Bedford, Substantive Rationality, and Participatory Democracy

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The Supreme Court of Canada is developing doctrines of arbitrariness, overbreadth, and gross disproportionality under the aegis of fundamental justice protection in section 7 of the Canadian Charter of Rights and Freedoms. These doctrines are means to measure the "substantive rationality" of legislation. The author contends that judicial review reliant on these doctrines promotes recognition of marginalized stakeholder interests in the crafting of legislation, respect for the value of each individual in legislation, and bridging of gaps between the legislative processes that we have and those we should have given our commitments to equality under the law. Substantive rationality doctrine promotes participatory democracy. The Supreme Court's Bedfordcase, which struck down several Criminal Code provisions relating to sex trade work, is addressed as a concrete example of the protection of participatory democracy through the application of substantive rationality doctrine.

La Cour suprême du Canada élabore des doctrines arbitraires, de portée excessive et exagérément disproportionnées sous l'égide de la protection de la justice fondamentale dans l'article 7 de la Charte canadienne des droits et libertés. Ces doctrines sont un moyen de mesurer la « rationalité substantive » des dispositions législatives. L'auteur prétend que la révision judiciaire qui dépend de ces doctrines favorise la reconnaissance des intérêts d'intervenants marginalisés dans l'élaboration de dispositions législatives, le respect de la valeur de chaque individu dans les lois et comble le fossé entre les processus législatifs que nous avons et ceux que nous devrions avoir étant donné nos engagements envers l'égalité en vertu de la loi. La doctrine de la rationalité substantive favorise la démocratie participative. La cause Bedford, instruite par la Cour suprême, qui annula plusieurs dispositions du Code criminel se rapportant au travail lié au commerce du sexe, est traitée comme un exemple concret de la protection de la démocratie participative par l'application de la doctrine de la rationalité substantive.

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The Supreme Court's *Bedford* decision[1] has life-altering significance for sex trade workers and is crucial to the prospects of Parliamentary regulation of the sex trade through the *Criminal Code*.[2] In *Bedford*, a unanimous decision written by Chief Justice McLachlin, the Supreme Court struck down three sets of offence provisions relating to the sex trade under the *Charter*[3] and established the framework under which the constitutionality of the new sex trade provisions in the *Protection of Communities and Exploited Persons Act* (Bill C-36) are likely to be determined.[4] The decision addressed numerous issues, including exceptions to *stare decisis*,[5] social fact evidence in *Charter* cases,[6] the "shifting objective" doctrine,[7] and the division of judicial labour between trial and appellate courts.[8] The public interest standing issue was raised at trial,[9] but

1 *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, McLachlin CJ [*Bedford*].

2 RSC 1985, c C-46.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 *Protection of Communities and Exploited Persons Act*, SC 2014 c. 25 (*An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*), which received Royal Assent on November 6, 2014, after this paper was submitted. In this paper, I am trying to make constitutional sense of the tools used by the Supreme Court in *Bedford*. Applying those tools to Bill C-36 is another project, particularly because of complexities raised by its form of the "Nordic model" of sex trade regulation. I will, however, refer below to a few features of Bill C-36 relevant to my exposition.

5 "The issue of when, if ever, such precedents may be departed from takes two forms. The first 'vertical' question is when, if ever, a lower court may depart from a precedent established by a higher court. The second 'horizontal' question is when a court such as the Supreme Court of Canada may depart from its own precedents:" *Bedford*, *supra* note 2 at para 39. "In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": *ibid* at para 42. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 44, 46 [*Carter*].

6 "[T]his Court has expressed a preference for social science evidence to be presented through an expert witness …. The assessment of expert evidence relies heavily on the trial judge …. This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence . . . . The distinction between adjudicative and legislative facts can no longer justify gradations of deference:" *Bedford*, *supra* note 2 at para 53.

7 *Ibid* at para 132.

8 "When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case:" *ibid* at para 49; *Carter*, *supra* note 6 at para 109.

9 *Bedford v Canada (Attorney General)*, 2010 ONSC 4264, Himel J at paras 60-62 [*Bedford (Trial)*]; on the issue of private interest standing, see *ibid* at paras 44-59.

did not figure in the appeal[10] or Supreme Court decisions. I shall address the Supreme Court's use of the section 7 principles of arbitrariness, overbreadth, and gross disproportionality to measure the "substantive rationality" of legislation. My task shall be to take some steps towards an account of these principles' place in the Canadian constitutional framework.

Why should one bother with this task? There is nothing new about the judicial review of legislation under the constitution, whether the *Constitution Act, 1867* or the *Charter*. There is nothing new about the review of legislation under section 7 of the *Charter*. There is nothing new about "overbreadth" arguments under section 7 [11] or "disproportionality" arguments under section 12 of the *Charter*.[12] There is nothing new about "proportionality" assessments, whether under section 1 of the *Charter* or elsewhere in the law. Yet, the sort of review at work in *Bedford* seems to augment the scope of section 7, authorizing legislative policy assessment based on weighing the merits or effectiveness of legislation. And while there is nothing new about the concern that *Charter*-based judicial review threatens the due separation of powers, the new approach to section 7 may appear to support a "judicial activism" that undermines the democratic legislative process.[13]

I do not dispute that the substantive rationality doctrines could be misused and could unbalance constitutional ordering. I shall contend, however, that the substantive rationality analysis exemplified in *Bedford* does not undermine but supports the democratic legislative process. *Bedford*-style judicial review, turning on the doctrines of arbitrariness, overbreadth, and gross disproportionality, identifies and helps to correct defects in the legislative process. It ensures that marginalized stakeholder interests are reasonably taken into account in the crafting of legislation. It ensures that the value of each individual is reflected and respected in legislation. It helps to bridge the gap between the legislative processes that we have and the legislative processes that we should have, given our commitments to equality under the law. In short, it promotes participatory democracy. The Supreme Court's analysis in *Bedford* provides a concrete example of fundamental justice protecting participatory democracy.

10 *Bedford v Canada (Attorney General)*, 2012 ONCA 186 at para 50 [*Bedford (Appeal)*].

11 See e.g. *R v Heywood*, [1994] 3 SCR 761 [*Heywood*] and *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical Society*].

12 See e.g. *R v Goltz*, [1991] 3 SCR 485 and *R v Smith*, [1987] 1 SCR 1045.

13 Dwight Newman, "The *PHS* Case and Federalism-Based Alternatives to Charter Activism" (2013), 22:1 Const Forum Const 85 at 86-87.

To make out my claims, I shall discuss

(A) the constitutional order that supports the interpretation of section 7;

(B) the *Bedford* applicants' satisfaction of the threshold conditions of section 7;

(C) the failure of the impugned legislation to meet the section 7 standards of substantive rationality; and

(D) the role of section 1 of the *Charter* when legislation fails to meet section 7 substantive rationality standards.

A. The Constitutional Order and Fundamental Justice

The discussion of "fundamental justice" in *Bedford* provides a passageway towards the constitutional order that supports and is supported by the *Charter*. In the *BC Motor Vehicle Act* reference, (then) Justice Lamer had described the principles of "fundamental justice" as "the basic tenets of our legal system."[14] In *Bedford*, Chief Justice McLachlin took up Justice Lamer's guidance, but with some twists: "The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order . . . . The principles of fundamental justice are an attempt to capture those values."[15] Notice that McLachlin CJ looked not to "basic tenets" of (or in) our legal system, but to "basic values" that lie beyond and "underpin" not only the "legal system" but "our constitutional order." Chief Justice McLachlin's recasting of Lamer J's advice moves us towards an understanding of not only the principles of fundamental justice at work in *Bedford* but of the principles of our constitutional order.

14 *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, Lamer J at 503 [*BC Motor Vehicle Act*].

15 *Bedford*, *supra* note 2 at para 96; *Carter*, *supra* note 6 at para 81. The Chief Justice seems to be engaged in the same project as the German Federal Constitutional Court, as reported by Habermas: "The law is not identical with the totality of written laws. Besides the law enacted by state authorities, under certain conditions an additional element of law can exist that has its source in the constitutional legal order as a whole and is able to work as a corrective to the written law; the task of the judiciary is to find this element and realize it in its decisions" (resolution of February 14, 1973) in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans William Rehg (Cambridge, Massachusetts: The MIT Press, 1996) at 244 [Habermas, *Between Facts and Norms*]; in the words of Habermas, what are sought are the "architectonic principles of the legal order": *ibid* at 247. For the Federal Constitutional Court, the Basic Law is a "concrete order of values": *ibid* at 254.

1. Basic Features of the Constitutional Order

An important "basic value" that underpins our legal system and constitutional order, while not being itself a principle of fundamental justice, is respect for individual dignity, worth, and autonomy.[16] Different aspects of this value can be reflected in different legal principles (such as the presumption of innocence or the requirement of blameworthiness). Aspects of the value, one might say, are refracted through the prism of our constitutional order.

A further aspect of the valued individual is that he or she is not solitary. We encounter the legal subject as a being-with-others. From a legal perspective, the individual is embedded in the "constitutional order" to which McLachlin CJ referred. It is only when "freely associated citizens join together in a politically autonomous legal community" that the legal subject and the legal subject's rights emerge.[17] The Constitution provides the framework for individuals to come together within a common national project, and enables the pursuit of regional, local, and individual projects through law-making.[18]

Within a democratic constitutional order, the value of the individual is not surrendered but preserved. Legally (and meta-legally) each individual retains value; and more precisely, each individual retains equal value. As section 15(1) of the *Charter* has it, "[e]very individual is equal before and under the law."[19] In our common projects undertaken within our constitutional order, all individuals have claims of right; none can be simply excluded. If individuals have value which should be promoted, it follows that individuals — all individuals with a stake in a project — should have their interests taken into account in democratic decision-making. Individuals and their interests should not be ignored, especially when a project will result in significant adverse impacts. Democracy entails a radical inclusiveness.

16 See e.g. *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] at para 29; *BC Motor Vehicle Act*, *supra* note 15 at 503; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, Sopinka J at 592 [*Rodriguez*]; Federal Republic of Germany, *Basic Law*, Article 1(1) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority"), trans Christian Tomuschat et al, online: Deutscher Bundestag <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

17 Habermas, *Between Facts and Norms*, *supra* note 16 at 250.

18 "[T]he constitution sets down political procedures according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative project of establishing just (i.e. relatively more just) conditions of life": Habermas, *Between Facts and Norms*, *supra* note 16 at 263.

19 An important issue raised by Professor Jennifer Koshan in conversation is the relationship between s 7 substantive rationality claims and s 15 claims. I will not pursue that issue here.

Two sets of issues emerge at the intersection of individuals in the constitutional order. On the one hand, individuals cannot simply interact randomly. Rules are required for coordination and the pursuit of joint projects; mechanisms are required for the resolution of disputes under rules; rules must be enforced. Organized social interaction engenders law and the State. Given the need for rule-based organization, institutions and processes for the establishment of rules are required. In a social system based on the value of the individual, rule-making institutions and processes will entail some form of individual, democratic input. The nature of rule-making institutions and processes will vary between and even within social organizations, but democratic law-making, in whatever form it takes, is an essential part of the fabric of the constitutional order.

On the other hand, in the common project that is the constitutional order, an individual cannot always get his or her way. The terms of some laws or the objectives pursued through some joint projects will be contrary to the interests of some individuals. A problem arises: individuals must (practically) exist together; but if each individual is equally valuable, how can the interests of some individuals be subordinated to the interests of others, even through legislation resting on democratic processes? Should each individual have a veto over legislation? This is one of the classic problems of political theory, pursued especially by contractarian philosophers from Locke and Rousseau to John Rawls. Fully working out the answer to this problem provided by our constitutional order would be a large and difficult undertaking. For present purposes, I can only offer an hypothesis, or a sketch of one.

2. Integration through Reason and Reasonableness

An aspect of the valued individual is rationality, the ability to reason. True, rationality does not exhaust and is not co-extensive with human dignity and worth. We are not always rational (we sometimes sleep or are unconscious); we may face challenges that reduce our ability to reason; we begin as children whose reason must form. Part of being human, moreover, is our emotion, our passion, which may or may not be rational. Yet, an important part of what it means to be a legal subject, a participant in our constitutional order, a being-with-others in the legal reality defined by our constitution, is that we can reason. Indeed, if we are not rational, we cannot be held responsible for failing to follow the law.

We can reason for ourselves; we can reason for others. A distinction may be

drawn between individuals as "consumers" and as "citizens."[20] Individuals have particular, personal interests (various appetites and passions, egoistic or altruistic) which, one may broadly assume, individuals wish to maximize. In this sense, individuals are "consumers" (the consumer is sometimes described as a "rational utility maximizer"). Individuals, though, are also capable of understanding and appreciating the interests of others in their communities as well as their own interests. Further, individuals can understand and appreciate resolutions of competing interests which do not maximize their private interests. In this sense, individuals are "citizens."

The shift by an individual to a citizens' perspective is not at all unusual. Judges are required, in a wide variety of contexts, to step outside their own particular perspectives into the perspectives of others, so they can determine the "reasonableness" of conduct or of others' decisions. A finding that conduct or a decision is reasonable is not a finding that the judge would have acted or decided in the same way, but that the conduct or decision is one that others (the "reasonable person") could have come to, that fell within the range of behaviour of others or the range of reasonable conduct or decisions in the circumstances. Politicians, similarly, shift to the perspective of others when legislating. The justification of legislation should not be that it serves some particular individuals' interests, but that it serves the interests of the community. Individuals who are bound by legal requirements of reasonableness (whether, e.g., the law of negligence or the law of self-defence) are expected to conduct themselves as reasonable people, duly taking into account the interests of others.

As citizens, individuals can recognize that legislative determinations that do not maximize their own interests are nonetheless acceptable. At their very worst, "unacceptable" results would support leaving the body politic or calling for revolution. Reasons for the acceptability of legislative determinations may be more-or-less purely practical or prudential. More fundamentally, though, what makes legislative determinations acceptable is that the determinations on the whole or generally are "reasonable" or "rational." A key feature of law, of rules that are to be understood and applied by rational subjects, is that the law too must be rational: "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting . . . Now the rule and measure of human acts is the reason, which is the first principle of human acts."[21] That is to say, a

20 See Sunstein, *After the Rights Revolution*, *supra* note 1 at 40, 42, 57, 59.

21 St Thomas Aquinas, *Summa Theologica*, Part I-II (Pars Prima Secundae), Q 90, Art 1,online: The Project Gutenberg eBook, <http://www.gutenberg.org/cache/epub/17897/pg17897.html> [Aquinas, *Summa*].

principle of fundamental justice is that law must be reasonable or rational.

(a) formal rationality

The requirement that the law be reasonable is reflected in the formal features that any system must display to be properly a system of laws. The rules of a legal system

(i) must be public (or promulgated or published), so that people can learn the standards that govern their conduct;[22]

(ii) must not be retroactive, so people can properly adjust their conduct;[23]

(iii) must not be vague — otherwise neither citizens nor officials and administrators would be able to discern standards of conduct from the text of rules;[24] and

(iv) must not be mutually contradictory.[25]

These features of law, while important, do not get at the reasonableness of democratic decisions. They do not get at the substance of legal rationality.

(b) substantive legal rationality and participatory democracy

Substantive legal rationality turns on law's status as the product of processes involving rational agents. Law is the product of deliberative assessments, whether in Parliament, legislative assemblies, municipal councils, or court

22 For a discussion from the perspective of the European Court of Human Rights, see Damien Scalia, "A few thoughts on guarantees inherent to the rule of law as applied to sanctions and the prosecution and punishment of war crimes" (2008) 90:870 Intl Rev Red Cross 343, online: International Committee of the Red Cross <https://www.icrc.org/eng/assets/files/other/irrc-870_scalia.pdf> at 347-48 [Scalia, "Rule of Law"].

23 *Charter,* s 11(g); Scalia, "Rule of Law," *supra* note 23 at 355-56.

24 "A law is unconstitutionally vague if it 'does not provide an adequate basis for legal debate' and 'analysis'; 'does not sufficiently delineate any area of risk'; or 'is not intelligible'. The law must offer a 'grasp to the judiciary' (*R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 639-400. Certainty is not required": *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at para 15 [*Canadian Foundation*]. See also Scalia, "Rule of Law," *supra* note 23 at 346-47.

25 Lon L. Fuller, *The Morality of Law, Revised Edition* (New Haven: Yale University Press, 1969) at 39; see Habermas, *Between Facts and Norms*, *supra* note 16 at 252.

rooms. We negotiate our common projects through reason, through public debate and questioning, through argument before tribunals. What makes legal results acceptable, even if they are not results that would maximize our own interests, is that they maintain their character as rational products, that is to say, so long as the results are reasonable. Democracy depends on perspectives being put before law-makers and decision-makers. Democracy depends on legislative determinations being made in light of those perspectives. No single solution to a legislative problem may be available. No one perspective may overwhelm all others beyond any objection. But, citizens would expect that the legislative determination would take competing perspectives into account. Citizens would expect, since all citizens have equal value, that legislation would promote the common good while minimizing adverse impacts on those who are adversely affected by the determination. The notion that the law should promote the common good has a venerable heritage:

> Now the end of law is the common good; because, as Isidore says . . . that "law should be framed, not for any private benefit, but for the common good of all the citizens." Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times. Because the community of the state is composed of many persons; and its good is procured by many actions; nor is it established to endure for only a short time, but to last for all time by the citizens succeeding one another, as Augustine says . . . .[26]

The common good is a desired end-point. The process to reach that end-point requires the consideration of citizens' perspectives, especially given the equal value of citizens. For legislative determinations to be acceptable to citizens as reasonable, these determinations must be the product of participatory democracy.[27] A "republican" understanding of our democracy best accommodates the deep constitutional commitment to the value of individuals:

> The republican concept of 'politics' refers not to rights of life, liberty, and property that are possessed by private citizens and guaranteed by the state, but pre-eminently to the practice of self-determination on the part of enfranchised citizens who are oriented to the common good and understand themselves as free and equal members of a cooperative, self-governing community.[28]

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26 Aquinas, *Summa*, *supra* note 22 at Q 96, Art 1.

27 Sunstein, *After the Rights Revolution*, *supra* note 1 at 12, 42.

28 Habermas, *Between Facts and Norms*, *supra* note 16 at 286.

Meditation along these lines leads to the realization of the "radical-democratic meaning of the system of rights."[29] As equal, we deserve to participate and be heard, to have our interests taken into account in law formation; as rational, we deserve reasonable decisions based on evidence and that take into account our arguments. Within our constitutional order, participatory democracy should be promoted. Laws should be the reasoned product of participatory democracy.

3. Contending with the Potentially Unreasonable: Section 7 of the *Charter*

What, then, should be the remedy of an individual who believes that a law is unreasonable? In some cases, depending on the nature of the alleged unreasonableness and the impact of the law, there need be no remedy at all outside of ordinary political processes. If, however, a law were to have a serious adverse impact on an individual, there should be some mechanism available to the individual as citizen to confirm the reasonableness of the law. If the law is found not to be reasonable, it should no longer qualify as law at all. As provided under section 52(1) of the *Constitution Act, 1982*, "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." It is not that an irrational law must be nullified, as if some bureaucratic act were needed to transform it into a nullity. By virtue of its irrationality, an unreasonable law nullifies itself. It is not law. Nonetheless, a practical requirement of social order is that citizens do not serve as their own judges of unreasonableness. Official recognition of reasonableness must be awaited. At least in our constitutional order, the task of confirming the reasonableness or unreasonableness of law falls to the judiciary, specifically, for present purposes, under section 7 of the *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

At the commencement of this provision, we encounter "Everyone" — the individuals, the legal subjects that are the primary elements in our constitutional order. Those individuals, it should be noted, are encountered only as they exist already embedded in a constitutional order. Section 7 refers to conditions that law must meet to bind those individuals, or, to put it another way, for promulgated rules to have legal validity.

29 *Ibid* at 252.

The opening words of section 7 have a gatekeeping function. Section 7 does not establish a free-standing constitutional right to fundamental justice generally or to a proportionality assessment of impugned law in particular.[30] An applicant is not entitled to a fundamental justice review of legislation just because he or she is unhappy with legislation or because legislation harms any identifiable interest whatsoever of the applicant. The applicant must show that specified serious personal interests have been harmed. The applicant must also show that the State and not, for example, non-State actors, should be held responsible for that risk. If either of these conditions is not satisfied, a fundamental justice analysis is not engaged and legislation is protected from section 7 scrutiny.[31]

(a) threshold interests

The threshold conditions of section 7 distinguish primary from secondary interests. Section 7 refers to, and gives primary importance to, life, liberty, and security of the person. "Life," "liberty," and "security of the person" are abstract, open-textured concepts that — like other *Charter* provisions — pose interpretative challenges.[32] The Court of Appeal's observations in *Bedford* respecting "security of the person" could apply to the other protected rights: the terms "[defy] exhaustive definition;" their meaning is "best articulated in the context of the specific facts and claims advanced in a given case."[33] Nonetheless, if deprivations of these rights are considered, paradigm-case examples are readily available. Legislation that provided for a penalty of death for specified offences would limit an applicant's right to life, as would legislation that imposed an increased risk of death on an individual.[34] Legislation providing for a penalty of imprisonment upon conviction for an offence would engage an applicant's liberty interests,[35] as would legislation that permitted State interference with

30 *Carter, supra* note 6 at para 71.

31 Through the imposition of the burden of proof on an applicant respecting these issues, the threshold conditions support the presumption of constitutionality of legislation. See *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110 at para 32.

32 "[T]he Constitutional Court is concerned only with cases of collision; its rulings always deal with hard cases .... Hence, the problem of the 'indeterminacy of law' ... accumulates and intensifies in constitutional jurisdiction, as it tends to do in higher courts anyway:" Habermas, *Between Facts and Norms*, *supra* note 16 at 243; see also Alana Klein, "The Arbitrariness in 'Arbitrariness' (and Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013), 63 SCLR (2d) 377 at 379-81 [Klein, "Arbitrariness"]..

33 *Bedford (Appeal), supra* note 11 at para 97.

34 *Carter, supra* note 6 at para 62.

35 *Bedford (Appeal)*, supra note 11 at para 92; *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 84 [*Malmo-Levine*].

individuals' ability to make "fundamental personal choices."[36] In *Carter*, the Supreme Court confirmed that

> Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R v Morgentaler*, [1988] 1 SCR 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[37]

Legislation that diminished an applicant's ability to mitigate risks of physical danger would impair the applicant's security of the person.

The primary value accorded to these interests is apparent. If a constitutional order did not take special steps to guarantee these interests for all of its citizens, those at risk could have little motivation to remain in and remain loyal to that social arrangement. If a constitutional order were not to protect these interests, "what point could there be for beings such as ourselves in having rules of *any* other kind?"[38] A democratic constitutional order, one that values the individual, must guarantee "reasonable" protection of at least *these* interests .

(b) threshold deprivation

The threshold conditions require that there be a "deprivation" of a relevant interest. This would entail proof of adverse impact, of a diminution, restriction, reduction, or removal of life, liberty, or security of the person (hence the importance of evidential issues in section 7 cases). The deprivation could apply to everyone; it could apply to only particular individuals; the deprivation might only be evident by comparing the impact of a measure on particular affected individuals as opposed to others. The State must be responsible for the deprivation. The *Charter* applies to the State, that is, to federal or provincial legislative or executive action.[39] Further, the standard of fundamental justice, which will govern the propriety of the deprivation, applies to the State and not private individuals, who are bound only by the strictures of ordinary justice of ordinary law.

36 *Carter*, *supra* note 6 at para 64, quoting *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 54.

37 *Carter*, *supra* note 6 at para 68.

38 H.L.A. Hart, *The Concept of Law, 2d ed* (Oxford: Clarendon Press, 1994) at 193.

39 *Charter*, s 32.

A State-caused legislative deprivation of a protected interest is not in itself sufficient to invalidate the legislation. Under section 7, law is invalidated only if it is established that the law is not "in accordance with the principles of fundamental justice:" "Section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person — laws do this all the time — but rather that the state will not do so in a way that violates the principles of fundamental justice."[40]

(c) fundamental justice and substantive rationality

What is "fundamental justice"? According to Justices Gonthier and Binnie in *Malmo-Levine*, a principle of fundamental justice must be

(i) a legal principle,

(ii) fundamental to the operation of the legal system,

(iii) accepted as a fundamental principle by "significant social consensus," and

(iv) identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[41]

As legal principles, "[t]hey do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."[42] As the subject of consensus, the principles would have "general acceptance among reasonable people."[43] As guidelines for identifying principles of fundamental justice, these criteria are not especially illuminating.

The Supreme Court has identified a variety of principles of fundamental justice, ranging from the enumerated legal rights in the *Charter*,[44] to the right to make full answer and defence (and derivatively for an accused to receive

40 *Carter*, *supra* note 6 at para 71.

41 *Malmo-Levine*, *supra* note 36 at para 113; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 127 [*Chaoulli*]; *Canadian Foundation*, *supra* note 25 at para 8. For difficulties with the application of this framework, see Nader R Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013), 63 SCLR (2d) 340 at 365-68 [Hasan, "Three Theories"].

42 *BC Motor Vehicles Act*, *supra* note 15 at 503.

43 *Rodriguez*, *supra* note 17 at 607.

44 *BC Motor Vehicles Act*, *supra* note 15 at 502.

Crown disclosure),[45] to the requirement that offences for which imprisonment is a possible penalty have at least a negligence fault requirement,[46] to the requirement that murder offences have a subjective *mens rea* element (mere negligence does not suffice).[47]

Despite what one might conclude from this list, fundamental justice cannot concern only narrowly legal or judicially-oriented processes. Fundamental justice is what the State owes the individual as citizen in rule-making. Fundamental justice concerns the legal order that binds a country constitutionally. Ensuring that legislation is in accordance with the principles of fundamental justice ensures that Canada remains a "just society:"

> The Just Society will be one in which the rights of minorities will be safe from the whims of intolerant majorities. The Just Society will be one in which those regions and groups which have not fully shared in the country's affluence will be given a better opportunity. The Just Society will be one where such urban problems as housing and pollution will be attacked through the application of new knowledge and new techniques. The Just Society will be one in which our Indian and Inuit population will be encouraged to assume the full rights of citizenship through policies which will give them both greater responsibility for their own future and more meaningful equality of opportunity.[48]

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45 *R v Stinchcombe*, [1991] 3 SCR 326, Sopinka J at 336.

46 *BC Motor Vehicle Act*, *supra* note 15 at 515.

47 *R v Martineau*, [1990] 2 SCR 633, Lamer CJ at 645-46. This amounts to the principle that things should be called by their right name. "If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success. When affairs cannot be carried on to success, proprieties and music do not flourish. When proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or foot": Confucius, The Analects, Part 13, online: The Internet Classics Archive <http://classics.mit.edu/Confucius/analects.3.3.html>. For a survey of the principles of fundamental justice, see Hasan, "Three Theories," *supra* note 42 and Klein, "Arbitrariness," *supra* note 33 at 382-83.

48 Pierre Elliott Trudeau, Official Statement by the Prime Minister, "The Just Society," June 10, 1968, in Ron Graham, ed, *The Essential Trudeau* (Toronto: McClelland and Stewart, 1998) at 18-19; See also the Remarks of the Right Honourable Beverley McLachlin, P.C., "The Challenges We Face," Presented at the Empire Club of Canada, Toronto, March 8, 2007, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> ("More than a quarter century ago, a Canadian Justice Minister, Pierre Elliott Trudeau, challenged Canadians to build "the just society". In the ensuing years, thousands of Canadians have worked to establish their visions of a just society. The centrepiece of Prime Minister Trudeau's vision of the just society was the *Charter of Rights and Freedoms*, adopted in 1982, and whose 25th anniversary we will celebrate on April 17, 2007. Whatever our political persuasion or our particular conception of justice, there can be no doubt that Canadians today expect a just society. They expect just laws and practices. And they expect justice in their courts.")

Whatever else might be included as a principle of fundamental justice, for a law to be fundamentally just, it must be rational, both formally and substantively. The specific fundamental justice principles recognized by the Supreme Court in *Bedford*, *PHS*, and *Carter* against arbitrariness, overbreadth, and gross disproportionality may be understood as proceeding from the requirement of substantive rationality of democratic decisions. These principles protect against irrational democratic or undemocratic decisions:[49] "What emerges is a jurisprudence that inspects legislation to determine whether representatives have attempted to act deliberatively."[50] This interpretation elaborates on the Supreme Court's own understanding of the foundation of the substantive rationality principles:

> Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:
>
> > The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.[51]

As Habermas has observed, these considerations establish the courts as the "custodians of deliberative democracy."[52]

The courts are called on to compare legislative purposes and adverse effects on individuals and determine whether the legislation adopted was rationally

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49 "Means-ends proportionality is none other than the deployment of reason as a limit on political will:" Benjamin L Berger, "Children of two logics: A way into Canadian constitutional culture" (2013) 11:2 *International Journal of Constitutional Law* 319 at 330; "irrationality and injustice, measured against the statute's own purposes, are avoided": Habermas, *Between Facts and Norms*, *supra* note 33 at 252, quoting Sunstein.

50 C. R. Sunstein, "Interest Groups in American Public Law" (1985) 38 Stan L Rev 29 at 59, quoted in Habermas, *Between Facts and Norms*, *supra* note 16 at 276.

51 *Bedford*, *supra* note 2 at para 107.

52 Habermas, *Between Facts and Norms*, *supra* note 16 at 275.

defensible. The courts are passing judgment on the adequacy of the political process, from the standpoint of whether all of the relevant evidence of adverse effect was considered, either properly or at all.

(d) substantive rationality and democratic law-making

While the requirements of formal rationality may not be contentious, there are concerns that substantive rationality assessment constitutes an undue intrusion by the courts into the democratic political order. In part, the issue of legitimacy was answered by the adoption of the *Charter*, as Justice Lamer observed some time ago:

> From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial legislatures and the electorate. The Attorney General for Ontario, in his written argument, stated that,
>
> > . . . the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.
>
> This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.[53]

A consistent view was expressed in *Chaoulli* by McLachlin CJ and Major J:

> The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act, 1985*, [1985] 2 SCR 486, at p. 497, per Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of*

53 *BC Motor Vehicle Act*, *supra* note 15 at 497.

Saskatchewan, [1977] 2 SCR 576, at p. 590, per Dickson J. (as he then was).[54]

More importantly, far from subverting democracy, substantive rationality review enhances democracy by ensuring that perspectives that may not have been heard or may not have been listened to in democratic processes are given their due public airing. Legislative decisions must be justifiable on the basis of reasons "that can be publicly advocated."[55] If, in the cold light of day, nothing better can be said in favour of injurious legislation than that it favours a particular set of interests, its factionalism is inconsistent with the common good, it manifestly ignores the interests of all, and it should be struck down.

If injurious legislation cannot be rationally supported given consideration of all relevant interests, the legislation was likely the product of a process that improperly or unfairly discounted or ignored some perspectives. Voices that were silenced can be heard in the courts. Substantive rationality doctrine compensates "for the gap separating the republican ideal from constitutional reality."[56] Judicial review serves as a surrogate for a wanting democratic process. Substantive rationality review recalls equal consideration as a condition and goal of democratic law-making.

Yet in all this, courts should extend deference to the law-maker. The standard, after all, is one of reasonableness or rationality (not the court's view of the "correct" legislative solution) given the adverse impacts of the legislation. In *Bedford*, McLachlin CJ emphasized that establishing arbitrariness, overbreadth, and gross disproportionality is difficult. Legislators are extended a significant margin of appreciation.[57] In particular, the disproportionality test is one of *gross* disproportionality, not simple or marginal disproportionality: "The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure . . . . The connection between the draconian impact of the law and its object must be

54 *Chaoulli*, *supra* note 42 at para 107. The "new constitutionalism," as Sweet has observed, "requires massive delegation to constitutional judges" who "[possess] the power to govern the rulers themselves": Alec Stone Sweet, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J of Transnat'l L 72 at 85, online: Yale Law School, *Faculty Scholarship Series, Paper 1296* <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2296&context=fss_papers> [Sweet, "Proportionality Balancing"].

55 Habermas, *Between Facts and Norms*, *supra* note 16 at 276.

56 *Ibid* at 277.

57 As regards arbitrariness and overbreadth, see *Bedford*, *supra* note 2 at para 119: "This standard is not easily met."

entirely outside the norms accepted in our free and democratic society."[58]

Furthermore, the complete assessment of reasonableness requires consideration of the State's reasons for enacting the challenged law. In our system, reasons of the State figure in the analysis under section 1 of the *Charter.* Under section 1, the State is to be given "a measure of leeway" when seeking (in particular) to reduce "antisocial behaviour." The Supreme Court has recognized that "[t]he primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights."[59] In addition, "[t]he bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate."[60]

With an account in hand of the constitutional order that informs the interpretation and understanding of section 7, we can turn to the application of section 7 in *Bedford.*

B. Bedford: Engaging section 7

The *Bedford* applicants sought to have a set of *Criminal Code* provisions relating to prostitution declared invalid. *Bedford* did not concern the legality of selling or purchasing sexual services by adults, since these transactions were not prohibited in Canada. Neither did *Bedford* concern all *Criminal Code* provisions relating to prostitution. At issue were section 210 and the definition of "common bawdy house" in section 197(1) [the "common bawdy-house provisions"], section 212(1)(j) [the "living on the avails provisions"], and section 213(1)(c) [the "communication for the purposes provisions"] of the *Criminal Code.* These provisions criminalize certain conduct surrounding prostitution:

> 210(1) Every one who keeps a common bawdy-house[61] is guilty of an indictable

58 *Ibid* at para 120; *Carter, supra* note 6 at para 89: "The standard is high: the law's object and its impact may be incommensurate without reaching the standard for *gross* disproportionality ...."

59 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 35 [*Hutterian Brethren*].

60 *Ibid* at para 37.

61 A "common bawdy-house" is a place that is "(a) kept or occupied, or (b) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency": *Criminal Code*, supra note 3, s 197(1). Bill C-36 repeals the definition of "prostitute" (s 12(1)) and provides a new definition of "common bawdy house" - "common bawdy-house" means, for the practice of acts of indecency, a

offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection

(3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

212(1) Every one who . . .

(j) lives wholly or in part on the avails of prostitution of another person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

213(1) Every person who in a public place[62] or in any place open to public view . . .

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place that is kept or occupied or resorted to by one or more persons" (s 12(2)). "Indecent" conduct is conduct that (a) by its nature, causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and formally endorsed through the Constitution or similar fundamental laws; and (b) poses a risk of harm of a *degree* that is incompatible with the proper functioning of society: *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 McLachlin CJ at para 62.

62 Under s 213(2) of the *Criminal Code*, "'public place' includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view."

> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

The claims that these provisions were invalid were founded on section 7.[63]

The finding of legislative invalidity based on section 7 had three stages.[64] First, the applicants must establish on a balance of probabilities that the legislation deprived or would deprive him or her[65] of life, liberty, or security of the person. Second, the applicants must establish on a balance of probabilities that the deprivation was not "in accordance with the principles of fundamental justice." Third, if the applicants has succeeded in establishing the first two points, the State had the burden of justifying the limitation of the applicants' rights under section 1 of the *Charter*.[66]

1. The *Bedford* Applicants and the Threshold Conditions for Section 7

The sex trade is dangerous. It has been well-known for some centuries that sex trade workers face threats of severe violence.[67] Sex trade workers' exposure to violence has been the subject of official reports[68] and has figured in Supreme Court decisions.[69] The investigation and prosecution of Robert Pickton provided a worst-case demonstration of the risks faced by sex trade workers.[70]

Sex trade workers have suffered and died at the hands of men. Yet, the violence

63 Paragraph 213(1) (j) was also challenged under s 2(b) of the *Charter*, but the Supreme Court did not rule on this issue: *Bedford*, *supra* note 2 at para 160.

64 State (executive) action may also be challenged under the *Charter*.

65 On the issue of the standing of corporations to raise constitutional issues based on s 7, see *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 181.

66 The mechanics and interpretation of s 1 follow *Oakes* and subsequent jurisprudence: *Oakes*, *supra* note 17; see also *R v Laba*, [1994] 3 SCR 965 at 1006-11 [*Laba*], *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 888-89, and *Hutterian Brethren*, *supra* note 60.

67 "No one knows the tally of murdered London prostitutes in the nineteenth century. We can assume they died in some numbers every year, their true count disguised by the crude forensic understanding of the time:" Jerry White, *London In The Nineteenth Century: 'A Human Awful Wonder of God'* (Jonathan Cape: London, 2007) at 315; *Bedford (Trial)*, *supra* note 10 at paras 227, 229, 239.

68 *Bedford (Trial)*, *supra* note 10 at paras 141-42, 157, 161, 169, 171.

69 *Smith v Jones*, [1999] 1 SCR 455, Cory J at paras 37-39.

70 See e.g. *R v Pickton*, 2010 SCC 32, [2010] 2 SCR 198.

of men was not the focus of the applicants' section 7 concerns. The bases of the applicants' arguments were the failings of the State, manifested through the impugned legislation.

The applicants' claim was that the legislation deprived sex trade workers of "security of the person." "Security of the person" must include personal security: "[p]roperly understood, the [applicants'] security of the person claim is about self-preservation."[71] The legislation diminished the ability of sex trade workers to mitigate risks of physical danger from third parties. It limited their ability to take preventative, self-protective measures.

The applicants argued as follows: The common bawdy-house provisions prevented sex trade workers from delivering services from fixed indoor locations (including safe houses) with attendant security features, consigning them to less safe locations such as the street or areas over which they did not exercise adequate control.[72] The living on the avails provisions prevented sex trade workers from hiring staff, such as drivers, receptionists, and bodyguards, who could increase their safety.[73] The communication for the purposes provisions prevented sex trade workers from screening clients and advising of transaction terms.[74]

The Crown contended in response that any deprivation of the applicants' interests was not the responsibility of the Parliament through the impugned legislation. The applicants were at risk because of men or because they chose dangerous work, not because of law.

The Court of Appeal in *Bedford* was uncomfortable with the notion that legislation could be the "cause" of the deprivation of the applicants' security of the person:

> It may be helpful to use a traditional causation analysis when deciding whether the actions of a government official are sufficiently connected to an infringement of a s. 7 interest to render the government responsible for that infringement. However, that analysis is inappropriate where legislation is said to have caused the interference with the s. 7 interest. The language of causation does not aptly capture the effect of

71 *Bedford (Appeal)*, *supra* note 11 at para 99. If further confirmation were needed, McLachlin CJ wrote in *PHS* that "[w]here the law creates a risk not just to the health but to the lives of the claimants, the deprivation is even clearer": *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 at para 93 [*PHS*].

72 *Bedford*, *supra* note 2 at para 64.

73 *Ibid* at para 67.

74 *Ibid* at para 71.

> legislation. Legislation, including legislation that creates crimes, is not so much the physical cause of a particular consequence as it is part of the factual and social context in which events happen and consequences flow.[75]

(Nonetheless, the Court of Appeal did find that the legislation increased the risk of harm to the applicants.[76]) The Court of Appeal's discomfort was not unwarranted. In ordinary language, we would be more apt to say that legislation provides "reasons" for acting or not acting than to say that legislation provides "causes" for acting or not acting.[77] One way to probe the discomfort of the Court of Appeal would be to ask whether it ever makes sense to describe "reasons" as "causes." This draws us towards the philosophy of action. In an influential 1963 article, Donald Davidson made a strong case that reasons could indeed be regarded as causes.[78] If this technical debate may be side-stepped, we do in practice think of legislation as having causal effect. We create offences because we wish to cause persons not to commit prohibited conduct. Prohibition — aside from enforcement and penalty — is itself regarded as a means of controlling undesirable conduct.

In the *Bedford* circumstances, because of the legislation, sex trade workers could not (e.g.) operate in-door fixed premises, hire security staff, or verbally screen potential clients. The law, then, was at least a cause-in-fact of the applicants' reduced ability to mitigate personal risk. Without the legislation, the applicants could have taken more and better steps to protect their personal security.[79] Many individuals in many occupations face risks of physical attack by third parties, but they are entitled to take steps to reduce those risks. The *Bedford* applicants established that the impugned legislation diminished their ability to protect themselves in comparison with persons in other occupations. The legislation deprived them of rights to security of the person. The legislation, in effect, deprived the *Bedford* applicants of equal treatment under the law.

The Crown's contention that men, and not laws, were the cause of any danger faced by sex trade workers missed the point.[80] The legislation deprived the

75 *Bedford (Appeal)*, *supra* note 11 at para 107.

76 *Ibid* at para 111.

77 A P Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Portland, Oregon: Hart Publishing, 2014) at 6-7.

78 Donald Davidson, "Actions, Reasons, and Causes" (1963) 60:23 *The Journal of Philosophy* 685.

79 Similarly, in *PHS*, the threat of imprisonment impaired the ability of caregivers to assist clients, depriving the clients of "potentially lifesaving medical care". The clients' rights to life and security of the person were thereby limited: *PHS*, *supra* note 72 at para 91.

80 *Bedford*, *supra* note 2 at paras 84-85.

applicants of their security of the person not by actually causing physical injury or threatening physical injury, but by diminishing the applicants' ability to take steps to prevent assault, to mitigate risks of physical threats. The Supreme Court got it right: "The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence."[81] According to Himel J at trial,

> [T]hese three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.[82]

Furthermore, Parliament knew that sex trade workers were working in a dangerous environment and that its legislation, while permitting the trade, denied workers the benefit of taking basic steps to preserve personal safety. Violence by johns was not an unexpected, independent intervention,[83] somehow overwhelming the State's contribution to sex workers' vulnerability.

As in an *actus reus* causality analysis, the State should not be responsible under section 7 for every "but-for" cause that links it to particular consequences. The Crown had argued in *Bedford* that the standard for legally attributing responsibility to the State, so that the State could be viewed as having deprived an applicant of his or her rights, is an "active and foreseeable" and "direct" causal connection.[84] The Supreme Court disagreed, endorsing instead a standard of "sufficient" cause:

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities . . . . A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link . . . . [it involves] a "practical and pragmatic" inquiry . . . .[85]

81 *Ibid* at para 89.
82 *Bedford (Trial)*, *supra* note 10 at para 362.
83 *Ibid* at paras 121, 123-24, 293, 295-98.
84 *Bedford*, *supra* note 2 at para 74.
85 *Ibid* at para 76.

A standard of "sufficiency" may seem vague and unhelpful. All that this language is signalling, though, is that a court must make a normative assessment of the degree of responsibility of the State for the limitation of the applicant's security of the person, based on a review of the context and the contributions of the State and other causal factors to the limitation. The term "sufficiency," it should be noted, is also deployed in determinations of legal causation for *actus reus* purposes: "Legal causation, however, is a narrowing concept which funnels a wider range of factual causes into those which are *sufficiently* connected to a harm to warrant legal responsibility."[86] At least one of the important reasons for sex trade workers' lack of security-promoting spaces and security-promoting staff was that creating these spaces and hiring these staff would be illegal. The State should not have been permitted to avoid responsibility for creating the very circumstances it legislated. Note that satisfaction of the standard of sufficiency entails only that the State has contributed *enough* to be held responsible. Satisfaction of the standard does not entail that the State is the *only* actor responsible for the outcome or even that it is the actor that is *most* responsible for the outcome. Further, a finding that the State is responsible for a deprivation does not specify the extent of the injury caused by the deprivation or measure the full impact of the deprivation. Such matters are best left to the fundamental justice and section 1 assessments.

The Crown also advanced a "volenti" argument. Given that the sex trade is beset with risks of physical violence, individuals can choose whether or not to engage in this work. Either those risks were accepted by engaging in this work or the true cause of the risks is the choice by individuals to engage in this work.[87] The Court rejected this line of argument for two reasons. First, at least some individuals do not enter the sex trade through "free choice." The Court alluded to a form of moral involuntariness: "Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money."[88] That some individuals enter the sex trade for lack of other real options is doubtless regrettably true. Some

86 *R v Maybin*, 2012 SCC 24, [2012] 2 SCR 30, Karakatsanis J at para 16 (emphasis added).

87 *Bedford*, *supra* note 2 at paras 79, 80. The Crown made the same sort of (unsuccessful) claim in *PHS* – the health risks were "the consequence of the drug users' decision to use illegal drugs": *PHS*, *supra* note 72 at para 97. According to Sunstein, ". . . the strategy of blaming the victim, or assuming that an injury was deserved or inevitable, tends to permit nonvictims or members of advantaged groups to reduce [cognitive] dissonance by assuming that the world is just – a pervasive, insistent, and sometimes irrationally held belief:" Sunstein, *After the Rights Revolution*, *supra* note 1 at p 66; see Sunstein, p 63.

88 *Bedford*, *supra* note 2 at para 86. In *PHS*, the Crown's "personal choice" argument was rebutted by the fact that, for many users, the cause of drug use was not choice but addiction: *PHS*, *supra* note 72 at para 99.

individuals are forced into this trade. They find themselves in the life, but not because they wanted it or chose it. Regardless of whether any one or any institution or any set of institutions is to blame, at the very least the Crown cannot escape responsibility for diminishing sex trade workers' personal security through the plea of voluntary acceptance of risk — there was no voluntary acceptance. Second, some individuals do freely choose to enter the sex trade. That, however, does not make them responsible for the limitations on their ability to mitigate risk. Again, the point is that the legislation diminishes the ability to mitigate risk. The business of supplying sexual services is legal, just as the supply of many other services is legal. The applicants' concern was that their ability to conduct their business in safety was impaired by the legislation: "they are asking this Court to strike down legislative provisions that aggravate the risk of disease, violence and death."[89]

The unexpressed argument of the Crown may have been that no one should be involved in the sex trade at all. It is wrong to engage in it, and if one does, one suffers the consequences. This sort of approach might make sense for persons engaged, say, in international drug trafficking. Yet again, as the Court points out in this regard, "it must be remembered that prostitution — the exchange of sex for money — is not illegal."[90] The legislation indirectly treated the sale of sexual services as if it were illegal, when it was not.[91]

From the standpoint of participatory democracy, a key lesson of *Bedford* is that the State may be held to account for the actual adverse effects of legislation, if the legislation "sufficiently" contributes to a deprivation of life, liberty, or security of the person. The State is bound to answer for injuries suffered by individuals who are entitled to the (equal) protection of the law. The State cannot simply ignore the impact of laws on citizens, as if their interests need not be considered by law or in law.

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89 *Bedford*, *supra* note 2 at para 88.

90 *Ibid* at para 87; Furthermore, at this point, "[t]he morality of the activity the law regulates is irrelevant:" *PHS*, *supra* note 72 at para 102.

91 Michael Plaxton rightly reminds us that between manifestly criminalized conduct and manifestly legal conduct lies conduct that is legal, but discouraged. The State does not prohibit the conduct, but aims through ancillary legislation to decrease the incidence of the conduct. Legislation can "nudge" us towards behavioural change: Michael Plaxton, "First Impressions of Bill C-36 in light of Bedford" (12 June 2014), online: SSRN <http://ssrn.com/abstract=2447006> or <http://dx.doi.org/10.2139/ssrn.2447006> at 5. Plaxton also rightly comments that the casting of a "shadow" of criminalization by nudging legislation does not make the conduct (such as sex work) criminal: *ibid*.

Having engaged the threshold conditions of section 7, the *Bedford* applicants were required to establish that the State-caused deprivations of their protected interests were not in accordance with the principles of fundamental justice. The *Bedford* applicants sought to show that the impugned legislation was not fundamentally just because it was not substantively rational.

C. Fundamental Justice, Substantive Rationality, and the Impugned Legislation

The *Bedford* applicants relied on three substantive rationality principles — the principles against arbitrariness, overbreadth, and gross disproportionality. To expose the workings of the substantive rationality principles and their promotion of participatory democracy, I will consider their shared features, then the specific scope of the principles.

1. Shared Features of the Substantive Rationality Doctrines

An arbitrary, overbroad, or disproportionate law may be properly promulgated, not retroactive, clear, and wholly consistent with other laws. The irrationality may lie not in the formal features of the law, but in the relationship (or better, lack of relationship) between the objective pursued by the law and the actual impact of the law. Arbitrariness, overbreadth, and disproportionality analysis each involve comparisons between the objectives of legislation and the effects of legislation.[92] The overarching question, asked from the perspective of the individual whose interests have been limited by the legislation, is whether the limitations imposed on him or her are rational: is the impairment of interests he or she has suffered rationally defensible? The comparison has three elements — the identification of the purpose or objective of the law, the interpretation of the legislative means adopted to achieve that objective, and the determination of the limitations of interests resulting from those legislative means.[93]
The comparison, as will be seen, is limited. The section 7 comparison defers broader social impact issues to the analysis under section 1.

92 *Carter*, *supra* note 6 at para 73. The development of these principles in Canadian constitutionalism, it should be understood, is neither alarming nor novel. Canada is keeping step with the development of constitutionalism internationally. See Sweet, "Proportionality Balancing," *supra* note 55 at 73-74, 79, 84.

93 The first two elements engage the problem of statutory interpretation, which is not pursued in the substantive rationality jurisprudence. Sunstein considers statutory interpretation to be a critical issue for courts in a regulatory state: see Sunstein, *After the Rights Revolution*, *supra* note 1, chapters 4, 5; Habermas, *Between Facts and Norms*, *supra* note 16 at 251-53.

(a) purpose

The approach to the purpose of the law is the same for each principle. The purpose is considered "in itself" or by itself. The law's effectiveness is not addressed. At this stage of *Charter* analysis, there is no assessment of ". . . how well the law achieves its object, or . . . how much of the population the law benefits;" or whether the legislation produces "ancillary benefits" for the general population.[94]

The isolation of purpose may seem unusual. Legislative purpose may be one consideration when interpreting legislation;[95] it may be one consideration when considering whether legislation fits under a particular subject matter under sections 91 or 92 of the *Constitution Act, 1867*.[96] In contrast, legislative purpose (whether impugned legislation serves a pressing and substantial objective) is a primary consideration in section 1 analyses. The focus on purpose in section 7 (and section 1) assessment is apt. Within the space created by judicial review, the legislator is compelled to address the individual whose interests have been adversely affected by the impugned legislation. To assess the rationality of the legislation, the first step must be to work out the nature of the legislative project: what was to be accomplished? What was the goal, the objective, the purpose?

The interests of others, those who have not been adversely affected, are not introduced into the analysis. True, positive effects on others could have an overall mitigating effect. While the applicant has suffered injury, that could be regrettable but justified by the greater good. At this point, though, issues of mitigation or excuse or justification have not been reached, and won't be reached unless and until the analysis enters section 1. The section 7 issue is whether there has been a legal injury to the applicant. The issue is whether the applicant's rights to fundamental justice have been violated. If they have not, that's an end on it. If they have, then issues of impact on others and justification from broader perspectives may be considered under section 1. Introducing impact on others at this point would mix up issues.

The identification of legislative purpose is obviously a crucial step. The difficulty

94 *Bedford*, *supra* note 2 at paras 123, 127. "In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s 1 ....": *Carter*, *supra* note 6 at para 79.

95 See e.g. *Interpretation Act*, RSC 1985, c I-21, s 12.

96 30 & 31 Victoria, c. 3 (U.K.). See e.g. *R v Keshane*, 2012 ABCA 330, Berger JA at paras 20-26.

of identifying legislative purpose will vary. In some cases, the characterization of purpose may be hotly contested. In some cases, Parliament may attempt to tell the courts what its legislative purposes were, as in the preamble to Bill C-36. A preamble, though, does not oust the courts' jurisdiction to determine legislative purpose.[97] In some cases, legislation may serve more than one purpose — perhaps some general and some specific, or perhaps, two or more of equal value.[98] If a purpose is narrowly interpreted or its interpretation is not well-fitted to its legislative means, findings that some or all effects are unnecessary or inimical to that purpose will be facilitated.[99] If a purpose is very broadly interpreted, that may immunize the law from *Charter* challenge.[100] There may be concern about courts' abilities to determine legislative purpose accurately. As indicated above, though, courts determine legislative purpose in other contexts (and, for that matter, parties' purposes in cases of contractual interpretation). Determining purpose is a task that courts perform. Any problems with performance are not unique to section 7 analyses.

(b) legislative means

The approach to the interpretation of legislative means is the same for each principle. In substantive rationality review, the interpretation of statutes follows the ordinary rules of interpretation. This point would be trivial, hardly worth mentioning, except that when faced with an over-reaching statute (one which may be overbroad) a temptation may arise to interpret the statute to circumvent constitutional scrutiny. In *Bedford* itself it was noted that the living on the avails provisions has been "judicially restricted" rendering the prohibition "narrower than its words might suggest" — although the provision was still found to be overbroad.[101] In *Boudreault*, Justice Cromwell in dissent opposed the majority's interpretation of the impaired care or control provisions of the *Criminal Code* (i.e., the reading in of an element of danger to avoid penalizing benign conduct):

97 Section 13 of the *Interpretation Act*, *supra* note 96, provides as follows: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object." The preamble assists, but does not conclusively determine. See *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557, LeBel and Deschamps JJ, dissenting, at para 101; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3, Binnie J at para 27; *M v H*, [1999] 2 SCR 3, Gonthier J, dissenting, at para 185.

98 Janneke Gerards, "How to improve the necessity test of the European Court of Human Rights" (2013) 11:2 *International Journal of Constitutional Law* 466 at 478-79 [Gerards, "Necessity Test"].

99 Klein, "Arbitrariness," *supra* note 33 at 384-87.

100 *Carter*, *supra* note 6 at para 77

101 *Bedford*, *supra* note 2 at paras 141, 142.

> It is well established that absent ambiguity in the statutory text, the courts should not apply an interpretative presumption of *Charter* compliance: see, e.g., *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 SCR 559, at para. 62. Applying such a presumption pre-empts judicial review and the possibility of resort to the justification of limiting provisions under s. 1 of the *Charter*. The appropriate context in which to assess whether Parliament has appropriately balanced the rights of the accused is in a *Charter* challenge to the legislation, not in the course of interpreting an unambiguous statutory text.[102]

In *Khawaja*, the Supreme Court's efforts to insulate an anti-terrorism provision from overbreadth review produced an interpretation that promoted constitutionality over intelligibility.[103] It is true that a principle of interpretation is that a statute should be interpreted to be constitutionally valid, but that principle is engaged when a statute is ambiguous, when more than one meaning is available;[104] the principle does not entail that statues unconstitutional on their face should be the subject of "reading in" or "reading down" to render them constitutional.

(c) effects

The approach to the effects of the law is the same for each principle:

> . . . none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.[105]

Three comments are warranted:

First, the restrictiveness of this analysis might seem odd: an adverse effect on *one* person can trigger a finding of a violation of fundamental justice? But the restrictiveness is entirely appropriate. The context is a section 7 challenge. To reach this stage of the analysis, the applicant had to establish a deprivation of constitutionally-protected rights (in the *Bedford* circumstances, security of the

102 *R v Boudreault*, 2012 SCC 56, [2012] 3 SCR 157 at para 85.

103 *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555, paras 44, 53, 57, 62-63; see Peter Sankoff, "*Khawaja*: Mixed Messages on the Meaning of Intention, Purpose and Desire," (2013) online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201685>.

104 *R v Mills*, [1999] 3 SCR 668 at para 118.

105 *Bedford*, *supra* note 2 at para 123.

person). The applicant bears the burden of proof and must contend with the applicable evidential doctrines. The applicant is dealing with adverse impacts on himself or herself alone. The cause of complaint is the personally-experienced adverse impact. The question is whether this adverse impact, this injury that the applicant has suffered, is in accordance with fundamental justice or not. Whether or not others have or have not suffered similar misfortunes does not add to or detract from whether fundamental justice was respected for this individual. And this individual, like each other individual, has constitutional rights that must be respected: "*Everyone* has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

It should be recalled that the substantive rationality assessment is not necessarily completed under section 7 alone. Substantive rationality is determined under both section 7 (under which the claimant has the burden of proof) and section 1 (under which the State has the burden of proof). It would not be right to say that the *Charter* establishes two "proportionality" tests. Rather, there is one test, which has two procedural stages. It is not that effectiveness, social benefit, and degree of adverse impact are irrelevant and should not be considered in a substantive rationality assessment. Rather, this evidence should be considered in its proper place, with the burden of proof allocated to the proper party.

Second, within the space created by the judicial review process, the applicant's interests are being put to the legislator: "I see what you're trying to do — I see your purpose; but do you see what your legislation is doing to me?" Within the space created by judicial review, the applicant's interests are being taken into account, are being considered. This may or may not have actually occurred in the process through which the legislation was passed. Within this space, democratic participation may be occurring that had earlier been denied.[106] Substantive rationality is corrective participatory democracy.

Third, the test that will be applied is one of rationality. Given the legislative purpose, and given the adverse impacts, was the legislative program reasonable or rationally defensible? Or, did the legislative pursuit of the purpose violate fundamental justice by having arbitrary effects, by being overbroad, or by having effects grossly disproportionate to the legislative purpose?

106 Klein, "Arbitrariness," *supra* note 33 at 398-99, 401; Alana Klein, "Section 7 of the Charter and the Principled Assignment of Legislative Jurisdiction" (2012), 57 SCLR (2d) 59 at 60-61 [Klein, "Principled Assignment"].

While arbitrariness, overbreadth, and disproportionality analyses share the foregoing features, the nature of the comparison made between purpose and effect differs (or may differ) between arbitrariness and overbreadth on the one hand and gross disproportionality on the other.

2. Arbitrariness and Overbreadth

(a) the principles

Arbitrariness and overbreadth may be considered together.[107] Arbitrariness and overbreadth "compare the rights infringement caused by the law with the objective of the law."[108] The issue is whether the adverse effects of the law (properly interpreted) actually promote the law's objective. The "evil" addressed by the arbitrariness doctrine is "the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law."[109] The deprivation of rights serves no purpose — it is unsuitable, superfluous, or arbitrary (the applicant has been harmed "for nothing").[110] An arbitrary deprivation of rights is irrational or not rationally justifiable:

> the decision maker may not make *any* choice. He must take account of any negative consequences of a certain choice of means for fundamental rights. It would be clearly unreasonable if an instrument would only harm Convention rights, without actually being able to benefit anyone or to achieve the desired results (test of effectiveness).[111]

An overbroad provision is arbitrary in part. Some effects of the law (properly interpreted) do promote the law's objective. Some effects, however, do not promote the law's objective. Hence, the law is too broad; it brings too much

107 One might say that the principles are distinct but not separate. On the one hand, McLachlin CJ writes that "[a]lthough there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles": *Bedford, supra* note 2 at 107; but on the other hand, McLachlin CJ writes that "[m]oving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is no connection between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective": *ibid* at 117.

108 *Ibid* at para 123.

109 *Ibid* at para 108; see also paras 111 and 119; *Carter, supra* note 6 at para 83.

110 See Gerards, "Necessity Test," *supra* note 99 at 469.

111 *Ibid* at 470, footnotes omitted.

conduct within its scope. Insofar as the law is too broad, it is arbitrary.[112]

A rights deprivation may fail to promote a legislative objective in two ways.[113] First, the deprivation may have consequences contrary to and may undermine or subvert the legislative objective:

> Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.[114]

While arbitrariness on the "contrary effect" basis was established in *PHS*, this approach imposes a high burden on an applicant, entailing a standard that is very deferential to the legislator.[115]

Second, the deprivation may simply not promote the objective at all. The deprivation is "unnecessary" because it does not in fact promote the legislative objective:

> In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.[116]

This seems like a less onerous standard from an applicant's perspective, but it masks some difficulties. While clear and obvious mistakes about cause and effect could occur, legislation that does not serve its purpose *at all* is likely to be rare. What would be more likely would be to encounter legislation that focuses on some conduct that has little causal impact on the purpose, but ignores (or includes) other conduct with stronger causal relations to the

112 *Bedford*, *supra* note 2 at paras 101-02, 112-13; *Carter*, *supra* note 6 at para 85.
113 *Bedford*, *supra* note 2 at para 119; see also paras 99-100.
114 *Ibid* at para 100.
115 Gerards, "Necessity Test," *supra* note 99 at 475.
116 *Bedford*, *supra* note 2 at para 99.

purpose. Practically, the arbitrariness problem is less likely to be about whether an infringement promotes a purpose *at all* than about whether the infringement has a *sufficient* causal link to the purpose.[117] *Chaoulli* spoke of the need for a "real connection" between the infringement and the purpose.[118] Determining whether an infringement has a real or sufficient connection to a purpose will turn on both factual and normative assessments.

On the factual side, the lack of connection between legislative effects and legislative purposes may be evident without the need to tender evidence.[119] In *Heywood*, for example, overbreadth was made manifest through reasonable hypotheticals showing the excessively broad scope of the former vagrancy offence (it applied to too many accuseds, in relation to too many places, for too long (without provision for review)).[120] But if *Heywood* required no significant evidence, *PHS* and *Chaoulli* did require significant evidence respecting causal issues. *Chaoulli* in particular involved the courts in difficult issues of causal assessment. For example, in a case like *Chaoulli*, evidence of the co-existence of a "banned" factor and a desired outcome would be relevant on the issue of whether the "banned" factor was causally inimical to the desired outcome: one might conclude that the "banned" factor had no causal relationship with the desired outcome, since the desired outcome was produced even if the "banned" factor was present. However, it may be that if the "banned" factor were not present, the desired outcome would have been greater; or some third factor may have either neutralized the effects of the "banned" factor or promoted the desired outcome despite the negative effects of the "banned factor." These sorts of factual complexities have led critics to argue that courts are ill-prepared to tackle evidence in disciplines that lie beyond legal training, and that legislative processes are better for accumulating and assessing the evidence required to legislate social policy.[121] One might similarly argue that courts are ill-suited to determine Aboriginal title cases, given the wide array of disciplines and types of

117 See *ibid* at para 118; see Gerards, "Necessity Test," *supra* note 99 at 474.

118 *Chaoulli*, *supra* note 42 at paras 131, 139.

119 Gerards, "Necessity Test," *supra* note 99 at 473.

120 *Heywood*, *supra* note 12; Gerards, "Necessity Test," *supra* note 99 at 484. See also *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 (The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (para 41). The Court found that insofar as the provisions applied to permanently unfit accuseds, who would never become fit to stand trial, the provisions were overbroad). On the appropriate use of reasonable hypotheticals, see *Bedford (Trial)*, *supra* note 10 at para 364.

121 Klein, "Arbitrariness," *supra* note 33 at 378, 388 n 55; Klein, "Principled Assignment," *supra* note 107 at 68.

evidence relevant to determining title issues;[122] or for that matter that the courts are ill-suited to hear any other type of case that turns on expert evidence. Yet the courts soldier on in all of these sorts of cases. That is their assigned lot in the administration of justice: "The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it."[123] Moreover, if the courts do not grapple with the evidence, there is no guarantee that the legislator will generate similar evidence or, if it does, that it will give it proper consideration. The section 7 problem is before the court because of a concern that proper evidence was not gathered or proper regard was not paid to the evidence by the legislator.

On the normative side, the "real or sufficient connection" assessment involves a comparison between the assessment of likelihood of a causal connection and the impact of the limitation on the applicant. The more severe the impact on the applicant, the higher the required degree of probability of causal efficacy:

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.[124]

This approach suggests a sliding scale of deference. It also requires identification of gradations of the "clarity" of causal connections. Both inspire complexities and uncertainties. Further, one might suggest that the "impact vs probability" comparison is really masking the true comparison, which is between the impact of legislative measures and their benefits. A "real" or "sufficient" connection

122 "At the British Columbia Supreme Court, McEachern CJ heard 374 days of evidence and argument. Some of that evidence was not in a form which is familiar to common law courts, including oral histories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archeology, anthropology, and geography:" *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 5; see *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 7.

123 *Chaoulli*, *supra* note 42 at para 107.

124 *Ibid* at 131.

arbitrariness argument may be a disproportionality argument in disguise (this may be the reasoning behind the view that the "three" principles are really one or are aspects of a single principle).

Regardless, the virtue of even the "real or sufficient connection" arbitrariness assessment is that it puts the rationality of the limitation of the applicant's rights into question by asking whether there was truly any need for the applicant to be adversely affected. The applicant has the opportunity to show that the limitation was not reasonable, on the evidence, because of its lack of causal relationship to the legislative goal. The principles against arbitrariness and overbreadth impose a requirement of evidence-based legislative decision-making — which is only rational.

(b) the impugned legislation and overbreadth

The Supreme Court found that the living on the avails provisions served the purpose of criminalizing conduct that exploited sex trade workers.[125] That legislation, however, was overbroad:

> The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes.[126]

125 *Bedford*, *supra* note 2 at para 137.

126 *Ibid* at para 142; *Carter*, *supra* note 6 at para 88. Looking to the future, (1) Bill C-36 appears to go some distance towards addressing the Supreme Court's concerns. While Bill C-36 repealed s 212 in s 13, in s 20 it created a new offence of obtaining material benefit from sexual services (new s 286.2). Two purposes in the preamble relevant to this offence are that "the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it" and "it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution." The new offence, then, serves the purpose of criminalizing conduct that exploits sex trade workers. To deal with the Supreme Court's overbreadth concerns, the new s 286.2(4) exempts persons from s 286.2(1) liability who do not exploit sex trade workers. Under the new s 286.2(5), however, the s (4) exemption does not apply to a person who "procures" a person to offer or provide sexual services for consideration (ss 286.2(5)(d) and 286.3) or if the person "received the benefit in the context of a commercial enterprise that offers sexual services for consideration" (s 286.2(5)(e)). Generally, the new provisions support only the independent or solo provision of sexual services, not the provision of sexual services through

This conclusion was unassailable.

3. Gross Disproportionality

(a) the principle

In a disproportionality analysis, the adverse effects suffered by the applicant do in fact contribute to the legislative purpose. The disproportionality comparison is between the legislative purpose and the degree of adverse effect suffered by the applicant:

> Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported . . . .
>
> Gross disproportionality under s. 7 of the Charter does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law . . . .
>
> [G]ross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.[127]

The disproportionality question is this: given the legislative purpose, is its pursuit permissible given *these* adverse impacts on *this* applicant? Can we pursue that

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cooperative enterprises. The issue will be whether overbreadth has been wholly or only partially corrected.

(2) Bill C-36 also created in s 20 a new offence of obtaining sexual services for consideration (new s 286.1). This provision applies to a "john" only – the purchaser, not the vendor of sexual services (so long as those sexual services are one's own (new s 286.5(2)). For the first time, Canada has partially criminalized prostitution. The criminalization is only partial, since the provision or sale of one's own sexual services remains legal. The new offence does not appear to be arbitrary. It manifestly promotes the purposes identified in the Bill C-36 preamble respecting exploitation as well as the need to address "the social harm caused by the objectification of the human body and the commodification of sexual activity" and the need to denounce and deter "the purchase of sexual services because it creates a demand for prostitution." Given those purposes, the new offence does not appear overbroad, since it applies to those who create the incentive to go into prostitution, and those who treat sexual services as a "commodity" to be purchased.

127 *Bedford*, *supra* note 2 at paras 120, 121, 122. In *PHS*, McLachlin CJ wrote that "[g]ross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate governmental interest": *PHS*, *supra* note 72 at para 133.

objective, if these will be the consequences for this applicant? Put another way: in deciding to pursue this purpose, has the legislator taken into account the adverse impact on the applicant? A finding of gross disproportionality amounts to a finding that no reasonable or rational legislator could pursue that objective in that way if this would produce these adverse effects.

As *Bedford* illustrates, disproportionality analysis involves a weighing of the value of an objective against the value (severity) of the adverse impact caused by the legislation. Proportionality assessments are not new to the courts. Proportionality assessments occur, for example, in the application of the defences of necessity,[128] common law duress,[129] and self-defence;[130] in sentencing;[131] and in the *Oakes* test under section 1 of the *Charter*.[132] The process has some conceptual challenges, though, despite judicial familiarity with proportionality assessment in practice.

The notion of proportionality (or disproportionality) suggests an objective comparison that can be observed.[133] Further, it suggests some single metric or standard for judging which can be applied to the matters being compared, and it suggests that each of the matters being compared can be measured as against that metric. These sorts of presuppositions seem to lie behind McLachlin CJ's comment that "[t]he rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally *out of sync* with the objective of the measure."[134] "Out of sync" is not precise language, and may draw on the wrong analogy (proportionality and synchronization are not identical concepts) but what seems to be conveyed is an absence of matching. Excess on one side, as against defect on the other. In ordinary language, we might say of an artist's rendering of a planned building that some elements are not "proportional," meaning that those elements do not properly match actual size (are not properly "scaled down"); or of a portrait that "he didn't get the ears right — they're not proportional" (they're too big or small). The judgment of proportionality depends on us being able (in principle) to take a ruler and do the requisite measurements and comparisons. If items have cash values, money

128 *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 at para 31.

129 *R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687 at para 62.

130 *Criminal Code*, *supra* note 3, s 34(2)(g).

131 *Ibid*, s 718.1: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." See Scalia, "Rule of Law," *supra* note 23 at 352-53.

132 *Supra* note 17; On the roots of proportionality in German law, see Sweet, "Proportionality Balancing," *supra* note 55 at 97 n 53.

133 See Gerards, "Necessity Test," *supra* note 99 at 471.

134 *Bedford*, *supra* note 2 at para 120 (emphasis added).

provides the metric by which comparisons are possible. We could convey the sense of disproportionality by claiming "he paid way too much for that." The difficulty is that purposes (such as decreasing public nuisance) and adverse effects (such as assault and murder) do not have an observable common metric. Neither can their "values" be objectively measured. The relative weights of death vs. consumer tranquility are very clear — but the "weighing" lies in a normative or moral assessment of the events. While in *Bedford* the proportionality assessment was obvious given the purposes of the legislation, in other cases the relative moral values of purpose and effect may not be so obvious. This does not mean that weighing and proportionality assessment cannot be done. It does mean that, to ensure transparency, judges should provide their reasons for their weighing and comparison.[135] The mechanical application of proportionality language or hiding moral reasoning behind false analogies should be avoided:[136] "Properly employed, [proportionality analysis] requires courts to acknowledge and defend — honestly and openly — the policy choices that they make when they make constitutional choices."[137]

(b) the impugned legislation and gross disproportionality

In *Bedford*, the purpose of the common bawdy house provisions was "to combat neighbourhood disruption or disorder and to safeguard public health and safety."[138] The adverse effects of the provisions, which exposed sex trade workers to risks of murder and severe violence, were found to be grossly disproportional to the goal of reducing public nuisance:

> [t]he harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.[139]

The communication for the purposes provisions also served the purpose of combating public nuisance.[140] The adverse effects of these provisions were similar

135 Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383 at 396.

136 Klein, "Arbitrariness," *supra* note 33 at 390, 397.

137 Sweet, "Proportionality Balancing," *supra* note 55 at 77.

138 *Bedford*, *supra* note 2 at para 132.

139 *Ibid* at para 136.

140 *Ibid* at para 147.

— "communication is an essential tool that can decrease risk. The assessment is qualitative, not quantitative. If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established."[141] Enhanced peace of mind for shop-keepers and shoppers should not be bought with death. No reasonable or rational legislator could determine that sex trade workers' sacrifices balanced marginal tranquility for others. The applicants had therefore satisfied their burden of establishing that the legislation did not respect their rights to fundamental justice.[142]

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141 *Ibid* at para 158.

142 Looking to the future, (1) Bill C-36 repealed the s 213(1)(c) communication for the purposes offence, but in s 15 created a new offence (new s 213(1.1)) of communicating to provide sexual services for consideration "in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre." This new offence promotes, in particular, Parliament's commitment "to protecting communities from the harm associated with prostitution." The new s 213(1) applies to persons who communicate for the purposes of offering or providing sexual services. Apparently, only persons selling sexual services – not johns – are targeted by this offence. This reduces the prosecution risk for johns and diminishes their incentive to keep communications in private (and more dangerous) locations. The new s. 213(1.1) does not prohibit communication in public places, but only in those public places where children are likely to be found. The new s. 213(1.1) appears to address the Supreme Court's overbreadth concern.

(2) Bill C-36, however, did not eliminate the "common bawdy house" provisions, although the definition is now restricted to places kept for the "practice of acts of indecency." The provision of sexual services for consideration, which is not (at least on the supply side) illegal, may not be "indecent:" Library of Parliament, Legislative Summary of Bill C-36, online: Parliament of Canada <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c36&Parl=41&Ses=2> at 12. See note 62 above. Hence, a safe place for typical street-level prostitution transactions like a "Grandma's House" may not fall within the definition of "common bawdy house." The new "Commodification of Sexual Activity" provisions established by s 20 remain antagonistic to the offering of sexual services through commercial enterprises (see, e.g., the new ss 286.2(5)(e) and 286.2(6)). The preamble to Bill C-36 refers to the need to denounce and deter "the development of economic interests in the exploitation of prostitution of others as well as the commercialization and institutionalization of prostitution." A non-profit, sex-trade-worker supportive institution such as a "Grandma's House" would appear to fall within the new s 286.2(4) exemptions. A for-profit establishment would not. One might observe that given Parliament's stated objectives of discouraging prostitution, it would be inconsistent for Parliament to encourage (or not discourage) the proliferation of prostitution on the commercial enterprise level. Parliament does appear to have gone a substantial distance towards addressing the Supreme Court's gross disproportionality concerns bearing on venues for sexual services transactions.

(3) The most significant problem posed by Bill C-36 will be whether the new obtaining of sexual services offence (new s 286.1) is grossly disproportional. The new offence will have to be considered not only with the retention of the common bawdy house provisions, but also with the new exemptions available to service providers, the geographical limitation of the communication for the purposes offence, and the targeting of the offering of services (only) by the communication for the purposes offence. The new offence will leave sex trade workers exposed to at least some of the former dangers of the life. Johns will still face prosecution, and will try to keep transactions private. The

D. Section 1 of the Charter and Substantive Rationality

In *Bedford*, the Crown made no serious effort to support the legislation under section 1 of the *Charter*.[143] The Court declared all three provisions to be constitutionally invalid, but suspended the declaration for one year to permit Parliament to develop new laws (the result being Bill C-36).[144]

Historically, the view had been that if legislation were found to deprive individuals of rights in violation of the principles of fundamental justice, a section 1 argument was doomed to failure. The only exceptions might be in extraordinary circumstances calling for extraordinary measures, such as times of war, epidemic, or natural disaster:

> This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re B.C. Motor Vehicle Act*, *supra*, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.[145]

In *Bedford*, however, McLachlin CJ did not simply dismiss the potential for successful governmental recourse to section 1. She devoted some paragraphs to the differences between sections 7 and 1, suggesting that, in the navigation of section 1's different terrain, the State could have some hope of justifying legislation that limits section 7 rights.[146] Two questions arise: is section 1 consistent with the sketch of the constitutional order presupposed by section 7? Could section 1 validate legislation found to limit substantive rationality under section 7?

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greater the privacy, the greater the danger. The purposes served by the new offence are significant, far exceeding the import of nuisance to shopkeepers and shoppers. The question will be whether Parliament has the power to regulate against exploitation, commodification, and the protection of human dignity and equality, at the cost of the health, safety and lives of sex trade workers, given increased protections now available under the new legislation.

143 *Bedford*, *supra* note 2 at para 161.

144 *Ibid* at para 169.

145 *Heywood*, *supra* note 12 at 802; see *Bedford*, *supra* note 2 at para 129; *Bedford (Trial)*, *supra* note 10 at para 440.

146 See also *Carter*, *supra* note 6 at paras 82, 95.

1. Section 1 and Participatory Democracy

Section 1 provides as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Duly enacted legislation would satisfy the "prescribed by law" element of section 1. The State must establish that legislation that limits *Charter*-protected rights imposes only "reasonable limits" that are "demonstrably justified in a free and democratic society." The Supreme Court has interpreted these conditions to require the State to satisfy the following multi-part test:

> 1) In order to be sufficiently important to warrant overriding a constitutionally protected right or freedom the impugned provision must relate to concerns which are pressing and substantial in a free and democratic society;
>
> 2) The means chosen to achieve the legislative objective must pass a three-part proportionality test which requires that they (a) be rationally connected to the objective, (b) impair the right or freedom in question as little as possible and (c) have deleterious effects which are proportional to both their salutary effects and the importance of the objective which has been identified as being of "sufficient importance."[147]

Section 1 requires consideration not only of the interests of an applicant, but of affected persons generally. On entering section 1, the perspective shifts from the narrow perspective of the aggrieved individual to the perspective that includes all members of the constitutional order. A pressing and substantial objective would serve the "common" good. But the valued individual is not abandoned at the door to section 1. Section 1 is not a "utilitarian" or consequentialist provision that allows the claimant individual's interests to be ignored in pursuit of the greatest good for the greatest number. The pressing and substantial objective (the common good promoted by legislation) is a good not only for others but for the applicant individual as well. The applicant is one of the participants in the "free and democratic society." Thus, in *Oakes*, Dickson CJ quoted Wilson J: "As Wilson J. stated in *Singh v. Minister of Employment and Immigration, supra*, at p. 218: '. . . it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter'."[148] Further, Dickson CJ wrote as follows:

147 *Laba*, *supra* note 67 at 1006.
148 *Oakes*, *supra* note 17 at 135-36.

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[149]

Section 1 expressly requires justifiable limitations on *Charter*-protected rights to be "reasonable." The link between reasonableness and the valued individual remains presupposed by section 1. The tripartite "proportionality" test for legislative means delineates conditions that must be satisfied for the State to "reasonably" limit a claimant's rights; that is, for a claimant to be "reasonably" satisfied (or for a "reasonable applicant" to be satisfied), even if the limit is not his or her preference, that a rights limitation is acceptable.

The reasonable is the practical: "In some cases the government, for practical reasons, may only be able to meet an important objective by means of a law that has some fundamental flaw."[150] The State has the burden of demonstrating the lack of practical alternatives. The State is entitled to deference in its selection of the legislative means to deal with complex social problems: "In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."[151]

The reasonable is also the proportional. In the final *Oakes* subtest, the good (or the benefits) to be achieved by the legislation are weighed against the actual harm (or the costs) caused by the legislation:

> At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of

149 *Ibid* at 136.

150 *Carter*, *supra* note 6 at para 82.

151 *Hutterian Brethren*, *supra* note 60 at para 53.

> society as a whole.[152]

Thus, "[d]epending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the Charter cannot be discounted."[153]

2. Section 1 and Legislation that Fails Section 7 Substantive Rationality

While legislation found to be "arbitrary" under section 7 may not be sustainable under section 1, overbroad and even grossly disproportional legislation could, at least in theory, be sustained under section 1.

Chaoulli appears to stand in the path of arbitrary legislation surviving the rational connection test. If legislation is arbitrary, either running contrary to its objective or not supporting its objective at all, satisfaction of the *Oakes* requirement that legislation be "rationally connected" to its objective may be precluded:

> The government undeniably has an interest in protecting the public health regime. However, given the absence of evidence that the prohibition on the purchase and sale of private health insurance protects the health care system, the rational connection between the prohibition and the objective is not made out. Indeed, we question whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*, [1986] 1 SCR 103.[154]

However, while Cory J suggested in *Heywood* that an overbroad law would be difficult to characterize as "minimally impairing" *Charter* rights, McLachlin CJ allowed in *Bedford* that even an overbroad law might, in the right circumstances, pass this test: "As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one

152 *Bedford*, *supra* note 2 at para 126. "Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right. . . . It requires placing colliding values and interests side by side and balancing them according to their weight": Aharon Barak, quoted in *Hutterian Brethren*, *supra* note 60 at para 76.

153 *Bedford*, *supra* note 2 at para 129.

154 *Chaoulli*, *supra* note 42 at para 155.

way the government may justify an overbroad law under s. 1 of the *Charter*."[155] This possibility is opened by the nature of the "minimal impairment test:" "'Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives."[156]

A grossly disproportional law is not arbitrary or overbroad. It would be rationally connected to its objective, and may well minimally impair rights, in the sense that no practical alternative to its legislative means are available. The section 7 finding was that promotion of the law's purpose, by itself, did not justify the adverse impact of the law on the claimant. From the deliberative democracy standpoint, the law maker had failed to listen to the claimant or to take the claimant's interests into account. The final stage of the section 1 inquiry allows the voices of others to be considered: "We see how the law affects you, but consider how the law affects all of us as well as you." A critical concern at this point is the actual benefit achieved by the law (for all, including the claimant) as set against the actual degree of adverse impact of the law.[157] These are matters of evidence, not anecdote, with the burden of proof remaining on the State.[158] But it is possible that the State may satisfy this burden, given the significance of legislative objective, the link between the legislation and the objective, the lack of practical alternatives to the legislation, and weight of the benefits of the legislation as compared with the adverse effects of the legislation. Legislation that is not reasonable from the standpoint of the affected individual may, from the standpoint of other affected individuals, turn out to be reasonable. Deliberative democracy does not entail that even the adversely affected valued individual always gets his or her own way.

The availability of section 1 moderates the impact of section 7 substantive rationality on the separation of powers. The State gets its fair chance under section 1 to justify the rationality of the impairment of individuals' life, liberty, or security of the person.

CONCLUSION

The substantive rationality principles of fundamental justice — which resist arbitrariness, overbreadth, and gross disproportionality — reflect the dignity

155 *Bedford*, *supra* note 2 at para 144.
156 *Ibid* at para 126.
157 *Hutterian Brethren*, *supra* note 60 at para 77.
158 *Carter*, *supra* note 6 at para 120.

and worth of individuals in the constitutional order, their rationality and their equality. Judicial review based on these principles imposes standards of rational, evidence-based, inclusive decision-making on legislators. Within the judicial review process, individuals have the opportunity to make the case that the legislator should have heard.

The principles, though, operate in the real world. Doctrines have not been fully and clearly worked out. Judges will make mistakes in applying the principles. Those who require recourse to these principles bear double burdens. They bear the burdens that prevented their voices from being heard or listened to when legislators acted. They bear the very real burdens of carrying their rights limitations into litigation, of getting access to court-based justice when politically-based justice was denied.

Yet cases like *PHS* and *Bedford* make their way to the courts. When they do, they help to move our constitutional order closer toward the goals identified by Sunstein in this paper's epigraph: promoting deliberation in government, furnishing surrogates for it when it is absent, limiting factionalism and self-interested representation, and bringing us toward political equality.[159]

159 Sunstein, *After the Rights Revolution*, *supra* note 1 at 171.