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The Arbitrariness in "Arbitrariness" (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter

Alana Klein*

I. INTRODUCTION

The scope of substantive protection in section 7 of the *Canadian Charter of Rights and Freedoms*[1] is expanding again. Recent developments in the Supreme Court of Canada's section 7 doctrine support what one might call a substantive right to proportionate government action, where that action affects the most fundamental of rights: the rights to life, liberty and security of the person. In *PHS Community Services v. Canada*, for example, the Supreme Court of Canada confirmed that when determining whether a law that interferes with the section 7 rights is arbitrary, overbroad, or grossly disproportionate, courts must closely examine the relationship between a law's ends and its means.[2] In doing so, they must look beyond whether a

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* Faculty of Law, McGill University.

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter "*PHS*"]. The move toward proportionality analysis may be a partial or contested one. See Kent Roach, "Section 7 of the *Charter* and National Security: Rights Protection and Proportionality versus Deference and Status" (2012) 42 Ottawa L. Rev. 337 (identifying, in the context of national security, competing strands of s. 7 jurisprudence: one requiring that limits on life, liberty and security of the person be justified as proportionate, and another based on *a priori* deference to governments).

piece of legislation *could conceivably* do what it purports to do, and examine whether it does in fact. This is a far less deferential form of arbitrariness review than previous jurisprudence had suggested.

Given the broad range of legislative and administrative decisions that might have an impact on life, liberty and security of the person, the development could greatly expand the scope of questions that can be subjected to section 7 review. Moreover, in the context of increasing concerns that lawmaking (most notably the federal crime agenda) ignores empirical evidence and is made with little democratic input beyond ordinary political processes, the focus on perverse impacts in section 7 could play an important role in ferreting out government policies that affect the most fundamental of rights and that are based on ideology or stereotype over evidence.

Yet some worry that the empirical challenge of means-testing government policies in a complex world would permit any judge who simply disapproves of a law to find that it fails the means-ends weighing.[3] This objection recalls institutional capacity and legitimacy concerns that have dogged section 7 since its early days. Part II of this paper describes how courts have struggled, often unsuccessfully, to set limits on expansiveness and subjectivity in section 7 interpretation. That history suggests that the increasing prominence of proportionality analysis in section 7 may be understood as a way to avoid the difficult task of setting normative boundaries on the scope of the provision. Part III examines the claim that arbitrariness, overbreadth and gross disproportionality analysis invites capricious decision-making and concludes that it may be impossible to avoid substantive normativity in proportionality analysis. Part IV argues that this concern is far from new: it has been central in our evaluation of proportionality analysis in section 1 of the Charter. Drawing on experience with proportionality analysis under section 1 of the Charter, it argues that it may be possible for courts to means-test government policy in a principled and transparent way, but that this requires a link to a substantive conception of the purpose of the Charter guarantee in question. So long as courts continue to perpetuate the illusion that section 7 means-testing is value-neutral, allegations of capriciousness will persist. Finally, the paper concludes in Part V with some preliminary suggestions about how section 7's purpose might be understood so that means-testing might respond to policies that are

[3] Peter Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 S.C.L.R. (2d) 195 [hereinafter "Hogg, 'The Brilliant Career'"].

generated with limited empirical support and with limited democratic legitimacy beyond ordinary political processes.

II. ELASTICITY AND LEGITIMACY IN SECTION 7 OF THE CHARTER

The increasing reach and prominence of proportionality analysis should be understood in light of section 7's history. Jamie Cameron describes section 7 as the Charter's "problem child"[4] precisely because of its potential for elasticity.[5] The entitlements listed in the first clause — to life, but especially to liberty and security of the person — are far more general than the remaining rights listed under the heading "legal rights" in sections 8 to 14. The second clause — the principles of fundamental justice — is, on the face of its text alone, devoid of substantive content. In the context of ambiguous constitutional text protecting such fundamental but general concepts as liberty and justice, legitimacy may be lost in two ways. It may be lost in a liberal interpretation: is the Court overreaching and protecting more than the text of the provision provides? But it may also be lost in narrow interpretation: is the Court shirking its responsibilities to uphold constitutional standards? Because of this tension, section 7's history can be told as a struggle to preserve the Court's institutional legitimacy in the face of its duty to give meaning to this ambiguous text.[6]

The development of jurisprudence on the definition of liberty illustrates the different ways in which judges have struggled to give meaning to section 7 entitlements without compromising the Court's institutional role, and their ultimate difficulty resisting the expansive force of the concept. Perhaps most famously, Wilson J. in her concurring reasons in *R. v. Morgentaler*, defined liberty broadly to "guarantee to every individual a degree of personal autonomy over important decisions intimately affecting their private lives",[7] including the right to terminate

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[4] Jamie Cameron, "From *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105, at 105 [hereinafter "Cameron"].

[5] *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 498 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"].

[6] A thorough history of this struggle is too complex for this short paper, but see Cameron, *supra*, note 4 for a careful analysis of the various competing strands of Supreme Court of Canada jurisprudence interpreting both s. 7's entitlements and its internal limitations clauses, and the ways in which concerns over preserving institutional legitimacy drove and troubled the jurisprudence.

[7] *R. v. Morgentaler*, [1993] S.C.J. No. 48, [1993] 1 S.C.R. 462 (S.C.C.) [hereinafter "*Morgentaler*"].

a pregnancy. Similarly, in *R. v. Jones*, she held that the liberty interest included a parent's right "to raise children in accordance with his conscientious beliefs".[8] Early lines of jurisprudence suggested that "human dignity is precisely what underlies the liberty interest in s. 7",[9] and, on that basis, held that section 7 could extend, for example, to rights to choose one's occupation.[10]

These cases, positing a broad, arguably amorphous substantive right to liberty, competed for prominence in a fractured jurisprudence with Lamer J.'s (later Lamer C.J.C.'s) steadfast efforts to confine liberty to encounters with the administration of justice that put physical freedom at risk.[11] His interpretation was based in part on the text and his view of the purpose of section 7. For example, he sought to distinguish liberty in section 7 from the freedoms protected in section 2 of the Charter, and suggested that the concepts of life, liberty and security of the person are connected through the concept of a person's corporeal or physical being.[12] But Lamer C.J.C.'s approach to section 7 was also clearly motivated by concerns over the limits of the courts' institutional role: he stated that a broader interpretation of liberty "would have the effect of conferring *prima facie* constitutional protection on all eccentricities expressed by members of our society under the rubric of 'liberty'" and would "inevitably lead to a situation where we would have government by judges".[13] In Lamer C.J.C.'s view, review could legitimately be undertaken so long as it was confined to matters within the justice system, an area in which judges are expert.

Despite Lamer J.'s resistance, the Court ultimately adopted the broader conception of liberty whose roots lay in *Morgentaler* and *Jones*. In *Blencoe v. British Columbia (Human Rights Commission)*, the Court pronounced unequivocally that the liberty interest is no longer limited to

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[8] *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284, at 319 (S.C.C.) [hereinafter "*Jones*"].

[9] *Blencoe v. British Columbia (Human Rights Commission)*, [1998] B.C.J. No. 1092, 160 D.L.R. (4th) 303, at para. 88 (B.C.C.A.).

[10] *Mia v. British Columbia (Medical Services Commission)*, [1985] B.C.J. No. 2920, 17 D.L.R. (4th) 385, at 414-15 (B.C.S.C.);*Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566, 30 B.C.L.R. (2d) 1, at 18 (B.C.S.C.) .

[11] See, *e.g.*, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Prostitution Reference*"]; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at 348 (S.C.C.) [hereinafter "*Children's Aid Society*"].

[12] *Children's Aid Society*, *id.* at 347-48.

[13] *Id.*, at 347.

freedom from physical restraint; rather, "'liberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices. ... In our society, individuals are entitled to make decisions of fundamental importance free from state interference."[14] The struggle for boundaries continued: though it recognized the broader liberty right in principle, the Court limited liberty of the person to "a narrow sphere of inherently personal decision-making" and held that the delay in processing a human rights complaint in *Blencoe* did not, on the facts, prevent the applicant from making any fundamental personal choices.[15] In fact, a majority of the Supreme Court has yet to recognize a case in which fundamental personal choices so affect the liberty interest as to run afoul of section 7,[16] though lower courts have recognized such instances of the liberty interest.[17] Further, despite this broader interpretation of the liberty interest, the Court has purported to draw the line at the suggestion that section 7 protects "purely economic interests".[18] As a result, some early section 7 cases, such as those suggesting that the right to liberty includes "the right to choose one's occupation and where to pursue it"[19] are now considered wrongly decided.[20] Meanwhile, in other cases, rights that might be characterized as economic have been recognized among section 7's substantive entitlements.[21]

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[14] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at para. 49 (S.C.C.).

[15] *Id.*, at para. 54.

[16] It has, however, recognized that sufficiently severe psychological distress might engage security of the person. See *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

[17] *R. v. Parker*, [2000] O.J. No. 2787, 49 O.R. (3d) 481, at para. 92 (Ont. C.A.) (holding that a prohibition on medical marijuana engaged the liberty interest by denying the applicant his choice of medication to alleviate the effects of an illness with life-threatening consequences); *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 313 D.L.R (4th) 29, at para. 109 (B.C.C.A.) (holding that a prohibition on the erection of temporary shelters in public parks, in the context of insufficient homeless shelters in the area, constituted "a significant interference with [the applicants'] dignity and independence").

[18] See, *e.g.*, *R. v. Edwards Books and Art Ltd*., [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 786 (S.C.C.) [hereinafter "*Edwards Books*"]; *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6, at para. 46 (S.C.C.) (holding that the ability to operate a video lottery terminal is not a "fundamental life choice" because it is a purely economic interest).

[19] *Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566, 30 B.C.L.R. (2d) 1, at 18 (B.C.C.A.).

[20] Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto, ON: Irwin Law, 2012), at 92 [hereinafter "Stewart"].

[21] See, *e.g.*, Cameron, *supra*, note 4, at note 198 (characterizing the rights claimed in *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.) [hereinafter "*Godbout*"] and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R 791

The broadened, more elastic scope in section 7's entitlements could be expected to put additional pressure on its second clause to respond to concerns about judicial overreaching. Indeed, the need to cabin the potential breadth of the principles of fundamental justice was recognized from the moment section 7 was given substantive rather than merely procedural content. In one of Charter jurisprudence's most oft-cited passages, the majority in the *Motor Vehicle Reference* explained that "the principles of fundamental justice are to be found 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 legal system."[22] These principles of fundamental justice were thus limited to principles — however substantive and normative — that have been "recognized as essential elements of a system for the administration of justice which is founded upon a belief in 'the dignity and worth of the human person' ... and on 'the rule of law'".[23]

In the *Motor Vehicle Reference*, the Supreme Court recognized its first principle of fundamental justice: that criminal liability requires proof of fault.[24] And in the years following, many substantive principles of fundamental justice were recognized, mostly linked to the institutions of criminal justice. These have included the pre-trial right to silence,[25] a prohibition on convicting someone for murder if they did not intend to cause death,[26] and a right to make a full answer and defence, in turn implying a disclosure obligation on the Crown.[27]

Even from the early days, however, there were principles of fundamental justice with less precisely substantive content than those related to penal responsibility listed in the previous paragraph. In *Jones*, La Forest J., writing for the plurality of the Court, recognized that a law limiting life, liberty and security of the person would violate the principles of fundamental justice if it were "manifestly unfair".[28] This language was

(S.C.C.) [hereinafter "*Chaoulli*"] as "economic or quasi-economic in nature". In *Godbout*, the Court invalidated a municipal resolution requiring municipal employees to live within its territorial limits, with two judges relying on the liberty interest in s. 7 of the Charter. In *Chaoulli*, access to private health insurance was protected under the guarantee of security of the person.

22 *Motor Vehicle Reference*, *supra*, note 5, at 503.

23 *Id*.

24 *Id.*, at 514.

25 *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.).

26 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

27 *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

28 *Jones*, *supra*, note 8, at para. 41.

famously picked up in *Morgentaler* to invalidate a criminal law limiting women's access to abortion. The regime purported to give access to therapeutic abortions, but contained so many barriers to its own operation that access was practically unavailable:[29] effectively, the law did not further its own objectives.[30] Justice McLachlin, in her dissenting opinion in *Rodriguez*, equated manifest unfairness with arbitrariness and found the prohibition on assisted suicide to be arbitrary.[31] The prohibition on arbitrariness only rose to prominence 10 years later, however, in the plurality and majority decisions in *Chaoulli* and *R. v. Malmo-Levine*[32] respectively. Two other principles targeting the means-ends relationship of government action developed alongside the rule against arbitrariness: *R. v. Heywood* recognized that laws must not be overbroad;[33] and *Malmo-Levine* held that a law would violate the principles of fundamental justice if it were "grossly disproportionate in its effects on accused persons, when considered in light of [its] objective[s]".[34]

The elevation of means-ends relationship of government action to a principle of fundamental justice has been criticized for "lack[ing] a content and a methodology".[35] Indeed, McLachlin J.'s early reliance on arbitrariness in her dissenting opinion in *Rodriguez* prompted the majority, which found no violation of section 7's second clause, to reiterate that the principles of fundamental justice must be "legal principles"; there must be sufficient societal consensus that the alleged principle is "vital or fundamental to our societal notions of justice"; and they must be

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[29] *Morgentaler*, *supra*, note 7, at 72, *per* Dickson C.J.C. and Lamer J.; see similarly *Morgentaler*, at 110, *per* Beetz J. and Estey J. (stating that the scheme's requirements "are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure").

[30] *Id.*, at 110, *per* Beetz J. and Estey J.

[31] *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at para. 206 (S.C.C.) [hereinafter "*Rodriguez*"] (holding that the purpose of the prohibition on assisted suicide — the protection of autonomy — was not furthered by the law in the case of Sue Rodriguez and that therefore "the objective that motivates the legislative scheme that Parliament has enacted to treat suicide is not reflected in its treatment of assisted suicide").

[32] *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) [hereinafter "*Malmo-Levine*"].

[33] *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) [hereinafter "*Heywood*"].

[34] *Supra*, note 32, at para. 169.

[35] Cameron, *supra*, note 4, at 159 (observing that the arbitrariness standard in *Rodriguez*, "in function and effect, propose[s] a 'fairness standard' which allows the court to invalidate laws simply because they are considered unfair").

capable of being "identified with precision and applied to situations in a manner that yields predictable results".[36]

These concerns sharpen as proportionality analysis has become increasingly prominent[37] and powerful[38] in recent years. As the next section demonstrates, proportionality analysis — particularly in the more searching form that has emerged since *PHS* — has created more space for the often hidden influence of subjective values. This is so despite the fact that proportionality analysis purports to be a value-neutral or content-neutral task that does not pass on the substantive ends of government policy but simply on whether the government is pursuing its own ends faithfully and with sufficient precision.

III. SUBJECTIVITY IN "ARBITRARINESS, OVERBREADTH AND GROSS DISPROPORTIONALITY"

The claim that arbitrariness, overbreadth and disproportionality analysis reflects little more than judges' policy preferences is compelling. Capricious or unprincipled decision-making may come from the way the court characterizes the purpose of allegedly infringing action, as well as how the court appreciates facts in its analysis of arbitrariness, overbreadth and disproportionality.

1. Purposes

Any consideration of the relationship between a government action's means and its ends requires that the goals — or in the language of *Oakes*,[39] the purpose — of that action be identified. Yet, there is no clear methodology for identifying the purpose of laws or policies against which its means are to be tested. How a law or policy's purpose is construed and deployed may determine the results of means-testing analysis in a number of ways.

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[36] *Rodriguez*, *supra*, note 31, at 590-91.

[37] See, *e.g.*, *PHS*, *supra*, note 2; *Canada (Attorney General) v. Bedford*, [2012] O.J. No. 1296, 109 O.R. (3d) 1, at para. 68 (Ont. C.A.), appeal heard and reserved June 13, 2013, [2012] S.C.C.A. No. 159 (S.C.C.) [hereinafter "*Bedford*"]; *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 287 C.C.C. (3d) 1 (B.C.S.C.), revd [2013] B.C.J. No. 2227, 2013 BCCA 435 (B.C.C.A.) [hereinafter "*Carter*"].

[38] See *supra*, note 2 and accompanying text.

[39] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

In *PHS*, for example, the Supreme Court measured the federal refusal to grant a statutory exemption from drug laws against the purpose of the *Controlled Drugs and Substances Act*[40] as a whole: the protection of health and public safety. This characterization of the purpose of the legislation made it easier for the Court to find the denial of the constitutional exemption arbitrary and grossly disproportionate: creating criminal law obstacles for Insite did nothing to promote health and safety (on the contrary), even as it presented a uniform stance on the possession of narcotics. Had the purpose of the Act been characterized as discouraging, or even curbing, the use of illegal drugs, then it would have been more difficult for the claimants to position Insite as furthering rather than undermining the goals of the legislation.

In *Canada (Attorney General) v. Bedford*, the Ontario Court of Appeal's finding that Canada's anti-prostitution laws were overbroad and grossly disproportionate to their purpose was driven largely by the ways in which the court characterized the purpose of those laws. The court considered multiple possible purposes behind the criminal prohibitions on operating bawdyhouses, living off the avails of prostitution and communicating for the purposes of prostitution, and ultimately defined each rather narrowly. The Attorney General of Ontario urged the broadest possible characterizations. It suggested, for example, that the bawdyhouse provisions were designed to promote values of dignity and equality by criminalizing a practice that reinforces anti-egalitarian attitudes.[41] (It is worth noting that such a characterization would permit a reviewing court to determine that a law can serve its purpose simply by "sending a message", which sits uneasily with the requirement in *PHS* that laws affecting the section 7 interest must serve their purpose in fact, on the evidence, and not merely in theory.) The Attorney General of Canada argued that the purpose of the bawdyhouse provisions was to discourage and deter prostitution in order to prevent harm to those who engage in prostitution outside of the public view. The court, based on historical analysis, ultimately concluded that the law's purpose was to combat neighbourhood disruption and disorder. With the purpose so narrowly construed, the court could more easily find the bawdyhouse provisions overbroad and grossly disproportionate. The similarly narrowly defined purpose of the living-off-the-avails provisions — the prevention of

40 S.C. 1996, c. 19.

41 *Bedford, supra*, note 37, at para. 182.

exploitation — allowed the court to conclude that it too, was overbroad in its scope and grossly disproportionate in its effects.

The judges at the Court of Appeal were ultimately divided by their disagreement over how the communication provision's purpose ought to be construed.[42] The majority preferred a broader interpretation of the objective of the communication provision: addressing the social nuisances flowing directly from prostitution (street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by, especially children), as well as other behaviours which in its view were "associated" with prostitution (such as drug possession, drug trafficking, public intoxication and organized crime).[43] The expanded conception of the purpose of the provision permitted the majority to place greater weight on the extent to which the provision served its goals in its analysis of gross disproportionality. The dissent, by contrast, found that the impact of the communication provision on the lives and safety of sex workers was grossly disproportionate in part because it weighed the impacts of the legislation against a narrower range of government objectives (and arguably less serious ones): "street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children".[44]

In *R. v. Khawaja*, the Supreme Court of Canada upheld a criminal prohibition on participation in terrorist activity by construing the purpose of the legislation narrowly, and then interpreting the prohibition narrowly in accordance with that purpose.[45] In doing so, it arguably avoided close scrutiny of the prohibition's likely effects.

Opponents of the prohibition on participation in terrorist activity were concerned that it had the potential to encompass people who, while not terrorists themselves, had some involvement — financial or political — with terrorists, even if, for example, the accused's contribution never actually enhanced the group's activity to carry out terrorist activity, or the accused did not know the nature of the activity being considered.[46]

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[42] All the members of the court rejected the broadest interpretation of the purpose of legislation urged by the Attorney General of Ontario — to combat the "normalizing" effect exposure to prostitution can have on children (*id.*, at para. 286).

[43] *Id.*, at para. 307.

[44] *Id.*, at para. 347.

[45] *R. v. Khawaja*, [2012] S.C.J. No. 69, [2102] 3 S.C.R. 555 (S.C.C.) [hereinafter "*Khawaja*"].

[46] The Canadian Bar Association, for example, feared that the law could apply to lawyers who represented known terrorists (Canadian Bar Association, *Submission on Bill C-36 – Anti-terrorism Act* (October 2001), online: Canadian Bar Association <http://www.cba.org/pdf/submission.pdf>, at 26); Kent Roach, "The New Terrorism Offences and The Criminal Law" in

The law's purpose, reasoned the Court, was to prosecute and prevent terrorism, *not* to punish individuals for "innocent, socially useful or casual acts, which, absent any intent, indirectly contribute to a terrorist activity".[47] Having so circumscribed the purpose, the Court then went on to interpret the participation prohibition narrowly in conformity with that purpose — an offender must have the "higher subjective purpose" of helping a terrorist to carry out terrorism — and ultimately upheld it as constitutional.[48] By elevating the mental element of the offence, the Court in some respects appears to answer its opponents' concerns. However, it has been criticized for failing to accurately reflect government's intention, and also for its failure to clarify what such a "higher subjective purpose" might be.[49]

PHS, *Bedford* and *Khawaja* demonstrate that courts may strike down, uphold, or craft the meaning of legislation through the way in which they cast legislative purpose against which to assess arbitrariness, overbreadth, and gross disproportionality. Even as it denies that courts pass on the wisdom of those legislative goals, the process leaves much scope for subjectivity.

2. Arbitrariness, Overbreadth and Gross Disproportionality

We 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. Although courts have acknowledged challenges in distinguishing among the doctrines for overbreadth, arbitrariness and gross disproportionality, these are beginning to emerge as a set of three distinct principles.[50] Each may be criticized for failing to adequately cabin judicial caprices.

(a) Arbitrariness

Chaoulli ushered in a more searching test for arbitrariness that was ultimately endorsed by the full court in *PHS*, one that asks not only

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Patrick Macklem, Ronald J. Daniels & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 151, at 161.

47 *Khawaja*, *supra*, note 45, at para. 44.

48 *Id.*, at para. 45.

49 Peter Sankoff, "Khawaja: Mixed Messages on the Meaning of Intention, Purpose and Desire" (2013), available on SSRN, at 8 [hereinafter "Sankoff"].

50 See *Bedford*, *supra*, note 37, at para. 151.

whether a law could reasonably serve its purpose,[51] but whether it does on the facts. The judicial standard for arbitrariness is not settled:[52] In *Chaoulli* itself, three judges would find state action affecting life, liberty or security of the person if it is not "necessary"[53] to further the state objective. Three would have posited a stricter test: ask instead whether the state action "bears no relation to, or is inconsistent with, the state interest that lies behind the legislation".[54] The latter test is more deferential, though the reasons for preferring one level of deference over another is not clearly articulated in the case. Both definitions of arbitrariness, however, rely closely on facts. And, indeed, it was the Court's appreciation of the facts in *Chaoulli* about the relationship between the ban on parallel private health insurance and the necessary conditions for protecting the public health care system that most divided the Court and that has attracted the most scholarly criticism.[55]

(b) Overbreadth

The doctrine of overbreadth raises similar concerns about judges' abilities to appropriately weigh facts in the proportionality assessment. In *R. v. Heywood*, for example, the Supreme Court of Canada struck down a provision of the *Criminal Code*[56] that prohibited anyone who had been convicted of sexual assault from "loitering in or near a schoolyard, playground, public park, or bathing area". Exemplifying concerns discussed above, the majority and dissent disagreed about the purpose of the legislation: was it designed to protect children only, or also adults? They

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[51] See, *e.g.*, *Malmo-Levine*, *supra*, note 32.

[52] *PHS*, *supra*, note 2, at para. 132.

[53] *Chaoulli*, *supra*, note 21, at paras. 131-132.

[54] *Id.*, at para. 232. This latter test was adopted by the courts in *Bedford*, *supra*, note 37, at paras. 145-147 and *Carter*, *supra*, note 37, at para. 1332 (S.C.).

[55] See Martha Jackman, "The Last Line of Defence for [Which?] Citizens: Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 Osgoode Hall L.J. 349, at 357; Hamish Stewart, "Implications of *Chaoulli* for Fact-Finding in Constitutional Cases" in Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice* (Toronto: University of Toronto Press, 2005) [hereinafter "*Access to Care*"] 207, at 211; Charles G. Wright, "Different Interpretations of 'Evidence' and Implications for the Canadian Healthcare System" in *Access to Care*, *id.*, 220, at 223 (all criticized the Supreme Court's failure to attend to expert evidence justifying the insurance ban, Wright calling it "utterly inexplicable"); Sujit Choudhry, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 S.C.L.R. (2d) 501, at 534 [hereinafter "Choudhry"] ("The Court's disregard for this evidence is nothing short of astonishing").

[56] R.S.C. 1985, c. C-46.

disagreed about the interpretation of the legislation — notably around whether loitering required any malevolent intent beyond simply hanging around without any particular purpose. Most importantly for the present purposes, they disagreed about key factual questions, such as whether those who sexually assault adults are any more likely to pose a threat to children,[57] and the magnitude of risks of re-offence for sexual offences.

Most recently, in *Carter v. Canada (Attorney General)*, the Supreme Court of British Columbia relied on the newly developed doctrine of overbreadth to read down the offence of assisting suicide, effectively re-visiting the Supreme Court of Canada's 1993 decision to uphold the same legislation in *Rodriguez*. The courts in both cases understood the prohibition's purpose in the same way: to protect the vulnerable who might be induced in moments of weakness to commit suicide.[58] What permitted revisiting *Rodriguez*, in the British Columbia Supreme Court's estimation, was how the newly developed and searching doctrines of overbreadth and gross disproportionality interacted with new "legislative and social *facts*" (emphasis added) that were not available at the time *Rodriguez* was decided. These included experience in jurisdictions with legalized physician-assisted death, changes in palliative care practices including reliance on the more painful terminal sedation in order to end life without running afoul of the criminal law, changes in Canadian public opinion, parliamentary and other reports since *Rodriguez*, and developments in medical ethics that found no meaningful ethical difference between physician-assisted suicide and end-of-life practices like withholding or withdrawing life-sustaining treatment or administering palliative sedation that might hasten death.[59] The Court ultimately granted a constitutional exemption for physician-assisted suicide on the factual bases that the risks inherent in permitting physician-assisted death could be mitigated through a system of judicial safeguards. It concluded that absolute prohibition was overbroad because it was neither necessary

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[57] *Heywood*, *supra*, note 33, at 809, Gonthier J. In the dissent's view: "Contrary to conventional wisdom, Dr Abel discovered that there is extensive cross-offending so that a given offender is likely to be involved in a variety of different activities throughout a lifetime."

[58] *Carter*, *supra*, note 37. One of Smith J.'s reasons for departing from *Rodriguez* was that overbreadth and gross disproportionality have only more recently emerged and been articulated as distinct principles of fundamental justice. The Ontario Court of Appeal relied on similar reasoning to reconsider the prostitution offences in *Bedford* (*supra*, note 37) despite the Supreme Court of Canada's prior consideration of the provisions in the *Prostitution Reference* (*supra*, note 11).

[59] *Carter*, *supra*, note 37, at paras. 942, 1336 (S.C.).

to prevent inducement of suicide by vulnerable persons, nor was it the least restrictive means by which to do so.[60]

(c) Gross Disproportionality

Gross disproportionality analysis has explicitly depended not only on how the facts are appreciated, but also on normative values and assumptions about the harms and benefits of government action. In *Bedford*, disagreement between the majority and dissenting justices about the disproportionate effect of the communication provisions on the lives and safety of street-based sex workers can be traced in part to different evaluations of the facts. The majority thought there was less evidence about the safety benefits of screening customers than there was about the benefits of moving indoors and hiring bodyguards; the dissenting judges, on the other hand, felt that the safety benefits of screening, as well as working in public as opposed to on isolated streets, were well established.[61] The majority found that street-based sex workers could mitigate the harms that came from the inability to verbally screen prospective customers, for example by relying on their intuition, checking customers' appearance, backseats of cars, or having friends nearby to take down licence plates.[62] The dissent considered that these alternatives were not as effective at mitigating the dangers of sex work as unrushed verbal negotiation.[63]

But the different appreciation of the facts in *Bedford* was also driven by values about the role of government in driving and responding to systemic inequality. The majority took a formal approach, holding that poverty, addiction, gender and race are the primary sources of street-based sex workers' marginalization and that the communication provision itself only partially contributed to the harm they faced on the streets. Weighing the harm caused by the communication provision only, and subtracting the impact of systemic factors, the majority concluded that the legislation's harm was not grossly disproportionate to its benefits in combating social nuisance. The dissent points out that this "turn[s] the question of pre-existing disadvantage on its head".[64] Rather than diluting

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60 *Id*., at paras. 1363-1367.
61 *Bedford*, *supra*, note 37, at para. 349.
62 *Id.*, at para. 313.
63 *Id.*, at para. 349.
64 *Id.* at para. 357.

the adverse effect of the communication provision, in the dissent's view pre-existing marginalization exacerbates it. The question of whether and how systemic vulnerability ought to be considered in a purposive interpretation of section 7 will be discussed further below.

IV. DÉJÀ VU ALL OVER AGAIN: RULES AND PRINCIPLES FOR GUIDING DEFERENCE UNDER SECTION 1 OF THE CHARTER

The yearning for principle in managing deference under section 7 of the Charter should feel deeply familiar. Struggle over deference to Parliament has been a leitmotif in section 7's own history, as suggested in Part II of this paper. Moreover, although the more searching section 7 standard is relatively recent, rights-affecting government policy has been means-tested for nearly 30 years under section 1 of the Charter, via the *Oakes*[65] test on proportionality. Over time, the test has been criticized for the ways in which courts have retreated from its robust application to allow greater deference to government, and, through this process, for its growing indeterminacy.[66] This section describes the ways in which section 1 analysis has grown increasingly deferential — most notably by taking the factual assessment about policy impact to the forefront of the judicial task — such that it presents similar challenges of judicial capacity and legitimacy as in the proportionality analysis in section 7. Next, it canvasses some of the devices that the Supreme Court has used to bring principle to that assessment and finds that these must be tethered to the purpose of section 1 to have meaning in context.

Oakes, on its face, presents a more exacting form of proportionality test than the one emerging through section 7. First, under section 1, government bears the burden of demonstrating proportionality; section 7, as a substantive right, places the burden on the rights claimant to prove the *absence* of a sufficient connection between government law or policy and its impact. *Oakes* requires government to demonstrate a pressing and substantial objective; courts applying the section 7 proportionality analysis identify, but do not evaluate, government objectives. At this point, it may be too early to distinguish the section 7 standard on arbitrariness from the rational connection test in *Oakes*, as well as *Oakes*' minimal

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[65] *Supra*, note 39.

[66] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), at 27-30.

impairment from the rule against overbreadth in section 7. The final *Oakes* branch requiring proportionality, however, is clearly more stringent than section 7's prohibition on gross disproportionality.

But over the years, the courts seem to have softened the requirements of *Oakes*,[67] often in ways that have increased the burden on courts to pronounce upon more subjective questions such as the impact of rights infringements on individuals and the importance and effectiveness of government policy.[68] The need for a "pressing and substantial objective" can now be satisfied by objectives that are merely "valid" and "sufficiently important".[69] The demand for careful legislative design at the rational connection stage has been replaced with the requirement that the means simply further, in some way, the legislative objective.[70] The subjective task of courts has been broadened through two developments in the "minimal impairment" test. First, "minimally impairing" has been downgraded to "impairing as little as is reasonably possible". Courts must perform the more subjective task of determining whether there is some "reasonable alternative scheme" instead of whether the measure was the least intrusive available.[71] More recently, in *Alberta v. Hutterian Brethren of Wilson Colony*, the Supreme Court qualified that the minimal impairment test cannot be satisfied by pointing to "less drastic means which do not actually achieve the government's objective".[72] Instead, one must ask whether there is an alternative, less drastic means that will achieve the government's objectives just as fully.[73] This question itself draws courts closer into difficult factual questions about the extent to which means fulfil their purpose in fact. Moreover, it pushes the analysis toward the final *Oakes* stage of balancing proportionality between the infringement and the objective, which "allows for a broader assessment

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[67] See Choudhry, *supra*, note 55, at 507.

[68] See Lorraine Weinrib, "Limitations on Rights in a Constitutional Democracy" (1996) 6 Caribbean L. Rev. 428, lamenting the softening of *Oakes*.

[69] *R. v. Whyte*, [1988] S.C.J. No. 63, [1988] 2 S.C.R. 3, at para. 36 (S.C.C.); *Prostitution Reference*, *supra*, note 11, at 1190.

[70] *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.).

[71] *Edward Books*, *supra*, note 18, at 772.

[72] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, at para. 54 (S.C.C.).

[73] *Id.*, at para. 55. Justice LeBel, dissenting, noted how challenging it would be to meet the test: "No means that would not allow the objective to be realized to its fullest extent could be considered as a reasonable alternative."

of whether the benefits of the impugned law are worth the cost of the rights limitation".[74]

The overall result is that as the scope for weighing of the deleterious and salutary effects of legislation expands, as analysis is pushed further into the realm of factual contest, it may become easier for judges to appreciate those facts in conformity with their own normative preferences and frameworks.[75] Petter and Monahan's words two years into the loosening of the *Oakes* test remain apt: "The court still has the stringent *Oakes* test sitting on the shelf waiting to be dusted off for use at an appropriate moment ... any time that the Court wants to strike down a law," but "on the other hand, when they are dealing with a law with which they are relatively unsympathetic, the Court is able to step aside and basically allow the legislature to do what it wants".[76]

The Supreme Court, for a number of years, worked to develop devices for managing subjectivity under the loosening *Oakes* test by listing considerations to guide deference at the minimal impairment stage (which has, until recently, been understood to be the point of greatest friction in the section 1 analysis). These categories and classifications all relate in different ways to courts' institutional capacity and legitimacy in interfering with government choices in the name of Charter protection.

The Court would construe minimal impairment more strictly, for example, where the Court enjoyed some institutional advantage or expertise, as the Court felt it did in criminal justice contexts.[77] (This same reasoning may explain the Court's early efforts, based on the *Motor Vehicle Reference*, to constrain the principles of fundamental justice to legal, most often criminal, institutions.) By contrast, where the Court is mediating concerns between competing claims of different groups, it might not be able to achieve the same degree of certainty, and might need to defer, as it did in *Irwin Toy Ltd. v. Quebec (Attorney General)*.[78] Where the interests that government is protecting are those of vulnerable groups, such as children,[79] employees[80] or low-skilled, non-unionized

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[74] *Id.*, at para. 77.

[75] See Benjamin L. Berger, "Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 S.C.L.R. (2d) 25.

[76] Andrew J. Petter & Patrick J. Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 S.C.L.R. 61, at 95.

[77] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 994 (S.C.C.).

[78] *Id.*, at 994.

[79] *Id*.

[80] *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

workers,[81] greater deference has been urged, presumably on the basis that the government might, too, be protecting Charter-related interests through legislation. In addition, the Court might view competing resource claims as a reason to defer. In *McKinney v. University of Guelph*, for example, the Supreme Court rejected a constitutional challenge to a university's mandatory retirement policy on the basis that universities needed financial flexibility, for example to recruit new faculty members.[82] Finally, the Court might rank constitutionally protected interests, and require a higher standard of proof for the more important ones.[83] This is most evident in the free speech jurisprudence, where "core" free speech interests like political speech warrant more scrutiny than "peripheral" speech like commercial expression or sexually explicit expression.[84]

The proportionality requirement in section 7, as it has grown more searching, has likewise come to focus on contestable factual assessments. In managing the empirical task, it might be tempting to reach for a similar set of classifications to determine deference under section 7. And indeed, the courts' categories for section 1 deference may be able to explain some of the section 7 arbitrariness, overbreadth and gross disproportionality decisions so far. A lower deference standard in criminal law cases could justify or explain the Court's assertiveness in construing both the purpose and the interpretation of the legislation in *Khawaja* narrowly via concepts of intent.[85] Deference to legislative protections of the vulnerable might justify the Supreme Court favouring Insite's continued operation over the uniform application of the federal drug law. The majority in *Bedford* may have applied its particular brand of vulnerability analysis to both sides of the balancing exercise, which might explain why it deferred to the government's interest in protecting children from seeing prostitution-related communication to justify the risks to the lives and safety of sex workers posed by the communication prohibition.

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[81] *Edward Books*, *supra*, note 18.

[82] *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 286 (S.C.C.).

[83] This evokes the U.S. practice of applying strict scrutiny to fundamental rights, but to test only the rational basis of legislation for rights that are not classified as fundamental.

[84] The Supreme Court rejected an argument from interveners representing sexual minorities that sexually explicit expression is a form of political expression in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) and in *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.).

[85] Even if it may have gotten them wrong (Sankoff, *supra*, note 49).

Yet in section 1 doctrine, these classifications failed to stand up as determinants of deference for a number of reasons.[86] First, courts failed to consistently follow these schemas. In the context of freedom of expression, for example, the Court has in practice shown almost as much deference on political speech, which is considered "core" speech, as it has on other issues.[87] In addition, the distinctions often lacked internal cogency. For example, courts could not justify lower deference on criminal law cases on the basis that they were balancing state versus individual interests alone, given the stake that victims, and society more broadly, have in the scope and enforcement of criminal law. For this reason, in *Thomson Newspapers Co. v. Canada (Attorney General)* in 1998, the majority of the Court rejected the criminal/non-criminal binary and stated that "nothing ... suggests that there is one category of cases in which a lower standard of s. 1 is applied and another in which a higher standard is applied".[88] The parallel with courts' difficulty confining section 7's reach to institutions of criminal justice is evident.

Although it may not be feasible to rely on binary categories to create a mechanism for determining deference, the rationales underlying those categories may continue to inform capacity and legitimacy in judicial means-testing in both section 1 and section 7.[89] It is important to recognize, however, that these common institutional capacity and legitimacy factors ought to weigh differently in a purposive, contextually-grounded application of the different sections.

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[86] For a more complete discussion of this point, see Choudhry, *supra*, note 55.

[87] *Harper v. Canada (Attorney General)*, [2000] S.C.J. No. 58, [2000] 2 S.C.R. 764 (S.C.C.) (upholding limits on third party spending); *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) (upholding a law prohibiting dissemination of election results from one electoral district to another if polling stations in the other district are still open). See also *Khawaja*, *supra*, note 45, at para. 73 (avoiding the freedom of speech implications of the impugned legislation by interpreting the criminal prohibition on participation in terrorist activity as catching only violent acts or expression, which are excluded from the protective zone of freedom of expression).

[88] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at para. 90 (S.C.C.).

[89] This finds some support in Deschamps J.'s own pronouncements in *Chaoulli*, *supra*, note 21, at para. 95, even though one might doubt whether Deschamps J. followed her own advice in that case:

> In short, a court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests. Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state. This list is certainly not exhaustive.

Section 1 has been understood as a device for placing limits on rights, based on the recognition that courts lack the democratic authority provided by electoral accountability, and that they lack expertise and resources to determine whether a particular law will increase the general welfare.[90] In other words, section 1 is explicitly concerned with tempering judicial overreach in light of the legislature's presumed democratic legitimacy; its mandate is to protect the general welfare; and its superior resources for collection, analysis and integration of empirical data for policy formulation. These factors operate differently in different contexts. Thus, in the wake of *Chaoulli* (in which the Supreme Court of Canada struck down a measure designed to protect the public health care system in favour of an individual right to purchase private health insurance), Sujit Choudhry defended the less exacting *Oakes* standard. In his view, a more flexible *Oakes* standard, requiring not proof, but "*reasoned demonstration* of the good which the law may achieve in relation to the seriousness of the infringement",[91] recognizes that governments need to be able to act in the public interest under conditions of uncertainty. *Oakes* should be understood as a way of allocating the risk of uncertainty,[92] bearing in mind such factors as relative institutional expertise, the balancing of interests, particularly those of the vulnerable, and the seriousness of the rights interests at stake.

Section 7, on the other hand, is a substantive, individual right. If the guarantees against arbitrariness, overbreadth and gross disproportionality are to be understood as substantive principles of fundamental justice, their application must be guided by a conception of section 7's substantive purpose. Untethered from such a purpose, it is difficult to know which factors for deference ought to be favoured and why, and deference on factual determinations will appear to be capriciously allocated. The final section of this paper draws lessons from section 7's history and makes some preliminary suggestions about how substantive normativity might guide judicial deference in the context of a section 7 right to proportionate lawmaking.

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[90] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), at 38.2.

[91] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 129 (S.C.C.) (emphasis added).

[92] Choudhry, s*upra*, note 55.

V. BEYOND LIMITATIONS: A RIGHT TO PROPORTIONATE LAWMAKING?

The rising prominence of proportionality as a principle of fundamental justice can be understood as a retreat to an *appearance* of value-neutrality following the difficulty setting substantive boundaries on entitlements such as liberty and limiting the principles of fundamental justice to those linked with institutions of justice.[93] And yet, although proportionality analysis appears to assess only how closely government action tracks its goals, substantive values may be inescapable as courts identify those goals and scrutinize proportionality with close attention to the policy's real-world impacts, in all its complexity.[94] If 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. It is beyond the scope of this paper to fully flesh out what those values might be or to place them within existing justifications for rights-based review.[95] I do, however, suggest that the focus on proportionality reflects an underlying concern in section 7 with overweening or abusive majoritarianism. So understood, purposive proportionality analysis may permit courts to take into account the transparency and inclusiveness of lawmaking beyond ordinary political processes among the factors guiding deference.

The Supreme Court has not decisively set out the purpose of section 7 the way it has for other rights.[96] It has, however suggested methodologies for identifying the principles of fundamental justice, which certainly inform that purpose. The *Motor Vehicle Reference* stated that the principles of fundamental justice are exemplified by the guarantees in sections 8-14, and might also be expressed in common law rules.[97] But as Hamish Stewart has observed, the "common thread among these principles was not their historical association with a particular legal system or international

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[93] See Part II, *supra*.

[94] See Part III, *supra*.

[95] See Stewart, *supra*, note 20, at 308-13 (sketching and contextualizing a liberal-democratic defence of a broad interpretation of s. 7, and suggesting that a broad s. 7 may have the effect of encouraging legislatures to take rights into account as they draft legislation).

[96] See, *e.g.*, *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 157-60 (S.C.C.) (setting out the purpose of s. 8 of the Charter as protecting a reasonable expectation of privacy); *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310 (S.C.C.) (stating that the purpose of s. 10(b) of the Charter is to allow a suspect to make a choice to speak to police investigators that is both free and informed).

[97] *Motor Vehicle Reference*, *supra*, note 5, at 503.

order but their connection with a normative idea about the function of law".[98] The *Motor Vehicle Reference* suggested that the principles of fundamental justice are founded upon the "dignity and worth of the human person" and the "rule of law".[99]

The ways in which the principles against arbitrariness and gross disproportionality are driven by the rule of law or the dignity and worth of a human being have not been made explicit.[100] In fact, ironically, the only time the Court has invoked the rule of law in relation to gross disproportionality has been to uphold the criminal prohibition on non-medical use of marijuana on the basis that it would undermine the rule of law for the Court to count the fact that people do not comply with the law against it in the analysis of gross disproportionality.[101]

On the other hand, some keys to the link between the protection from arbitrary action on the one hand and rule of law and human dignity on the other may be found in the jurisprudence. In *Heywood*, for example, Cory J. stated that overbroad laws violate the principles of fundamental justice because they limit rights for no reason.[102] The same can of course be said of arbitrary laws. Grossly disproportionate laws limit rights for insufficient reason. The proportionality norms can thus be understood to vindicate the dignity of human beings and arguably rule of law by protecting against overweening majoritarianism — majoritarianism that takes insufficient account of the needs of those whose interests may be excluded from or harmed by law and policy.

If the norms against arbitrariness, overbreadth, and gross disproportionality are designed to protect against overweening majoritarianism, it follows that, in addition to the capacity- and legitimacy-affecting factors considered explicitly or implicitly within the *Oakes* framework, courts adjudicating section 7 claims may be less inclined to shift the risk of uncertainty onto government where its laws and policies are made with demonstrated attention and input from those most affected, including those marginalized from legislative processes.[103] Hogg states the same

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[98] Stewart, *supra*, note 20, at 102.

[99] *Id.*, at 102-103, citing *Motor Vehicle Reference*, *supra*, note 5, at 503.

[100] See *contra*, the principle of fundamental justice that rules must not be overly vague, which has been linked to the concept of rule of law via the notion that a law must be precise enough "to give sufficient guidance for legal debate". (*R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606, at 639 (S.C.C.)).

[101] *Malmo-Levine*, *supra*, note 32, at paras. 176-178.

[102] *Heywood*, *supra*, note 33, at 793.

[103] Note here the difficulties that poor and marginalized applicants face in building a strong evidence-based record to support a Charter challenge. Martha Jackman, "Reality Checks: Presuming

proposition in the inverse in response to his own concerns about judicial overreaching in section 7 adjudication: "If persons harmed by the dysfunctional law have little popular appeal or political power, then legislators may be uninterested in their problems and disinclined to take any action especially if they believe that a remedial law is likely to be unpopular. In that situation, there is a case for judicial review of the deprivation of life, liberty or security of the person of the unpopular minority."[104] In the context of challenges to the federal crime agenda, for example, the legitimacy of judicial intervention would not come from courts' relative expertise in the appropriateness of, say, mandatory minimum sentences (which may be a question of values over which the court has no greater institutional legitimacy), but from the facility with which the majoritarian legislatures might sacrifice the rights of the abstract accused, considering in particular the social and political marginalization of those who pass through the criminal justice system.

There are methodological, doctrinal, and conceptual challenges to factoring marginalization from political processes into deference granted in proportionality analysis. How are politically powerless minorities to be identified? And when will efforts to include and consider such minorities answer a charge of overweening majoritarianism? Such questions have troubled international human rights scholars interpreting similar requirements to include the participation of marginalized groups in health policy, for example.[105]

Furthermore, courts have historically been reluctant to inquire into the "democratic quality" of laws passed through constitutionally mandated processes. In *Wells v. Newfoundland*, for example, the Court affirmed that legislative decision-making was not subject to any administrative law duty of fairness beyond the constitutional requirements for valid law-making.[106] Similarly, in *Authorson v. Canada*, the Supreme

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Innocence and Proving Guilt in Charter Welfare Cases" in Margot Young, Susan Boyd & Sheilagh Day, eds., *Poverty Rights, Social Citizenship, Legal Activism* (Vancouver: U.B.C. Press, 2007), at 24.

[104] Hogg, "The Brilliant Career", *supra*, note 3, at 209.

[105] See, *e.g.*, Gunilla Backman, Paul Hunt *et al*., "Health systems and the right to health: an assessment of 194 countries" (2008) 372 The Lancet 2047, at 2079, 2082 (attempting to create a set of indicators to assess countries' compliance with the right to the highest attainable standard of health, but recognizing the difficulty of identifying indicators of, *inter alia*, marginalization and participation).

[106] *Wells v. Newfoundland*, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199, at para 59 (S.C.C.) [hereinafter "*Wells*"] (stating that Parliament could legislate to bar compensation for senior civil servants whose positions were abolished, provided the constitutional requirements for valid law-making were met and clear statutory language was used).

Court stated: "long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable."[107] On that basis, the Court upheld legislation to expropriate interest owed on pensions of disabled veterans, even contrary to the Crown's fiduciary duty, and rejected Authorson's claim that he should have been given notice and a hearing to contest the expropriation law.

One response to the doctrinal objection is that neither *Wells* nor *Authorson* concerned a constitutional rights claim. *Wells* was principally argued on administrative law grounds,[108] and the claim in *Authorson* was based on the *Bill of Rights* protections against deprivation of property except by due process of law and to a fair hearing for determination of rights and obligations.[109] And indeed, the Court in *Authorson* conceded that "legislatures are subject to constitutional requirements for valid lawmaking, but *within their constitutional boundaries*, they can do as they see fit".[110]

It remains an open question, from a doctrinal perspective, whether courts might directly or indirectly favour more inclusive lawmaking practices or take into account political marginalization in enforcing *constitutional* rights. Although the Court has not read rights to participation beyond ordinary electoral processes into existing constitutional guarantees, it has suggested a willingness to encourage more inclusive policymaking through rights enforcement, even at the risk of blurring traditional lines around its function. In *Doucet-Boudreau v. Nova Scotia*, for example, the Court, by a 5-4 majority, approved of a novel constitutional remedy in which the judge retained jurisdiction to require the Nova Scotia government to report to the claimants, in Court, its progress in constructing schools in fulfilment of constitutional minority language education rights.[111] A strong dissent objected that the court was overstepping its role of declaring the law and ordering relief and thus undermined the principle of separation of

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[107] See, *e.g.*, *Authorson v. Canada*, [2003] S.C.J. No. 40, [2003] 2 S.C.R. 40, at para. 37 (S.C.C.) [hereinafter "*Authorson*"].

[108] *Wells*, *supra*, note 106, at para. 19.

[109] *Canadian Bill of Rights*, S.C. 1960, c. 44, ss. 1(a) and 2(e).

[110] *Authorson*, *supra*, note 107, at para. 59 (emphasis added).

[111] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).

powers.[112] The case does stand, however, as an example of the softening of rigid conceptions of the separation of powers in service of the Court's perception of effective rights enforcement.

A focus on whether it is doctrinally feasible to factor political marginalization into the proportionality calculus begs the question of whether such a thing is normatively desirable. This paper does not purport to offer an exhaustive answer to that question. Rather, it suggests that if the normative concern underlying proportionality analysis is with oppressive majoritarianism, then, in a complex world where it becomes difficult to demonstrate with certainty that a policy is doing what it purports to do, it may make sense to offer governments a greater margin of manoeuvre where they are making efforts toward more inclusiveness in setting law and policy.

It notes briefly, however, that accounting for political marginalization in this way finds support within frameworks that see rights as corrections for democratic deficits in ordinary political processes. Traditionally, human and constitutional rights have been criticized for being anti-democratic: they vest power in courts to second-guess democratic legislative choices. Two responses are typical: some concede the point that rights are anti-majoritarian, but accept that other values are more important.[113] Deliberative democratic theorists, seeking to steer a middle ground between rights and democracy, and drawing on the idea that democracy and rights are interdependent,[114] support the increasingly dominant idea that courts and legislatures both have a role to play in rights enforcement. Further, they have challenged the democratic legitimacy of ordinary political processes themselves, urging more robust processes seeking better input from citizenry.[115] Giving government more leeway when it seeks to craft laws with input from and attention to groups traditionally marginalized from political processes is one way to encourage such collaboration.

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[112] See *id*., dissenting opinion of Major, Binnie, LeBel and Deschamps JJ., at paras. 106-112.

[113] See, *e.g*., Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), at 17.

[114] As Simone Chambers explains: "There is no People's will to speak of without rights and there are no rights without some theory of popular sovereignty to create an original justification" (Simone Chambers, "Deliberative Democratic Theory" (2003) 6 Ann. Rev. Pol. Sc. 307, at 310).

[115] This is so despite the criticism that deliberative democratic theorists fail to attend to the concerns of marginalized groups. See, *e.g*., Melissa Williams, "The Uneasy Alliance of Group Representation and Deliberative Democracy" in Will Kymlicka & Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 127.

Taking account of the political exclusion of marginalized groups and individuals in allocating the risk of uncertainty in proportionality analysis likewise finds support among those who argue that section 7 ought to be informed by a concern for substantive equality and addressing social and economic power imbalance.[116] Indeed, this paper has suggested that proportionality analysis, detached from such a substantive purpose, runs the risk of arbitrariness. Section 1 is concerned with when governments, through the laws they pass, might justifiably place limits on rights. Section 7, on the other hand, has the potential to support a substantive conception of proportionality that responds to heavy-handed, opaque, perverse or ineffective policy that compromises life, liberty and security of the person. Given the complexities of measuring the real-world impact of law and policy, such a normative foundation may help temper, cabin, or at least expose some of the subjectivity inherent in a purportedly value-neutral proportionality analysis.

[116] See, *e.g.*, Kerri Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010-2012) 42 Ottawa L. Rev. 411, at 436; Marie-Ève Sylvestre, "The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and Adjudication of Rights" (2010-2012) Ottawa L. Rev. 391, at 407; Vanessa MacDonnell, "The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*" (2012) 17 Rev. Const. Stud. 53, at 70-73.