

## Rational Connections: Oakes, Section 1 and the Charter's Legal Rights

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Any review of *Charter* jurisprudence will rank *R v Oakes* at or very near the top. The decision where the Supreme Court of Canada set out its approach to justifying rights limits under section 1, *Oakes* has been cited hundreds of times over the last quarter-century. Much scholarship has been devoted to “the *Oakes* test,” and to questions of deference, evidence and judicial review. One aspect, though, has tended to escape notice: rational connection. Given that the law at issue in *Oakes* foundered at this first stage of proportionality, its muted legacy is intriguing. This article takes a fresh look at rational connection, arguing that it is essential to the overall process of justification and a rich source of principles that have particular purchase in the criminal law context. It urges a reinvigorated approach, noting a number of attendant benefits, including rendering section 1 more consistent with *Oakes*' original vision.

Toute analyse de la jurisprudence relative à la *Charte* doit classer l'arrêt *R c Oakes* au premier plan ou à tout le moins en haut de la liste. L'arrêt *Oakes*, soit la décision dans laquelle la Cour suprême du Canada expose sa méthode permettant de justifier des limites à des droits garantis en vertu de l'article 1, a été cité à des centaines de reprises au cours du dernier quart de siècle. Une grande partie de la doctrine juridique a été consacrée au critère établi dans *Oakes* et aux questions de retenue judiciaire, de preuve et de révision judiciaire. Un aspect qui, cependant, semble avoir échappé à la vigilance des analystes est le lien rationnel. Étant donné que la loi invoquée dans *Oakes* a échoué au test dès la première étape du critère de proportionnalité, le silence sur cette question est d'autant plus intrigant. Cet article jette donc un regard neuf sur la question du lien rationnel, en soutenant qu'il est un élément essentiel du processus de justification dans son ensemble et constitue une riche source de principes d'une valeur particulièrement intéressante dans le contexte du droit criminel. Il exhorte par conséquent à l'adoption d'une approche revigorée, en observant un certain nombre d'avantages qui en découlent, notamment le fait que la cohérence de l'article 1 avec la version originale formulée dans l'arrêt *Oakes* s'en trouve renforcée.

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## Rational Connections: Oakes, Section 1 and the Charter's Legal Rights

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I was once asked to name my favourite Supreme Court of Canada decision. This is the kind of deceptively simple question that is tricky to answer. Numerous cases sprang to mind. As a former litigator for the Women's Education and Action Fund (LEAF), I enjoyed the thrill of decisions that vindicated a hard-fought position (*R v Mills*;<sup>1</sup> *R v Darrach*;<sup>2</sup> *Vriend v Alberta*<sup>3</sup> are some examples). There were, of course, disappointing moments too. But I did not choose any of the cases I had encountered in litigation. Instead, I chose *R v Oakes*.<sup>4</sup>

A review of *Charter*<sup>5</sup> jurisprudence must rank *Oakes* at, or near, the very top. In a system committed to rights, but that does not protect them absolutely against all other interests, the ultimate question is one of justification.<sup>6</sup> As the decision where the Court first articulated its approach to, and the framework for, section 1 of the *Charter* (which guides that process of justification), *Oakes* has been cited repeatedly over the past twenty-five years. Indeed, the "*Oakes* test" has become synonymous with section 1 itself.<sup>7</sup> Much has been written about various aspects of section 1 of the *Charter*, including: the role it assigns to the courts; the kind of evidence that is

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1 *R v Mills*, [1999] 3 SCR 668, 244 AR 201.

2 *R v Darrach*, 2000 SCC 46, [2000] 2 SCR 443.

3 *Vriend v Alberta*, [1998] 1 SCR 493, 212 AR 237.

4 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR]. In fact, I had not spent much time engaging with *Oakes* on an academic level, though I have discussed the case in the course of other works. See e.g. Carissima Mathen, "Dialogue Theory, Judicial Review and Judicial Supremacy: A Comment on 'Charter Dialogue Revisited'" (2007) 45:1 Osgoode Hall LJ 125 at 135-36.

5 *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*].

6 I recognize that the relationship between section 1 and the various *Charter* rights is variable, depending on whether a particular right already uses an embedded standard (such as "reasonableness"). This is especially the case with respect to section 7, violations of which have yet to be upheld by the Supreme Court of Canada. See e.g. *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

7 Indeed, the inter-changeability of the two has sparked occasional judicial discomfort. See *RJR MacDonald Inc v Canada*, [1995] 3 SCR 199 at para 62, 127 DLR (4th) 1, La Forest J; *Newfoundland (Treasury Board) v NAPE* (2002), 220 Nfld & PEIR 1, 221 DLR (4th) 513.

required for the state to make out a reasonable limit; and the relationship among section's 1 constitutive elements.<sup>8</sup> This article addresses a less examined aspect: the requirement that a rights limit be rationally connected to the purpose of the law in which it is found.

Though rational connection has not figured large in subsequent *Charter* jurisprudence, or received much scholarly attention, in *Oakes* it was the deciding factor. I have come to see it as essential to the overall question of justification and a rich source of principles that have particular purchase in the criminal law context. The *Oakes* approach to rational connection is a stringent one. I believe that a return to the understanding of rational connection that was articulated in *Oakes* would be a positive development. My sense of *Oakes*' potential is bolstered by recent cases that have emphasized a related, but also nascent, principle: that criminal law must not be arbitrary. In this article, I set out the beginnings of a project which examines the scope of arbitrariness,<sup>9</sup> urging a broad understanding of the concept that is rooted both in the fundamental justice guarantees under section 7 of the *Charter* and the requirement of rational connection set out in section 1.

This article will, first, outline the determinative role played by rational connection in *Oakes* itself (a role it has rarely played since<sup>10</sup>). Next, the article will briefly canvass how rational connection and its close relation, non-arbitrariness, have fared in post-*Oakes* criminal jurisprudence. Finally, it will argue for a reinvigorated approach to rational connection and consider some possible objections. Such an approach would be consistent with the powerful, prescient and rights-affirming vision of the *Charter* that *Oakes* articulates.

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8 William E Conklin, "Interpreting and Applying The Limitations Clause: An Analysis of Section 1" (1982) 4 Sup Ct L Rev 75; Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup Ct L Rev 469; Pamela A Chapman, "The Politics of Judging: Section 1 of the *Charter of Rights and Freedoms*" (1986) 24:4 Osgoode Hall LJ 867; Robin M Elliot, "The Supreme Court of Canada and Section 1 – The Erosion of the Common Front" (1987) 12:2 Queen's LJ 277; The Honourable Mr Justice Roger P Kerans, "The Future of Section One of the Charter" (1989) 23:3 UBC L Rev 567; R Elliot, "Developments in Constitutional Law: the 1989-90 Term" (1991) 2 Sup Ct L Rev (2d) 83; Andrew Lokan, "The Rise and Fall of Doctrine under Section 1 of the *Charter*" (1992) 24:1 Ottawa L Rev 163; Leon E Trakman, William Cole-Hamilton & Sean Gatién, "*R v Oakes* 1986-1997: Back to the Drawing Board" (1998) 36:1 Osgoode Hall LJ 83; Christopher D Bredt & Adam M Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 Sup Ct L Rev (2d) 175; Errol Mendes, "The Crucible of the Charter: Judicial Principles v Judicial Deference in the Context of Section 1" (2005) 27 Sup Ct L Rev (2d) 47; Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 Sup Ct L Rev (2d) 501; Sara Weinrib, "The Emergence of the Third Step of the *Oakes* Test in *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 68:2 UT Fac L Rev 77.

9 For more analysis of arbitrariness, see Carissima Mathen, "Reflecting Culture: Polygamy and the Charter" 57 Sup Ct L Rev [forthcoming in 2012]; Carissima Mathen, "Big Love and Small Reasons" (Lecture delivered at the University of Calgary, 28 January 2011) online: Youtube <<http://www.youtube.com/watch?v=FqPbY5yygcc>>.

10 Vanishingly few cases have been decided at this stage. See e.g. *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*]; *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358, 143 DLR (4th) 577.

## Oakes, Section 1 and the Charter's Legal Rights

I. THE ROLE OF RATIONAL CONNECTION IN *OAKES*

*Oakes* did not appear to be a very significant appeal. In view of the decision's subsequent gravitational pull,<sup>11</sup> this seems incredible, but the hearing attracted no interventions by either Attorneys General or public interest litigants.<sup>12</sup> The case presented as a run-of-the-mill drug prosecution resting on section 8 of the *Narcotic Control Act*,<sup>13</sup> which incorporated a reverse onus into the offence of possession with intent to traffic. An accused person found to be in possession of a narcotic would have to prove that the possession was not for the purpose of trafficking; if the defendant was unable to do so, the Crown could rely on the mere fact of possession to demonstrate the fault element for the more serious offence. David Edwin Oakes argued that the law infringed his right to be presumed innocent under section 11(d) of the *Charter*. His success at the *prima facie* stage led the Court to consider section 1 in detail for the first time.<sup>14</sup>

At the beginning of the *Charter* era, one might have assumed that section 1 would act as a safeguard for the wishes of democratic majorities. *R v Big M Drug Mart*<sup>15</sup> put paid to this assumption by endorsing a broad and purposive approach to rights protection in which “democracy” assumes a constitutive rather than limiting role.<sup>16</sup> *Oakes* confirmed this. Far from being a tool to uphold majoritarian sentiment,<sup>17</sup> justification was characterized as a process that itself furthers the *Charter*'s underlying purpose:

[In] any s. 1 inquiry ... [t]he Court must be guided by the values and principles essential to a free and democratic society which I believe

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- 11 Term borrowed from Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).
- 12 Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 332-36.
- 13 *Narcotic Control Act*, RSC 1970, c N 1 [NCA].
- 14 In previous successful *Charter* cases, the Court had not really addressed section 1. See e.g. *R v Big M Drug Mart*, [1985] 1 SCR 295, 60 AR 161 [*Big M* cited to SCR] (where the Court found the law unconstitutional on grounds (religiosity) that made it impossible to save); *R v Therens*, [1985] 1 SCR 613, 18 DLR (4th) 655 (where the infringing police action was not prescribed by law); *Hunter v Southam Inc.*, [1984] 2 SCR 145, 55 AR 291 [*Hunter* cited to SCR] (where the Crown did not make a section 1 argument, leading the Court to conclude that the limit was not demonstrably justified).
- 15 *Big M*, *supra* note 14.
- 16 *Ibid* at 344.
- 17 In contrast, the override clause (*Charter*, *supra* note 5, s 33) does favour majoritarian interests. See Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, translated by Doron Kalir (Cambridge: Cambridge University Press, 2012) at 169 (where Barak describes the difference between limitations and override clauses as follows: “The limitations clause expresses both the formal and substantial notions of democracy ... One of [its] main features is the imposition of legal restraints—in the form of judicial review—on ... disproportional limitations of constitutional human rights. In contrast to the limitation clause, the override clause only satisfies the formal notion of democracy”).

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.<sup>18</sup>

The justification of a rights infringement would be evaluated using standards “commensurate with the occasion” that the law had been found on a *prima facie* basis to violate the Constitution.<sup>19</sup> Specifically, after determining that a limit is prescribed by law, a court must be satisfied that the limit is inspired by a pressing and substantial objective and is achieved by means that are: rationally connected to that objective; minimally impairing of the right or freedom in question; and reflective of an appropriate and overall balance between the negative effect of the rights infringement and the law’s benefit.<sup>20</sup>

Before delving more into *Oakes*’s treatment of rational connection, it is worth pointing out how little of *Oakes* actually deals with section 1. Much of the decision is taken up with the presumption of innocence, and two-thirds of the Court’s discussion of “rationality” relates to that issue.<sup>21</sup> The context was the scope of protection offered by section 11(d) of the *Charter*, in particular, its guarantee that guilt in a criminal proceeding must be proved “according to law.” Two alternative readings were proposed: one requiring only the positivist safeguard that an offence must be defined through enacted law (with whatever content the legislature selects),<sup>22</sup> and one demanding something more.

As previously mentioned, *Oakes* involved a reverse onus provision that applied to an essential element of a criminal offence. Now, it can be argued that reverse onuses merely reflect reality. Inferences are often drawn from facts, and sometimes the inference seems so logically necessary that it has the appearance of a legal requirement—for example, the inference that a person intends the natural consequences of his or her actions.<sup>23</sup> The question is whether, and when, the drawing of an inference from a given fact is so compelling that Parliament may command the trier of fact to draw on it. Prior to *Oakes*, both English and Canadian courts had stated that such a command would be legitimate so long as there was a rational connection—i.e. a common-sense relationship—between the proven and presumed fact.<sup>24</sup>

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18 *Oakes*, *supra* note 4 at 135-36.

19 *Ibid* at 138.

20 *Ibid* at 138-40.

21 See generally *Charter*, *supra* note 5, s 11(d) (which guarantees an accused person, *inter alia*, the right to be presumed innocent).

22 This was the approach taken in earlier cases litigated under the *Canadian Bill of Rights*, SC 1960, c 44, reprinted in RSC 1985, App III. See e.g. *R v Appleby*, [1972] SCR 303, 21 DLR (3d) 325.

23 *Woolmington v Director of Public Prosecutions*, [1935] AC 462.

24 *R v Shelley*, [1981] 2 SCR 196, 123 DLR (3d) 748.

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The genius of *Oakes* is its insistence that, given a constitutional commitment to the presumption of innocence, a standard of mere rationality is insufficient because “[a] basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt.”<sup>25</sup> The presumption of innocence does not just mean a right to be tried according to whatever criteria the legislature happens to provide. Instead, it reflects a basic “faith in humankind”—the “belief that individuals are decent and law abiding members of the community until proven otherwise.”<sup>26</sup> Against this overarching commitment, a reverse onus reflects not only unfairness, but a betrayal of the very principles that a criminal justice system is meant to uphold.

Rational connection, then, was rejected as a possible safeguard for reverse onuses because it did not safeguard against the risk of a conviction in the presence of reasonable doubt. Chief Justice Dickson argued, as well, that too heavy a reliance on rational connection at the *prima facie* stage of a *Charter* claim would unacceptably blur the lines between the substantive rights and section 1.<sup>27</sup> The more suitable role for rational connection, he held, is at the justification stage. There, rational connection provides the first necessary check on a legitimate state objective: it ensures that an objective may not be achieved in ways that are “arbitrary, unfair or based on irrational considerations.”<sup>28</sup> Turning to section 8 of the *NCA*, Chief Justice Dickson stressed the need for a sufficient connection between the proved fact of possession and the presumed fact of possession for an ulterior purpose (trafficking). Chief Justice Dickson warned that the ultimate risk of getting it wrong is a wrongful conviction. He concluded that the law failed the first stage of proportionality because “it would be irrational to infer that a person had intent to traffic on the basis of his or her possession of a very small quantity of narcotics.”<sup>29</sup>

When examined closely, the rational connection element applied in *Oakes* is a kind of overbreadth. In a system committed to fundamental justice, a law that predictably risks convicting persons who do not meet the prescribed elements of an offence is “irrational.” This is a startling conclusion. That said, *Oakes* confronted a particular legal question—the appropriate balance between the presumption of innocence and criminal justice administration—in which rational connection’s role

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25 *Oakes*, *supra* note 4 at 134. In subsequent cases involving substituted elements, the Court articulated a much higher threshold than rational connection to ensure respect for the presumption of innocence. The Court also extended the presumption of innocence beyond the elements of an offence to other legal issues material to guilt—for example, defences. See e.g. *R v Whyte*, [1988] 2 SCR 3, 51 DLR (4th) 481 [*Whyte* cited to SCR]; *R v Downey*, [1992] 2 SCR 10, 125 AR 343 [*Downey* cited to SCR].

26 *Oakes*, *supra* note 4 at 120.

27 *Oakes*, *supra* note 4 at 134. See also the discussion in Part II below.

28 *Ibid* at 139.

29 *Ibid* at 142. The conclusion has been criticized. See e.g. Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thompson Reuters, 2011) at ch 38.10 (where Hogg argues that *Oakes* should have been decided at the minimal impairment stage).

would relate primarily to a law's internal coherence without much need to anchor it in broader policy concerns. As it turned out, that stringent approach, under which logical incoherence merges with overbreadth, would wither in the face of different competing interests.<sup>30</sup>

## II. "RATIONALITY" AFTER *OAKES*

In subsequent *Charter* cases, rational connection proved to be a fairly low criterion for the state to meet. This was the case even for other reverse onuses.<sup>31</sup> Consider *R v Chaulk*,<sup>32</sup> which examined the presumption in section 16 of the *Criminal Code* that, until proven otherwise, every person is deemed to be sane. The party wishing to argue that the accused suffered a mental disorder capable of negating criminal responsibility bears the burden of proving that fact. The burden is satisfied on a balance of probabilities, but this means that a person can be convicted of an offence despite a reasonable doubt that he or she suffered from a mental disorder that rendered him or her incapable of appreciating the nature and quality of the act, or of knowing that the act was wrong.<sup>33</sup> Such a risk would appear to raise the concerns articulated by Chief Justice Dickson in *Oakes*. If anything, concerns about unfairness are amplified if the trier of fact is forced to convict despite having a reasonable doubt about incapacity. Yet, in a divided judgment, the Court upheld the provision. It emphasized the difficulty of disproving that someone is suffering from a mental disorder, describing it as a "nearly impossible task."<sup>34</sup> Given this fact, the Court reasoned, it is a rational choice to design an evidentiary rule that minimizes the risk of acquitting guilty persons based on unanswerable insanity pleas.<sup>35</sup> The lone dissenter, Justice Wilson, agreed that the law was designed to meet a real and pressing problem, but suggested that the law struck the wrong balance between the competing risks of acquitting the guilty and convicting the incapacitated.<sup>36</sup>

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30 See generally *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1. Here, the Court considered a provision (*Retail Business Holidays Act*, RSO 1980, c 453 s 3(4)) that infringed constitutional rights by allegedly under-protecting them. The majority found that in grappling with a complex and multi-faceted problem, the legislature was entitled to be selective in its protection. This meant granting a common pause day that aligned with the religious convictions of only some retail workers because of a competing policy goal of maintaining the pause day for as many workers as possible. Justice Wilson, dissenting, found that the legislature could not consistently maintain that it was pressing and substantial for some retail workers to have a common pause day that aligned with their beliefs, while others with the same belief be required to work. To her, the impugned legislation incorporated an internal compromise that undermined the very goal the legislature was trying to achieve (*ibid* at 808-12).

31 *R v Keegstra*, [1990] 3 SCR 697, 114 AR 81 [*Keegstra* cited to SCR]; *Whyte*, *supra* note 25.

32 *R v Chaulk*, [1990] 3 SCR 1303, 119 NR 161 [*Chaulk* cited to SCR].

33 *Criminal Code*, RSC 1985, c C 46 s16 [*Criminal Code*].

34 *Chaulk*, *supra* note 32 at 1337-38.

35 *Ibid* at 1388. Justice Wilson, dissenting on the overall issue of constitutional validity, nonetheless found there to be a rational connection between the law and its objective.

36 *Ibid* at 1390-93. Justice Wilson would have imposed only an evidentiary burden on the accused.

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Another case, *R v Downey*,<sup>37</sup> considered the reverse onus under which a person who lives with, or habitually in the company of, prostitutes is deemed, in the absence of contrary evidence, to be living on the avails of prostitution.<sup>38</sup> Section 212(1)(j) of the *Criminal Code* seeks to minimize the harmful effects of prostitution, while leaving untouched the exchange of sex for money. The provision was said to be “aimed at the parasites who control street prostitutes,” to encourage reporting, and to “facilitate prosecutions without the need for the prostitutes involved to testify.”<sup>39</sup> A 4-3 majority found that the reverse onus was rationally connected to those goals, and upheld it. The dissent applied a higher standard, arguing that “proof of the substituted fact must make it likely that the presumed fact is true.”<sup>40</sup> The dissent argued that the provision did not qualify, describing it as reaching a level of unfairness that was “much worse than it was in *Oakes*.”<sup>41</sup>

I do not wish to minimize the difficulty that the legislature faces in such situations. An alleged mental disorder, or a crime that regularly involves participants in unequal and exploitative relationships, complicates the evidentiary process. Yet, in the cases just discussed, the Court upheld overbroad provisions, at least in part, because of administrative expediency. Administrative expediency does not fully explain the Court’s analysis but, all the same, it seems difficult to align the judicial results with the spirit of *Oakes*. Rather than accepting the premise that persons are owed the basic respect of being presumed to be decent, law-abiding citizens, post-*Oakes* decisions have accepted that the state is entitled, in at least some circumstances, to make it easier for the Crown to secure a conviction.<sup>42</sup> Many would argue that Parliament is entitled to do just that, and does not thereby descend into

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37 *Downey*, *supra* note 25.

38 *Criminal Code*, *supra* note 33, s 212(1)(j).

39 *Downey*, *supra* note 25 at 16-17. Justice La Forest wrote for the dissent, but not on this point. Writing for the majority, Justice Cory cited the following passage from the Committee on Sexual Offences Against Children and Youths (*ibid* at 33):

Many [sex workers] believe that a prostitute who gives evidence against a pimp is almost certain to be murdered . . . . Another palpable fear . . . is that of being ostracized by the other prostitutes in whose company they work. Furthermore, the Committee’s survey indicates that many of the young prostitutes either were “in love” with their pimps, or were psychologically dependent upon them . . . . As a result, many girls adopted a highly protective attitude toward their pimps and were unwilling to divulge information which might have proved damaging to them, or which portrayed them in a negative light.

40 *Ibid* at 44, McLachlin J [emphasis in the original]. She went on to state: “Any lesser degree of probability must be fatal under the rational connection branch of the proportionality enquiry” (*ibid* at 44-45).

41 *Ibid* at 46, McLachlin J.

42 This is particularly well-expressed by Justice McLachlin, as she was then, in *Downey*. See e.g. *ibid*: [Here], the evidential burden of raising a reasonable doubt with respect to whether one is living on the avails of prostitution is placed on those who have been proven only to be habitually in the company of a prostitute, which is not a criminal offence. Yet the presumption applies to these innocent people, placing on them the burden of raising a reasonable doubt as to whether they have been living on the avails of prostitution. Any presumption which has the potential to catch such a wide variety of innocent people in its wake can only be said to be arbitrary, unfair and based on irrational considerations.

irrationality.<sup>43</sup> But such an objective is, at the very least, far removed from the standard expressed in *Oakes*.

The Court's immediate retreat from *Oakes*' high-water mark can be explained, in part, by the complex questions the Court faced in *Charter* disputes; especially ones involving conditions of "imperfect information."<sup>44</sup> Although initial cases implied that judicial deference would be less warranted in criminal law,<sup>45</sup> the Court quickly realized that rights would conflict no less in this area than in others. The right most often at stake for the accused is liberty, though other rights such as expression<sup>46</sup> or personal autonomy<sup>47</sup> may also be implicated. The rights of the accused may conflict with the rights of others, for example, the right to equal protection of the law; or with a societal interest in preventing certain kinds of harm.<sup>48</sup> In such situations, the Court has ruled, the accused's rights are not owed automatic deference. The accused is guaranteed a fair trial, but not "the most favourable procedures that could possibly be imagined."<sup>49</sup> Even more critically, the Court decided that Parliament may enact a law to respond to a reasonable apprehension of harm, even where the harm at issue is not amenable to empirical proof. Thus, for section 1 purposes, the Court accepted a rational connection between hate speech restrictions and protecting minorities from dignitary injury,<sup>50</sup> and between obscenity prosecutions and inculcating resistance to anti-social beliefs about women and female sexuality.<sup>51</sup> This is not to contest the fact that the legislature faces a daunting task in such circumstances. But, with every step, the Court has moved further away from *Oakes*' guiding principles.

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43 See e.g. Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:1 UTLJ 383. "[I]n a democracy the legislature is entitled to pursue any purpose, provided it is not excluded by the constitution. The importance of the purpose is not a condition for legislative action. What is important enough to become an object of legislation is a political question and has to be determined *via* the democratic process" (*ibid* at 388).

44 Choudhry, *supra* note 8 at 504.

45 *Hunter*, *supra* note 14; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577; *R v Martineau*, [1990] 2 SCR 633, 109 AR 321; *R v Swain*, [1991] 1 SCR 933, 125 NR 126; *R v Vaillancourt*, [1987] 2 SCR 636, 68 Nfld & PEIR 281; *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469.

46 *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler* cited to SCR].

47 *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* cited to SCR]; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74, [2003] 3 SCR 571.

48 It is also important that the Court thus far has resisted the argument that constitutional rights operate in a hierarchy where some are more important than others. See *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 839, 120 DLR (4th) 12; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 31, [2001] 1 SCR 772. But see *Sauvé*, *supra* note 10 at paras 11, 14, McLachlin CJC. For an argument that not all constitutional rights are created equal, see Barak, *supra* note 17 at 7, ch 3.

49 *R v Lyons*, [1987] 2 SCR 309 at 362, 82 NSR (2d) 271 (holding that the dangerous offender provisions, which permit an application to be made after a trial is concluded, do not violate section 7 of the *Charter*).

50 *Keegstra*, *supra* note 31.

51 *Butler*, *supra* note 46.

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Some counter-narratives did appear. One of the most important was *Morgentaler*,<sup>52</sup> in which the Court struck down the *Criminal Code*'s therapeutic abortion provision.<sup>53</sup> The impugned law made procuring an abortion an offence, but with a defence for therapeutic abortions approved by a special committee and performed in accredited hospitals. It was accepted by all parties that the defence was intended to exempt abortions necessary to a woman's life or health. Writing for himself and Justice Lamer, Chief Justice Dickson found that numerous administrative hurdles made the defence "illusory," thereby violating section 7:<sup>54</sup>

When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met . . . . [If the administrative and procedural structure attending a particular defence] is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice", that structure must be struck down.<sup>55</sup>

Although the above analysis occurred at the *prima facie* stage of a section 7 challenge, it fully informed section 1 and, arguably, the ultimate remedy of a wholesale declaration of invalidity. Such an assertive result is more understandable given that the Court had identified a fundamental misfit between the goals of the substantive offence and the conditions under which exemptions from that offence could be obtained.

Another important moment was *Sauvé v Canada (Chief Electoral Officer)*.<sup>56</sup> *Sauvé* concerned a challenge to section 51(e) of the *Canada Elections Act*,<sup>57</sup> under

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52 *Morgentaler*, *supra* note 47.

53 *Criminal Code*, *supra* note 33, s 251.

54 *Morgentaler*, *supra* note 47. Justice Beetz's opinion—one of three making up the majority decision—also found a lack of rational connection. The third opinion, by Justice Wilson, seems to rely more on the later stages of proportionality.

55 *Ibid* at 70-72 [emphasis in the original]. The deficiencies in the scheme are articulated as follows (*ibid* at 67-68):

The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial regulation . . . . During argument, it was noted that it would even be possible for a provincial government, exercising its legislative authority over public hospitals, to distribute funding for treatment facilities in such a way that no hospital would meet the procedural requirements of s. 251(4). Because of the administrative structure established in s. 251(4) and the related definitions, the "defence" created in the section could be completely wiped out. A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees . . . .

56 *Sauvé*, *supra* note 10.

57 RSC 1985, c E-2 s 51(e).

which prisoners serving a sentence of two or more years were disenfranchised from voting in federal elections. In a deeply divided decision, a majority of the Court found no rational connection between the law and the government's stated goals. Specifically, the majority held that denying a class of persons the right to vote was inconsistent with the purported objective of educating inmates to respect the law:

The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The 'educative message' that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy.<sup>58</sup>

In *Sauvé* the majority did not take explicit issue with the stated objective, but it found that it was illogical to further that objective by denying the vote to an entire class of citizens.<sup>59</sup>

In the criminal context, a discussion of rational connection is closely linked to *prima facie* infringement, especially where the *Charter* claim involves section 7. This is because, despite Chief Justice Dickson's caution that we should not blur the lines between section 1 and section 7, it is difficult to conceive of a criminal law that fails at rational connection that would not already have been found deficient under the principles of fundamental justice. Because of the complex relationship between section 7 and section 1, it is instructive to consider cases in which an analysis very akin to that of rational connection occurs at a stage prior to justification.

A good example is *Rodriguez v British Columbia (Attorney General)*.<sup>60</sup> *Rodriguez* considered the constitutionality of the assisted suicide provisions in the *Criminal Code*<sup>61</sup> and, in particular, whether the state can legitimately foreclose the option of suicide to persons who are unable to do so simply because of a physical impairment.<sup>62</sup>

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58 *Sauvé*, *supra* note 10 at para 32. The majority further held (*ibid* at para 38):

The government argues that disenfranchisement will "educate" and rehabilitate inmates. However, disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity .... To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

59 While *Sauvé* was decided on the basis of rational connection, the majority did express a concern that the "rhetorical nature" of the goals rendered them "suspect." See *ibid* at para 24. I am grateful to Kent Roach for reminding me of this.

60 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez* cited to SCR].

61 *Criminal Code*, *supra* note 33, s 241(b).

62 *Rodriguez*, *supra* note 60 (the law was challenged as violating both the security of the person and the equality rights of people with disabilities).

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A majority of the Court found that the principles of fundamental justice do not require the state to remove all obstacles to someone wishing to bring about his or her own death. To impose such a duty, the majority reasoned, would represent an intolerable conflict with the commitment in our society to the sanctity of life. Justices McLachlin and L'Heureux-Dubé dissented, arguing that the state's commitment to the sanctity of life must be consistently maintained.<sup>63</sup> They relied heavily on the fact that attempted suicide had not been a crime in Canada since 1972. Parliament's lack of a "consistent intention"<sup>64</sup> to criminalize all similar life-ending acts weakened, in their view, its assertion of a legitimate interest in "absolutely forbidding"<sup>65</sup> assisted suicide. Where a law denies to severely disabled persons what it permits for non-disabled persons (here, the ability to make a profoundly personal decision about the manner of one's death), the law is arbitrary.

For the purposes of this article, what is interesting about *Rodriguez* is how the dissenting justices take a broader view of the circumstances in view of which a criminal law may be arbitrary. Justices McLachlin and L'Heureux-Dubé go beyond the four corners of the assisted suicide provision to consider past state choices and related criminal law goals. Their model implies that a court should conduct a more searching inquiry into the relationship between the legislative goal and the operation of the law. What emerges is a kind of proportionality analysis that can intervene even when the law does not appear to be "irrational".

A highly controversial decision employing a similar approach to the *Rodriguez* dissent is *Chaoulli v Quebec (Attorney General)*.<sup>66</sup> Admittedly, *Chaoulli* does not engage the criminal law, but it looms so large in arbitrariness analysis that it must be considered. *Chaoulli* involved a challenge to Quebec legislation prohibiting the purchase or sale of private medical insurance. Of the four justices who ruled in the plaintiffs' favour,<sup>67</sup> three decided the issue on the basis of section 7 of the *Charter*.<sup>68</sup> Those three justices conducted a robust inquiry into whether there was sufficient evidence to support the prohibition on the purchase of private insurance, examining, in that regard, the difficulties in accessing health care services available solely through the

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63 See *ibid* at 561-63 (where Chief Justice Lamer also dissented, but applied the alternative argument, which relied on section 15 of the *Charter*). Chief Justice Lamer did, though, find a rational connection between the law's means and its purpose, primarily by drawing a distinction between irrationality and overbreadth. Justice Cory agreed with both dissents.

64 *Rodriguez*, *supra* note 60 at 623.

65 *Ibid*. But see *Carter v Canada (Attorney General)*, 2012 BCSC 886, 261 CRR (2d) 1 (where the Supreme Court of British Columbia held that the assisted suicide offence does breach the *Charter*). Justice Lynn Smith reasoned that *Rodriguez* did not foreclose challenges based on newer principles of fundamental justice, particularly overbreadth and gross disproportionality, and she found that under those principles the law violated section 7. She further held that the Supreme Court of Canada had not decided the section 15 issue, and she found the law deficient in that respect as well. At the time of writing, the case is under appeal.

66 *Chaoulli v Quebec (Attorney-General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

67 *Ibid* (the Court split 4-3 in favour of the *Charter* claimants).

68 *Ibid* (the fourth judge in the 4-3 majority, Justice Deschamps, decided the issue on the alternative basis of the *Quebec Charter of Human Rights and Freedoms*).

publicly funded system.<sup>69</sup> Relying heavily on both *Morgentaler* and *Rodriguez*, the concurring justices defined an arbitrary law as one bearing no relation to, or being inconsistent with, the objective that lies behind it.<sup>70</sup> Critically, though, they held that defeating an arbitrariness challenge requires not only identifying an appropriate state goal behind the prohibition, but also establishing a “real connection, on the facts”<sup>71</sup> between the limit and the goal.

In *Morgentaler*, Justice Beetz held that the abortion scheme included “manifestly unfair”<sup>72</sup> rules that endangered women’s health. Relying on this analysis as providing an (implicit) example of the arbitrariness principle in the health care context,<sup>73</sup> the concurring justices in *Chaoulli* found the prohibition on the purchase of private health insurance to be arbitrary in a similar way. They rejected the government’s arguments that the prohibition was required—that without it, financial and human resources would increasingly turn toward private health care. Examining the structure of health care regimes in other countries (Sweden,<sup>74</sup> Germany,<sup>75</sup> the United Kingdom<sup>76</sup> and the United States<sup>77</sup>), the majority concluded that “there is no real connection in fact between prohibition of health insurance and the goal of a quality public health system.”<sup>78</sup>

The concurring opinion in *Chaoulli* appears to lower the threshold—developed in previous cases—for finding that a law is arbitrary. This was noted and vigorously critiqued by the dissenting justices. They objected on the ground that the majority had replaced the ordinary language of arbitrariness, which focuses on mere rationality, with the very different language of necessity. Such a standard, they cautioned, would greatly expand the scope of section 7.<sup>79</sup> While the dissenting justices were perhaps right to be concerned by the effect of the stricter approach to “arbitrariness” articulated in *Chaoulli* in certain areas (for example, in cases involving large-scale social welfare schemes),<sup>80</sup> the approach would be a positive development in criminal law. The final section of this article will review its potential before offering some concluding thoughts.

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69 *Ibid* at para 111.

70 *Rodriguez*, *supra* note 60 at 594-95, cited in *Chaoulli*, *supra* note 66 at para 130.

71 *Chaoulli*, *ibid* at para 131.

72 *Morgentaler*, *supra* note 47 at 110.

73 *Chaoulli*, *supra* note 66 at para 133.

74 *Ibid* at para 142.

75 *Ibid* at para 143-45.

76 *Ibid* at para 146.

77 *Ibid* at para 148.

78 *Ibid* at para 139.

79 *Ibid* at para 234.

80 See Carissima Mathen, “Developments in Constitutional Law: The 2004-2005 Term – A Court in Transition” (2005) 30 Sup Ct L Rev (2d) 89 at 112-13; Philip Bryden, “Section 7 of the Charter Outside the Criminal Context” (2005) 38 UBC L Rev 509 at 530; Sujit Choudhry, “Worse than Lochner?” in Colleen M Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 75.

## III. WHAT WAS OLD IS NEW AGAIN

The most striking example to date of the *Chaoulli* approach applied to criminal law is the Ontario Superior Court of Justice decision in *Bedford v Canada*.<sup>81</sup> *Bedford* challenged three criminal offences related to prostitution: keeping a common bawdy-house, soliciting in a public place for that purpose and living on the avails of a prostitute.<sup>82</sup> All of these provisions were held to be deficient under a number of principles of fundamental justice, including the principle that criminal law must not be arbitrary.

Justice Himel first considered the objectives of the each of the impugned provisions.<sup>83</sup> She found that the objective of the bawdy-house provision is not to stamp out particular “bad” activities in such houses, but to prevent collateral harms to surrounding neighbourhoods and communities. In other words, the objective is “the control of common or public nuisance.”<sup>84</sup> The law against living on the avails of a prostitute is meant to prevent “the exploitation of prostitutes and profiting from prostitution by pimps.”<sup>85</sup> And the communicating offence is designed to “curtail street solicitation and the social nuisance which it creates.”<sup>86</sup> After finding that the laws create a risk of deprivation of both liberty and security of the person, Justice Himel then considered whether those deprivations offend fundamental justice. She noted, and relied upon, the concurring opinion in *Chaoulli* that a law “requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts.”<sup>87</sup>

Justice Himel found all three provisions to possess at least a “theoretical” connection to their respective objectives. With respect to the “real connection on the facts,” though, she found the laws deficient. Importantly, she considered each provision both separately and as part of a broader legislative scheme aimed at tackling some of the endemic social problems associated with the sex trade. Reviewing each provision in turn, she held that the living on the avails law lacked internal coherence. In other words, it lacked coherence between its objective and its means. This was because the provision inhibits prostitutes from entering into certain business relationships that could enhance their safety. It renders them more vulnerable to exploitation by persons such as pimps. Since the objective of the provision is to *prevent* such exploitation, it failed on its own terms.<sup>88</sup> The other two provisions,

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81 *Bedford v Canada (Attorney General)*, 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford*].

82 *Criminal Code*, *supra* note 33, ss 210, 212(1)(j), 213(1)(c). In Canada, the actual exchange of sex for money is not an offence.

83 Justice Himel found that the laws risked deprivations of both liberty and security of the person. The liberty deprivation was the straightforward risk of imprisonment, while the security of the person deprivation was made out because Justice Himel found that the laws contributed significantly to the greater danger faced by prostitutes who worked around the laws in order to avoid jail. *Supra* note 81 at paras 327, 359-62.

84 *Ibid* at para 255.

85 *Ibid* at para 259.

86 *Ibid* at para 274 [emphasis removed].

87 *Ibid* at para 369, citing *Chaoulli*, *supra* note 66 at paras 130-31.

88 *Bedford*, *ibid* at para 379.

though, did demonstrate internal coherence, mostly because they were concerned with preventing public nuisance. The court was satisfied that, in at least some instances, laws against keeping a common bawdy-house and soliciting in a public place would catch some nuisance-related activities.<sup>89</sup>

Though Justice Himel found only the living on the avails provision arbitrary *per se*, she went on to declare that the other two provisions interacted in such a way as to make prostitutes less safe and, thus, contradicted at least one of the state's objectives. Since the goal of promoting sex worker safety—and decreasing their exploitation—animated the laws as a whole, the effect of the provisions' mutual interaction rendered them arbitrary in a broader sense. “[P]utting prostitutes at greater risk of violence cannot be said to be consistent with the goal of protecting public health or safety . . . . [The bawdy-house and communicating provisions] may actually exacerbate the nuisance Parliament intends to eradicate . . . . Such an outcome cannot be said to be consistent with Parliament's objectives.”<sup>90</sup>

By taking a broader, contextual view of the provisions working in concert, Justice Himel was able to illuminate their essential incoherence. Her approach makes a great deal of sense in the criminal law context. It is a mistake to view discrete sections of the *Criminal Code* in isolation and to ignore the historical realities that have led the legislature to choose to criminalize conduct in some circumstances, but not in others. This is the crucial lesson of the *Rodriguez* dissent—Parliament can legitimately be held to account for the *cumulative* effect of its criminal law choices, and the law *as a whole* must demonstrate the level of coherence necessary to justify the imposition of penal consequences.

The Ontario Court of Appeal upheld much of Justice Himel's analysis,<sup>91</sup> but not her reasoning on arbitrariness. Yet, the court acknowledged (as, indeed, the Supreme Court of Canada itself has done<sup>92</sup>) that the correct standard for determining arbitrariness remains unclear:

[In *Chaoulli*] the Court split 3-3 on the question of whether a more deferential standard of inconsistency, or a more exacting standard of necessity, should drive the arbitrariness inquiry . . . . Until a clear majority of the Supreme Court holds otherwise, we consider ourselves bound by the majority in *Rodriguez* . . . .<sup>93</sup>

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89 *Ibid* at paras 379-84. Note that Justice Himel was markedly less persuaded by this conclusion with respect to the communicating law, but ultimately declined to rule it arbitrary on its own terms.

90 *Ibid* at paras 385-88.

91 *Bedford v Canada (Attorney General)*, 2012 ONCA 186, 109 OR (3d) 1 [*Bedford CA*]. The Court of Appeal agreed with the lower court (albeit on somewhat narrower grounds) that the bawdy-house and living on the avails of prostitution offences were unconstitutional. It upheld the solicitation law.

92 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 134, [2011] 3 SCR 134 [PHS]. The Court deemed it unnecessary to clarify which standard to apply, as the impugned actions failed under the both the “necessity” and “merely rational” branches of arbitrariness.

93 *Bedford CA*, *supra* note 91 at paras 146-47.

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Applying the narrower standard, the Court of Appeal disagreed with Justice Himel that the offence for living on the avails of prostitution was arbitrary.<sup>94</sup> The court did not address Justice Himel's finding that arbitrariness also may arise as a result of the incoherent interaction among a number of criminal provisions that seek to address a single goal or social problem. But the court stated that direction from the Supreme Court of Canada is necessary, and one hopes that that Court will address the issue on appeal.

A second example of the *Chaoulli* approach being applied to criminal law is *Canada (Attorney General) v PHS Community Services Society*.<sup>95</sup> This case is distinct from the others discussed in this article because it relates to a claim made against a Minister of the Crown with respect to a decision to grant (or refuse) an exemption authorized by law—in this case, the *Controlled Drug and Substances Act*.<sup>96</sup> A Charter claim against executive action is somewhat removed from the section 1 context. Nonetheless, the decision's engagement with arbitrariness places it among recent cases which have resurrected the doctrine.

Insite, a medical clinic and supervised injection site in Vancouver overseen by PHS Community Services ("PHS"), operated for a number of years pursuant to a Ministerial exemption granted under section 56 of the *Controlled Drugs and Substances Act* (without the exemption, PHS, its workers and its patients would be vulnerable to charges of drug possession). In 2008, the Minister of Health communicated his intention to discontinue the exemption. The Court held that this decision was arbitrary. It noted that the statutory framework clearly contemplated that exemptions for valid medical purposes would be forthcoming. It further noted that the trial judge had reasonably concluded that the best available evidence supported a supervised injection site, including evidence of greatly reduced risks of death and disease for injection drug users. The Court could find no rational basis for the Minister's decision; indeed, it described the decision as "undermining the very purposes of the *CDSA*, which include public health and safety."<sup>97</sup> This is a devastating conclusion, especially directed at a Minister of the Crown, which is why *PHS* may signal an increased willingness on the part of the Court to consider non-arbitrariness in a wider variety of situations. Thus, the decision bolsters the argument for a more rigorous standard overall.

Returning to *Oakes* and to section 1, overbreadth frequently is a factor in the justification framework apart from rational connection. Therefore, it could be objected that to put so much emphasis on a revamped approach to rational connection is unwarranted<sup>98</sup> and even duplicative of the second and third branches

94 See *ibid* at paras 241-42 (where the court states, "[i]n prohibiting persons from living on the earnings of prostitutes, the legislation ... may be overbroad ... but that is not the same as arbitrariness ...").

95 *PHS*, *supra* note 92.

96 SC 1996, c 19, ss 4(1), 4(3)-(6), 5(1), 10(1), 55, 56.

97 *PHS*, *supra* note 92 at para 136.

98 See Barak, *supra* note 17 at 315 (where he discusses the narrower version of rational connection and argues that we may well do without it).

of proportionality. What is to be gained by a return to the more rigorous approach apparently advocated by Chief Justice Dickson?

The question of how (or, indeed, whether) to distinguish between a stronger version of rational connection and other elements of proportionality is a fair one but, unfortunately, beyond the present article's scope. I maintain, though, that by employing a stronger version of rational connection we stand to gain a fair bit. I have attempted to show that the promise of the rational connection test is not just its ability to catch the (rare) case where there is a bizarre misfit between the law and objective. A reinvigorated approach to rational connection will capture criminal prohibitions framed in terms that have no regard to the coherence of the criminal law as a whole. It also provides a counter-balance to an ever expansive resort to criminal law at a time where evidence-based reasoning appears to have fallen out of favour in criminal justice policy.<sup>99</sup> The focus on evidence, combined with a stringent approach to rights protection, would suggest caution and restraint in the face of imperfect information. It would permit a more searching inquiry of criminal laws which operate in some relationship of mutuality. Thus, for example, one might expect some explanation of how greater use of mandatory minimum sentences relates to societal protection,<sup>100</sup> or why polygamy alone should be singled out among intimate relationships for criminal sanction.<sup>101</sup>

My argument could also be challenged to the extent that it relies on certain assumptions about criminal law, namely that persons generally are decent and law-abiding (to borrow from Chief Justice Dickson), entailing a commitment to employ the criminal law with restraint.<sup>102</sup> Since restraint is not the only approach to criminal law, perhaps the argument requires too many pre-conditions: that the legislature accepts it has a duty to balance protecting the public with the liberty and dignity of the individual; that the legislature has wrestled with this balance; and that, somehow, something has been lost in the translation of this conclusion to criminal law rules. In those circumstances, a stronger version of rational connection may be helpful. But, suppose the legislature adopts a different approach to criminal law; one that sees value in the sheer number of convictions it can obtain out of a belief that most people are not decent and law-abiding. For example, in *Morgentaler*, the analysis of "illusory defences" worked because the law purported to permit a criminal defence to abortion where such a procedure was necessary to safeguard a woman's life or health. If the state asserted a different objective—such as a blanket protection for all foetal life—rational connection would not perform the same

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99 See e.g. *PHS*, *supra* note 92 at paras 28, 131.

100 See *R v Smickle*, 2012 ONSC 602, 110 OR (3d) 25.

101 See *Reference re: Criminal Code of Canada (BC)*, 2011 BCSC 1588, 245 CRR (2d) 75.

102 For arguments why criminal law is best approached from this perspective, see H L A Hart, *Law Liberty and Morality* (London: Oxford University Press, 1963) at 20; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008); A P Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011) at 19.

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prophylactic function. Similarly, in *PHS*, the Minister's actions were deemed arbitrary because the *Criminal Code* already allowed for medical-based exemptions to drug possession laws. If such exemptions were removed from the *Criminal Code*, the *Charter* claim would not have proceeded in the same way.

The above objection is an important one, but it relates more to the first stage of justification under section 1. It is about the legislature's authority to make criminal law choices in a system bound by constitutional limits, rights and norms. The argument underscores the porosity of the distinction between the *legitimacy* of a state objective and the *coherence* of the means with which that objective is realized. Rational connection corresponds most closely to the latter, but it also examines the relationship between the two. I have argued for a broader understanding of what that relationship is. Rational connection cannot, on its own, determine the legitimacy of the legislature's objective. It does not take us fully down the path to a just criminal law,<sup>103</sup> but it is an important part of the path.

In *Oakes*, Chief Justice Dickson sketched out a challenging approach to section 1: a provision seemingly designed to *entrench* deference to state objectives was read so as to further protect the *Charter's* rights and freedoms. A reverse onus—relying on so-called “common sense” propositions called upon in aid of prosecuting a serious crime—was deemed to overreach; unacceptably risking the conviction of the morally innocent. In the intervening twenty-five years, the *Oakes* approach has bowed to pressure from various directions and its elements occasionally have worked to inappropriately shield state choices from judicial scrutiny. This is evident regarding the first step of proportionality, and, also, feeds back into questions of the fundamental justice of certain criminal law policy choices. Especially with regards to criminal law, section 1 and rational connection must be equipped to fully interrogate the underlying reasons for a particular provision. The *Charter* suggests, even commands, this approach.

It is time to contemplate a deeper analysis of rational connection. The complex relationship between section 1 and section 7 provides multiple entry-points for doing so. Take, for example, a revamped approach to the conditions under which a law may be deemed arbitrary. A more attentive regard to rational connection would demand some explanation of criminal provisions which, as part of a broader criminal law policy, operate in an incoherent manner. Of course, criminal law can embody different policy goals, but those goals should not be mutually contradictory. Forging such a path would be closer to Chief Justice Dickson's original vision of the role of section 1. It would fully recognize his tremendous contribution to our *Charter* jurisprudence. And, finally, it would be truer to the *Charter* itself. As we contemplate the last twenty-five years, and look forward to the next, we should expect no less.

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103 That said, I think that there *are* limits to the state's criminal law making power *per se* that would apply to the choice of particular criminal law goals. Those limits arise, in part, from the kinds of considerations I have tried to articulate in this article that are related to arbitrariness