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# The Constitutional Status of Overbreadth: A Reply to Professor Stewart

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The Supreme Court's jurisprudence constitutionalizing overbreadth as a principle of fundamental justice under section 7 of the Charter adopted two understandings of the norm. The first conception operates in a "strict" sense wherein any effect of a law that is disconnected from its objective renders the law overbroad. The second conception applies in a "relaxed" manner by prohibiting any application of a law that overshoots its objective more than reasonably necessary. Hamish Stewart's recent contribution to the literature agrees with and builds upon my prior argument that the strict version of the norm fails to qualify as a principle of fundamental justice. He nevertheless asserts that the relaxed norm ought to maintain its constitutional status. There are, however, two reasons to question this conclusion. First, the relaxed version is highly indeterminate as what is "reasonably necessary" to meet a legislature's objective provides no concrete restraint on judges declaring laws violative of the *Charter*. Second, the relaxed norm does not attract adequate consensus as a principle of fundamental justice. Instead, overbreadth in this form operates as a "gross disproportionality light" that effectively crowds out the more intuitive principle of justice that laws must not impose grossly disproportionate effects.

## I. Introduction

Hamish Stewart's work on the interpretation of section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*")[1] has proven exceedingly valuable for jurists. Both his book on the

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

provision[2] and his scholarly work more generally have aided in developing a principled understanding of section 7's role in various areas of the law. I nevertheless wish to engage with Stewart on a point of substantial importance in the section 7 jurisprudence, namely, the constitutional status of the Supreme Court's favored principle of fundamental justice: overbreadth. Stewart recently revisited this question given the overbreadth principle's development in the jurisprudence in what Stewart calls a "strict" form and a "relaxed" form.[3] The former version asserts that any law that applies to a single real or hypothetical individual in a way that is inconsistent with that law's objective violates fundamental justice.[4] The latter version, by contrast, only requires that the law apply in a manner that is "reasonably necessary" to its operation.[5] As Stewart observes, recent decisions of the Court appear to pick and choose between these two versions of the norm without acknowledging let alone defending the version of the overbreadth norm applied.[6]

This state of affairs is particularly problematic as no argument has ever been provided as to why either norm qualifies as a principle of fundamental justice.[7] Stewart's contention that the strict version of overbreadth fails to so qualify is eminently reasonable and sits well with my earlier argument to this effect. In essence, I argued that the strict standard renders any law that engages the life, liberty, or security of the person interest and employs a bright line rule — a structure of rules that inherently catches conduct that overshoots its objective — is not "fundamental to justice" as required under section 7 of the *Charter*.[8] As Stewart seems to agree with (and build upon) that view,[9] I need not discuss the rejection of the strict overbreadth standard in detail. I am more interested in the insight that the overbreadth norm applies in a "relaxed" manner and, less clearly, that this norm meets the criteria for qualifying as a principle of fundamental justice. I think at minimum this is not obvious, and at worst the case cannot be persuasively made that the relaxed norm should be a constitutional principle. To defend this view, I begin by overviewing the Supreme Court's two conceptions of overbreadth. I then explain Stewart's defence of a modified understanding of the relaxed form of overbreadth before subjecting that defence to closer scrutiny.

Before proceeding further, it is prudent to make a preliminary observation about the purpose of this article. What follows is a relatively uncommon (at least in Canada) "reply" article. I therefore assume that the reader is familiar with Stewart's important contribution to the thorny question of how any norm of overbreadth should be conceptualized in Canadian con-

2 See Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019) [Stewart, *Fundamental Justice*].

3 See Hamish Stewart, "Overbreadth Revisited" (2024) 69 McGill LJ 247 at 249 [Stewart, "Overbreadth Revisited"].

4 See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 112–19, 123 [*Bedford*].

5 See Stewart, "Overbreadth Revisited", *supra* note 3 at 249.

6 See e.g. *R v JJ*, 2022 SCC 28; *R v Ndhlovu*, 2022 SCC 38 [*Ndhlovu*]; *R v Sharma*, 2022 SCC 39 [*Sharma*]; *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17.

7 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 252, citing *R v Heywood*, [1994] 3 SCR 761 at 790–91 [*Heywood*]; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 629–31 [*Nova Scotia Pharmaceutical*] (reasons of Justice Gonthier implying the idea of overbreadth, while relevant under section 1 analysis, is *not* a principle of fundamental justice).

8 See Colton Fehr, "Re-thinking the Instrumental Rationality Principles of Fundamental Justice" (2020) 58 Alta L Rev 133 [Fehr, "Instrumental Rationality"].

9 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 286–87, n 137.

stitutional law. As his work details much of the legal doctrine, I am selective in my review of the same. Instead, I review parts of this jurisprudence that I think best illuminate a question that requires further reflection: whether *any* conception of overbreadth is a defendable constitutional norm. While we agree that the strict norm fails to so qualify, Stewart does not adequately explain why the relaxed standard meets this definition. Any such argument must engage not only the question of whether overbreadth satisfies the requirements for qualifying as a principle of fundamental justice, but also how the overbreadth principle relates more generally to the other principles of fundamental justice constitutionalized in the *Charter*. At bottom, I contend that the relaxed overbreadth principle is most problematic as it operates as a "gross disproportionality light" that crowds out the more intuitive principle of justice that laws must not impose grossly disproportionate effects.

## II. Two Understandings of Overbreadth

The overbreadth principle was initially held by the Supreme Court to be subsumed by the minimal impairment branch of the test for justifying infringements of rights under section 1 of the *Charter*.[10] As Justice Gonthier wrote for a unanimous Court, in cases where overbreadth is constitutionally relevant it "remains no more than an analytical tool [because] [t]he alleged overbreadth is always related to some limitation under the *Charter*."[11] It followed that "[t]here is no such thing as overbreadth in the abstract" and that "overbreadth has no autonomous value under the *Charter*."[12] Justice Gonthier nevertheless recognized the complex relationship between the overbreadth concept and the principle of fundamental justice prohibiting vague laws.[13] Building on this relationship two years later in *R v Heywood* ("*Heywood*"),[14] the overbreadth principle was nevertheless defined separately from vagueness. As Justice Cory wrote, "[o]verbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined … [while with] overbreadth the means are too sweeping in relation to the objective."[15]

In explaining the scope of the overbreadth principle, Justice Cory wrote that the central inquiry is whether the impugned means are "reasonably necessary" to achieve the law's objective.[16] Importantly, whether a particular law meets this standard was required to be assessed with a sense of deference to Parliament.[17] As Justice Cory explained, "[a] court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator."[18] While showing some deference to democratically enacted laws is prudent, it is unclear in *Heywood* why "reasonably necessary" constitutes an acceptable threshold for declaring a law unconstitutional. Unfortu-

10 See *Nova Scotia Pharmaceutical*, *supra* note 7 at 629.
11 *Ibid* at 630.
12 *Ibid*.
13 *Ibid* at 630–31.
14 *Supra* note 7.
15 *Ibid* at 792.
16 *Ibid*.
17 *Ibid* at 793.
18 *Ibid*.

nately, the Court in *Heywood* did not engage with whether overbreadth so defined qualified as a principle of fundamental justice. This was particularly unusual in light of Justice Gonthier's earlier comments and the fact that the Court elaborated a legal test for determining whether a principle is fundamental to justice just one year before deciding *Heywood*, a test that continues to govern today.[19]

Post-*Heywood*, the overbreadth principle laid dormant for nearly two decades until the Supreme Court released its landmark decision in *Canada (Attorney General) v Bedford* ("*Bedford*").[20] Writing for a unanimous bench, Chief Justice McLachlin provided an updated understanding of the overbreadth principle so as to address a legitimate concern with its application: the need to avoid an individual being required to prove that the law's means and ends were unreasonably balanced. "Unlike individual claimants," she wrote, "the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole."[21] For Chief Justice McLachlin, requiring that section 7 claimants "establish the efficacy of the law versus its deleterious consequences on members of society as a whole … would impose the government's s. 1 burden on claimants under s. 7. That cannot be right."[22]

To address these concerns, Chief Justice McLachlin altered the overbreadth principle to accord with what Stewart calls a "strict" and I elsewhere call an "individualistic" approach.[23] As Chief Justice McLachlin opines, an overbroad law "addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts."[24] Under this approach, "the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose."[25] It is irrelevant at the section 7 stage "how well the law achieves its object" or "how much of the population the law benefits."[26] Instead, the question at the rights stage of the analysis "is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7."[27]

While the strict understanding of overbreadth continues to be selectively applied,[28] a return to the relaxed or "holistic" (as I elsewhere call it)[29] understanding of overbreadth adopted in *Heywood* is now frequently being deployed post-*Bedford* by both the Supreme Court and

19 See *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 590–91, 607 [*Rodriguez*].

20 See *Bedford*, *supra* note 4.

21 *Ibid* at para 126.

22 *Ibid* at para 127.

23 See Colton Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51 UBC L Rev 55 [Fehr, "Individualistic Approach"].

24 See *Bedford*, *supra* note 4 at para 112.

25 *Ibid* at para 113.

26 *Ibid* at para 123.

27 *Ibid*. For an earlier argument for why an individualistic conception of arbitrariness is incoherent, see Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60 McGill LJ 575 at 587 [Stewart, "Structure"].

28 See e.g. *Ndhlovu*, *supra* note 6. For my commentary on this case, see Colton Fehr, "Sexual Offender Information Registries: The Case for a Punishment-Based Framework" (2025) 50 Queen's LJ 32. Effectively, I contend that the wrong provision of the *Charter* was applied in this case and that a punishment analysis would have rendered the law constitutional.

29 See Fehr, "Individualistic Approach ", *supra* note 23.

provincial appellate courts. As Stewart points out, the latter understanding of overbreadth is typically applied as a means to uphold a challenged law against an overbreadth challenge.[30] The concern in cases where the relaxed version of the overbreadth norm is deployed is that the impugned provision may prove incapable of adequately achieving its objective if the strict norm is applied. As Stewart succinctly puts it, "if a law is overinclusive, the strict version of the norm would say that the law is overbroad, while on the relaxed version, over-inclusiveness might be reasonably necessary to avoid under-inclusiveness, and if so, the law would not be overbroad."[31] As opposed to requiring the state to justify its law under section 1 of the *Charter*, the relaxed overbreadth norm therefore returns to a more deferential version of the principle that recognizes perfect tailoring of a law to achieve its objective in all cases is often an unreasonable expectation.

## III. Stewart's Proposal

Stewart opens his comment on the Supreme Court's overbreadth jurisprudence by making an astute observation about two assumptions underpinning this principle. First, the Court assumes that every law is instrumental in nature and therefore can logically be assessed for overbreadth. As Stewart writes, it is assumed that "every law is instrumental to an objective that is external to that law, in the sense that its objective can be adequately specified without reference to legal order itself."[32] Second, the Court at times also assumes that "it is possible to draft and interpret a law so that it never applies in situations where its application would not directly forward that externally defined objective."[33] The strict version of overbreadth accepts both of these assumptions while the relaxed approach only accepts the first assumption.[34] In Stewart's view, both assumptions are problematic and therefore require that the structure of overbreadth be revisited.

In rejecting the first assumption, Stewart explains that a law is instrumental if it has "a well-defined purpose that is independent of the means chosen to achieve it."[35] In his view, by insisting that all laws be defined in this manner, the Supreme Court "overlooks the ways in which a specific law can, and sometimes does, in the context of a legal order, constitute the very purpose it is supposed to promote."[36] This is because "the purpose of legal order in general is not instrumental at all, because its function is not to achieve a good that is definable independently of it but to constitute a system of right that governs the interactions of human beings who pursue their own purposes freely in the sense of not being subject to each others' private power, but only to properly constituted public power."[37] Stewart continues:

> The success of a legal order of this kind cannot be judged according to the amount of some independently definable good, such as the amount of happiness or the level of atmospheric carbon dioxide, that it produces. Although oriented towards human freedom, it cannot be understood as an instrument for

30 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 257.

31 *Ibid*.

32 *Ibid* at 260.

33 *Ibid*.

34 *Ibid*.

35 *Ibid* at 282.

36 *Ibid* at 260.

37 *Ibid* at 261.

> producing human freedom, because human freedom is not a good that can be quantified and assessed independently of the idea of legal order that is supposed to constitute it. The success of such a legal order must be judged according to how well it constitutes the relevant idea of freedom.[38]

While this view is not without controversy,[39] I agree with Stewart that "some laws are enacted just to do what they do; for example, to create a system of rules just to make exchange possible, apart from any good that exchange might serve (contract law), or to prohibit certain conduct merely because it is, in some sense, inherently wrongful (the law of theft)."[40] As Stewart suggests, the norm against overbreadth cannot rationally apply to these laws.[41]

Stewart makes this point more clearly by applying the overbreadth principle to the law of murder. In his view, the purpose of this prohibition is to sanction a serious moral wrong. Yet, such a conclusion fails to separate the purpose of the law from its means and therefore is contrary to the Supreme Court's insistence that all laws be assessed instrumentally.[42] If the offence's purpose is separated from its means, Stewart suggests that the murder prohibition might reasonably be thought to be the protection of each individual's interest in their life. However, such a formulation counterintuitively renders the murder prohibition overbroad as some individuals have no interest in continuing their life. As Stewart contends, this would be the case for an individual who received approval for medical assistance in dying but the procedure was delayed longer than expected. If that person consented to another person killing them in the interim, the latter person would be guilty of murder despite the victim objectively having no interest in continuing their life.[43] As Stewart persuasively concludes, avoiding such a result is most sensibly dismissed by rejecting the Court's current assumption that all laws are instrumental in nature.[44]

Stewart nevertheless concedes that the bulk of laws that threaten the threshold life, liberty, or security of the person interests required under section 7 of the *Charter* to engage the question of whether a law is overbroad are capable of being assessed instrumentally. This follows regardless of whether the law is a bright line rule (e.g. do not drive over 50 km/h) or a standard (e.g. drive in a reasonable manner).[45] If true, then application of the strict standard of overbreadth would invariably lead to all instrumental laws being "overbroad in the sense that there will inevitably be at least one actual or reasonably hypothetical fact situation in which the application of the law is not directly necessary to its purpose."[46] This follows "because laws, even instrumental ones, are stated in general terms and must be applied to a vast and unpredictable range of individual cases."[47]

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38 *Ibid*.

39 *Ibid*.

40 *Ibid*.

41 *Ibid* at 261–62.

42 *Ibid* at 262, critiquing *R v Moriarity*, 2015 SCC 55.

43 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 263.

44 *Ibid* at 264–65. Stewart also applies this rationale to several more recent cases to explain why courts have recently rejected a variety of overbreadth claims. See *ibid* at 265–71, citing *Sharma*, *supra* note 6 (limitations on conditional sentence orders); *R v Forcillo*, 2018 ONCA 402 (minimum sentence for manslaughter with a firearm); *R v NS*, 2022 ONCA 160 (sex work laws).

45 See Stewart, "Overbreadth Revisited", *supra* note 3 at 271–72.

46 *Ibid*.

47 *Ibid*.

Stewart illustrates the inherent vulnerability of instrumental rules to an overbreadth challenge based on the strict standard by reviewing numerous cases applying this norm. The overbreadth principle's impact on bright line rules is demonstrated by assessing the constitutional challenges to the prohibition against having sex with a minor found in section 150.1 of the *Criminal Code of Canada* ("*Criminal Code*").[48] That provision states that the age of consent for sexual relations is 16 years but allows for a series of "close-in-age" exceptions. Subsection 2.1 in particular provides that if the complainant is between 14 and 16 and the accused is not more than 5 years older, consent operates as a defence. In *R v AB* ("*AB*"),[49] this provision was declared overbroad at trial but upheld on appeal. The purpose of the provision was held at trial to be protecting young people from sexual exploitation.[50] As the trial judge found that the encounter between the accused and the young person who fell outside the close-in-age exception was consensual, the law was held to be overbroad.[51]

The Ontario Court of Appeal upheld the prohibition by implicitly relying upon the relaxed version of the overbreadth principle. In so doing, however, it was unclear what the Court determined to be the objective of the impugned law. At first, Justice Feldman purported to adopt a broader understanding of the law's purpose than merely protecting children from exploitation. In his view, the law sought "to protect children from sexual contact with adults or the invitation to have sexual contact by adults."[52] But this objective ignores the fact that the exceptions built into the law *allow* limited sexual contact between minors and adults. More persuasively, Justice Feldman observed that the policy underpinning the law was meant to "reflect Parliament's view that the inherent power imbalance between adults and children vitiates consensual sexual relations between them."[53] The latter observation is consistent with the conclusion that protecting children from exploitation is the narrower objective of the impugned law. Despite this unclear understanding of the law's objective, Justice Feldman concluded that the use of a bright line rule was reasonably necessary to achieve the law's aim.[54]

As Stewart points out, the rejection of the overbreadth challenge in *AB* is difficult to square with the strict standard. The broader objective stated by Justice Feldman effectively reads out the law's more intuitive end — preventing exploitation — thereby relying upon an objective that merely states that the law does what it says it does. Stewart observes that such an approach defines the law's objective too broadly, contrary to the Supreme Court's methodology for determining legislative objectives.[55] Yet, if preventing exploitation is presumed to be the legislative objective, then the law becomes glaringly overbroad when applying the strict standard, as the trial judge found that the sexual encounter in that case was consensual.[56] Stewart nevertheless suggests that the legislation would not violate the overbreadth norm if the relaxed overbreadth standard were applied. This approach allows the court to determine what is "reasonably necessary" for the law's operation. As Stewart suggests, "abandoning bright-line age-based rules

48 *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*].

49 *R v AB*, 2015 ONCA 803 [*AB*].

50 *Ibid* at para 12.

51 *Ibid*.

52 *Ibid* at para 38.

53 *Ibid*.

54 *Ibid* at paras 39–43.

55 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 275.

56 *Ibid* at 275–76.

in favour of a standard, such as lack of exploitation or abuse of power, would require a case-by-case inquiry into whether the purposes of the legislation were served by conviction in the particular case."[57] As I suspect most people would conclude, such an approach is imprudent "not only because it would make trials more complex, but also because it would significantly detract from the law's function of guiding its subjects," which in turn would render children less well protected from sexual exploitation.[58]

It is also possible — though in my view less obvious — that some laws that apply a standard-based rule are overbroad. Stewart illustrates this point by relying upon the overbreadth challenge in the Supreme Court's decision in *R v Boutilier*.[59] In response to guilty pleas to several offences, the Crown brought a dangerous offender application under section 753(1) of the *Criminal Code*. That provision requires proof that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons." The offender's overbreadth challenge was ultimately rejected based on an interpretation of the provision that permitted evidence of past and future dangerousness to impact the dangerous offender determination.[60] Stewart nevertheless suggests that the law may have been overbroad because the Court failed to "consider the possibility (though it does not appear to have been argued) … that a judge may well find an offender to be dangerous when he is not — not because of any error in fact-finding, but because of the inherent imprecision in the application of standards to particular factual situations."[61] Stewart's argument therefore extends the logic of the strict overbreadth principle to decisions made by judges, not just to the law itself. For Stewart, this approach is defendable as "any decision process, even when properly applied, will occasionally produce the wrong result."[62]

While Stewart acknowledges that most inappropriate applications of a rule may be corrected on appeal,[63] his interpretation of the overbreadth principle's scope can be grounded in the fact that the application of a legal standard is typically subject to deference out of recognition that not every discretionary decision can be subject to a correctness standard without rendering the justice system intolerably inefficient. It is therefore not implausible that a court would find that a standard wherein fact-finding is prone to error and subject to deference on appeal could be overbroad.[64] The fact that this approach impugns judicial discretion more so than the law itself nevertheless renders it questionable whether the overbreadth principle should be understood so broadly. If true, however, such examples should be situated along-

57 *Ibid* at 276.

58 *Ibid*. For a sample of literature discussing when to choose a rule over a standard, see Michael Coenen, "Rules Against Rulification" (2014) 124 Yale LJ 644 at 646, citing Louis Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42 Duke LJ 557; Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv L Rev 1685; Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U Chicago L Rev 1175; Pierre Schlag, "Rules and Standards" (1985) 33 UCLA L Rev 379; Kathleen Sullivan, "The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards" (1992) 106 Harv L Rev 22; Cass Sunstein, "Problems with Rules" (1995) 83 Cal L Rev 953. In Canada, see e.g. Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018).

59 *R v Boutilier*, 2017 SCC 64.

60 *Ibid* at para 23.

61 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 278.

62 *Ibid*.

63 *Ibid*.

64 *Ibid* at 278–79.

side bright line rules declared contrary to fundamental justice when considering the question: does the strict standard of overbreadth satisfy the prerequisites for qualifying as a principle of fundamental justice? As Stewart agrees with me that this question should be answered in the negative, I only provide a cursory review of this point below.[65] More important is whether Stewart is correct to assert that the relaxed standard of overbreadth should qualify as a principle of fundamental justice.

## IV. The Non-Fundamental Nature of Overbreadth

While the relaxed standard of overbreadth is less obviously problematic than the strict standard, Stewart's argument that the Supreme Court should affirm the former standard's constitutional status under section 7 of the *Charter* did not adequately engage with the requirements for qualifying as a principle of fundamental justice. Below I apply the legally applicable test to question whether the relaxed standard ought to be constitutionalized. I suggest it should not for two reasons: the relaxed version of the overbreadth principle is both unduly indeterminate and fails to attract adequate societal consensus as it effectively crowds out the more intuitive constitutional standard of gross disproportionality.

### A. Defining Fundamental Justice

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Despite the use of a second conjunction, the provision has consistently been interpreted by the Supreme Court as requiring a two-stage analysis.[66] First, the law must engage one or more of the threshold interests, namely, life, liberty, or security of the person. Second, any law that engages these interests must be inconsistent with a "principle of fundamental justice."[67] The latter question is relevant for present purposes as overbreadth in both its relaxed and strict form has at all relevant times been presumed to so qualify.

The legal test for qualifying as a principle of fundamental justice is now well-settled. Any principle must meet three criteria.[68] First, it must be a "legal principle."[69] This element of the test for qualifying as a principle of fundamental justice serves to avoid the "judicialization" of policy matters.[70] Second, any proposed principle must be capable of being defined in a sufficiently precise manner.[71] This requirement protects against "vague generalizations about what our society considers to be ethical or moral" from forming the basis for striking down democratically enacted laws.[72] Finally, any proposed principle must attract sufficient "societal

65 See generally Fehr, "Instrumental Rationality ", *supra* note 8; "Stewart, "Overbreadth Revisited ", *supra* note 3 at 286–87, n 137.

66 See *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 81–82, 338.

67 *Ibid*.

68 See *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8 [*Canadian Foundation*]. See also Stewart, *Fundamental Justice*, *supra* note 2 at 122–27.

69 See *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at paras 112–13 [*Malmo-Levine*].

70 *Ibid*.

71 *Ibid*.

72 See *Rodriguez*, *supra* note 19 at 591.

consensus."[73] Such principles derive from the "shared assumptions upon which our system of justice is founded."[74] Principles of fundamental justice therefore "find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens" and are viewed by society "as essential to the administration of justice."[75]

**B. Questioning Overbreadth**

One of Stewart's important contributions to the understanding of overbreadth is his suggestion that not all laws are instrumental. This observation renders the overbreadth principle more determinate by making it clearer to which laws the norm applies. Stewart nevertheless acknowledges that many laws are instrumental in nature, which results in the norm applying to many laws.[76] The question therefore remains as to whether a law should be declared contrary to "fundamental justice" because it goes further than the judiciary thinks is "reasonably necessary" to achieve its aim. Stewart's response relies in part on the fact that the flaws with the strict standard are not present with the relaxed standard. As Stewart rightly suggests, the strict standard's flaws are glaring as they render any bright line rule or standard that is the proper object of instrumental rationality review contrary to "fundamental justice," an eyebrow raising assertion on any measure.[77] As Stewart observes, "the relaxed version of the norm recognizes that none of these aspects of regulation by law are inherently suspect."[78]

The extent to which the strict standard of overbreadth intrudes into the legislative realm is well-illustrated by the Ontario Court of Appeal's decision in *R v Michaud* ("*Michaud*").[79] The applicant successfully argued that Ontario's *Highway Traffic Act* ("*HTA*"),[80] and its associated regulations,[81] violated section 7 of the *Charter*. The impugned provisions required that drivers place speed limiters on large vehicles.[82] The accused set his vehicle's speed limiter 4.4 km/h higher than permitted. The speed limiter was found to jeopardize his safety in rare circumstances where it is necessary to increase a vehicle's speed to avoid an accident thereby engaging the accused's security interests. The law was further found to apply in a manner that is disconnected from its objective of making the roads safer and was accordingly declared overbroad.[83] Justice Lauwers nevertheless held for a unanimous bench that it was "strangely incongruous to consider highway safety regulation, or any safety regulation, as 'depriving' anyone of 'security of the person' or of engaging the 'principles of fundamental justice' in the sense demanded by s. 7."[84] Despite this concern, the strict understanding of the overbreadth principle compelled a finding of overbreadth although this breach was readily upheld as a justifiable infringement under section 1 of the *Charter*.[85]

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73 See *Malmo-Levine*, *supra* note 69 at para 113.
74 See *Canadian Foundation*, *supra* note 68 at para 8.
75 *Ibid*.
76 See "Stewart, "Overbreadth Revisited ", *supra* note 3 at 271–72.
77 For a more detailed review of this critique, see Fehr, "Instrumental Rationality ", *supra* note 8.
78 See Stewart, "Overbreadth Revisited ", *supra* note 3 at 282.
79 *R v Michaud*, 2015 ONCA 585, leave denied 2016 CanLII 24866 (SCC) [*Michaud*].
80 *Highway Traffic Act*, RSO 1990, c H8 [*HTA*].
81 See RRO 1990, Reg 587.
82 See *HTA*, *supra* note 80, s 68.1(1).
83 See *Michaud*, *supra* note 79 at paras 72–73.
84 *Ibid* at para 147.
85 *Ibid* at paras 114–45.

As the *Michaud* case illustrates, the strict standard of overbreadth catches laws that a reasonable observer would not think to challenge for being inconsistent with the basic tenets of a legal system. While this provides a good reason to question whether the strict standard of overbreadth qualifies as a principle of fundamental justice, the fact that the relaxed standard of overbreadth is not so egregiously intrusive into the legislative realm says little, if anything, about whether that standard qualifies as a principle of fundamental justice. Indeed, the fundamental nature of other principles constitutionalized under section 7 is perhaps best illustrated by the fact that in no other context has an infringement of section 7 been upheld under section 1.[86] The unsurprising conclusion in *Michaud* that the impugned provision was readily justifiable strongly suggests that the strict standard of overbreadth is not fundamental to any system of justice.

Stewart further argues that "[t]he viability of the relaxed version of the norm as a constitutional principle is well illustrated both by cases where laws with an extraordinarily broad scope have been invalidated (such as *Heywood* and *Carter v Canada (Attorney General)* ["*Carter*"]) and by cases where laws that look over-broad from the perspective of the strict version (such as *R v Sharma* ["*Sharma*"] and *AB*) have been upheld."[87] I agree with Stewart that the laws in these cases were correctly upheld or declared unconstitutional. But this fact alone is not a good reason to constitutionalize the relaxed overbreadth principle. Such an approach would only be necessary if other constitutional principles could not achieve the same result as the overbreadth principle. In each of the judgments listed by Stewart, however, alternative constitutional arguments were readily available to test the constitutionality of each law without relying upon a principle of questionable constitutional status. It is particularly notable that I developed such arguments at length in a recent book entitled *Constitutionalizing Criminal Law*,[88] a source Stewart does not engage with in his article.

In *Heywood*, for instance, the applicant challenged a form of the vagrancy offence prohibiting individuals previously convicted of certain sexual offences from "loitering in or near a school ground, playground, public park or bathing area."[89] This provision was overbroad for three reasons. First, the provision overreached geographically as it caught offenders in vast wilderness parks where no children could reasonably be expected to be present.[90] Second, the provision was temporally overbroad because it applied for the duration of the offender's life without any possibility of reviewing the order to determine if the offender still posed a reasoned risk to the safety of children.[91] Finally, the provision was overbroad with respect to the people to whom it applied because it caught offenders who committed a sex offence against an

86 For a recent example of a section 1 argument being rejected with respect to a non-instrumental rationality principle, see *R v Brown*, 2022 SCC 18 at paras 110–66. Notably, the *Michaud* case is the only instance in which a section 7 violation has been found to be a justifiable infringement under section 1. This is because the Supreme Court held early on that section 1 should play a limited role in the section 7 context. See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518 ("[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like").

87 See Stewart, "Overbreadth Revisited", *supra* note 3 at 282

88 See Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022) [Fehr, *Constitutionalizing*].

89 See *Criminal Code*, *supra* note 48, s 179(b). This provision was subsequently repealed in SC 2019, c 25, s 60.

90 See *Heywood*, *supra* note 7 at 794–96.

91 *Ibid* at 796–98.

adult and do not pose a reasoned risk of sexually assaulting a child.[92] While I agree that these flaws strongly suggest the law is constitutionally problematic, Stewart does not consider the possibility of using a different principle of fundamental justice to declare the provision inoperative. In particular, Parliament's legislation arguably created what is known in criminal law theory as a "status offence." This category of offences requires "neither an act nor omission, instead punishing a person for her state of being."[93] The Supreme Court alluded to this problem in *Heywood*,[94] and leading scholars contend that this category of offence is clearly contrary to fundamental justice.[95]

As for the prohibition against euthanasia declared unconstitutional in *Carter*,[96] the Supreme Court invoked its determination that the law was overbroad and unjustifiable under section 1 of the *Charter* as a reason to avoid considering the merits of an equality rights challenge.[97] Scholars nevertheless contended shortly after the Court's decision that the law more directly infringed the equality right in section 15 of the *Charter* given the profound impact of limiting assisted dying on those with disabilities. Maneesha Deckha highlighted the trial judge's persuasive reasoning on this point and bemoaned the fact that the Supreme Court's decision prevented "the disability studies orientation of the trial judgment's [s]ection 15 analysis [from receiving] a broader airing and much needed juridical and social attention."[98] David Lepofsky similarly identified the clear disadvantages imposed on disabled people by a prohibition on euthanasia and contended that "broad public discussion and debate about designing new legislation to address assisted dying would benefit from judicial recognition that disability equality is on the table."[99]

The laws that Stewart identifies as being consistent with the overbreadth principle pose fewer difficulties as each law was ultimately upheld. While I agree that the impugned law in *AB* was constitutional for the reasons Stewart articulates,[100] the Supreme Court's decision in *Sharma*[101] to uphold limitations as to which offences are eligible to receive conditional sentence orders — a sentence often referred to as "jail in the community"[102] — also does not engage the overbreadth norm. This follows either because the law is not a decision subjectable to instrumental rationality review as Stewart suggests,[103] or as I argue elsewhere because the

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92 *Ibid* at 798–800.

93 See Fehr, *Constitutionalizing*, *supra* note 88 at 97.

94 See *Heywood*, *supra* note 7 at 795, citing *R v Graf*, (1988) 42 CRR 146 at 150 (the impugned provision rendered "a person in a permanent state of exile within his community who is, because of his status, absolutely prohibited from standing idly in vast areas of this country").

95 See e.g. Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond Montgomery, 2015) at 355.

96 *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

97 *Ibid* at para 93.

98 See Maneesha Deckha, "A Missed Opportunity: Affirming the Section 15 Equality Argument against Physician-Assisted Death" (2016) 10 McGill JL & Health S69 at S75.

99 See David Lepofsky, "*Carter v. Canada (Attorney General)*, The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the *Charter*'s Disability Equality Guarantee" (2016) 76 SCLR (2nd) 89 at 98.

100 See the discussion in the preceding section of this article.

101 See *supra* note 6.

102 See *Criminal Code*, *supra* note 48, s 742.1.

103 See Stewart, "Overbreadth Revisited", *supra* note 3 at 265–66.

prohibition against "cruel and unusual … punishment" in section 12 of the *Charter* is the only relevant right for challenging the impugned law.[104] I accordingly can think of no constitutional argument that would result in a successful challenge to either of these laws. Such a conclusion is untroublesome as each law strikes me as consistent with other *Charter* rights.[105]

If the above criticisms are persuasive, then it is prudent to more directly consider whether the relaxed version of the overbreadth principle satisfies the test for qualifying as a principle of fundamental justice. The determinacy problem with the relaxed norm is evident when considering Stewart's guidance in applying that term. As he explains, "the narrower the objective and the more sweeping the prohibition, the more likely the law would be to run afoul of even the relaxed version of the norm."[106] The inherently vague nature of this standard is compounded by the fact that properly identifying the prohibition's objective remains a "critical" component of the constitutional analysis despite the uncertainty involved when interpreting a law's purpose.[107] While the latter difficulty is inherent to many constitutional principles, the term "reasonably necessary" itself implies a substantial degree of indeterminacy not present in other principles of fundamental justice. While section 8 of the *Charter* provides a right not to be subjected to "unreasonable" search or seizure, this and other similar enumerated rights[108] are procedural in nature and therefore are far less intrusive into the legislative realm as they do not purport to limit the scope of what may be prohibited. Moreover, a right like that found in section 8 of the *Charter* engages specific interests relating to privacy and criminal investigations, which may be developed more determinately than a principle that relies upon a broad appeal to laws being "reasonably necessary."[109]

A second problem with respect to the relaxed form of the overbreadth principle is that it is unlikely to attract sufficient societal consensus that the principle is fundamental to justice. This point is best illustrated by comparing overbreadth to a more readily accepted principle of fundamental justice: gross disproportionality. As Chief Justice McLachlin explained in *Bedford*, this principle prohibits any law with "effects on life, liberty or security of the person [that] are so grossly disproportionate to its purposes that they cannot rationally be supported."[110] Put

104 See Colton Fehr, "Reflections on the Supreme Court of Canada's Decision in *R. v. Sharma*" (2023) 60 Alta L Rev 933.

105 While I think that limiting conditional sentence orders for offenders such as *Sharma* is poor criminal justice policy, not all bad sentencing policies can be declared unconstitutional. To conclude otherwise would substitute the word "disproportionate" for "grossly disproportionate" as the standard governing section 12 of the *Charter*. See *ibid* at 935. Moreover, I contend that allowing the equality right to result in a punishment law being declared unconstitutional despite being consistent with section 12 of the *Charter* provides too broad a role for equality. Building on the work of Peter Hogg, I suggest that sometimes the equality provision's function is to be a value that aids in the interpretation of other rights. See Peter Hogg, "Equality as a *Charter* Value in Constitutional Interpretation" (2003) 20 SCLR 113. This may be achieved by allowing for individual circumstances (e.g. mental health, poverty, Indigeneity, and so on) to be factored into the section 12 analysis. This is precisely what the Supreme Court laudably did one year after *Sharma* was decided in *R v Hills*, 2023 SCC 2 [*Hills*].

106 See Stewart, "Overbreadth Revisited", *supra* note 3 at 283.

107 *Ibid*.

108 See e.g. the *Charter* rights to be tried within a reasonable time (11(b)) and to be granted reasonable bail (11(e)).

109 See e.g. *Hunter v Southam*, [1984] 2 SCR 145.

110 See *Bedford*, *supra* note 4 at para 120.

differently, the principle "applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure."[111] This principle is intuitively fundamental to justice as it supplements the specifically enumerated prohibition in section 12 of the *Charter.* As the Court recently reiterated, the latter provision protects against "grossly disproportionate" punishments and treatments.[112] To the extent that section 12 does not capture all laws resulting in grossly disproportionate effects — such as laws jeopardizing the lives of sex workers by prohibiting them from screening clientele to avoid the "nuisance" inherent to this activity[113] — constitutionalizing a residual principle under section 7 of the *Charter* plays a defendable constitutional role.

The relaxed overbreadth principle does not have a reasoned role when considered in light of the narrower gross disproportionality principle. With the strict norm, the overbreadth analysis served a different purpose by identifying a logical defect in a law. The analysis did not purport to make a normative judgment about the law as the legislature could pass a reply law imposing the same effects but adopting a slightly broader objective that encompassed the law's effects.[114] The relaxed standard of overbreadth necessarily goes further than the strict standard by permitting the court to *weigh* the benefits of the law against its objective to determine whether a law is "reasonably necessary" to achieve its aim. But this task of weighing competing interests is more intuitively the domain of the gross disproportionality principle. Importantly, the latter principle — as occurs under section 12 of the *Charter* — applies a substantial measure of deference to legislatures in making policy decisions. As under section 12, the legislature should be permitted to prohibit conduct that does not result in a grossly disproportionate effect on an individual's life, liberty, or security interests. To conclude otherwise effectively constitutionalizes a "gross disproportionality light" standard as the "reasonably necessary" standard strikes me as inherently easier for applicants to meet.[115]

The suggestion that the overbreadth and gross disproportionality principles should be distilled into a single constitutional norm is not novel. Indeed, the question of whether each principle should qualify as a distinct requirement of fundamental justice plagued the courts during the initial development of the instrumental rationality principles. While each principle may be developed in an analytically distinct manner, the Supreme Court recognized shortly before *Bedford* was decided that these concepts "may simply offer different lenses through which to consider a single breach of the principles of fundamental justice."[116] Chief Justice McLachlin similarly recognized in *Bedford* that there was "significant overlap" between the

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111 *Ibid*.

112 See e.g. *Hills*, *supra* note 105 at para 40; *R v Smith*, [1987] 1 SCR 1045 at 1072.

113 See *Bedford*, *supra* note 4 at paras 146–59.

114 See Fehr, *Constitutionalizing*, *supra* note 88 at 9–10. Even if instrumental laws often will have a rationality defect, another round of litigation would be required to expose that defect. So long as the legislature tweaked the objective in response to further court challenges, nothing about the strict standard of overbreadth prohibited the government from taking this approach. This is what I mean when I say the strict standard required no normative judgment.

115 I am assuming at this point that the applicant is able to garner the relevant evidence for making such a determination. I discuss this challenge more below as the assumption that all applicants will be financially capable of gathering all relevant evidence is not prudent and drove the Supreme Court in *Bedford*, *supra* note 4, to "individualize" the instrumental rationality principles of fundamental justice.

116 See *R v Khawaja*, 2012 SCC 69 at paras 39–40.

overbreadth and gross disproportionality principles.[117] Earlier in the development of these principles, Justices Gonthier and Binnie wrote that "[o]verbreadth … addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect."[118]

The latter suggestion strikes me as prudent but describes the governing principle inaccurately. The constitutional principle should instead take its form from a mirror principle that governs section 12 of the *Charter*: gross disproportionality. As I suggested earlier, it is much clearer that gross disproportionality qualifies as a principle of fundamental justice, as any law with grossly disproportionate effects on even a single individual is so ill-conceived vis-à-vis that individual as to require justification. Under this approach, overbreadth as a constitutional concept would be relegated to a place where it can serve a clear and sensible constitutional purpose: the minimal impairment stage of the section 1 test. While the Court notes that it is difficult to imagine a scenario wherein a law imposing a grossly disproportionate effect on even a single person would satisfy the section 1 standard, this is not surprising as section 1 of the *Charter* has also yet to result in a law that violates the prohibition against cruel and unusual treatment or punishment being upheld.[119] The Court nevertheless recently reiterated that this is still possible in "rare cases."[120]

The significantly reduced role for overbreadth in the constitutional analysis might nevertheless strike some readers as troubling. In particular, it might be thought that rescinding the overbreadth principle's constitutional status would render decisions striking down prior laws using the overbreadth principle of questionable merit. While it is not possible to undertake a full assessment of this question here, I have endeavoured to do so elsewhere with respect to the various laws declared inoperative by the Supreme Court using either version of the overbreadth principle. I can think of no instance where a law that was declared overbroad in the sense of being "reasonably unnecessary" (or declared overbroad for violating the strict standard and then failing to be justified under section 1) would not also violate either the individualistic conception of the gross disproportionality principle and/or some other principle of fundamental justice.[121]

Under my proposed approach, the gross disproportionality principle would operate in a "strict" or "individualistic" sense by prohibiting any law that imposed on a real or hypothetical individual an effect that is grossly disproportionate to the impugned provision's legislative objective.[122] Again, this approach mirrors the application of the gross disproportionality principle under section 12 of the *Charter*, and has the added benefit of avoiding the key difficulty with respect to using the "relaxed" or "holistic" conception of overbreadth identified by Chief

117 See *Bedford*, *supra* note 4 at para 107.

118 See *R v Clay*, 2003 SCC 75 at para 38.

119 See e.g. *R v Nur*, 2015 SCC 15 at para 111; *R v Morrison*, 2019 SCC 15 at para 188; *R v Bissonnette*, 2022 SCC 23 at para 121; *R v Mariani*, 2025 BCSC 1298.

120 See *Hills*, *supra* note 105 at para 170.

121 See Fehr, "Instrumental Rationality ", *supra* note 8 at 144–47; Fehr, *Constitutionalizing*, *supra* note 88 at chapters 3–4.

122 For a criticism of using hypothetical scenarios in the section 7 context, see Debra Haak, "The Case of the Reasonable Hypothetical Sex Worker" (2022) 60 Alta L Rev 205.

Justice McLachlin in *Bedford*: requiring applicants to bring evidence about the efficacy of the law.[123] This can constitute a profoundly unjust burden when imposed upon the constitutional applicant, as they must prove that a law strikes a reasonable balance between its means and ends. As the late Alan Young observed when publicly discussing *Bedford*, such a burden would have cost the litigants seeking to challenge the constitutionality of the former sex work laws (and likely those challenging the current laws)[124] well over a million dollars.[125] By relying upon an individualistic or strict standard, it is possible for applicants to raise a constitutional challenge more readily by relying on a single witness' testimony — possibly their own — in establishing that the law's effects are draconian. The evidentiary burden would then fall to the state to justify its law's effects on a balance of probabilities.[126]

Relying on an individualistic or strict conception of gross disproportionality is nevertheless not without its own issues. As Stewart observed in his initial reply to the Supreme Court's reasons in *Bedford*, the comparative nature of any proportionality assessment will invariably result in situations where the applicant may contest the extent to which an objective is achieved by its law.[127] This is problematic in the gross disproportionality context because of the analytical presumption imposed in *Bedford* — a necessary means to ensure a less onerous burden of proof on applicants — when reviewing a law's compliance with the individualistic conception of the instrumental rationality principles. This presumption requires that a court take the law's objective "at face value."[128] If not presumed, then the applicant will have to submit the social science evidence that Chief Justice McLachlin rightly sought to remove from any consideration at the section 7 stage of analysis out of economic fairness to the applicant.[129]

Stewart and I have separately concluded that such a presumption will sometimes pose a barrier to proving gross disproportionality under the individualistic approach.[130] This might occur in cases where the law's objective is pitched broadly but the law is incapable of achieving its objective in identifiable circumstances, or where it is unclear to what extent the law actually achieves its objective. If the impact on the offender is grossly disproportionate when considering the limited ability of the law to achieve its objective, then presuming the law actually achieves its objective can provide an unprincipled shield against a constitutional challenge.

123 See *Bedford*, *supra* note 4 at para 127.

124 See *R v Kloubakov*, 2023 ABCA 287 (leave to Supreme Court of Canada heard 12–13 November 2024), challenging various provisions adopted in the *Protection of Communities and Exploited Persons Act*, SC 2014, c 25. Similarly, see *R v Boodhoo*, 2018 ONSC 7205; *R v Anwar*, 2020 ONCJ 103; *R v NS*, 2022 ONCA 160; *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197.

125 See Alan Young, *The Costs of Charter Litigation* (Department of Justice Canada: Research and Statistics Division: 2016), online: <https://www.justice.gc.ca/eng/rp-pr/jr/ccl-clc/ccl-clc.pdf> [https://perma.cc/RTF2-GH8H]. For a more detailed review of the case deriving from an interview with Young, see chapter two of my book on the case, titled *Judging Sex Work: Bedford and the Attenuation of Rights* (Vancouver: University of British Columbia Press, 2024).

126 See generally *R v Oakes*, [1986] 1 SCR 103.

127 See Stewart, "Structure", *supra* note 27 at 586.

128 See *Bedford*, *supra* note 4 at para 125. See also Mark Carter, "*Carter v Canada*: Societal Interests Under Sections 7 and 1" (2015) 78 Sask L Rev 209 at 213–15.

129 See *Bedford*, *supra* note 4 at para 127.

130 See Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54 Alta L Rev 69 at 82–84 [Stewart, "Sex Work"]; Stewart, "Structure", *supra* note 27 at 586; Fehr, "Individualistic Approach", *supra* note 23 at 66–68.

Indeed, I illustrate how this might occur elsewhere by considering how the federal government's refusal to renew exemptions allowing safe injection sites to operate could lead to different results when litigants are permitted to submit evidence to bring a law's efficacy into question.[131] Stewart and I accordingly developed separate solutions to this evidentiary problem. In Stewart's view, the evidentiary burden could revert back to the applicant in cases where the extent to which the law achieves its objective might impact the constitutional challenge.[132] Alternatively, the burden could be "shared" in those circumstances so as not to completely impose the state's burden of proving its law's efficacy on the applicant. The latter proposal would require the applicant "to prove that it is possible that the government's objective is not fully achieved in practice, and that lesser achievement of the government's objective could tip the balance in favour of a finding of gross disproportionality."[133]

## V. Conclusion

Hamish Stewart's recent work developing a clearer understanding of the overbreadth principle furthers our collective thinking on the scope of the principles of fundamental justice. In addition to building upon my case for why the strict standard cannot qualify as a principle of fundamental justice, he also offers the most refined defence to date of the overbreadth principle in its "relaxed" form. If the Supreme Court preserves the overbreadth principle, it certainly will benefit from contemplating and ultimately adopting the reforms proposed by Stewart.[134] Yet, it remains questionable whether the norm against overbreadth in its relaxed form is "fundamental to justice." The principle's application is precisely as it sounds: imprecise. More troubling, the "reasonably necessary" inquiry central to the relaxed norm requires the competing benefits and costs of a law to be weighed against each other. Yet, the standard underpinning this understanding of overbreadth is difficult to reconcile with a more deferential and intuitively fundamental principle of justice: gross disproportionality. Preserving an individualistic conception of the latter principle and abandoning overbreadth also has the salutary effect of rendering the litigation process less financially prohibitive. Indeed, this is the concern that drove the Supreme Court in *Bedford* to individualize the instrumental rationality principles. The Court may preserve this benefit while ensuring a coherent development of the principles of fundamental justice by affirming the individualistic conception of gross disproportionality and abandoning the overbreadth principle entirely when assessing alleged violations of section 7 of the *Charter*.

131 See Stewart, "Sex Work", *supra* note 130 at 83.

132 See Fehr, "Individualistic Approach", *supra* note 23 at 62–64, relying upon *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

133 See Fehr, "Individualistic Approach ", *supra* note 23 at 68.

134 It is notable that courts have not to my knowledge rescinded a principle of fundamental justice once it has been constitutionalized by the Supreme Court of Canada.