal Law* concisely introduces the core issues of the book, its argument, and its structure. A fundamental premise of Fehr's analysis is that in reviewing criminal law provisions for consistency with the *Charter*, courts are balancing two "competing objectives underlying the constitutionalization of criminal law: creating greater coherence in criminal law while maintaining the [democratic] legitimacy of judicial review."[22] As explained below, Fehr links the section 7 principles of criminal law theory to the former purpose, while viewing the section 7 principles of instrumental rationality as a withdrawal from the project of increasing coherence in order to avoid compromising the judiciary's legitimacy.[23]

The second chapter provides a comprehensive analysis and critique of the Supreme Court's jurisprudence regarding principles of criminal law theory. It includes a separate discussion of each principle, not only those accepted by the Supreme Court as being principles of fundamental justice, but also those that were proposed but rejected. Overall, while Fehr concludes that these principles have allowed the Supreme Court to invalidate "many unjust doctrines of criminal liability,"[24] he argues that they have been developed and applied in an incoherent fashion while also raising concerns about the democratic legitimacy of constitutional review.[25] According to Fehr, concern for institutional legitimacy "resulted in the court abandoning the project" of finetuning and applying the section 7 principles of criminal law theory.[26]

In Chapter 3, Fehr turns to the conceptual and institutional consequences of "[t]he Supreme Court's decision to stop constitutionalizing principles of criminal law theory and to rely on the principles of instrumental rationality."[27] The argument in this chapter is probably the most pivotal of the book, and it has two main threads. The first begins with a review of the Supreme Court's inconsistent development of the principles against arbitrariness, overbreadth, and gross disproportionality until their definitive consolidation in *Bedford* in 2013. Fehr critiques several conceptual elements of how the principles of instrumental rationality were articulated in *Bedford*, including the Supreme Court's individualistic or qualitative approach, whereby a problematic impact on even one individual can be sufficient to make a law contrary to section 7.[28] Fehr argues that the individualistic approach to overbreadth in particular — with its potential to call into question the bright-line rules so often found in criminal law and other policy areas — is lacking the degree of societal consensus required of a principle of fundamental justice.[29]

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22 *Ibid* at 10.
23 *Ibid* at 8–9.
24 *Ibid* at 50.
25 *Ibid* at 53 (Fehr's assessment is damning: "[I]t is fair to conclude that every area of substantive criminal law that the Supreme Court has constitutionalized using principles of criminal law theory has resulted in incoherent doctrinal development," partially because of misunderstanding of the underlying principles, and partially because of concerns for democratic legitimacy).
26 *Ibid* at 17.
27 *Ibid* at 101.
28 *Ibid* at 58–59, 65, 69–75, 80–82. See also *Bedford*, *supra* note 13 at paras 121–27.
29 Fehr, *ibid* at 72–75.

The second thread of chapter 3 assesses the broader consequences of the increasing emphasis on the principles of instrumental rationality.[30] Fehr observes that these principles are meant to open up the legislative dialogue by avoiding the kind of "strict 'no-go zones'" and value-laden assessments that often result from applying the principles of criminal law theory.[31] Instead, the principles of instrumental rationality allow "legislatures to choose from among a broad range of policy responses," as long as the legislature's chosen means of pursuing its objective has a baseline level of rationality and avoids unduly severe impacts on section 7 protected interests.[32]

Yet, based on his review of the case law thus far, Fehr concludes that the principles of instrumental rationality provide minimal guidance to legislatures. He notes that they allow for responses to judicial decisions that adjust the objective and framing of a policy more than the substance of the law itself. Thus, "[t]he dialogue between courts and legislatures has instead turned into more of a shouting match in which the legislature forces the court to reconsider its initial [constitutional] assessment … without having responded seriously" to the impacts of the impugned law on the right to life, liberty and security of the person.[33]

After finding significant flaws in the Supreme Court's section 7 *Charter* jurisprudence in relation to criminal law, no matter the principles of fundamental justice that are applied, Chapter 4 turns to the other enumerated rights in the *Charter*.[34] Fehr takes the position that constitutional review under the specifically enumerated rights has comparatively greater democratic legitimacy since these rights are explicitly guaranteed in the text of the *Charter*, as opposed to being the result of judicial interpretation.[35] The question is whether these other rights could "give rise to protections equal to those provided for under section 7."[36] Ultimately, Fehr identifies several circumstances where "unjust" laws that were invalidated under section 7 could not have been invalidated under one of the enumerated rights.[37]

After a discussion of the theoretical debates surrounding judicial review, Chapter 5 sets out Fehr's proposal for how to overhaul the Supreme Court's approach to reviewing the *Charter* consistency of substantive criminal law. This approach is based on three key conclusions arising from the previous chapters: (1) the enumerated rights outside of section 7 can address some, but not all, "unjust criminal laws"; (2) the section 7 principles of criminal law theory lack democratic legitimacy and ought to be avoided where possible; and (3) the section 7 principles of instrumental rationality are unable to facilitate constructive dialogue, and lack analytical coherence.[38]

Given its centrality to the book, the proposal is worth quoting at length. Fehr would have the principles of instrumental rationality discarded as principles of fundamental justice, with

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30 Chapter 3 also concludes that there are at least some instances where the principles of instrumental rationality provide broader rights protection than the established section 7 principles of criminal law theory: *ibid* at 94–100.

31 *Ibid* at 85.

32 *Ibid* at 9, 83–84.

33 *Ibid* at 14. See also *ibid* at 101.

34 The key rights discussed in this chapter are freedom of expression, the prohibition of cruel and unusual punishment, and the section 15 equality rights.

35 Fehr, *supra* note 7 at 131.

36 *Ibid* at 15.

37 *Ibid* at 15, 132.

38 *Ibid* at 140.

courts taking the following approach to "constitutional cases implicating substantive criminal law":

> If faced with a multi-pronged Charter challenge from counsel, then the court should first consider whether the impugned law violates an enumerated right…. To facilitate appellate review, lower courts should decide all rights issues, including those raised under section 7. However, the Supreme Court typically should refrain from determining whether a law violates section 7 if an enumerated right applies…. If an enumerated right does not apply, then the Supreme Court should consider whether the impugned law is inconsistent with any [section 7] principle of criminal law theory proposed by counsel.[39]

Fehr relates this framework back to the two competing objectives of democratic legitimacy and doctrinal coherence, which were noted at the outset of this section: by giving primacy to the enumerated rights and "allowing section 7 to play a gap-filling role, the court will ensure that it strikes a reasonable balance between using the Charter in both a legitimate and a just manner."[40]

Constitutionalizing Criminal Law concludes in Chapter 6 by briefly providing some lessons for foreign jurisdictions, especially those in the process of constitution-making or amendment. Perhaps most importantly, Fehr recommends that "it would be better if legislatures considered explicitly constitutionalizing more substantive criminal law principles when enacting or amending a bill of rights."[41]

IV. QUESTIONS FOR FURTHER CONSIDERATION

This section will consider Fehr's argument in light of subsequent case law from the Supreme Court, before posing some conceptual and practical questions.

A. SUBSEQUENT CASE LAW

As explained at the outset, the Supreme Court's 2022 decision in *Brown* complicates the core narrative of *Constitutionalizing Criminal Law* by invalidating section 33.1 of the *Criminal Code* on the basis of two section 7 principles of criminal law theory.

Brown therefore addresses at least one of the main concerns expressed by Fehr. The section 7 principles of instrumental rationality have not entirely replaced the principles of criminal law theory, nor have they become a mandatory default. The unanimous reasons of the Supreme Court acknowledged the co-existence of the two distinct categories of principles of fundamental justice,[42] stating that "[a] court's s. 7 analysis should start by asking whether a statutory provision fails to meet the requirements of the specific principle *raised by the*

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39 *Ibid*.
40 *Ibid*.
41 *Ibid* at 178.
42 *Brown*, *supra* note 1 ("[t]he principles in *Bedford* speak to 'failures of instrumental rationality' that reflect a legislative provision that is unconnected from or grossly disproportionate with its purpose (para. 107). By contrast, the principles of fundamental justice in this case relate to substantive and procedural standards for criminal liability that ensure the fair operation of the legal system and which are 'found in the basic tenets of our legal system' (*Motor Vehicle Reference*, at p. 503)" at para 72).

claimant before turning to the more general matter as to whether the law is arbitrary or disproportionate in light of its purpose in the *Bedford* sense."[43]

But in other ways, *Brown* does not go as far as proposed by Fehr. The principles of instrumental rationality remain principles of fundamental justice, and claimants can make the strategic decision of which section 7 principles they wish to rely on in challenging a criminal law — or any other law for that matter.[44] Going forward, it very well could remain the case that litigants prefer to focus their claims on the principles of instrumental rationality. *Brown* indicates no concern on the part of the Supreme Court with such an outcome.

Nor does *Brown* contain any suggestion that there should be a deprioritization of section 7 analysis vis-à-vis the other enumerated rights in the *Charter*. Indeed, a decision issued by the Supreme Court the month after *Brown* suggests that a majority of the Supreme Court does not support this approach. In *R. v. J.J.*, a majority of six justices declined to impose a strict sequence of analysis for cases where claimants rely on multiple *Charter* provisions. They called instead for a "highly context- and fact-specific" approach to assessing such claims.[45] On the other hand, Justice Rowe in dissent would have adopted a rule quite similar to what is proposed by Fehr, whereby claims under the enumerated *Charter* rights would be considered before any section 7 argument.[46]

As pointed out in Justice Rowe's dissent, it seems difficult to square the majority's comments in *J.J.* with earlier statements by the Supreme Court on the relationship between the *Charter*'s "specific guarantees" as compared to section 7.[47] That said, the majority's approach is consistent with the principle that there is no hierarchy among human rights, which is well-established in both *Charter* jurisprudence[48] and international human rights law.[49]

Therefore, the issues and questions raised by *Constitutionalizing Criminal Law* remain very much open and worthy of consideration. I would flag several conceptual questions in

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43 *Brown*, *ibid* [emphasis added] (expressing agreement with the majority reasons of Justice Paciocco in *R v Sullivan*, 2020 ONCA 333 at para 61).

44 Post-*Brown*, the Supreme Court has also applied the principles of instrumental rationality in *R v JJ*, 2022 SCC 28; *R v Ndhlovu*, 2022 SCC 38; *R v Sharma*, 2022 SCC 39. Outside of the criminal context, they have been applied by the Supreme Court in *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 [*Canadian Council for Refugees*].

45 *R v JJ*, *ibid* at para 115 ("[t]he appropriate methodology for assessing multiple *Charter* breaches alleged by the accused may depend on the factual record, the nature of the *Charter* rights at play, and how they intersect. This Court has repeatedly affirmed that the methodology for assessing multiple alleged *Charter* breaches is highly context- and fact-specific").

46 *Ibid* at paras 327, 433.

47 *Canada (Attorney General) v Whaling*, 2014 SCC 20 at para 76, citing *R v Harrer*, 1995 CanLII 70 at para 13 (SCC) ("[w]hen both s. 7 and a specific guarantee under the *Charter* are pleaded, this Court has generally shown a preference for dealing with the specific guarantee"). See also *ibid* at paras 410, 420 (Rowe J dissenting on this point).

48 *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 50; *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 at 877 (SCC); *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 2.

49 See e.g. *Vienna Declaration and Programme of Action*, UNHRC, 1993, UN Doc A/CONF.151/23 ("[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" at para 5).

relation to the book's argument, and some practical ones about the proposed approach to *Charter* claims implicating substantive criminal law.

B. CONCEPTUAL QUESTIONS

The book's argument often returns to a key characterization of the competing objectives pursued by courts when reviewing the constitutionality of criminal law: "[C]reating greater coherence in criminal law while maintaining the [democratic] legitimacy of judicial review."[50] As explained above, this essentially instrumentalist perspective forms the premise of Fehr's assessment of the effectiveness and utility of the various principles of fundamental justice. Thus, the principles of criminal law theory were unsuccessful because of issues with their doctrinal coherence and abandoned by the Supreme Court because they undermined its democratic legitimacy. Fehr's critique of the principles of instrumental rationality is, essentially, that they accomplish neither objective.

But is this a complete or satisfying account of the purpose of *Charter* rights and judicial review, and thus an adequate methodology for evaluating whether the jurisprudence in this area has accomplished its objectives? While it may be the case that *Charter* rights can help advance coherence in criminal law, the Supreme Court has treated the interpretation and enforcement of constitutional human rights as an end in itself, rather than as a means to some other policy goal. According to the Supreme Court, the *Charter* is "essentially an instrument for checking the powers of government over the individual."[51] The purpose of the *Charter* is "to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action."[52]

Therefore, if governments and courts wish to pursue coherence in the criminal law (for example, through statute or common law), they can choose to do so. But the Supreme Court views the *Charter* as an outer constraint on such a policy aim, rather than as an instrument that seeks to facilitate the realization of that aim. This same idea was articulated elegantly by the late Justice Marc Rosenberg:

> It is only fair to measure the success of the Charter in terms of what a constitutional bill of rights is intended to do. In the criminal law context, a constitutional bill of rights is primarily a statement of individual rights. It is a means to limit or control state intervention rather than protect collective rights. It is fundamentally an exercise in line drawing; it tells the state where and when the individual has the right to be left alone and outlines the process for legitimate interference with an individual's autonomy, including the process that

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50 Fehr, *supra* note 7 at 10, 140 ("[i]n choosing from among the available options [to review criminal law for *Charter* consistency], the court should employ judicial review in a way that creates the most coherence and fairness in criminal law without unduly sacrificing democratic legitimacy").

51 *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 45, citing *McKinney v University of Guelph*, [1990] 3 SCR 229 at 261.

52 *Hunter v Southam Inc*, 1984 CanLII 33 at 155–56 (SCC) ("[a] constitution … is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a … *Charter of Rights*, for the unremitting protection of individual rights and liberties" at 155).

> leads to the imposition of criminal sanctions. The legal rights enshrined in the Charter are not the means to end hunger, achieve world peace or alleviate injustice in its many forms.[53]

Further, Fehr's review of the principles of instrumental rationality and their utility or effectiveness compared to other *Charter* principles and rights is essentially limited to how these principles have been applied in challenges to criminal law. The book is quite forthright in its focus on criminal law, and of course any research project needs some reasonable limits. But the book's methodology omits the application of arbitrariness, overbreadth, and gross disproportionality outside of the criminal context. In recent years, Canadian courts have applied the principles of instrumental rationality to several other policy areas where the state can interfere with the section 7 interests, including legislation related to the removal of foreign nationals from Canada,[54] quarantine measures,[55] the administration of correctional facilities,[56] and inpatient psychiatric care against the will of the patient.[57]

Constitutionalizing Criminal Law proposes to entirely eliminate the principles of instrumental rationality on the basis of its review of the criminal law jurisprudence, without including a fair consideration of the principles' apparent relevance to non-criminal contexts.[58] In all of these non-criminal policy areas, it is at least arguable that the principles of instrumental rationality fill an important gap for assessing interferences with the section 7 interests. All of these policy areas may be so specialized, compared to the criminal law, that they lack the same kind of well-developed legal principles (those "found in the basic tenets of our legal system")[59] that enabled the courts to develop section 7 principles of criminal law theory. In other words, in these non-criminal policy contexts, the ability to assess a law for "failures of instrumental rationality"[60] may provide a useful way to substantively review the scope of an impugned measure for its consistency with section 7 of the *Charter*, even if the nature of the review is less normatively rich than what might be accomplished in a criminal matter via the principles of criminal law theory.

These conceptual issues raise the question of whether *Constitutionalizing Criminal Law*'s assessment of the principles of fundamental justice may be incomplete, especially in regards to the principles of instrumental rationality and the recommendation that they be eliminated from the jurisprudence. Therefore, while Fehr's review of the criminal jurisprudence is comprehensive and penetrating, and his critiques of the principles of instrumental rationality are rigorous and largely convincing, some important questions are left unaddressed and some of the furthest-reaching recommendations are not as persuasive as they could have been.

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53 Honourable Marc Rosenberg, "Twenty-Five Years Later: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law" (2009) 45 SCLR 233 at 234.

54 *Canadian Council for Refugees*, *supra* note 44.

55 *Spencer v Canada (Health)*, 2021 FC 621.

56 *Ewert v Canada*, 2018 SCC 30; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCCA 282.

57 *JH v Alberta (Minister of Justice and Solicitor General)*, 2020 ABCA 317; *Nelson v Livermore*, 2017 ONCA 712.

58 See e.g. Fehr, *supra* note 7 ("[b]ecause I find that the combination of the principles of criminal law theory and enumerated rights applies as broadly as the instrumental rationality principles, the latter principles can be abandoned without any cost to criminal justice" at 12).

59 *Brown*, *supra* note 1 at para 72, citing *BC Motor Vehicle*, *supra* note 7 at para 31.

60 See e.g. *Brown*, *ibid*, citing *Bedford*, *supra* note 13 at para 17.

C. PRACTICAL QUESTIONS

The novel approach proposed in *Constitutionalizing Criminal Law* also raises some practical questions in terms of how it would function in litigation. As noted above, in *R. v. J.J.* a majority of the Supreme Court recently declined to adopt the kind of prioritization between the enumerated rights and section 7 that is suggested by Fehr. But setting this aside, there are other questions raised.

It is a well-established principle that the party claiming the *Charter* breach bears the burden of proving the limitation of a *Charter* right on a standard of balance of probabilities.[61] In *Brown*, the Supreme Court's guidance was consistent with its usual approach to litigation in an adversarial system:[62] courts consider the evidence, legal claims, and arguments that are brought to them by the parties. *Charter* claimants are permitted, like other litigants, to make strategic choices about what arguments to advance based on considerations that include their personal objectives for the litigation, their assessment of the strength of the various available arguments, and where they wish to devote their limited resources (and the courts'), in terms of establishing an evidentiary record and making legal arguments.

Constitutionalizing Criminal Law proposes what seems to be a major shift. Under the new approach the parties would know, in advance, that there is a clear sequence in which the court must consider the *Charter* consistency of the impugned criminal law: first under the various enumerated rights, then under the section 7 principles of criminal law theory. Does this mean that if a claimant wishes to eventually make a section 7 argument they would need to first address all the potentially relevant enumerated rights in their arguments, to either make a claim under the right or explain why there is no violation? What, if any, burden would be placed on the claimant in relation to rights that they believe are *not* violated by the impugned law? And would a court be expected to address all or most enumerated rights in its reasons, even those with little relevance, in order to explain its own recourse to section 7?

Some of these questions may seem absurd; presumably a court would not impose a persuasive burden on the claimant in relation to every enumerated right, especially those that are clearly irrelevant in a particular matter. But courts seeking to operationalize the proposed framework in a litigation context would need to settle these questions and find a workable solution. It would have been helpful if the discussion in *Constitutionalizing Criminal Law* had worked through these issues, since they may have impacted the framework that is ultimately proposed.

V. CONCLUSION

The questions and critiques in the previous section are a sign of how engaging, provocative, and full of ideas Fehr's book is. Some significant aspects of the book's analysis and argument could not even be included in this review due to space constraints. Even if a reader comes to *Constitutionalizing Criminal Law* with different assumptions or beliefs about

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[61] See e.g. *Canadian Council for Refugees*, *supra* note 44 at paras 56, 98; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 12; *Bedford*, *ibid* at para 78.

[62] *Brown*, *supra* note 1. See also the text accompanying note 42.

the purpose of the *Charter* and its appropriate relationship to criminal law, there is a great deal in this book for any reader to learn, consider, and respond to.

Constitutionalizing Criminal Law offers an even-handed assessment and wide-ranging critique of the Supreme Court's reasoning in a central area of *Charter* jurisprudence. It challenges accepted *Charter* orthodoxy, taking the crucial step of declining to assume that certain constitutional principles are unchangeable or unquestionable simply because they are a part of our current law. Instead, Fehr sets out clear tests and criteria and measures the case law against those guideposts in a systematic fashion. By doing so, and proposing a provocative path forward that flows logically from his conclusions, Fehr has made a valuable scholarly contribution that should be considered by all those involved in the development of the *Charter* going forward.

Dan Moore[*]
Senior Counsel
Department of Justice Canada

[*] The author holds a JD and an MA (Political Science) from the University of Toronto. In his practice, he provides legal advice on the *Charter* and international human rights law, primarily in the areas of criminal law, immigration, corrections, and national security. The views expressed in this review are of the author alone and are not those of the Department of Justice or the Government of Canada. The author extends many thanks to his colleagues in the Human Rights Law Section, including his supportive managers.