

RETHINKING THE INSTRUMENTAL RATIONALITY PRINCIPLES OF FUNDAMENTAL JUSTICE

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In Canada (Attorney General) v. Bedford, the Supreme Court of Canada fundamentally altered its approach to proving breaches of the instrumental rationality principles of fundamental justice. In response, commentators have charged that the Supreme Court's new "individualistic" approach makes it too easy to prove a breach of the principles of fundamental justice. This is mainly a result of the Supreme Court's expanded understanding of overbreadth, which now requires only that a law apply in an arbitrary manner to a single person. The problem with the Supreme Court's new approach, however, is not necessarily with individualizing the analysis. Instead, upon revamping the instrumental rationality principles, the Supreme Court neglected to ask a more basic question: does the new conception of each principle still meet the requirements to qualify as a principle of fundamental justice? Although the arbitrariness and gross disproportionality principles are still integral to fundamental justice, I contend that the individualized conception of overbreadth has inadequate societal consensus to qualify as a principle of fundamental justice.

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I. INTRODUCTION

In *Canada (Attorney General) v. Bedford*,¹ the Supreme Court of Canada altered its approach to proving breaches of the “means-ends” or “instrumental rationality” principles of fundamental justice.² The Supreme Court previously required applicants prove that the extent to which a law achieves its objective was improperly balanced against any arbitrary, overbroad, or grossly disproportionate effects on *all* people in society.³ In contrast to this “holistic” approach, the Supreme Court’s new “individualistic” approach asks whether the law has an arbitrary, overbroad, or grossly disproportionate effect on a single person.⁴ The purpose of this change was laudable: to alleviate an unduly onerous evidentiary burden on

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¹ 2013 SCC 72 [*Bedford*].

² *Ibid* at paras 97–123.

³ See *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 594–95 [*Rodriguez*].

⁴ See *Bedford*, *supra* note 1 at para 123.

the applicant.⁵ As the Supreme Court observed, the previous approach required that those who bring a claim under section 7 of the *Canadian Charter of Rights and Freedoms*⁶ establish the overall efficacy of the law, which typically required calling significant social science evidence.⁷ The individualistic approach only requires litigants to show an improper effect on a single hypothetical person.⁸

Commentators have nevertheless scrutinized the coherency of the Supreme Court's new understanding of the instrumental rationality principles.⁹ In separate works, Hamish Stewart and I have queried whether there is any room left for arbitrariness post-*Bedford*.¹⁰ As the individualistic approach presumes the impugned law achieves its objective,¹¹ it is unclear how a litigant is supposed to prove that a law is entirely divorced from its objective as required by the arbitrariness principle.¹² We have also questioned the effect presuming a law achieves its objective will have on litigants' ability to prove that said law violates the gross disproportionality principle.¹³ If a law is only minimally capable of achieving its objective, this will affect whether any given law will be found to appropriately balance its objective vis-à-vis its effects.¹⁴

Despite the saliency of these criticisms, a more basic question has yet to be asked: does the individualized approach to instrumental rationality meet the requirements to qualify as a principle of fundamental justice? Although the Supreme Court concluded that its holistic conception of the instrumental rationality principles met these requirements, it did not renew that analysis in *Bedford*.¹⁵ As several commentators have observed, the Supreme Court's new approach to the instrumental rationality principles renders many regulatory and criminal laws in breach of the overbreadth principle.¹⁶ This effect should surprise most people, which in itself suggests a failure to meet the societal consensus requirement for qualifying as a principle of fundamental justice.¹⁷

⁵ *Ibid* at para 127.

⁶ Section 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁷ *Bedford*, *supra* note 1 at para 127. In *Bedford*, for instance, the applicant was required to prove the total negative effects of three restrictions on sex work: prohibitions against communicating in public for the purpose of sex work, maintaining bawdy houses, and living on the avails of sex work. These negative effects were then required to be weighed against any benefits derived from restricting sex work. The evidence submitted by the defence reached 25,000 pages: *ibid* at para 15.

⁸ *Ibid* at para 127.

⁹ See Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill LJ 575 [Stewart, "Structure"]; Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69 [Stewart, "Sex Work"]; Mark Carter, "Sections 7 and 1 of the Charter after *Bedford*, Carter, and Smith: Different Questions, Same Answers?" (2017) 64 Crim LQ 108; Colton Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51:1 UBC L Rev 55 [Fehr, "Individualistic"]; Colton Fehr, "Instrumental Rationality and General Deterrence" (2019) 57:1 Alta L Rev 53 [Fehr, "Instrumental Rationality"].

¹⁰ See Stewart, "Structure," *ibid* at 587; Fehr, "Individualistic," *ibid* at 64–65.

¹¹ See *Bedford*, *supra* note 1 at para 123. As explained in more detail below, this presumption assures that litigants will not be required to submit vast amounts of social science evidence when challenging a law for breaches of instrumental rationality.

¹² See Stewart, "Structure," *supra* note 9 at 587; Fehr, "Individualistic," *supra* note 9 at 64–65.

¹³ See Stewart, "Sex Work," *supra* note 9 at 83–84; Fehr, "Individualistic," *ibid* at 66–68.

¹⁴ This point will be discussed in more detail below.

¹⁵ See generally *Bedford*, *supra* note 1.

¹⁶ See Stewart, "Structure," *supra* note 9 at 589–91; Fehr, "Individualistic," *supra* note 9 at 61, 65–66; *R v Michaud*, 2015 ONCA 585, leave to appeal to SCC refused, 36706 (5 May 2016) [*Michaud*].

¹⁷ The requirements for qualifying as a principle of fundamental justice will be reviewed in Part III below.

The same issue does not arise with the arbitrariness and gross disproportionality principles. As I maintain that the arbitrariness principle is unworkable within the individualistic conception of instrumental rationality,¹⁸ it is sensible to resort back to the holistic analysis. This allows the arbitrariness principle to play its important constitutional role of ensuring that laws provide adequate guidance to citizens seeking to follow the law. The gross disproportionality principle serves a sound constitutional role in its individualistic form. It effectively mirrors the prohibition against cruel and unusual punishment in circumstances where laws result in harsh, but non-punitive, consequences.¹⁹

In my view, however, the individualistic conception of overbreadth fails to qualify as a principle of fundamental justice, as doing so renders any bright-line rule that engages a litigant's interests in life, liberty, or security of the person contrary to fundamental justice. Bright-line rules involve a trade-off: they catch conduct broader than that encompassed by a law's objective because the manifestation of the relevant harm is too difficult to predict. Given the necessity of using bright-line rules in modern governance,²⁰ it is inappropriate to accept the Supreme Court's individualistic conception of overbreadth as a principle of fundamental justice. Fortunately, denying overbreadth this status is unlikely to narrow constitutional protections given the significant, if not complete, overlap between the individualistic conceptions of the overbreadth and gross disproportionality principles. As a result, I maintain the Supreme Court should not hesitate to rescind overbreadth's status as a principle of fundamental justice.

The article unfolds as follows. In Part II, I provide a more detailed explanation of the Supreme Court's "holistic" and "individualistic" conceptions of instrumental rationality. In Part III, I then briefly review the Supreme Court's requirements for constitutionalizing a principle of fundamental justice under section 7 of the *Charter*.²¹ I then query in Part IV whether the Supreme Court's individualistic conception of overbreadth meets the requirements for qualifying as a principle of fundamental justice. Although I answer this question in the negative, I also show how the overlap between the gross disproportionality and overbreadth principles addresses any concern about the scope of rights being narrowed. I conclude by offering a merger of the Supreme Court's "holistic" and "individualistic" approaches to proving breaches of the instrumental rationality principles.

II. TWO APPROACHES TO INSTRUMENTAL RATIONALITY

Section 7 of the *Charter* provides that "[e]veryone 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."²² To prove an infringement of section 7, a litigant must therefore demonstrate that a law deprives them of life, liberty, or security of the person, and that this deprivation is inconsistent with a principle of fundamental justice.²³ Although the plain wording of section 7 suggests that rights infringements apply if *anyone* is affected in a

¹⁸ See Stewart, "Structure," *supra* note 9 at 587; Fehr, "Individualistic," *supra* note 9 at 59. This argument will be unpacked further below.

¹⁹ See *Charter*, *supra* note 6, s 12.

²⁰ This point will be discussed below.

²¹ *Supra* note 6.

²² *Ibid*, s 7.

²³ See *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55 [*Carter*].

manner inconsistent with a principle of fundamental justice, the unique focus on means-ends rationality inherent to the instrumental rationality principles initially caused the Supreme Court to assess whether a law was suitably tailored to its ends in a holistic manner.

Under this approach, the applicant was required to weigh the actual ability of the law to further its objective against the negative effects of the law on the life, liberty, or security of the person of all affected individuals.²⁴ In effect, the holistic approach to instrumental rationality mirrored the section 1²⁵ test for justifying infringements of rights.²⁶ Arbitrary laws are those that were not rationally connected to the objective of the law; overbroad laws are connected to the law's objective but caught more conduct than necessary to achieve the law's objective and, in so doing, did not have a minimally impairing effect; and grossly disproportionate laws fail to appropriately balance an impugned law's salutary effects vis-à-vis its objective.²⁷

In *Bedford*, the Supreme Court abandoned this holistic approach in favour of an individualistic approach. Given the centrality of this development to this article, the Supreme Court's explanation of the new analytical structure is worth quoting at length:

All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, 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. 7.²⁸

In other words, when asking if a law violates the instrumental rationality principles, one must consider the effect of the law on a given individual's interests and weigh that effect only against the object of the law. How well, if at all, the law actually achieves its objective is relevant at the section 1 stage of the analysis.

Presuming that a law achieves its objective is arguably necessary for the individualistic analytical structure to serve its broader purpose. Without this presumption, it would be necessary to consider whether the law is capable of meeting its objective at the section 7 stage of the analysis. Yet, this is precisely the type of evidence the Supreme Court wished to consider only under section 1. As the Supreme Court reasoned in *Bedford*, “[u]nlike 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 society as a whole.”²⁹ The Supreme Court continued, “[t]o require s. 7 claimants to establish the efficacy of the law ... would impose

²⁴ See *R v Heywood*, [1994] 3 SCR 761 [*Heywood*].

²⁵ *Charter*, *supra* note 6, s 1.

²⁶ See Lisa Dufraimont, “*Canada (Attorney General) v. Bedford* and the Limits on Substantive Criminal Law under Section 7” (2014) 67 SCLR (2d) 483 at 496–98.

²⁷ *Ibid* at 487–88.

²⁸ *Bedford*, *supra* note 1 at para 123 [emphasis in original].

²⁹ *Ibid* at para 126.

the government's s. 1 burden on claimants under s. 7. That cannot be right."³⁰ By limiting the amount of evidence needed to prove a section 7 violation, the Supreme Court has realigned the burden of proof in a way that is sensitive to the appropriate role of each party.

Under the individualistic approach, the Supreme Court describes the instrumental rationality principles as follows. A law is arbitrary where the law "bears no connection to its objective."³¹ A law is overbroad where the effects of the law, although typically connected to its objective, fail to achieve its objective even as applied to one hypothetical person.³² Finally, a law that is connected to its objective will violate the gross disproportionality principle where the effect of the law on a single person is "totally out of sync"³³ with the law's purpose.

The Supreme Court's post-*Bedford* description of overbreadth has, on occasion, conflated the individualistic and holistic approaches. In *R. v. Safarzadeh-Markhali*³⁴ for instance, the Supreme Court stated that a law is overbroad where it goes "further than reasonably necessary to achieve its legislative goals."³⁵ Yet, the Supreme Court also relied on the statement from *Bedford* that an overbroad law is one that "goes too far and interferes with some conduct that bears no connection to its objective."³⁶ In my view, the former statement is best framed as an inadvertent mistake by the Supreme Court as opposed to an implicit attempt to adjust the *Bedford* approach three years after it was adopted. To conclude that a law only violates the overbreadth principle where it goes "further than reasonably necessary" readopts the holistic conception of instrumental rationality. As the Supreme Court in *Bedford* observed, this approach is undesirable given the illogicality of constitutionalizing elements of the section 1 proportionality test as principles of fundamental justice.

III. THE PRINCIPLES OF FUNDAMENTAL JUSTICE

The principles of fundamental justice "are to be found in the basic tenets of our legal system."³⁷ As the Supreme Court has often observed, such principles must be integral to the proper functioning of law in a well-governed society.³⁸ Principles of fundamental justice must therefore be essential to the basic beliefs upon which Canada is founded. These beliefs include a "belief in 'the dignity and worth of the human person' (preamble to the *Canadian Bill of Rights* ...) and on 'the rule of law' (preamble to the ... *Charter*)."³⁹ Distilling the above considerations into a functional legal test, a principle must fulfill three criteria to qualify as a principle of fundamental justice. It must be: (1) a legal principle; (2) upon which there is some consensus that the principle is "vital or fundamental to our societal notion of

³⁰ *Ibid* at para 127.

³¹ *Ibid* at para 111 [emphasis omitted].

³² *Ibid* at para 112.

³³ *Ibid* at para 120.

³⁴ 2016 SCC 14 [*Safarzadeh-Markhali*].

³⁵ *Ibid* at para 50 [emphasis added].

³⁶ *Bedford*, *supra* note 1 at para 101 [emphasis added]. See also Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019) at 162, n 56 [Stewart, *Fundamental Justice*].

³⁷ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503.

³⁸ *Ibid* at 512.

³⁹ *Ibid* at 503 [citations omitted].

justice”;⁴⁰ and (3) which is sufficiently precise to be applied in a manner that yields predictable results.⁴¹

The purpose behind requiring the principles of fundamental justice to be legal principles which are definable with some precision is straightforward. By requiring the principles to be legal principles, the principles of fundamental justice are able to avoid the “judicialization” of policy matters.⁴² The requirement that the principles be sufficiently precise ensures that “vague generalizations about what our society considers to be ethical or moral”⁴³ do not become the basis for striking down democratically enacted laws. By so requiring, the principles of fundamental justice are able to provide meaningful guidance to legislatures, courts, and the public when assessing the permissible scope of the law.

The requirement that there be sufficient societal consensus that the principle is vital to the legal system is more complex. Broadly stated, this requirement considers the “shared assumptions upon which our system of justice is grounded.”⁴⁴ As the Supreme Court observed, these assumptions “find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens” and are principles that “[s]ociety views ... as essential to the administration of justice.”⁴⁵ This framework does not, however, endorse a strictly empirical investigation into what Canadians believe ought to qualify as a principle of fundamental justice. Instead, the decisive question is what role the principle plays in a legal order that is committed to the values expressed in the *Charter*. Those values include respect for human rights and the rule of law.⁴⁶

IV. INSTRUMENTAL RATIONALITY AS FUNDAMENTAL JUSTICE

The Supreme Court in *Bedford* did not consider whether its “individualistic” approach to instrumental rationality met the strict requirements for qualifying as a principle of fundamental justice under section 7 of the *Charter*. As I contend below, the arbitrariness and gross disproportionality principles are connected to the rule of law and human rights theory, respectively. Overbreadth, however, does not sufficiently connect to either of these basic tenets of fundamental justice. This conclusion, I maintain, flows from the fact that the individualistic conception of the overbreadth principle does not have adequate societal consensus to qualify as a principle of fundamental justice.

A. ARBITRARINESS

As suggested earlier, the current presumption that the objective of a law is achieved under the individualistic conception of the instrumental rationality principles renders the arbitrariness principle unworkable. Since the arbitrariness principle requires proof that the

⁴⁰ *Rodriguez*, *supra* note 3 at 590.

⁴¹ See *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 113 [*Malmo-Levine*].

⁴² *Ibid* at paras 112–13.

⁴³ *Rodriguez*, *supra* note 3 at 591.

⁴⁴ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8 [*Canadian Foundation*].

⁴⁵ *Ibid*.

⁴⁶ See *Re BC Motor Vehicle Act*, *supra* note 37 at 503.

law is *incapable* of achieving its objective,⁴⁷ presuming the objective is achieved at the section 7 stage of the analysis is inconsistent with the arbitrariness principle's basic purpose. As a result, it is likely that the Supreme Court did not mean to apply its individualistic approach to the arbitrariness principle. As such, the Supreme Court's original "holistic" rationale for determining that an arbitrary law offends fundamental justice is more coherent. This rationale requires proof that the effect of a law is either logically divorced from its objective or that the law is empirically unproven to be able to achieve its objective.⁴⁸

The holistic conception of the arbitrariness principle ought to partially qualify as a principle of fundamental justice given its connection to the rule of law.⁴⁹ This is evident upon considering one of the more important accounts of the rule of law: Lon Fuller's *The Morality of Law*.⁵⁰ Therein, Fuller provided eight formal principles he maintained are central to the rule of law — at least one of which is engaged by the arbitrariness principle. Fuller's "clarity" principle requires that citizens be able to determine what a law prohibits and permits.⁵¹ As with a law that is impermissibly vague,⁵² an arbitrary law, at least in the "logical" sense, provides inadequate guidance to citizens trying to follow the law. A citizen would be understandably confused trying to follow such a law given the clear disconnect between what the lawmaker says the law does and the actual wording of the law. It would take a judge, choosing between the wording of the law and the legislature's intent, to give the law any meaning.

The empirical conception of the arbitrariness principle is not as obviously connected to the rule of law. A law that breaches the empirical conception of arbitrariness is honest about the objective it purports to achieve, but the evidence in support of the law's efficacy in achieving its aim is inadequate.⁵³ The citizen therefore should have no difficulty determining how to follow the law given the clarity of the law's objective and its connection to the text of the impugned law. By definition, however, a law scrutinized under section 7 will have serious effects on the life, liberty, or security of the person interests of the litigant. A law that affects such important interests without achieving its aim is constitutionally problematic. As I explain in more detail below, however, this constitutional harm is better assessed by asking whether the law's actual effects are grossly disproportionate when compared to the ability of the law to achieve its objective.

B. GROSS DISPROPORTIONALITY

The gross disproportionality principle mirrors a common principle found in modern constitutions: the prohibition against cruel and unusual punishment.⁵⁴ This principle is

⁴⁷ See *Bedford*, *supra* note 1 at para 111.

⁴⁸ See Fehr, "Instrumental Rationality," *supra* note 9 at 61. I will discuss examples of each below.

⁴⁹ Although the Supreme Court in *R v Morgentaler*, [1988] 1 SCR 30, determined that arbitrariness was a principle of fundamental justice, the decision occurred before the Supreme Court had set down the test for determining whether a law qualifies as a principle of fundamental justice outlined in Part III, above.

⁵⁰ Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969).

⁵¹ *Ibid* at 39.

⁵² See *Canadian Foundation*, *supra* note 44 at paras 15–18, citing *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 638–40.

⁵³ For a detailed example see Fehr, "Instrumental Rationality," *supra* note 9 at 61 (contending that the general deterrence principle in sentencing is arbitrary for being incapable of proving its efficacy).

⁵⁴ I am unaware of a modern constitution that does not include a similar prohibition.

entrenched under section 12 of the *Charter*. Whether evaluating the effects of a punishment, an enacted law, or some other state conduct, sections 7 and 12 collectively ask the same question: whether the effect of some state sanctioned action is grossly disproportionate when compared to the purpose of the state act.⁵⁵ Given the prohibition against cruel and unusual punishment's obvious connection to human rights theory, it is reasonable to conclude that other non-punitive state actions with similar effects also ought to be constitutionally prohibited.

The Supreme Court drew precisely this conclusion in *Malmo-Levine*.⁵⁶ As the Supreme Court reaffirmed, sections 8 to 14 of the *Charter* are illustrative of the types of principles that are fundamental to justice under section 7.⁵⁷ The Supreme Court's section 12 jurisprudence has subsequently revealed that the potential for a sentence to result in a grossly disproportionate punishment to even one (reasonably hypothetical) person is enough for a law to violate section 12.⁵⁸ If grossly disproportionate punishment of one person is constitutionally prohibited, it seems reasonable to conclude that other grossly disproportionate effects of state actions ought to receive similar treatment.

C. OVERBREADTH

The Supreme Court's "individualistic" conception of overbreadth may be summarized as follows: it is a principle of fundamental justice that any law engaging life, liberty, or security of the person must be crafted perfectly and be aligned with its objective in all instances. Few people, I think, would agree that such a strict rule is imperative to a law being fundamentally just. In my view, this conclusion follows for a simple reason: using bright-line rules is a necessary part of modern governance.

There is an extensive debate concerning when bright-line rules ought to be used in place of a standard. As one author summarizes:

With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and [at times] arbitrary-seeming outcomes. With standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs.⁵⁹

⁵⁵ See *Malmo-Levine*, *supra* note 41 at para 159, citing *R v Morrissey*, 2000 SCC 39 at paras 26, 44; *R v Smith*, [1987] 1 SCR 1045 at 1072; *Steele v Mountain Institution*, [1990] 2 SCR 1385 at 1417; *R v Latimer*, 2001 SCC 1 at para 77.

⁵⁶ *Supra* note 41.

⁵⁷ See *Malmo-Levine*, *ibid* at para 159, citing *Re BC Motor Vehicle Act*, *supra* note 37.

⁵⁸ See *R v Nur*, 2015 SCC 15 at para 77 [*Nur*].

⁵⁹ Michael Coenen, "Rules Against Rulification" (2014) 124:3 Yale LJ 644 at 646, citing Louis Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42:3 Duke LJ 557; Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685; Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56:4 U Chicago L Rev 1175; Pierre Schlag, "Rules and Standards" (1985) 33:2 UCLA L Rev 379; Kathleen M Sullivan, "Foreword: The Justices of Rules and Standards" (1992) 106:1 Harv L Rev 22; Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953. In Canada, see Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018).

The literature debating the merits of employing rules as opposed to standards is by now voluminous.⁶⁰ For present purposes, however, the literature clearly accepts that bright-line rules are one of two main rule types that are widely used in modern governance.

The need for bright-line rules arises from human fallibility. If given a standard to follow, some will inevitably be incapable of achieving the ends of the law due to errors in judgment. It is for this reason that speeding laws are commonly imposed as opposed to standards requiring individuals to drive “safely.” Where human fallibility is particularly acute and likely to lead to serious consequences, bright-line rules are used in place of standards to protect the broader community. Bright-line rules are thus tailored in a manner that recognizes that the law must be drawn broadly so as not to miss any seriously harmful conduct. In so doing, however, bright-line rules typically catch conduct divorced from their objective. As such, bright-line rules can be expected to violate the overbreadth principle if the impugned rule engages the life, liberty, or security of the person interests of even a single person.

The post-*Bedford* case law is illustrative of how far the overbreadth doctrine reaches under the individualistic approach. In *Michaud*,⁶¹ the Ontario Court of Appeal was asked to decide whether Ontario’s *Highway Traffic Act*,⁶² and its associated regulation,⁶³ violated section 7 of the *Charter*. The relevant provisions required that speed limiters be placed on larger vehicles.⁶⁴ The accused set his truck’s speed limiter 4.4 km/h higher than allowed under the *HTA* and its associated regulations. The accused reasonably argued that the speed limiter would jeopardize his life interest in narrow circumstances where it is necessary to increase speeds to avoid an accident. As such, the law was disconnected from its objective of making the roads safer in readily defined circumstances, and thus was declared overbroad.⁶⁵

The Court of Appeal did not mince words in expressing its dissatisfaction with this finding. Writing for the Court, Justice Lauwers observed that it was “strangely incongruous to consider highway safety regulation, or any safety regulation, as ‘depriving’ anyone of ‘security of the person’ or of engaging the ‘principles of fundamental justice’ in the sense demanded by s. 7.”⁶⁶ Justice Lauwers continued by noting that regulators may choose “a proactive bright-line rule in preference to a general behavioural standard, even though such a rule is usually over-inclusive and errs on the side of safety.”⁶⁷ In the Court’s view, determining that such a choice breaches “fundamental justice” risks trivializing the concept.⁶⁸ As a result, the Court suggested resorting back to the holistic approach to instrumental rationality in instances where a regulatory law engages the life, liberty, or security of the person interests of any individual.⁶⁹

⁶⁰ See generally *ibid.*

⁶¹ *Supra* note 16.

⁶² RSO 1990, c H.8 [*HTA*].

⁶³ *Equipment Regulation*, RRO 1990, Reg 587.

⁶⁴ See *HTA*, *supra* note 62, s 68.1(1).

⁶⁵ See *Michaud*, *supra* note 16 at paras 72–73.

⁶⁶ *Ibid* at para 147.

⁶⁷ *Ibid* at para 148.

⁶⁸ *Ibid* at para 149.

⁶⁹ *Ibid* at para 151.

Yet, it is unclear why such trivialization ought to be tolerated at all given the high likelihood that overbreadth will have similar effects in other areas of the law.⁷⁰ The criminal law is the next most obvious candidate. Given the availability of penal sanctions when an offender violates a provision of the *Criminal Code*,⁷¹ the liberty interests of the accused will be engaged thereby requiring all criminal laws to be consistent with the principles of fundamental justice.⁷² Any bright-line rule relating to a criminal law therefore violates section 7, regardless of whether the use of a standard would inadequately serve the legislation's purpose.

Section 150.1(1) of the *Criminal Code* is exemplary.⁷³ That provision sets the age of consent to sexual activity at sixteen years. Although there are several exceptions to this rule,⁷⁴ the provision would allow for the conviction of a 21 year old accused who is in a non-exploitive relationship with an emotionally mature teenager who is 15 years and 11 months old. The teenager's liberty interests are engaged as a result of the state's choice to restrict their sexual conduct. The adult's liberty is engaged given the possibility of imprisonment upon conviction. As the law's purpose is to protect young persons from *premature* sexual activity, the hypothetical scenario outlined above clearly runs contrary to the law's purpose. The law is therefore overbroad.⁷⁵

It is highly likely that section 150.1(1) would be saved under section 1 of the *Charter*,⁷⁶ as was the case with the impugned law in *Michaud*.⁷⁷ This does not, however, take away from the fact that the principles of fundamental justice are trivialized by requiring the state to offer justifications for obviously permissible laws. Although litigants are unlikely to be motivated to bring many overbreadth challenges if a law is clearly justifiable under section 1,⁷⁸ the structure of the law matters and should not be ignored simply because it is unlikely to have any material consequences. If I am correct that any bright-line rule that engages life, liberty, or security of the person is overbroad, it must be asked: is there any theory of human rights or the rule of law that could plausibly form the basis for a societal consensus that the Supreme Court's individualistic conception of overbreadth is fundamental to justice?

I am unaware of any such theory. Such an absence is likely due to the necessity of using bright-line rules in modern governance. As discussed earlier, using a standard to avoid catching overbroad conduct would risk missing too much objectionable conduct which, in turn, would jeopardize the health and safety of citizens. Requiring the truck driver in

⁷⁰ See Stewart, "Structure," *supra* note 9 at 589 [footnotes omitted] ("[w]henver a law is conceived of as an instrument to achieve purposes that are defined independently of the law itself ... there is likely to be some degree of overbreadth").

⁷¹ RSC 1985, c C-46.

⁷² See *Re BC Motor Vehicle Act*, *supra* note 37 at 492.

⁷³ I borrow this example from Stewart, "Structure," *supra* note 9 at 590-91.

⁷⁴ See *Criminal Code*, *supra* note 71, ss 151.1(2)-(6).

⁷⁵ See Stewart, "Structure," *supra* note 9 at 590-91. For a subsequent case finding the contrary, see *R v AB*, 2015 ONCA 803. Stewart has subsequently provided a persuasive rebuttal to this case: see Stewart, *Fundamental Justice*, *supra* note 36 at 161-62.

⁷⁶ For an extensive explanation as to why section 150.1(1) is saved under section 1 of the *Charter*, see Stewart, "Structure", *ibid*.

⁷⁷ See *Michaud*, *supra* note 16 at paras 144-45.

⁷⁸ See Fehr, "Individualistic," *supra* note 9 at 65-66. It is also notable that *Michaud*, *ibid*, was brought as a test case.

Michaud to “drive safely” or for adults to engage in relationships only with “sufficiently mature” youth provides unclear guidance to those who might cause the serious harms at the heart of the broader prohibitions. It is for this reason that the Court in *Michaud* viewed the Supreme Court’s individualistic conception of overbreadth as “trivializing” the idea of “fundamental justice.”⁷⁹ The Ontario Court of Appeal, however, would have done better to put this conclusion in section 7 language: the individualistic conception of overbreadth is unlikely to attract significant *societal consensus* given the numerous instances in which bright-line rules are necessary tools of governance.

A similar argument was successfully advanced by the Crown in *Malmo-Levine*.⁸⁰ The applicant argued that John Stuart Mill’s harm principle ought to qualify as a principle of fundamental justice. The harm principle provides that only conduct that harms another person ought to be subject to state sanction.⁸¹ Despite the Supreme Court’s recognition that Mill’s conception of harm is frequently the target of criminal prohibitions,⁸² the fact that it was not sufficient to capture all offences was enough to find an absence of societal consensus under section 7 of the *Charter*.⁸³ The Supreme Court cited several narrow instances in the *Criminal Code* where harm to others did not underpin a criminal prohibition to support this view: cannibalism (does not harm another sentient being),⁸⁴ bestiality (harm to animals),⁸⁵ duelling (activity of consenting adults),⁸⁶ and incest (where there is consent).⁸⁷ Given the high bar for satisfying the societal consensus requirement exhibited in *Malmo-Levine*, it ought to follow that the individualistic conception of overbreadth fails to qualify as a principle of fundamental justice.

If the foregoing analysis is persuasive, two issues remain to be resolved. First, should the Supreme Court’s holistic conception of overbreadth regain its status as a principle of fundamental justice? Second, and relatedly, would denying overbreadth the status of being a principle of fundamental justice result in a narrowing of constitutional rights? Given the prominence of overbreadth in the Supreme Court’s jurisprudence,⁸⁸ the latter concern is of the utmost importance. As I explain below, however, the overlap between the individualistic conception of the gross disproportionality and overbreadth principles requires that both of these questions be answered in the negative.

⁷⁹ See *Michaud*, *ibid* at para 149.

⁸⁰ *Supra* note 41.

⁸¹ *Ibid* at para 106, citing JS Mill, *On Liberty and Considerations on Representative Government* ed by RB McCallum (Oxford: Basil Blackwell & Mott, 1946) at 8–9.

⁸² See *Malmo-Levine*, *ibid* at para 115.

⁸³ *Ibid* at paras 116–22.

⁸⁴ *Ibid* at para 117, citing *Criminal Code*, *supra* note 71, s 182.

⁸⁵ *Malmo-Levine*, *ibid*, citing *Criminal Code*, *ibid*, s 160.

⁸⁶ *Malmo-Levine*, *ibid* at para 118, citing *Criminal Code*, *ibid*, s 71 as it appeared on 12 December 2018 (repealed by *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29, s 4). It is notable that consent does not negate the fact that harm does occur from a duel.

⁸⁷ *Malmo-Levine*, *ibid*, citing *Criminal Code*, *ibid*, s 155. For a detailed argument outlining why instances of consensual incest do not result in any provable harm, see Colton Fehr, “Consent and the Constitution” (2019) 42:3 *Man LJ* 217 at 243–47.

⁸⁸ See *Carter*, *supra* note 23 at para 72 (“[w]hile the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object”).

D. OVERLAP BETWEEN GROSS DISPROPORTIONALITY AND OVERBREADTH

The impact of rescinding the overbreadth principle's status as a principle of fundamental justice may be mitigated if one condition is met. It must be true (or at least highly likely) that a law that is both overbroad and unjustifiable under section 1 also violates the individualistic conception of the gross disproportionality principle. This condition is important, as the mere fact that the individualistic conception of overbreadth is violated does not result in a law being unconstitutional under section 1 of the *Charter*.⁸⁹ Thus, the potential for a law under the individualistic conception of instrumental rationality to be overbroad but not grossly disproportionate has no practical effect on the scope of constitutional rights.

To begin, it is notable that the Supreme Court has recognized on several occasions that a law that is grossly disproportionate at the section 7 stage of the analysis also fails to satisfy the overbreadth principle. For instance, despite the Supreme Court treating gross disproportionality as an independent principle of fundamental justice in *Malmo-Levine*, it wrote in the companion case, *R. v. Clay*,⁹⁰ that “[o]verbreadth ... addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly* disproportionate to the state interest the legislation seeks to protect.”⁹¹ Writing a year before *Bedford* in *R. v. Khawaja*,⁹² the Supreme Court affirmed this position and observed that overbreadth and gross disproportionality “may simply offer different lenses through which to consider a single breach of the principles of fundamental justice.”⁹³

It is unsurprising, then, that the Supreme Court has yet to devise a scenario where a law could plausibly violate the holistic conception of the gross disproportionality principle without also violating the holistic conception of overbreadth.⁹⁴ This conclusion ought to apply similarly under the now broader “individualistic” conception of the gross disproportionality principle. As a grossly disproportionate effect on a single person is enough to violate section 7, it is difficult, if not impossible, to imagine a scenario where the law is overbroad and fails the section 1 test but does not violate the gross disproportionality principle. Similarly, it is also implausible for a law that violates the overbreadth principle and fails to be justified under section 1 to also violate the gross disproportionality principle and be justified under section 1.

The Supreme Court's recent application of the overbreadth doctrine is illustrative of the overlap between these principles. In *Bedford*, the Supreme Court determined that the prohibition against living off the avails of sex work was overbroad. As the Supreme Court observed, the lower Court found the prohibition was both overbroad and grossly

⁸⁹ See *Michaud*, *supra* note 16 at paras 144–45. It is necessary to make this point given the fact that violations of section 7 are viewed by some as “unjustifiable” under section 1.

⁹⁰ 2003 SCC 75.

⁹¹ *Ibid* at para 38 [emphasis in original]. Similarly see *Heywood*, *supra* note 24 at 793 (“[t]he effect of overbreadth is that in some applications the law is arbitrary or disproportionate”).

⁹² 2012 SCC 69.

⁹³ *Ibid* at para 40.

⁹⁴ I am unaware of such commentary. For a review of the justification test under section 1 of the *Charter*, see *R v Oakes*, [1986] 1 SCR 103 at 135–42.

disproportionate.⁹⁵ Although the Crown claimed the provision was designed to *protect* sex workers from exploitation, it also served to prevent sex workers from hiring protective employees such as bodyguards, drivers, and receptionists and was therefore overbroad.⁹⁶ Yet, the law was also grossly disproportionate when compared to its ability to achieve its objective. In considering bodyguards and the like help protect sex workers, the law does not achieve its objective at all when applied to those who would hire non-exploitive workers. As the Ontario Court of Appeal observed, a law that is incapable of achieving its objective in readily definable scenarios, yet also puts the lives of innocent citizens at risk in those scenarios, clearly has effects that are grossly disproportionate to the law's objective.⁹⁷

In *Carter*,⁹⁸ the Supreme Court was asked to determine whether the blanket ban on assisted dying violated the instrumental rationality principles. The object of the law was to protect vulnerable persons from being tempted to commit suicide in moments of weakness.⁹⁹ As the Supreme Court concluded:

We agree that the impact of the prohibition is severe: it imposes unnecessary suffering on affected individuals, deprives them of the ability to determine what to do with their bodies and how those bodies will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician's assistance in dying. Against this it is argued that the object of the prohibition — to protect vulnerable persons from being induced to commit suicide at a time of weakness — is also of high importance. We find it unnecessary to decide whether the prohibition also violates the principle against gross disproportionality, in light of our conclusion that it is overbroad.¹⁰⁰

This indecision avoids addressing the problem with using overbreadth over gross disproportionality. Although the law clearly catches some people in a manner disconnected from the law's objective — an unsurprising result given the use of a bright-line rule — the extent of the disconnection and its true effects on litigants goes unevaluated at the section 7 stage. Yet, the lower Court had no issue assessing the available evidence and drawing a conclusion with respect to the law's compliance with the gross disproportionality principle. As the British Columbia Court of Appeal concluded: "the effect of the prohibition is to cause premature deaths. This is grossly disproportionate . . . to the goal of protecting the vulnerable *when such protections can be achieved through the regulation of physician-assisted dying.*"¹⁰¹

In *R. v. Appulonappa*,¹⁰² the accused were charged with smuggling people into Canada contrary to section 117 of the *Immigration and Refugee Protection Act*.¹⁰³ The Supreme Court interpreted the objective of the legislation to be preventing "the smuggling of people into Canada in the context of organized crime."¹⁰⁴ Parliament had explicitly recognized during the legislative process that its legislation was broad enough to allow for the conviction

⁹⁵ See *Bedford*, *supra* note 1 at para 139.

⁹⁶ See *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 221.

⁹⁷ *Ibid* at paras 253–54.

⁹⁸ *Supra* note 23.

⁹⁹ *Ibid* at paras 74–75.

¹⁰⁰ *Ibid* at para 90.

¹⁰¹ *Carter v Canada (Attorney General)*, 2013 BCCA 435 at para 166 [emphasis added].

¹⁰² 2015 SCC 59 [*Appulonappa*].

¹⁰³ SC 2001, c 27 [*IRPA*].

¹⁰⁴ *Appulonappa*, *supra* note 102 at para 70.

of those helping undocumented immigrants settle in Canada for humanitarian purposes.¹⁰⁵ However, the Crown maintained that the requirement in section 117(4) of *IRPA* that all prosecutions be approved by the Attorney General would ensure humanitarian aid cases would not be prosecuted.¹⁰⁶

Consistent with its jurisprudence in other contexts,¹⁰⁷ the Supreme Court concluded that the strong likelihood that prosecutorial discretion would be exercised to avoid prosecuting those bringing in undocumented migrants was irrelevant to the overbreadth analysis.¹⁰⁸ As convicting people for aiding undocumented immigrants for humanitarian purposes would not further the legislative objective of thwarting organized crime, the Supreme Court found that the legislation was overbroad.¹⁰⁹ Yet, a similar conclusion may be raised with respect to the gross disproportionality principle. Prohibiting a narrow act that is incapable of achieving the legislature's objective, but achieves some social good, is readily framed as striking a grossly disproportionate balance between that law's means and ends.

Another recent instance of overbreadth arose in *Safarzadeh-Markhali*.¹¹⁰ Therein, the Supreme Court faced a challenge to section 719(3.1) of the *Criminal Code* which placed various restrictions on the practice of granting accused persons enhanced credit for time spent in pretrial custody.¹¹¹ Enhanced credit was not available, however, if the judge stated on the record that their primary reason for denying bail was related to the accused's criminal record.¹¹² As such, an offender who applied for bail, was denied, and subsequently had the judge provide a section 719(3.1) endorsement would receive lower credit than an offender with an identical charge and criminal record who chose not to apply for bail.

The Supreme Court found that restricting the practice of granting enhanced credit based on an irrelevant factor such as bail eligibility rendered the law overbroad. In so doing, the Supreme Court concluded that the legislation's objective was to "enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs."¹¹³ Yet, the scope of the provision applied in circumstances that had nothing to do with enhancing safety and security. Most notably, a person with multiple convictions for failing to appear in court may be denied bail despite no reason to suspect that they posed a threat to public safety or security.¹¹⁴

The *Safarzadeh-Markhali* case could not be framed as a breach of the gross disproportionality principle under section 7. Denial of sentencing credit would result in the offender's *sentence* increasing in accordance with the number of days for which the offender was denied enhanced credit. As this consequence concerns appropriate punishment, section 12, not section 7 gross disproportionality, is applicable. Yet, a 50 percent increase in the overall time served in prison could result from the offender applying for bail and being

¹⁰⁵ *Ibid* at para 72.

¹⁰⁶ *Ibid*.

¹⁰⁷ See e.g. *Nur*, *supra* note 58.

¹⁰⁸ See *Appulonappa*, *supra* note 102 at para 74.

¹⁰⁹ *Ibid* at paras 73–77.

¹¹⁰ *Supra* note 34.

¹¹¹ These restrictions were adopted by the *Truth in Sentencing Act*, SC 2009, c 29, s 3.

¹¹² See *Criminal Code*, *supra* note 71, ss 515(9.1), 719(3.1).

¹¹³ *Safarzadeh-Markhali*, *supra* note 34 at para 47 [emphasis omitted].

¹¹⁴ *Ibid* at para 53.

denied as a result of her criminal record.¹¹⁵ It is plausible that such a significant increase would constitute cruel and unusual punishment, especially when the increase may result without furthering Parliament's objective of enhancing public safety and security. Indeed, this was precisely the conclusion arrived at by the Ontario Court of Appeal.¹¹⁶

The above case examples considering the overlapping applicability of gross disproportionality and overbreadth are admittedly sparse to date. This is at least partially a result of the recency of the Supreme Court's individualistic approach to the instrumental rationality principles.¹¹⁷ Nevertheless, it is telling that the main cases finding a violation of the individualistic conception of the overbreadth principle are also readily framed as breaches of the gross disproportionality principle. Although the fact that both principles apply as broadly as each other might suggest that neither should receive constitutional status, the important distinction lies in the reasons underlying each principles' status as a principle of fundamental justice. Overbreadth has been shown to possess an unpersuasive rationale for qualifying as a principle of fundamental justice, while gross disproportionality (like the prohibition against cruel and unusual punishment) engages with the actual effects of the law on the litigant's life, liberty, or security of the person interests when compared to the impugned law's ability to meet its objective. Given the overlap between these two principles, I maintain that any concern that rescinding overbreadth's status as a principle of fundamental justice would negatively affect the scope of *Charter* rights is negligible. If correct, this raises a final question: how should the arbitrariness and gross disproportionality principles of fundamental justice operate moving forward?

V. RETHINKING INSTRUMENTAL RATIONALITY

In my view, it would be better to abandon the "holistic" and "individualistic" conceptions of instrumental rationality. Instead, it is prudent to think of these principles as what I call "logical" and "empirical" breaches of instrumental rationality.¹¹⁸ As applied to the arbitrariness and gross disproportionality principles, the "logical" approach takes the objective of the law at face value and queries whether the effects of the law are adequately connected to its stated objective. Under this approach, a breach may be proven if the wording of the law is divorced from the legislature's stated objective (arbitrariness) or has some connection to its objective but imposes unacceptable costs to an identifiable person(s) (gross disproportionality).

An example of this use of the arbitrariness principle has not yet arisen in the case law. This is unsurprising given the level of incoherence a law must exhibit to be arbitrary in the logical sense. Such a law would require that the legislature intend that a law serves one objective, while the wording of the law be disconnected from that objective in any imaginable scenario in which the law would apply. Given the unlikelihood of such a law

¹¹⁵ An offender who is in remand until the day of their trial and is found guilty and sentenced the same day would lose the potential 1.5:1 credit.

¹¹⁶ See *R v Safarzadeh-Markhali*, 2014 ONCA 627 at paras 90–101.

¹¹⁷ *Bedford*, *supra* note 1, was decided in 2013.

¹¹⁸ These terms were first discussed by me in Fehr, "Instrumental Rationality," *supra* note 9. What follows builds upon those remarks.

passing through the democratic process, it may fairly be concluded that the logical conception of arbitrariness is unlikely to arise often.

The logical approach to gross disproportionality has a firm foundation in the existing case law. The Supreme Court's decision in *Bedford* is illustrative. The Supreme Court found that the prohibition against keeping a bawdy house prevented sex workers from operating in a secure setting, thereby placing sex workers' lives at risk. When compared to the law's nuisance abatement objective, the law was grossly disproportionate in its effect.¹¹⁹ Similarly, prohibiting sex workers from screening their clientele placed their lives in jeopardy.¹²⁰ In both instances, the alleged "nuisances" were likely prevented by the respective criminal prohibitions, though at unacceptable costs to the health and safety of sex workers.

The "empirical" approach to instrumental rationality would allow the applicant to challenge the extent to which a law achieves its objective. This approach is a poor fit under the arbitrariness principle. As explained earlier, a law is no less capable of satisfying the rule of law if it is empirically proven to be incapable of achieving its aims. The law nevertheless remains constitutionally suspect as it is unlikely to achieve its ends and, importantly, deprives a person of an important interest such as life, liberty, or security of the person. Where a law fails to achieve its ends and denies a person of an important interest, it seems intuitive that the impugned law will be grossly disproportionate as applied to a single litigant. If true, there is simply no reason to preserve the empirical conception of arbitrariness, because the individualistic conception of the gross disproportionality principle is capable of serving the same purpose.

An example of the empirical approach to the arbitrariness principle arose in *R. v. Smith*.¹²¹ Therein, the federal government had prohibited use of non-dried forms of medical marijuana. This had the effect of forcing users of medicinal marijuana to smoke as opposed to ingest their medicine.¹²² The government's stated objective in prohibiting use of non-dried forms of marijuana was to protect the health and safety of users of medicinal marijuana.¹²³ As the Supreme Court concluded, however, requiring that individuals smoke marijuana as opposed to ingest it is *more* dangerous to the user.¹²⁴ Moreover, for some users, ingesting marijuana is much more effective than inhaling it.¹²⁵ Given the negative effects on the subject's health and the impossibility of the impugned law achieving its interests in the purported circumstances, the Supreme Court's decision in *Smith* is readily reframed as a breach of the empirical conception of the gross disproportionality principle.

As detailed in Part II, however, the Supreme Court's current conception of instrumental rationality relies upon a key assumption: the law achieves its objective. This assumption is questionable when employing the empirical conception of instrumental rationality. Although the Supreme Court recognized that it is unfair to require the applicant to prove the extent to

¹¹⁹ See *Bedford*, *supra* note 1 at paras 130–36.

¹²⁰ *Ibid* at paras 146–59.

¹²¹ 2015 SCC 34 [*Smith*].

¹²² *Ibid* at para 1.

¹²³ *Ibid* at para 24.

¹²⁴ *Ibid* at para 25.

¹²⁵ *Ibid*.

which a law achieves its objective,¹²⁶ the Supreme Court failed to recognize that such proof will often be necessary to demonstrate that a law violates the empirical conception of the gross disproportionality principle. The Supreme Court's decision in *Canada (Attorney General) v. PHS Community Services Society*,¹²⁷ which was decided under the holistic approach to gross disproportionality, is illustrative.¹²⁸

In *PHS*, the federal Minister of Justice decided not to renew an exemption allowing for the operation of a safe injection site.¹²⁹ The Minister's decision purported to increase health and safety by deterring drug use which, if true, would save many lives. Weighed against the lives lost by closing a safe injection site, the Minister's decision to close the site seems proportionate. It is only when the ability of the law to achieve its objective is scrutinized, as occurred under the holistic approach,¹³⁰ that we realize closing down a safe injection site is unlikely to convince people with drug addictions to stop using drugs.¹³¹ As a result, challenging the objective of the law was necessary to prove a breach of the gross disproportionality principle.

There is, however, a legitimate concern over whether the individualistic approach makes proving gross disproportionality too difficult. Presuming that a law achieves its objective will often make it *relatively* more difficult to prove that the effect on any given individual is disproportionate.¹³² As I observe elsewhere:

It is inherent in the idea of proportionality that the court must compare a law's beneficial effect on one interest with its harmful impact on another interest. If it were possible to prove that the impugned law only marginally achieves its objective, the severity of the deprivation needed to show that the law is grossly disproportionate to its beneficial effects should, logically, be less.¹³³

Challenging the new sex work laws will also require engaging with empirical evidence concerning the feasibility of achieving the government's objective of denouncing and deterring sex work.¹³⁴ The government claims to achieve these ends by adopting a variant of the "Nordic Model," which criminalizes purchasing, but not selling sex.¹³⁵ By deterring sex work, the government claims to be able to *protect* sex workers.¹³⁶ If this claim is presumed to be true, the government may argue that any negative effects on sex workers' security of

¹²⁶ See the Introduction to this article, citing *Bedford*, *supra* note 1 at paras 126–27.

¹²⁷ 2011 SCC 44 [*PHS*].

¹²⁸ This example is taken from Fehr, "Individualistic," *supra* note 9 at 62–63.

¹²⁹ See *PHS*, *supra* note 127 at para 2.

¹³⁰ *Ibid* at para 133 [emphasis added] ("[t]he effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics").

¹³¹ See Fehr, "Individualistic," *supra* note 9 at 63–64; *R v Preston* (1990), 47 BCLR (2d) 273 at 282 (CA): While I am content to accept, at least for the purposes of this case, that sentences of incarceration can have a deterrent effect in cases of trafficking and trafficking related offences, including importing, where the offender or potential offender is not an addict, I have grave doubts that the same can be said in cases of possession where the offender who is to be specifically deterred, or the potential offender who is to benefit from the so-called general deterrent effect of such a sentence, is addicted to the substance in question.

¹³² See Fehr, "Individualistic," *ibid* at 66–68. See also Stewart, "Sex Work," *supra* note 9 at 82–83.

¹³³ Fehr, "Individualistic," *ibid* at 62.

¹³⁴ See *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, Preamble [*Protection Act*].
¹³⁵ See *Criminal Code*, *supra* note 71, ss 286.1(1), 286.5(2). For a review of the Nordic Model, see Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 *Alta L Rev* 101.

¹³⁶ See *Protection Act*, *supra* note 134, Preamble.

the person is balanced by the “good” done by the law: namely, preventing people from engaging in sex work in the first place and thereby protecting them from harm.

Litigants charged under the new provisions may quite reasonably disagree that the new laws are capable of deterring sex work. Instead, they will argue that the new laws have the same primary effect as the old laws: forcing sex workers to the margins of society, where conducting their trade is significantly more dangerous.¹³⁷ The law likely has such an effect for at least two reasons. First, criminalizing the purchaser will result in negotiations taking place in more remote areas where sex workers are vulnerable to abuse.¹³⁸ Second, the new law indirectly criminalizes utilizing bawdy houses by preventing sex workers from working in groups.¹³⁹ Solo sex work is, by its nature, more dangerous.

If these criticisms of the new sex work laws have merit, which I believe they do,¹⁴⁰ it becomes possible to prove that the new provisions run afoul of the gross disproportionality principle. Importantly, however, such a constitutional challenge is only possible if the presumption that the law achieves its objective is abandoned. Yet, the applicant would still be required to prove that the new sex work laws do not achieve their stated objective. Preserving the individualistic approach to gross disproportionality will therefore require applicants to submit significant social science evidence contrary to the stated purpose of the Supreme Court’s individualistic approach to instrumental rationality.¹⁴¹

Abandoning the presumption that the law achieves its objective under the empirical approach thus raises the question: can the burden of proof relating to the extent to which the law achieves its objective be altered? To address this issue, it is possible that the Crown and applicant share the burden of proof at the section 7 stage. As I have argued elsewhere, the applicant may be asked to “prove that it is possible that the government’s objective is not fully achieved in practice, and that lesser achievement of the government objective could tip the balance in favour of a finding of gross disproportionality.”¹⁴² Subsequently, the government would be required to show, using empirical evidence, the extent to which its law actually achieves its policy aim.¹⁴³ The extent to which the law actually achieves its objective could then be weighed against the effect on the individual litigant.

¹³⁷ Commentators have questioned whether the objective could ever be even marginally obtained. See Stewart, “Sex Work,” *supra* note 9 at 74; Chris Bruckert, “*Protection of Communities and Exploited Persons Act*: Misogynistic Law Making in Action” (2015) 30:1 CJLS 1 at 1.

¹³⁸ Stewart, “Sex Work,” *ibid.*

¹³⁹ The “material benefit” offence under section 286.2 will have similar effects as the previous bawdy house provision. Section 286.2(5)(e) provides that the exemptions in section 286.2(4) — which provides an exemption where the material benefit exists due to a legitimate living arrangement, a “moral obligation,” or a service that one provides to the general public — are not available where the accused person “received the benefit in the context of a commercial enterprise that offers sexual services for consideration.” This limit makes the exemptions nearly meaningless in the context of sex work from a fixed, indoor location. As such, it is impossible to have a permanent bawdy house where one hires bodyguards, drivers, and so on. See *Criminal Code*, *supra* note 71, ss 286.2(4)–(5).

¹⁴⁰ In general, I agree with the analysis offered by Stewart, “Sex Work,” *supra* note 9.

¹⁴¹ See *Bedford*, *supra* note 1 at paras 126–27.

¹⁴² Fehr, “Individualistic,” *supra* note 9 at 68.

¹⁴³ *Ibid.*

In applying this approach to the new sex work laws,¹⁴⁴ the applicant would be required to provide evidence tending to prove that sex workers will generally not be deterred by the new laws. This could take the form of sex worker testimony to the effect that many sex workers are in the industry out of necessity, not choice. Given the ease with which such a point may be proven,¹⁴⁵ the government would then face the burden of proving the extent to which the law actually achieves its end of protecting sex workers. If the law was proven unlikely to achieve its objective in readily definable scenarios, the new sex work laws would clearly violate the individualistic conception of the gross disproportionality principle. The government would then be required to justify its law under section 1 of the *Charter*, which would require it to submit social science evidence proving the extent of the harms and benefits accrued to sex workers.

Before concluding, it is worth noting that a similar sharing of the burden of proof could be applied to the holistic conception of overbreadth as well. Assuming the holistic conception of overbreadth is a principle of fundamental justice, it must nevertheless be asked: why should this principled be preserved? There are three reasons to reject this possible development. First, as discussed in Part II, the holistic conception of overbreadth does not apply an individualistic conception of rights. Only the latter is true to the wording of section 7. Second, the holistic conception of overbreadth illogically mirrors the minimal impairment branch of the section 1 test for justifying a breach of a *Charter* right. Refusing to readopt this principle therefore avoids redundancy in the constitutional analysis. Finally, the arguments made in this article show that the gross disproportionality principle is capable of doing all the work at the section 7 stage that the holistic conception of overbreadth used to do. There is great appeal, in my view, to simplifying the instrumental rationality analysis. Preserving only the arbitrariness and gross disproportionality principles as described herein furthers precisely this aim.

VI. CONCLUSION

In *Bedford*, the Supreme Court of Canada fundamentally altered its approach to proving breaches of the instrumental rationality principles of fundamental justice. By requiring litigants to prove only an arbitrary, overbroad, or grossly disproportionate effect on one person, the Supreme Court abandoned its previous holistic approach to these principles of fundamental justice. This move was well-meaning, as it sought to alleviate an inequitable burden of proof previously placed on the applicant. Yet, further reflection suggests that the only way to understand the arbitrariness principle is through the Supreme Court's holistic approach to instrumental rationality. The gross disproportionality principle is, however, workable under the individualistic approach. The essence of instrumental rationality challenges may nevertheless be more usefully categorized into what I call "logical" and "empirical" breaches of instrumental rationality.

¹⁴⁴ For an example of how the burden of proof would operate in the context of the arbitrariness principle, see Fehr, "Instrumental Rationality," *supra* note 9 (discussing the constitutionality of the general deterrence provision found in section 718(b) of the *Criminal Code*).

¹⁴⁵ The Supreme Court of Canada came to precisely this conclusion in *Bedford*, *supra* note 1 at para 86 ("while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so").

The Supreme Court's individualistic conception of the instrumental rationality principles nevertheless failed to address a more fundamental question: do the individualistic instrumental rationality principles meet the requirements for qualifying as principles of fundamental justice? Although the arbitrariness and gross disproportionality principles ought to remain relatively intact, the Supreme Court's individualistic conception of overbreadth does not meet the societal consensus requirement to qualify as a principle of fundamental justice. As I have shown, almost any bright-line rule that engages life, liberty, or security of the person is inconsistent with the overbreadth principle. Given the necessity of employing bright-line rules in modern governance, I maintain that overbreadth should no longer be considered a principle of fundamental justice. Fortunately, given the significant overlap between the overbreadth and gross disproportionality principles, abandoning overbreadth is unlikely to have an adverse effect on the scope of *Charter* rights.