Effecting Balance: *Oakes* Analysis Restaged

MARK ZION* **

This article challenges the present structure of the *R v Oakes* test for *Charter* section 1 applicability, which is one form of international four-stage proportionality analysis (PA). The article argues that stage four of the test—proportionality *stricto sensu* (PSS) in the international setting—ought to determine case outcomes routinely. Accordingly, other stages must be modified so that each one has a necessary and logical function. First, the article surveys the evolution of German doctrine and proposes Canadian changes. Second, the article draws on the works of Gregoire Webber and Robert Alexy to theorize the most democratically contentious stage within PA, which is PSS. Third, the article engages in a structural comparison between the Israeli Supreme Court's "robust PSS" decision by President Bara, *Beit Sourik*, with the Supreme Court of Canada's "weak PSS" decision by Chief Justice McLachlin, *Wilson Colony*, arguing in favour of the former approach. Fourth, the article refutes the positions of Webber and Jurgen Habermas in affirming that a four-stage framework, if applied properly, is preferable to straightforward "moral reflection." Finally, the article considers the extent to which one pernicious form of "deference" has impeded the evolution of Canadian PA, and argues that it undermines the rule of law. In conclusion, the article proposes that restructuring the *Oakes* test along Israeli and German lines not only makes the most sense with respect to the stages' logical functions, but that such an approach would be consonant with the Rawlsian idea that a decision procedure (such as *Oakes*) ought to be judged by the likelihood that it will produce just outcomes. Stage four considers outcomes explicitly.

Cet article remet en question la structure actuelle du critère établi par l'arrêt *R c Oakes* pour déterminer l'applicabilité de l'article 1 de la *Charte*, qui est une forme de l'analyse de la proportionnalité (AP) internationale en quatre étapes. Dans cet article, on soutient que la quatrième étape de ce critère, soit la proportionnalité *stricto sensu* (PSS) dans un contexte international, devrait servir à statuer sur des cas de façon courante. Il faudrait par conséquent modifier les autres étapes afin que chacune d'entre elles soit dotée d'une fonction aussi logique que nécessaire. L'article explore en premier lieu l'évolution de la doctrine allemande et propose des changements applicables au Canada. En second lieu, l'article se fonde sur les travaux de Gregoire Webber et de Robert Alexy qui ont théorisé l'étape la plus controversée sur le plan démocratique de l'AP, soit la PSS. En troisième lieu, l'article établit une comparaison structurelle entre la décision rendue par la Cour suprême d'Israël à propos du caractère « solide de PSS » par le président Bara, dans l'arrêt *Beit Sourik*, et la décision rendue par Cour suprême du Canada à propos du caractère « faible de la PSS » sous la plume de la juge en chef McLachlin, dans l'arrêt *Wilson Colony*, et conclut en faveur de la première approche. En quatrième lieu, l'article réfute les positions de Webber et de Jurgen Habermas en affirmant qu'un cadre composé de quatre étapes, à condition qu'il soit correctement appliqué, est préférable à une « réflexion morale » simple. Enfin, l'article examine dans quelle mesure une forme pernicieuse de « déférence » a entravé l'évolution de l'AP canadienne et soutient que cela mine la primauté du droit. En conclusion, l'article propose que la restructuration du critère établi dans l'arrêt *Oakes* en fonction des thèses israélienne et allemande est non seulement plus sensée du point de vue des fonctions logiques des étapes de l'analyse mais qu'en outre une telle approche correspondrait à l'idée rawlsienne qu'une procédure décisionnelle (tel que l'arrêt *Oakes*) devrait être jugée en fonction de la probabilité qu'elle favorise le prononcé de résultats justes. La quatrième étape tient compte des résultats de façon explicite.

* Mark Zion completed his Juris Doctor at the University of Alberta in 2012. He is presently an LLM candidate at the University of Victoria, where he is focusing on constitutional law and legal theory.

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I. INTRODUCTION

The Supreme Court of Canada's recent decision in *Alberta v Hutterian Brethren of Wilson Colony*[1] set off a firestorm of critical reaction in the academic community. The decision upheld a law requiring all drivers' licenses to include photographs. Because their religious beliefs forbid them to be photographed, the Hutterites of Wilson Colony were unable to comply with this law and challenged it on freedom of religion grounds under section 2(a) of the *Canadian Charter of Rights and Freedoms*.[2] The Court ruled that although the law violated section 2(a), it could be saved under section 1.[3] As this article will show, this decision has caused significant hardship for the Hutterites in exchange for negligible communal gain. Although this article contends that the majority decision itself was flawed, it raises the question as to whether there are wider, structural lessons that might be learned from the case. This article will further argue that *how* the Supreme Court of Canada structures the stages of the test from *R v Oakes*[4] for section 1 applicability bears strongly on

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1 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Wilson Colony*]. Further discussion of this case will be found at 16, below.

2 *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*].

3 *Ibid*, s 1 (which reads, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

4 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR]. The *Oakes* test, in its current configuration, can be summarized as follows: (1) does the impugned government measure have a pressing and substantial objective; (2) is there a rational connection between the measure and the objective; (3) does the measure use the minimally impairing means to achieve the objective; and (4) do the measure's salutary effects outweigh its deleterious effects? Stage three initially referred to the "least restrictive" means, but this standard was relaxed for the government in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1. Stage four was reformulated by Justice Lamer in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887, 120 DLR (4th) 12. *Oakes* itself had called for proportionality between the effects of the limiting measure and the objective (already deemed important), which made the final stage unavoidably residual.

what it ultimately decides and how that decision is justified in its written reasons.[5] The *Oakes* test methodology should be reformed so that stage four may be decisive in difficult cases. It is only this balancing stage which calls for a searching inquiry into all of the likely consequences that a government measure might have. John Rawls expounds an "instrumentalist condition of good government" whereby, "The fundamental criterion for judging any procedure is the justice of its likely results."[6] If stage four were allowed to do its work of considering likely results explicitly, the *Oakes* test might be viewed as an exceptionally just decision procedure.

In Canada, the Court has gradually refined *Oakes* in the decades since Chief Justice Dickson introduced it, but *Wilson Colony* illustrates the difficulties that persist. Peter Hogg states that stage one of the test, the requirement of a pressing and substantial government objective, leaves little work for stage four's balancing to do.[7] Accordingly, he notes that most cases resolve at stage three's "least drastic means" inquiry.[8] This state of affairs is well known, but it remains surprising; surely laws that employ the least drastic means may nevertheless be unjustifiable in their effects. The *Oakes* test is but one incarnation of the four-stage "proportionality analysis" (PA), as it is known in the comparative constitutional literature. In that literature, stage four (which balances salutary and deleterious effects) receives special attention and it has a technical name: "proportionality *stricto sensu* (PSS)."[9] For many reasons that are beyond the scope of this paper, PA has become the dominant framework for adjudicating constitutional challenges to government measures across most of the world.[10] This article's approach is reciprocal: it defends PA by advocating for it in one specific idealized *Oakes* configuration and defends that configuration by showing how it draws strength from PA's theoretical merits.

This article will proceed in four parts. First, it will use a comparative approach to demonstrate the historical and theoretical legitimacy of robust PA—that in which every part, especially PSS, plays a meaningful role. Second, it will ground the discussion in a comparison between an Israeli "robust-PSS" (termed by this article) case and a Canadian "weak-PSS" (*Oakes*) case. In the former, PSS (stage four) plays a greater role than it does in the latter, but there are other important differences that prepare the way for that stage's success. Third, it will address critics

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5 See generally Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTL J 383 at 396-97. Grimm asks, "Is it sufficient that the relevant questions are asked somewhere, or is there a legal value in raising them in a certain order?" He believes that "the disciplining and rationalizing effect" of full proportionality analysis has advantages, but declines to answer the question without more knowledge of Canadian jurisprudence.

6 John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1999) at 230-31.

7 Peter W Hogg, *Constitutional Law of Canada*, Student ed (Toronto: Carswell, 2009) at 835 [Hogg].

8 *Ibid* at 852. Despite judicial rhetoric to the contrary, this article will argue that this occurred in *Wilson Colony*.

9 This technical name means "proportionality in the strict sense."

10 The United States is a notable exception.

of PA who favour dispensing with this framework altogether. Fourth, it will justify *Oakes*' reform with attention to Canada's particular constitutional structure and post-Charter judicial history. The article will conclude by critiquing one particular concept of "deference," whose influence poses the primary obstacle to a refigured fourth stage. In this preliminary foray, the article examines PA solely as a framework for section 1 adjudication, not as an interpretive theory,[11] and evaluates *Oakes* in the context of social policy, not criminal law.

II. PA PROTECTS RIGHTS

A. PA in Historical Context

Grégoire Webber contends that by eliding categorical prohibitions, PA threatens the inviolable core of classical liberal rights. He claims that "rights have become merely one reason among others juggled in a process of proportionality reasoning. The result is perhaps nothing short of a loss of rights."[12] However, a brief review of German legal history will disclose a more complicated relationship between PA and the function of rights as a "firewall"[13] against undesirable state coercion of individuals.[14]

In mid-eighteenth century Prussia, the *Rechtsstaat* (a state "governed by law") was born under the enlightened rule of Friedrich the Great.[15] His successor, Friedrich Wilhelm III, codified the law to include a provision that "the police [are] to take only the *necessary* measures for the maintenance of public peace, security, and order ...."[16] Police law applied to "nearly the whole of the state's (then fairly primitive) interventions in society,"[17] so this early "least restrictive means" criterion

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11 See generally David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004). Beatty sees PA as the "ultimate rule of law," the interpretive theory to end all theoretical debate. In its pragmatic conformity to the pattern of real historical adjudication, he touts PA qua theory's superiority to more "deductive" approaches, such as Ronald Dworkin's Interpretivism and Justice Scalia's Originalism. See also *Lochner v NewYork*, 198 US 45 (1905); *Brown v Board of Education*, 347 US 483 (1954); *Roe vWade*, 410 US 959 (1973). Beatty uses PA to reconcile PSS-like balancing outcomes across these diverse cases, a goal shared by none of the aforementioned approaches (and for good reason, despite recent attempts to rehabilitate *Lochner*).

12 Grégoire CN Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23:1 Can JL & Jur 179 at 202.

13 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by William Rehg (Cambridge, Mass: The MIT Press, 1996) at 258.

14 This article focuses on the evolution of Weimar/German doctrine partly because it may foreshadow Canadian changes, but Aristotelian PA analogues and common law forms (i.e. in Britain) might also be investigated.

15 Moshe Cohen-Eliya & Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" (2010) 8:2 International Journal of Constitutional Law 263 at 271.

16 Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47:1 Colum J Transnat'l L 72 at 100, cited in *Allgemeines Landrechtfür die Preußischen Staaten* [ALR] Feb 5, 1794, § 10 II 17 [emphasis added].

17 *Ibid* at 98.

conferred wide-ranging protections.[18] However, these soon proved insufficient; it became necessary to balance the positive effects of a measure against its negative ones.

Scholarly accounts of balancing appeared long before it arose in case law. Robert Von Mohl's 1849 formulation grounded a nascent form of PSS not in natural rights, which then held purchase, but in the rule of law. By the early twentieth century, balancing was applied, but only in some districts. For instance, in assessing citizen arrests of fleeing criminal suspects under the Criminal Procedure Law, some courts balanced the defendant's dangerous action (e.g. shooting a trespassing hunter who could not be chased down) against the public interest of catching criminals, but some courts still evaluated detentions using "least restrictive means" testing.[19]

The judiciary abandoned PA doctrines after World War I. Under the new Weimar Constitution, conservative judges protected bourgeois property rights against any state incursion with little opposition from a government crippled by the war. Three scholars, Heinrich Triepel, Rudolf Smend and Gerhard Leibholz, nevertheless saw rights as a way to "'integrate' state and society" by "impos[ing] positive duties on government."[20] However, these ideas would have to gestate. With the rise of the Nazis and the death of the rule of law, "Labeling a state measure 'political' was usually enough to shield it from judicial review."[21] Balancing was gone, but not forgotten.

After the war, Smend joined the new German Federal Constitutional Court. In the academy, Rupprecht Krauss "coined the term, 'proportionality in the narrow sense' and presented it as a latent strain already present in the very concept of proportionality."[22] By the late 1950's, PA had assumed its present four-stage form and by 1963, the court declared that it would be applied to all cases. PA's increasing formalization was concomitant with the court's singular devotion to state-limiting rights after the Holocaust; discrete stages made the framework logical and transparent. This is the model that diffused internationally in the postwar paradigm[23] and whose artificiality Webber deems threatening to rights.

PA's Prussian-German evolution demonstrates that a formalist PA actually enhances rights protection.[24] These origins inform the prospects for PSS in Canada—

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18 *Ibid* at 105. An 1886 case deemed it disproportionate for police to close a shop because the owner served brandy without a license; it held, "The operation of the shop was itself not unlawful; only the distribution of brandy was" (*ibid* at 101).

19 See *ibid* at 102, n 74.

20 *Ibid* at 103.

21 *Ibid* at 103-4, citing Michael Stolleis, *The Law Under the Swastika*, translated by Thomas Dunlap (Chicago: The University of Chicago Press, 1998) at 134.

22 Sweet & Mathews, *supra* note 16 at 104-5.

23 *Ibid* at 73. "By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA … [as had treaty-based regimes such as] the European Union, the European Convention on Human Rights, and the World Trade Organization" (*ibid* at 74).

24 Here, "formalism" refers to the logical framework of analysis, which is applied consistently from case to case, not to a rigid, substantive constraint informed by precedent. PA's emphasis on context ought to make mechanical reasoning difficult.

the Prussian narrative entails a transition first from unlimited state power to least restrictive means testing, and then, influenced by the academy, to an emphasis on balancing.

B. PSS is Theoretically Defensible

To improve rights protection, a greater reliance on PSS ("balancing," in Canada) is preferable to abandoning the four-stage test altogether, as Webber proposes. The benefit of an explicit balancing test is that it *requires* judges to address policy effects openly. Some judges may be reluctant to rely on PSS precisely because it engages with politically charged issues—an activity some believe is best allocated to the elected branches of government. However, an overview of PSS theory will show that it is possible to conduct balancing in a way that both maximizes "objectivity" and respects the C*harter*'s enhanced judicial review function.

1. Alexy's Weight Formula and Barak's Relative Approach to Balancing

Given that the first three stages of PA are straightforward logical requirements, PA's robustness turns on the theoretical viability of PSS (which finally determines "which side has to bear the costs").[25] This article's thesis turns on this stage, and it is this stage at which PA proponents encamp. Robert Alexy, one of its chief theoretical architects, provides a careful analysis in defense of PSS, which helps to justify a greater role for it. He views rights not as bright-line "rules," which are self-disclosing and context-specific, but rather as "principles" to be "optimized"—these are context-independent, so they require interpretation.[26] For Alexy, when a claimant asserts a specific constitutionally protected right, it becomes a "rights principle." The government measure challenged by the claimant becomes a "competing principle." As such, the asserted right and the challenged measure can be compared to one another in his Weight Formula.[27] The formula registers the same attributes for each principle and usually one or the other prevails within a given case.[28]

Alexy has recently mathematized the formula, but for the purposes of this article it will suffice to note the three attributes it compares for each principle. First, it considers their "abstract weights." This refers to how important they are in the hierarchy of a nation's constitutional rights, without reference to the facts at hand. For example, if the rights principle is "freedom of expression" and the government principle is "public safety," neither one might be said to prevail in the abstract. Abstract weights are underdetermined and will often register as equal.[29]

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25 Robert Alexy, "The Construction of Constitutional Rights" (2010) 4:1 Law & Ethics of Human Rights 19 at 28.

26 *Ibid* at 21. For example, a speed limit is a rule, whereas "freedom of religion" is a principle.

27 See *ibid* at 30.

28 *Ibid*.

29 See Part II-B-2, below, for criticism on this point.

Second, the formula considers the intensity of interference with each principle on a triadic scale ranging from "slight" to "moderate" to "severe;" each degree of interference becomes geometrically more difficult to justify. Take the classic example of a law that prohibits yelling "fire" in a crowded theatre when in fact there is no fire. Upholding the law would only slightly interfere with the rights principle of "freedom of expression." However, striking down the law would interfere severely with the competing principle of public safety. The latter severe interference would carry geometrically more weight in the Weight Formula. Finally, the formula considers how reliable the court's effects forecast can be, given the "empirical assumptions" it makes about the government measure. For example, there will be low reliability with respect to a new and complex government measure if it is not clear how it will be implemented, and there will be high reliability with respect to a rights principle if it is nearly certain that a government measure will interfere with it.

Curiously, at least in his recent article, Alexy seems to not address the potential stalemate situation whereby the rights principle and competing principle ultimately have the same weight in a case (neither one "wins" when relativized in the Weight Formula). However, the plain words of *Oakes*' stage four suggest that if the salutary effects do not outweigh the deleterious ones, the measure should fall. In other words, the burden is on the government to prove greater salutary effects, however marginal. In any event, the formula might be informative in a stalemate situation; the government's alternative proposal may only have to impair the right slightly less than in the stalemate situation in order to tip the scales in its favour.[30] This stalemate question is important because one principle does not clearly trump the other in many cases that reach the Supreme Court of Canada and the PSS stage. This article proposes that Canadian courts adopt former Israeli Supreme Court President Aharon Barak's relative approach to balancing (discussed below), which allows the government to tailor its measure so that its salutary effects minimally outweigh the deleterious effects. Because the rights claimant may have input in this tailoring, the relative approach adds a deliberative dimension to the process of justification and arguably promotes respect for both sides.[31] No logical scheme will remove the need for judgment. Alexy's model, however, provides a useful justification for relying more heavily on PSS because it registers a case's balancing "variables" individually and as clearly as possible before relating them to one another, which arguably enhances judicial conceptualization.[32]

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30 PSS holds the prospect of becoming more objective in difficult cases. In any event, it could not be less objective if it inspires judges to reason about each attribute individually before considering them holistically. Such reasoning is not necessarily reflected perfectly in written decisions. See e.g. Grimm, *supra* note 5 at 389 (where he states, "The distinction between ends and means can be quite difficult"). See also Webber, *supra* note 12. Although Webber stresses that his quarrel is not with PSS as a reasoning tool, but as a stable rights commensuration device, the reasoning dimension may be equally interesting.

31 Obviously, deliberation required by the courts may not promote social harmony as much as deliberation that avoids legal action. However, late and "compelled" deliberation may be better than none at all.

32 See Part V, below, for a discussion of how this might have been done in *Wilson Colony*.

2. Barak's Principled Balancing

Barak views Alexy's abstract weights as too general, and his concrete (case-specific) weights as too particularized. He therefore proposes the intermediate level of "principled balancing" to create abstract rules applicable *across* cases. He argues persuasively that it is possible to identify "prerequisite rights" (e.g. life, human dignity, equality, political expression) that are more important than derivative rights[33] (e.g. commercial expression). Barak provides an example of a principled balancing rule for political expression: it can only be limited "when the goal of protecting public peace from the consequences of hate speech is crucially important for the realization of an urgent social need that is required to prevent extensive and *immediate* harm to public peace."[34] Thus, if there were insufficient evidence to conclude that hate speech posed an immediate threat to public peace, it would have to be permitted (i.e. the mere possibility that suggestible people could be incited to violence against a certain cultural minority would likely be insufficient). The sort of harm which would qualify as "immediate harm" seems to be case-specific. But if that is so, has principled balancing really been of service? It may also be difficult in practice to create a matrix of proactive principled balancing rules that actually diminishes controversy. The principled level may be helpful for judges, but as this article will discuss, Barak himself performed admirably without it in *Beit Sourik Village Council v The Government of Israel*.[35] Alexy's abstract and concrete levels are sufficient to justify a greater role for PSS in the context of *Oakes*. However, Barak's judicial approach will be instructive not just with respect to the relative approach to balancing at the PSS stage, but with regards to how all of the stages ought to interact. After examining how judges conduct PA, this article will address prominent critiques of this approach.

III. IMPROVING PA ADJUDICATION

In order to develop the foregoing PSS theory and to explain how all of PA's stages ought to function, this article will compare an Israeli and Canadian case. Both cases grapple with the conflict between constitutional rights and public security considerations. Since the terrorist attacks of 9/11, a state of emergency justifying exceptional security measures has reached the status of normalcy in neoliberal

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33 This is the Supreme Court of Canada's term. See *Ontario (Public Safety and Security) v Criminal Lawyer's Association*, 2010 SCC 23, [2010] 1 SCR 815. The Court states that a derivative right may arise "where it is a necessary precondition for meaningful expression on the functioning of government" (*ibid* at para 31). A right to public access to information may derive from the *Charter* section 2(b) guarantee of freedom of expression.

34 Aharon Barak, "Proportionality and Principled Balancing" (2010) 4:1 Law & Ethics of Human Rights 1 at 12 [emphasis in the original].

35 *Beit Sourik Village Council v The Government of Israel*, HCJ 2056/04, Israel: Supreme Court, 30 May 2004, online: United Nations High Commissioner for Refugees <http://www.unhcr.org/refworld/docid/4374ac594.html> [*Beit Sourik*]. See Part II-B-2, below, for further analysis of this holding. The case was decided six years prior to Barak's aforementioned intermediate balancing proposal.

countries worldwide.[36] The question is: "how are we to protect freedom (through security) without denying its essence (by violating human rights)?"[37] The Israeli PA structure has been tested frequently amidst a state of "normalized crisis" since the country's inception in 1948.

A. The Israeli Template: Barak and *Beit Sourik*

In *Beit Sourik*, the Israeli Defense Forces (IDF) wished to construct a forty kilometre security fence,[38] partly within the West Bank, in order to prevent terrorist incursions into Israel. It ordered the confiscation of citizens' land that would fall on the *de facto* "Israeli" side of the fence. Affected Palestinian landowners in various West Bank villages challenged the fence on three important grounds, only one of which is relevant to this structural analysis: that it would violate the petitioners' rights to property and freedom of movement.[39] In response, the IDF said that the project was of the "utmost national importance" because the lives of Israeli citizens were in imminent danger from suicide bombers.[40] Citing the efficacy of fences in other locations, the IDF claimed that this segment would prevent terror attacks known to originate in the vicinity.[41] It further said that in the planning process, "great weight was given to the interests of the residents of the area."[42] Where their lands were cut off, farmers would be granted licenses and be permitted access via regular security checkpoints open at all times.

1. The Objective

To assess the competing claims, Barak employed a form of PA structurally identical to the *Oakes* test, and likewise based on the German model.[43] However, Barak's

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36 Liora Lazarus & Benjamin J Goold, "Security and Human Rights: The Search for a Language of Reconciliation" in Liora Lazarus & Benjamin J Goold, eds, *Security and Human Rights* (Portland: Hart Publishing, 2007) at 1. There is a vast and growing literature on human rights in a time of global terror. See also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge, UK: Cambridge University Press, 2006); Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011).

37 Lazarus & Goold, *supra* note 36 at 1.

38 *Beit Sourik*, *supra* note 35 at para 7. In this case, the "fence" could be as wide as thirty-five meters because in an addition to the electronically surveyed concrete wall, it included such things as an anti-vehicle ditch, an additional "delaying fence," etc.

39 *Ibid* at para 11. The other two grounds, which did not succeed, were: first, that the fence would expand Israel's boundary contrary to international law; second, that the route planning process failed to conform to principles of administrative law (*ibid* at para 10). This is not to say that the international law question is not profoundly important; security walls in general may well contravene international law, but this article is concerned with structural lessons for *Oakes*.

40 *Ibid* at para 12.

41 *Ibid*.

42 *Ibid* at para 13.

43 However, the rights claims did not derive from a bill of rights. In the absence of a written constitution, Barak endowed the statutory Basic Law with constitutional status, dramatically expanding the Israeli Supreme Court's power of judicial review during his tenure as its President.

model of PA offers a unique formulation of institutional roles. As the stages of PA progress, becoming increasingly "legal" in character, judicial discretion increases, whereas government discretion decreases. In addressing the first stage of inquiry, the only question is whether a goal is "appropriate."[44] As it is used by Barak, this diction seems synonymous with the administrative law "reasonableness" standard. There is no requirement of a "pressing and substantial objective" as in *Oakes*. The key difference is that the Israeli approach relies on the government's own subjective assessment, whereas the Canadian approach makes an objective determination at the outset.[45] Barak is deferential to government specialists at *this preliminary stage* because they are best positioned by virtue of their expertise to make decisions in their own area. In the present case, "All [the court could] determine is whether a *reasonable* military commander would have set out the [wall's] route as this military commander did."[46] Thus, the threshold for entering the three proportionality subtests within PA, with respect to both the goal and its *prima facie* implementation, is in fact the low one of reasonableness.

2. Rational Connection

The rational connection test received little attention because the "ruling that the route of the fence passes the test of military rationality also [means] that it realizes the military objective of the separation fence."[47] Here, reasonableness was synonymous with rationality, so stage two was largely redundant. Although inconsequential in this case, stage two is necessary because it is possible (although rare) for the government to reasonably decide that a goal is appropriate—only to choose means which, however minimally impairing, cannot reasonably be expected to achieve the goal.[48]

3. Least Restrictive Means

The Israeli means-test conforms to strict Pareto Optimality, in that it asks whether there exists a less restrictive means that does not appreciably compromise the objective. A solution is Pareto-optimal if any *deviation* from it, in order to benefit

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44 Barak, *supra* note 34 at 6.

45 See e.g. *ibid* at 9. In practice, the Court's approach often looks equivalent to Barak's. However, by both keeping the threshold low (measures rarely fail at stage one) and deciding prematurely that the objective is "pressing and substantial," the measure becomes unduly difficult to defeat at stage four (or at stage three, where "stage four type" reasoning usually occurs at present).

46 *Beit Sourik*, *supra* note 35 at para 46 [emphasis added].

47 *Ibid* at para 57.

48 See e.g. *Benner v Canada*, [1997] 1 SCR 358, 143 DLR (4th) 577. In the Canadian security context, the government in Benner attempted to justify a provision under the federal *Citizenship Act*, RSC 1985, c C-29, which required a person born to a Canadian mother to apply for citizenship and to pass a security check. There was no equivalent provision for someone born to a Canadian father, who qualified automatically upon registering his or her birth in Canada. The Court struck down the "Canadian mother" provision because, "The children of Canadian mothers could not rationally be regarded as more dangerous than the children of Canadian fathers." Hogg, *supra* note 7 at 850.

one party, necessarily worsens the position of another party. Barak concluded that "there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants."[49] The petitioners proposed a lesser impairing route, but it was rejected because the military commander's expert assessment held that such a route would compromise security. If stage three is kept sufficiently strict to allow stage four to decide cases in the usual course, why retain it? Although this would be rare empirically, it is theoretically possible for the claimant (against the government) to devise a solution which is less impairing but which fully achieves the government's broad objective.[50] While this article ultimately rejects this theory, it offers a novel reading of *Wilson Colony* in which the "non-identification" license proposal may have been just that.[51]

4. PSS

At the final stage of PA, the Israeli judge affords the government the least deference. There is "deference" in the sense that the government's evidence with respect to effects is presumed trustworthy and so on, but the fact that one of the parties in the case is the government has no immanent bearing on the PSS analysis. With PSS, PA finally exits the province of government expertise and fully enters the legal domain. The government has laid out the importance and the details of its proposed measure in previous stages, but now, it falls to the judge to balance between the government's touted communal benefits and the effect on the claimant. In *Beit Sourik*, this assessment considered "the general normative structure of the legal system, which recognizes human rights and the necessity of ensuring the … welfare of the local inhabitants, and which preserves 'family honour and rights'"[52] in accordance with international human rights obligations.

Barak demonstrated that balancing need not proceed in an "all-or-nothing" manner. He explained that PSS "is commonly applied with 'absolute values,' by directly comparing the advantage of the administrative act with the damage that results from it."[53] However, the aforementioned "relative" approach is also possible whereby "the administrative act is tested vis-à-vis an alternate act, whose benefit will be somewhat smaller than that of the former one."[54] In this case, the relative approach was preferable because it was possible for a wall to be constitutional. The wall simply could not impose a burden on farmers that was disproportionate to the security benefit.

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49 *Beit Sourik*, *supra* note 35 at para 58.

50 Stage three might even be viewed as encouraging creative thinking; if an equally satisfactory alternative measure can be devised, claimants could bypass stage four's more searching analysis.

51 See Part IV-A, below, for more on this topic.

52 *Beit Sourik*, *supra* note 35 at para 59.

53 *Ibid* at para 41. The outcome is also absolute because one principle usually prevails totally over the other. That both principles may be satisfied to at least some extent may mollify Webber's objection to having judges "pick favourites" in an atmosphere of reasonable pluralism.

54 *Ibid*.

If a slight impairment of the government objective enormously alleviates the rights infringement, the former is favoured. As initially proposed, the wall would have "injure[d] the local inhabitants in a severe and acute way."[55] The security gates were far apart along the wall and long line-ups were likely, so passing through them multiple times per day would have been unduly burdensome.[56] It would have violated locals' rights to property and freedom of movement. Given the high unemployment rate in the region, it would have made their already difficult lives worse.[57] Barak therefore insisted on a route that was *less* secure. It was ultimately redrawn to accommodate both sides to the greatest possible extent. His version of PSS affords no opportunity to take stock of political appearances—and that may be its most profound asset. His structure brings institutional actors into concert in a way that maximizes their strengths, and in a way that sanctifies the rights claimant's dignity.

B. Lessons for Canadian PA: Chief Justice McLachlin and *Wilson Colony*

Although identity security, not military security, was at stake in *Wilson Colony*,[58] *Beit Sourik* is nonetheless structurally instructive.[59] When Alberta first issued driver's licenses with photographs in 1974, there was an exemption for those who objected to being photographed on religious grounds; "it was an unspoken assumption that [it] was created for the Hutterian Brethren who have long had a number of colonies throughout the Prairies."[60] In 2003, a new provincial regulation mandated a universal photo requirement for driver's licenses and it created a provincial facial recognition data bank for the photographs. In *Wilson Colony*, the Hutterites objected on religious grounds. However, the government claimed the measure was necessary in order to address the growing problem of identity theft. For present purposes, the relevant issue was whether the proposed law, which clearly violated the Hutterites' section 2(a) *Charter* right to freedom of religion, could be justified under the *Charter*'s section 1 limitations clause.

1. The Objective

Based on Barak's model, both the majority and minority correctly defined the objective narrowly with regard to the government's stated objective. The majority opinion stated, "Maintaining the integrity of the driver's licensing system in a way

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55 *Ibid* at para 60.
56 *Ibid*.
57 *Ibid*.
58 *Wilson Colony*, *supra* note 1.
59 If anything, greater judicial scrutiny might have been warranted in the former relative to the latter, because although identity theft is a serious problem, it does not rise to the same level of life and death level as terrorism.
60 Margaret H Ogilvie, "The Failure of Proportionality Tests to Protect Christian Minorities in Western Democracies: *Alberta v Hutterian Brethren of Wilson Colony*" (2010) 12:2 Ecclesiastical Law Journal 208 at 209.

that minimizes the risk of identity theft is clearly a goal of pressing and substantial importance ...."[61] The government was permitted to frame its own objective. However, the "pressing and substantial" language that is a holdover from the original *Oakes* case must be replaced if stage four is to play a greater role. Even if some objectives might properly be considered "substantial," the temporal dimension of "pressing" is unclear.[62] Barak's inquiry has the advantage of keeping the question tied to government expertise: "is the objective reasonable?"

2. Rational Connection

Stage two was the least contentious part of the test; the government only had to "show that it [was] *reasonable* to suppose that the limit would further its goal."[63] As in *Beit Sourik*, meeting this criterion naturally flowed from satisfying stage one.

3. Least Restrictive Means

As discussed above, stage three ought to meet a strict Pareto requirement, which means that if the government can demonstrate that its objective would be *at all* compromised by the lesser means, the analysis would have to proceed to stage four. The majority held that any measure other than the universal photo requirement would "significantly increase the risk of identity theft ...."[64] This language was no doubt hyperbolic, but the question of whether there was *some* risk remains. The Hutterites proposed that they be granted licenses without photos, which would be marked "not to be used for identification purposes." Although such licenses could not be used as identity theft "breeder documents," the majority was concerned that "the one-to-one correspondence between issued licences and photos in the data bank would be lost ... [and] this disparity could well be exploited by wrongdoers."[65] However, it is difficult to imagine how this exploitation might occur. In any event, it would only enable a wrongdoer to drive illegally—though not for long unless he or she also forged the requisite insurance documentation and used both to register a vehicle. A wrongdoer could not simply forge a non-photo license under any name and then purport to be a Hutterite—would names and identifying information (e.g. height, weight, eye colour, hair colour) not still be stored in the database? The one-to-one correspondence between photos and licences would obviously be

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61 *Wilson Colony*, *supra* note 1 at para 42.

62 See *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21, [2010] 1 SCR 721. In publication ban cases, the government objective of preventing an accused's information from being disseminated is genuinely "pressing" because such bans are often necessary to protect the accused's immediate pre-trial privacy and to "preven[t] delay of the bail hearing" (*ibid* at para 22). Conversely, government objectives should not be considered "pressing" when they relate to programs that will not come into force until years after a case will be heard or, as in *Wilson Colony*, when the objective includes coordinating with future similar measures *possibly* to be adopted in other provinces.

63 *Wilson Colony*, *supra* note 1 at para 48 [emphasis added].

64 *Ibid* at para 62.

65 *Ibid* at para 60.

lost, but the correspondence between *drivers* and licenses would remain. The only realistic way for identity theft to occur (and only in the limited context of being able to drive) would be if a wrongdoer (Hutterite or otherwise) were to steal the license of a Colony member with a similar physical description.[66] Unreported thefts are possible, but especially with respect to the 240-member Wilson Colony, they strain the parameters of Pareto Optimality.[67]

Perhaps the majority's more serious concern related to the possibility of exemptions for "an unspecified number of religious objectors ...."[68] What might those justices have had in mind? "[T]he unspoken elephant in the case [is] its potential to spill over into claims by other religious groups for photo identification exemptions ... [such as] the over one million Muslims now living in Canada."[69] However, such a floodgate concern seems inappropriate in evaluating the specific claim of the small Wilson Colony. In any event, it is a perfect example of policy effect-based reasoning that should not influence stage three. Such reasoning should take place, if at all, in stage four's daylight.

4. PSS

Before *Wilson Colony*, some cases had addressed stage four in depth,[70] but it appears that only one case actually turned on stage four[71] and it was decided nearly ten years prior. In *New Brunswick (Minister of Health and Community Services) v G(J)*,[72] withholding state-funded counsel in a custody application passed the first three stages of *Oakes*. However, the deleterious effects of the policy were found to be far greater than the salutary effects of government cost-cutting.[73] Clearly, the case had little precedential value. In *Wilson Colony*, Chief Justice McLachlin stated that "the decisive analysis

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66 This might better be termed "identity conferral" if one Hutterite were to willingly, and illegally, give his or her license to another.

67 Nonetheless, as long as there is no way for the government's communal objective to be realized to exactly the same extent without derogating rights any less, the analysis must proceed to stage four. This is especially true because presently the government must use "minimally" impairing means, as opposed to the "least" impairing means. Recall that at stage four, Barak's "relative approach" makes it possible to require means that truly are "least" impairing—or not impairing at all—if the means used would have unacceptably deleterious *effects* on the claimant's rights.

68 *Wilson Colony*, *supra* note 1 at para 60. See also *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 (where the attendant problems with respect to idiosyncratic religious self-definition also arise). However, it is unlikely that a claimant would ground a potentially expensive *Charter* claim on an insincere belief (such a claim would be even more unlikely to succeed).

69 Ogilvie, *supra* note 60 at 213.

70 See e.g. *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45. Here, a criminal ban on child pornography was deemed constitutional even if it did not contain depictions of actual people. The stage three conclusion was that the impugned section *might* be overbroad and that stage four would decide matters. However, this still confuses the justificatory division between stages one to three, which are tied to the objective, and stage four, which is not.

71 Janet Epp Buckingham, "Drivers Needed: Tough Choices from *Alberta v. Wilson Colony of Hutterian Brethren*" (2010) 18:3 Const Forum Const 109 at 115, n 74.

72 *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR, 216 NBR (2d) 25.

73 *Ibid* at para 98.

[fell] to be done at the final stage of *Oakes*."[74] However, the majority's reasoning makes it implausible that a future law that passes the first three stages could be found to have sufficiently deleterious effects to be struck down.[75] If the majority's reasoning was generally preferable in the first three stages, the minority's approach was more compelling (if not more coherent) at the final stage.

Chief Justice McLachlin stated that a legislature cannot be required to "await proof positive"[76] that its objective will be furthered by a measure.[77] However, Justice Abella pointed to Chief Justice McLachlin's own statement in *RJR-MacDonald v Canada (Attorney General)*[78] that evidence, not speculation, was required to justify limiting a right.[79] The possibility that the license system might be harmonized with those of other provinces in the future does not seem significant enough to override a serious detriment to the Hutterites in the here and now. And as Justice Abella suggested, it is impossible to know if other provinces will provide exemptions in the future. President Barak might concede the existence of some negligible security benefit to Chief Justice McLachlin, but if he were willing to favour a less secure security wall in the midst of pressing danger in order to protect locals' rights, then would he not find it relatively easy to deny the government a speculative benefit in order to protect the Hutterites' immediate rights claim? Barak's institutional role formulation suggests that at stage four, the Court should have evaluated *all* of the benefits and harms flowing from the law as realistically as possible. Stage four is where the government no longer receives the benefit of the doubt.[80]

Chief Justice McLachlin found the impairment to the Hutterites "[did] not rise to the level of seriously affecting the claimant's right to pursue their religion."[81] She viewed driving as a privilege, not a right.[82] However, the dissenting judgments highlighted how being unable to drive imposes a severe burden on the Hutterites. The Alberta Court of Appeal also saw driving as a vital part of the Hutterites' daily

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74 *Wilson Colony*, *supra* note 1 at para 78.

75 Buckingham, *supra* note 71 at 114.

76 *Wilson Colony*, *supra* note 1 at para 85.

77 Incidentally, the impugned law was an administrative regulation, not the product of legislative deliberation.

78 *RJR-MacDonald v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1 [*RJR-MacDonald* cited to SCR].

79 *Wilson Colony*, *supra* note 1 at paras 137-48.

80 This means that the inquiry should not have been confined to the internal integrity of the driver's license system. The existence of over 700 000 unlicensed drivers should have been material. See *Wilson Colony*, *supra* note 1 at para 159 (where Justice Abella questioned why the government had not issued universal identification cards, for example, if cogent identification systems were so vital).

81 *Wilson Colony*, *supra* note 1 at para 99.

82 It is noteworthy that the Court seems to define something as a privilege just before it is taken away. See e.g. *Wilson Colony*, *supra* note 1 (concerning the driver's licences); *Black v Canada (Prime Minister)* (2001), 54 OR (3d) 215, 199 DLR (4th) 228 (concerning Black's peerage). However, when something is about to be validated by the Court, it is defined as a right. See e.g. *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 (concerning Roncarelli's liquor license). See also *Wilson Colony*, *supra* note 1 at para 201. Justice LeBel points out that drivers' licenses are available to anyone who qualifies. As both commercial licenses and drivers' licenses are integral to daily life, a driver's license is arguably more similar to a liquor license right than to a peerage privilege.

lifestyle. Colony members had to drive in order to "facilitate the sale of agricultural products, purchase raw materials from suppliers, transport colony members (including children) to medical appointments, and conduct the community's financial affairs."[83] Alexy's Weight Formula would have shown that at the appropriate (widest) level of consideration, the contest was not even close. The abstract weights of freedom of religion and identity theft prevention might as well be registered as equal, as both are equally important. The intensity of harm to the Hutterites was either moderate or severe, but even if it were "light," as characterized by Chief Justice McLachlin, it would have made no difference.[84] Given the intensity of interference with the competing principle, identity theft prevention was "light" *at best* or, arguably, "trivial." This is because even if all Wilson Colony licenses were associated with photographs, this alone would have a negligible effect on the incidence of identity theft, as Justice Abella explained. While the empirical reliability of the infringement on the Hutterites' freedom of religion was virtually certain, the infringement on the government's identity theft countermeasure (the competing principle) was far from. Wilson Colony's rights claim should have prevailed. Applying Barak's relative balancing approach, the Colony's non-identification license proposal would have achieved the best balance between freedom of religion and identity theft prevention.

Although the dissents were substantively compelling, they disclose some structural confusion. Justice Abella held, "The stages of the *Oakes* test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed."[85] However, although a judge's reasoning may be unavoidably holistic during oral arguments, the *written* reasons should be tied to the stages' logical function. Weighing should only take place in stage four. Similarly, Justice Abella stated, "It is possible … to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional."[86] Arguably, it is not. If a measure fails at stage three, it does not enter stage four;[87] "minimally impairing means" is a prerequisite for balancing—if it were not, why retain it? Justice LeBel similarly saw stages three and four as tightly wedded. It is difficult to say whether there is a general misunderstanding of PA's logic and history (which would be surprising given the Court's obvious interest in foreign scholarly resources) or whether there has been an attempt to cloak the "policy" reasoning demanded by stage four in the neutral trappings of stage three. In any event, the resulting application remains unsatisfactory.

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83 *Hutterian Brethren of Wilson Colony et al v Alberta*, 2007 ABCA 160 at para 6, 417 AR 68.

84 Recall that the Weight Formula frames both the rights principle and competing principle negatively so that they can be relativized directly.

85 *Wilson Colony*, *supra* note 1 at para 134.

86 *Ibid* at para 149.

87 See e.g. *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 (where the measure failed at stage three and should not even have been allotted the cursory paragraph in stage four).

IV. ANSWERING PA'S CRITICS

This article thus far has attempted to show, through *Beit Sourik* and *Wilson Colony*, that "robust PSS" adjudication has serious advantages over its "weak PSS" rival, which presently reigns in Canada. However, is retaining any form of PA preferable to abandoning multi-part tests altogether?

A. Habermas's Accusation of Irrationality

Jürgen Habermas claims that balancing is irrational. He contends that PSS converts rights, which have a deontological character, into values, which "can only be relativized by other values."[88] This relativity is problematic because in his view, there are no "rational standards" by which to bring values "into a transitive order … from case to case …. [Therefore] weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies."[89] Habermas concedes that "not every right will win out over every collective good in the justifications of concrete decisions."[90] However, a collective good will defeat a right only when it "can itself be justified in the light of higher norms or principles."[91]

This rights-values binary raises two questions. First, what "collective good" that reaches the PSS stage cannot be justified in terms of a higher order norm?[92] The distinction between values and deontic rights seems unsustainable in practice. Second, one may disagree with Alexy's suggestion that some rights ("values" for present purposes) can be prioritized over others, but is it fair to say that all such determinations must be arbitrary because they proceed from customary standards? It is difficult to conceptualize law without "customary standards." These may be critiqued, and ought to be. However, in doing so we are no longer talking about PA as one form of constitutional adjudication. Rather, we are talking about the institutional practice of law itself. In *Wilson Colony*, the competing abstract principles ought to have been assigned equal weights, and perhaps this is often the case. However, as it was suggested above, preventing terrorism might be assigned a higher abstract weight than preventing identity theft. This hierarchy of customary standards may be contestable, but "contestability does not imply irrationality,"[93] so the irrationality accusation seems unfounded. Challenges to PA's commensurability unfortunately are less readily dispatched.

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88 Habermas, *supra* note 13 at 259.

89 *Ibid*.

90 *Ibid*.

91 *Ibid*.

92 See e.g. *Criminal Code*, RSC 1985, c C 46 s 269.1(1). Torture is proscribed in Canada and is ineligible for PA. Recent equivocation on torture via extradition had nothing to do with any defect intrinsic to PA.

93 Alexy, *supra* note 25 at 32.

B. Webber's Incommensurability Objection

Webber argues that "the moral and political choices that must be made in relation to constitutional rights reveal a surplus of valuations, not a single metric."[94] For Alexy, the single metric is "the point of view of the constitution."[95] Webber, however, does not see how abstract constitutional principles inform judgments made via the triadic scale: "Should it follow that because a competing principle is admitted by the constitution that the constitution can therefore settle whether an interference with that principle is light, moderate, or serious?"[96] Webber may be putting the cart before the horse; the Constitution merely helps to identify abstract weights, which need not necessarily be forced into a priority sequence. It is only *after* the judge identifies the relevant abstract weights that interferences with them can be assessed uniquely in each case. Precedent might illuminate what qualifies as a "moderate" as opposed to "serious" infringement of a certain right (recall that the latter is geometrically more difficult to justify). For instance, *RJR-MacDonald* suggests that restricting advertising for an important public purpose (e.g. child protection) represents a moderate infringement on commercial expression, not a severe one.[97]

Webber is correct that if Alexy is read to characterize PSS as a technical exercise that will produce absolute mathematical answers, abstracting morality out of the equation, his contribution is actually counter-productive. However, Alexy's approach is instructive if it is understood to organize and explain complex moral reasoning. He contends that the constitution provides the common metric for balancing. But the constitutional view is not a transitive ordering device—it imports into the balancing process the entirety of the *corpus juris* and everything that makes a society "free and democratic." The "constitutional view" is over-determined, dynamic and irreducible, so it is contingent on a case's facts and relevant precedent. It may be more productive to characterize the common metric as the *procedure* of balancing itself, as it is refined across an ever-growing number of cases. Assessed purely in terms of the Weight Formula itself, such a metric is at least plausible.

The law is not an instrument of scientific precision. There is no reason to accept that Webber's pure moral reasoning would do a better job than PSS, which is admittedly imperfect, of bringing entire constellations of interests (and deontic visions) into conversation with a law. To simply say that "rights are firewalls" is not enough because the intricate rights terrain that may be engaged by a law rarely is obviously one-sided. A government measure may advance individual rights

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94 Webber, *supra* note 12 at 196.

95 Robert Alexy, "On Balancing and Subsumption: A Structural Comparison" (2003) 16:4 Ratio Juris 433 at 442, cited in *supra* note 12 at 194-95.

96 *Ibid* at 195.

97 *RJR-MacDonald*, *supra* note 78. Obviously, what qualifies as "moderate" for one judge may be "severe" for another. It is the facts of the potentially analogous case which homogenize intensity judgments to some extent, not their dictionary meaning *per se*.

(especially those related to "positive liberty") just as much as the specific "rights" claim advanced against it.[98] Balancing adopts a bird's-eye view of the rights landscape. That is the view required by Canada's constitutional structure. To call for balancing is not to call for the end of moral absolutes (as in the need for an absolute prohibition of torture, Webber's recurrent PA bogeyman). On the contrary, PSS is a tool—and no more—for resolving difficult legal disputes in a way that fully respects the possible complexity of the moral entanglements therein.

V. LARGER TRENDS IN *OAKES*

If PA is theoretically defensible and "robust PSS" is its ideal form, it remains necessary to go beyond *Wilson Colony* to assess the prospects for improving the *Oakes* analysis. To this end, Barbara Billingsley's rare empirical survey of the history of the *Oakes* test confirms that "in both Social Policy Cases and Criminal Cases, the Court most often divided on … a combination of two or more of the proportionality factors …. [And that] the *Oakes* Test led to less consensus of result in Social Policy than in Criminal Policy Cases"[99] Billingsley attributes this to the competing values at play in the former, which different judges may appraise differently.[100] It is telling that "in six of [eight divided policy cases between 1995 and 2003] either the majority or dissenting justices cast doubt on the definition, accuracy, or importance of the purported legislative objective(s)."[101] Clearly, irregularities at the stage of the objective, which precedes the "proportionality proper" part of PA,[102] are bound up in that subsequent phase. The unpredictability of these outcomes suggests that the *Oakes* test needs reform. To say that the relatively value-laden nature of social policy inquiries will forever preclude greater judicial consensus is insufficient and it fails to strive towards honouring the rule of law.

Sujit Choudhry's more qualitative analysis reveals the extent to which inconsistent evidentiary standards are at the heart of the judicial chaos. *Oakes*' "dominant narrative" is the transition from simple dichotomies (i.e. different standards in social policy as opposed to criminal cases) to a more contextual inquiry. The test is "by its very nature a fact-specific inquiry."[103] However, Choudhry identifies a powerful "counter-narrative." The Court has failed even to articulate one of the

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98 This is to say nothing of novel group rights that may receive constitutional protection in the future; certain individual rights (e.g. those related to religious expression) may be better understood and analyzed as group rights.

99 Barbara Billingsley, "*Oakes* at 100: A Snapshot of the Supreme Court's Application of the *Oakes* test in Social Policy v. Criminal Policy Cases" (2006) 35 SCLR (2d) 347 at 366-67.

100 *Ibid* at 367.

101 *Ibid* at 368.

102 See Barak, *supra* note 34 at 5 (where he refers to part two of the *Oakes* test, the latter three stages taken together, as "proportionality in the *regular sense*") [emphasis in the original].

103 *RJR-MacDonald*, *supra* note 78 at para 133, McLachlin J (as she was then), cited in Sujit Choudhry, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 523.

most pressing questions in *Charter* cases: "who should bear the risk of empirical uncertainty with respect to government activity that infringes *Charter* rights?"[104] Interestingly, Chief Justice McLachlin has been clearest in calling "not just [for] common sense or theory, but [for] evidence."[105] Choudhry advocates honouring the "reasonable basis" test for government action set out in *Irwin Toy Ltd v Quebec (Attorney General)*.[106] He states that "the question is whether the government has a 'reasonable basis' for concluding that an actual problem exists, that the means chosen would address it, and the means chosen infringes the right as little as possible."[107] He believes that had this test been applied in *Chaoulli*, the Quebec government's law banning private health care would have easily been upheld because, clearly, "the materials put into evidence more than met this attenuated [reasonable basis] standard."[108]

Choudhry is likely correct on the facts of *Chaoulli*, and the Court does need a consistent evidentiary standard. However, the requirement in *Irwin Toy*—that the means chosen infringes the right as little as possible—still does nothing to address the need for balancing. Stage four should evaluate all of the effects of a measure as thoroughly as possible, but evidence should not have to pass a bright-line reasonableness test. Uncertain effects should not be left out of the analysis; they should merely receive a very low *weight*. In *Wilson Colony*, a simple reasonable basis test, coupled with inadequate regard for the effect of the impugned law on the Hutterites, imperilled a discrete and insular minority's very insularity by requiring a false choice between their religious requirements and their ability to maintain their community without the undesired and significant outside assistance of hired drivers.

VI. CONCLUSION: TOWARDS A MORE DETERMINATIVE FOURTH STAGE

Judges reluctant to enter stage four are justifiably concerned with maintaining the independence of the judiciary, a requirement for the court's ongoing legitimacy. Even poor public optics may be a concern. The judicial practice of "deference" must be kept separate from structural critiques of judicial review.[109] In the latter instance, academics investigate the theoretical and empirical legitimacy of judicial review. In the former, judges constitutionally tasked with judicial review abdicate by

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104 *Ibid* at 522 [emphasis added].

105 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 150, [2005] 1 SCR 791 [*Chaoulli*], cited in Choudry, *supra* note 103 at 533. Where was the government's evidence in *Wilson Colony*? Recall Justice Abella's consideration of the 700 000 people who have no driver's licences.

106 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy* cited to SCR].

107 Choudhry, *supra* note 103 at 525, citing *Irwin Toy*, *supra* note 6 at 994.

108 Choudhry, *supra* note 103 at 534.

109 If one perceives judicial review to be illegitimate, that does not translate straightforwardly into favouring greater deference when judicial review actually occurs (i.e. as "the best of a bad situation"). This is because if the court fails to quash a law when it is warranted, the relevant rights may be harmed more conclusively than if the law were not assessed at all. It is the difference between institutional ratification of a government measure on the part of the judiciary and keeping constitutional responsibility with the government alone by not assessing the measure at all.

deciding unjustifiably that a question before the court is better decided by another government branch. Lord Mansfield distilled a judge's duty to its essence: "let justice be done though the heavens may fall"[110]—the cave at "unless politicians appear better situated to do it instead" is nowhere to be found.[111] Judicial review ultimately is about protecting the rights of citizens—all citizens—not just those belonging to the majority that is represented in the legislature. If the "majority" in an increasingly pluralistic society sometimes "loses out" to an individual or to a minority on the most concrete level, it must be remembered that those in the majority in the present configuration will on some other day be in a minority. Lorraine Weinrib highlights that the purpose of the *Charter* was to put certain important rights *beyond* ordinary politics.[112]

Webber's proposal that judges should engage in more direct moral reasoning would follow naturally from Jeremy Waldron's structural assessment that "[t]he ability of judges in the regular hierarchy of courts to reason about rights is exaggerated when so much of the ordinary discipline of judging distracts their attention from direct consideration of moral arguments."[113] He explains that "doctrines and precedents [can become] a distorting filter on the rights-based reasoning ...."[114] However, doctrines such as PA assist in logical reasoning and precedents provide some objective constraints for judges. Especially in the contemporary constitutional setting, the positive law itself is not devoid of "moral" or "policy" reasoning (which may be reflected in recurrent findings of popular trust in the judiciary over other branches of government). Indeed, precedents ought to be informative, but not determinative.

Although interpretive and institutional role theories are not coextensive, Canada's structure of constitutional supremacy, in which judicial review is an indispensable component, is best served if judges use transparent logical tests to organize and systematize analyses that have unavoidable moral dimensions. Robust PA ensures that judicial justification is careful and transparent, which itself promotes morality and fairness.

Both dissenting justices in *Wilson Colony* relied meaningfully on stage four, and the Court increasingly gestures at its importance. That the Court is so receptive to comparative jurisprudence also bodes well for the emergence of robust PSS.

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110 *R v Wilkes* (1768), 4 Burr 2527, 98 ER 327 at 347 (where Lord Mansfield first invoked the maxim in Latin, "*fiat justitia ruat caelum*"). Some might argue that the maxim should be translated as "do justice unless the court thereby risks losing its legitimacy." However, if doing justice in a particular case risks illegitimating the court, its legitimacy is not worth much.

111 Obviously, no court has the capacity to legislate unilaterally the precise details of complex social schemes. This article is concerned with the extent to which the Court defers for reasons other than institutional capacity. Government branches must coordinate with each other to comply with the *Charter*, and with as much citizen participation as possible.

112 Lorraine E Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6:2 Rev Const Stud 119 at 123.

113 Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:4 Yale LJ 1346 at 1359.

114 *Ibid*.

Justice Abella has saturated her judgments with foreign authorities and Chief Justice McLachlin has referred to Barak's writing in *Wilson Colony* itself. The fact that every other nation that uses PA relies more heavily on PSS has likely not gone unnoticed. But if awareness is to translate into action, serious reform is needed. To prevent contaminating subsequent stages, stage one must serve as a low threshold; it should refer to a "reasonable" objective, not to a "pressing and substantial" one. Stage three must be confined to Pareto Optimality—its logical strictures must not be used to cloak policy reasoning. Stage four must do the heavy lifting in the usual course. Judges ought to engage in a searching inquiry into the full extent of rights infringement, which ought to be weighed against the likely actual benefit of the measure, not just the benefit as the government frames it. It is not by accident that "deference" receives no weight in the Weight Formula. When judges follow Justice LaForest's advice to bear in mind the legislature's representative function, they put their thumb on the government's side of the scales of justice. When self-legitimating deference is the order of the day, PA loses touch with its origins—and its origins were all about constitutional supremacy, logical rigour, and genuine fairness to all parties in the process of justification.