





## Introduction

This paper, which falls under the Regroupement's 1<sup>st</sup> research axis, "Droit et nouveaux rapports sociaux," forms part of a larger research project that examines how understandings of community are given expression in, and in turn shape, Canadian constitutional adjudication involving section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> That project builds on interdisciplinary scholarship that explores how justice and democracy are challenged by contemporary forms of pluralism: plural ideas about what we value, plural ideas about who counts as a member of our community, and plural ideas about how we ought to resolve justice disputes.<sup>2</sup>

The feature of that project that I discuss here focuses specifically on the judgment of the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*.<sup>3</sup> I will dwell in particular on the Court's efforts in section IV.B.(3) of that judgment to clarify and synthesize the substantive norms encompassed by section 7's principles of fundamental justice, efforts which draw heavily on a narrative of basic values.<sup>4</sup>

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; section 7 reads in full: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

<sup>2</sup> I will not elaborate on these elements here. For an account of these forms of pluralism that has influenced my research, see e.g. Nancy FRASER, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009) and in particular "Chapter 4: Abnormal Justice" at 48-75. See also Amartya SEN, *The Idea of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009), Rainer FORST, *The Right to Justification: Elements of a Constructivist Theory of Justice*, translated by Jeffrey FLYNN (New York: Columbia University Press, 2012) and Manuel CASTELLS, "The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance" (2008) 616 *The Annals of the American Academy* 78.

<sup>3</sup> 2013 SCC 71, [2013] S.C.R. 1101.

<sup>4</sup> *Ibid.* at paras. 93-129. The scope of my inquiry in the present paper is self-consciously narrow. My intention is not to establish an overall trend in adjudicative outcomes under s. 7. Instead, I propose to engage in a circumscribed but sustained reflection into the justification the Court in *Bedford* provides for interpreting the principles of fundamental justice in the way that it does. My interest lies in better understanding the relationship between proportionality review and community that such a justification implies.

In short, I contend that the Court's account of those principles in terms of basic values is significant for two reasons. First, the narrative of basic values is emblematic of, and helps to reveal, a challenge that contemporary pluralisms pose to proportionality-based constitutional adjudication: the challenge of imagining the parameters and character of the community to which 'we' belong. Second, considered as a response to that challenge, the narrative of basic values signals a shift in proportionality's meaning in Canadian constitutional adjudication. Rather than relying on the principle of proportionality to weigh competing constitutional values, the Court's approach equates proportionality to a constitutional value in its own right.

In so arguing, my intention is not to critique the Court's use of basic values to identify new principles of fundamental justice, or for that matter to interpret those principles. By attending to the Court's emphasis on basic values, my purpose is rather to better appreciate how the Court understands 'our' community, and see how that understanding of community informs its approach to constitutional adjudication involving section 7.

I will proceed as follows. I begin in Part I by examining the Court's repeated assertions in *Bedford* that the principles of fundamental justice are about basic values. By relying on a narrative of basic values to link the principles of fundamental justice with means-ends analysis, the Court has, I contend, reframed its section 7 jurisprudence. In Parts II and III, I argue that this reframing in terms of basic values simultaneously affirms and denies the importance of community to proportionality review, revealing a fraught relationship between proportionality and community. In Part IV, I introduce the idea of community imagination to capture the challenges that arise from that fraught relationship in light of contemporary pluralisms. I then describe the Court's response to that challenge and assess the implications of its response for the meaning of proportionality. I conclude by offering some suggestions for further research.

## **I. Viewing Section 7 Jurisprudence Through the Lens of Basic Values**

When the Supreme Court of Canada was confronted in *Bedford* with a constitutional challenge to Canada's prostitution laws, it looked out on a shifting jurisprudential landscape with regard to section 7 of the Charter whose contours were not altogether clear.<sup>5</sup> A measure of uncertainty

<sup>5</sup> See generally Peter W. HOGG, "The Brilliant Career of Section 7 of the Charter" (2012) 58 *SCLR* (2d) 195; see also Alana KLEIN, "The Arbitrariness in 'Arbitrari-

surrounded the interpretation of the substantive principles of fundamental justice that were increasingly central to section 7 litigation.<sup>6</sup> But one thing was certain: values were nowhere on the horizon. After *Bedford*, that would no longer be the case. I argue in this Part that the Court's reasons in *Bedford*, which emphasize that the principles of fundamental justice are about basic values, significantly reframe the Court's jurisprudence in those terms.

McLachlin C.J., writing for a unanimous Court, embraced the opportunity presented by *Bedford* to clarify how the principles of fundamental justice should be understood and interpreted. Her reasons represent the fullest exposition to date of the substantive norms of proportional justice encompassed by section 7 of the Charter,<sup>7</sup> norms that the Court itself has gone on to affirm and apply in *Carter v. Canada*<sup>8</sup> and *R v. Smith*,<sup>9</sup> among others. The Court's interpretation recognizes what has been called a "substantive right to proportionate government action,"<sup>10</sup> comprising individual principles of fundamental justice against arbitrariness, overbreadth and gross disproportionality.<sup>11</sup> That recognition relies heavily on an appeal to 'our basic values'.

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ness' (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013) 63 *SCLR* (2d) 377 at 377, 387.

<sup>6</sup> See *Canada (Attorney General) v. Bedford*, *supra* note 3 at paras. 106, 114-115, 118; *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at paras. 143-146, 150-153; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 132, [2011] 3 S.C.R. 134; *R v. Khawaja*, 2012 SCC 69 at paras. 38-40, [2012] 3 S.C.R. 555.

<sup>7</sup> In total, the Court devotes over 20 pages of its reasons in the Supreme Court Reports to the interpretation and application of the principles of fundamental justice. See *Bedford*, *supra* note 3 sections IV.B.(3) and IV.B.(4). In contrast, in *PHS*, the Court dealt with the compliance of the Minister's decision with the same principles of fundamental in a mere three pages. See *Canada (Attorney General) v. PHS Community Services Society*, *supra* note 6 at paras. 127-135.

<sup>8</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

<sup>9</sup> *R v. Smith*, 2015 SCC 34.

<sup>10</sup> A. KLEIN, *supra* note 5 at 377.

<sup>11</sup> It is important to note that the Court's endorsement of these principles supplements, but does not displace, the numerous principles of fundamental justice that have already been recognized: Margot YOUNG, "The Other Section 7" (2013) 62 *SCLR* (2d) 2 at 31. For a full survey of those principles, see Hamish STEWART, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012).

The Supreme Court justifies its appeal to ‘our basic values’ by drawing on no less authority than *Re BC Motor Vehicle Act* (also known as the *Motor Vehicle Reference*),<sup>12</sup> the Court’s earliest attempt to specify the contours of the principles of fundamental justice in the Charter era. At paragraph 96 of *Bedford*, having reproduced some notable excerpts from its earlier judgment, the Court states: “the *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order.”<sup>13</sup> Although such an assertion might be overlooked as a benign statement paraphrasing a well-known opinion of the Court, it actually deserves closer attention. This is because the Court’s statement lays the groundwork for a re-framing of the *Motor Vehicle Reference*, and ultimately the Court’s entire fundamental justice jurisprudence, through the lens of basic values. The Court in *Bedford* goes on to invoke not just the basic values of our constitutional order but simply ‘our basic values’ over and over to substantiate its interpretation of the principles of fundamental justice.<sup>14</sup>

What exactly does the Court say about values in the *Motor Vehicle Reference*? One thing is clear: it does not recognize or even seem to suggest that the principles of fundamental justice are “about...basic values,”<sup>15</sup> as the Court in *Bedford* asserts. Garnering the support of six of seven judges, Lamer J. (later C.J.C.) in the *Motor Vehicle Reference* ventures instead that the principles of fundamental justice are associated with “the essential elements of a system for the administration of justice”<sup>16</sup> and are to be “found in the basic tenets of our legal system.”<sup>17</sup> These terms would become a familiar refrain in section 7 cases up until recently. On the handful of occasions that Lamer J. does mention ‘values’ in the *Motor Vehicle Reference*, it is conspicuous that he is not referring to the principles of fundamental justice at all. Instead, following the academic work of former Chief Justice Bora Laskin, he uses the word value in the singular to describe the essence of what judges must do when they must determine

<sup>12</sup> *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486.

<sup>13</sup> *Canada (Attorney General) v. Bedford*, *supra* note 3 at para. 96.

<sup>14</sup> *Ibid.* at paras. 96, 98, 101, 103, 105, 106, 116.

<sup>15</sup> *Ibid.* at 96.

<sup>16</sup> *Re BC Motor Vehicle Act*, *supra* note 12 at 512.

<sup>17</sup> *Ibid.* at 503. See also at 512: “...the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.”

the pith and substance of legislation in division of powers cases: distill the 'constitutional value' or true meaning of challenged legislation.<sup>18</sup> In the sole other use of 'values' in the *Motor Vehicle Reference*, Lamer J. raises the specter that the "rights, freedoms and values embodied in the Charter" might become undesirably frozen in time at the moment of adoption, if too much weight were to be put on the proceedings of the parliamentary committee that helped to develop the federal proposal for constitutional reform.<sup>19</sup> In short, Lamer J. mainly resists reference to values in his observations regarding the scope and content of the principles of fundamental justice.

Nor do values play a prominent role in any of the Court's rulings prior to *Bedford* that deal with the substantive protections afforded by section 7. Following Lamer J.'s lead in the *Motor Vehicle Reference*, the Court tended to emphasize the association between the principles of fundamental justice and the 'basic tenets of our legal system' when considering section 7 claims. Asked to recognize a new principle of fundamental justice, the jurisprudence gravitated towards three criteria that stressed the necessarily legal character of the principles: those principles should be "legal principles; [they should] reflect significant societal consensus that they are fundamental to how the legal system ought fairly to operate; and [they should] generate a manageable standard of measurement."<sup>20</sup>

Considering such an approach, in section 7 case after section 7 case, right up until *Canada (Attorney General) v. PHS Community Services Society*,<sup>21</sup> values were rarely mentioned by the Court when considering section 7 of the Charter, and certainly not when addressing the principles of fundamental justice.<sup>22</sup> When values were discussed in relation to section 7, they were generally discussed in one of two ways. Either judges relied upon values to help delimit the scope of the interests the section was meant to protect – life, liberty and security of the person –<sup>23</sup> or, judges

<sup>18</sup> *Ibid.* at 496.

<sup>19</sup> *Ibid.* at 509.

<sup>20</sup> M. YOUNG, *supra* note 11 at 31.

<sup>21</sup> *Supra* note 6.

<sup>22</sup> For instance, *R v. Heywood*, [1994] 3 S.C.R. 761, *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 and *Canada (Attorney General) v. PHS Community Services Society*, *supra* note 6 contain no reference to values whatever.

<sup>23</sup> See e.g. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 584 (Sopinka J.) and *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at

specifically de-emphasized the relevance of values to the proper interpretation of the principles of fundamental justice, in contrast to the type of analysis called for by the *Oakes* test.<sup>24</sup> Either way, values played virtually no acknowledged role interpreting the standard a deprivation of life, liberty or security of the person would have to meet to respect the principles of fundamental justice.<sup>25</sup> Given the absence of relevant references to values in prior section 7 jurisprudence, it is striking that ‘our basic values’ are invoked over and over in *Bedford* as the bedrock upon which the principles of fundamental justice rest – and have always rested.<sup>26</sup>

## II. ‘Our Basic Values’ as an Affirmation of Community

There is much at stake for the relationship between constitutional adjudication, proportionality and community in this narrative. As I argue in this Part, by reframing its jurisprudence relating to the principles of fundamental justice in terms of ‘our basic values,’ the Court implicitly appeals to an idea of community. It does so both by emphasizing a discourse of values, and by making the first person plural perspective ‘we’ central to that discourse.

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paras. 81-82 (McLachlin C.J.) and at paras. 213-214 (Bastarache J., dissenting), [2002] 4 S.C.R. 429.

<sup>24</sup> See e.g. *R v. Mills*, [1999] 3 S.C.R. 668 at para. 67; *R v. Marmo-Levine*; *R v. Caine*, 2003 SCC 74 at para. 99, [2003] 3 S.C.R. 571.

<sup>25</sup> The only meaningful caveat to this statement stems from Sopinka J.’s opinion in *Rodriguez*. Sopinka J. might be understood to be gesturing towards the necessity of some loose connection between principles of fundamental justice and social values, when he suggests that for a legal principle to be recognized as a principle of fundamental justice, there must exist some level of consensus or general acceptance about it. See in particular pages 590, 607, 608. Sopinka J. nonetheless resists equating the principles of fundamental justice to values.

<sup>26</sup> See *Canada (Attorney General) v. Bedford*, *supra* note 3 at paras. 101, 103, 105, 106, 116. When discussing the principle against gross disproportionality, the Court in like style sometimes refers to “our basic norms” (para. 103) or “our fundamental norms” (para. 109) or the “the norms accepted in our free and democratic society” (para. 120). Conversely, the Court only refers to basic values as belonging to “our constitutional order” once, when paraphrasing the judgment of the Court in the *Motor Vehicle Reference*: see *Canada (Attorney General) v. Bedford*, *supra* note 3 at para. 96.



Before elaborating, however, I wish to clarify one point. In making the observations that follow about the link between our basic values and community, I am not arguing that Bedford in any way mandates a collective or aggregate analysis of section 7 violations. The Court excludes that possibility when it insists that “the question under s. 7 is whether anyone’s life, liberty or security of the person has been denied by a law that is inherently bad.”<sup>27</sup> Notwithstanding the Court’s insistence that the impact of an inherently bad law on one person is enough to make out a section 7 violation, the question of whether or not a law is inherently bad to begin with remains bound up with the idea of community. That is the connection that the Court’s appeal to our basic values helps to reinforce, in the following ways.

First, ‘values’ are substituted for ‘principles’, ‘tenets’ and ‘elements’ – the once familiar grammar of fundamental justice under section 7. Making section 7 about values marks an important rhetorical shift. As a preliminary matter, that shift helps to subsume section 7 firmly within the values-talk characteristic of proportionality analysis, a discourse that dominates Canadian constitutional adjudication more generally. As Mark Antaki has noted, mainly in relation to the *Oakes* test, the rise of ‘values’ as a keyword in Canadian constitutional law, as in other jurisdictions, is linked closely to the emergence of proportionality analysis as the dominant paradigm of constitutional adjudication.<sup>28</sup> By turning to values to justify its account of the principles of fundamental justice, the Court underscores the newfound prominence of means-ends assessments characteristic of proportionality review within section 7.<sup>29</sup> In the process, the Court signals that violations of the principles of fundamental justice must be assessed contextually, as proportionality review requires. The Court’s narrative of basic values is therefore consistent with a repudiation of a doctrinal or textual approach to judicial review on constitutional grounds.<sup>30</sup>

<sup>27</sup> *Ibid.* at para. 123. See also Hamish STEWART, “*Bedford* and the Structure of Section 7” (2015) 60:3 *McGill L.J.* 575.

<sup>28</sup> See generally Mark ANTAKI, “The Turn to Values in Canadian Constitutional Law” in Luc B. TREMBLAY and Grégoire C.N. WEBBER, eds., *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Montreal: Éditions Thémis, 2009) 155.

<sup>29</sup> A. KLEIN, *supra* note 5 at 379, 387, 397.

<sup>30</sup> On proportionality’s turn away from textual interpretation, see Moshe COHEN-ELIYA & Iddo PORAT, “Proportionality and the Culture of Justification” (2011) 59 *Am. J. Comp. L.* 463.

In its place, the Court favours a flexible, all-things-considered approach characteristic of proportionality analysis that is attentive to local circumstances and potentially able to account for a community's particularities and ethical objectives.<sup>31</sup> Perhaps as importantly, making section 7 about values suggests that the principles of fundamental justice have a visceral, embodied character. Whereas values are almost invariably referred to subjectively, as belonging to someone or to something – they are mine, or ours, or yours, or theirs – tenets, elements and to a lesser extent principles lead a primarily rational and objective existence. Consider how strange it would sound, for instance, to talk about 'my basic *tenets*.'

Second, the 'basic tenets [or principles or elements] of our legal system' become 'our basic values' full stop. This second aspect of the reframing reinforces the same narrative of belonging implied by the rhetorical shift from tenets to values. In so doing, the Court partly picks up on an element of section 7 jurisprudence that recognized the need for a degree of societal consensus about whether a suggested principle of fundamental justice was indeed fundamental to the legal system.<sup>32</sup> In *Bedford*, however, the Court's reliance on basic values goes considerably further. By the end of its opinion, the Court makes the attribution of the principles of fundamental justice to the legal system essentially superfluous, preferring instead to anchor those principles directly in 'our' fundamental norms and 'our' basic values.<sup>33</sup> The principles of fundamental justice no longer belong to the legal system, or even to our constitutional order as the Court first says in *Bedford*. Instead those values, whatever they may be, belong directly to 'us'.

This shift carries several implications. On the one hand, the status and nature of these values is transformed from something that could conceivably be dismissed as a positivist legal norm to something that

<sup>31</sup> JACCO BOMHOFF, "Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law" (2008) 31:2 *Hastings Intl. & Comp. L. Rev.* 555 at 575-576. As Bomhoff insists in his scholarship, however, proportionality scholarship tends to be beset by contradictions that stem from a failure to distinguish between different types of balancing that are more or less committed to universalism as opposed to particularity.

<sup>32</sup> M. YOUNG, *supra* note 11 at 31. See also *Rodriguez v. British Columbia (Attorney General)*, *supra* note 23 at 590, 607-608; and *R v. Malmo-Levine*; *R v. Caine*, *supra* note 24 at paras. 99, 115-126.

<sup>33</sup> *Canada (Attorney General) v. Bedford*, *supra* note 3 at para. 109.

arguably reflects the moral character of ‘our’ community. On the other hand, the Court’s formulation also implies an ontological claim about our collective existence. Since these basic values belong to ‘us’ directly and not to our legal system or our constitutional order, a tangible ‘we/us’ must exist who possesses them. And given their basic, fundamental character – something the Court repeats over and over in its reasons – it would hardly be overstating the case to suggest that the Court portrays these values as constitutive of our community’s identity. Arguably, our basic values make ‘us’ who and what ‘we’ are.

In short, the Court’s insistence that the principles of fundamental justice are about our basic values affirms the importance of community to those principles in two ways. It embeds constitutional adjudication involving those principles within an overall approach to the resolution of rights claims that relies heavily on proportionality, thereby emphasizing a flexible, context-specific assessment of section 7 violations. It also sends the message that the values embodied by that particular flexible approach are distinctly ‘ours’ in a way that distinguishes our community from the communities of others.

### III. ‘Our Basic Values’ as a Denial of Community

This affirmation of community is only one half of the story. The Court’s efforts to rely on our basic values to incorporate means-ends rationality standards within the the principles of fundamental justice also constitutes a denial of community. This is because the appeal in *Bedford* to our basic values actually turns out to be an appeal to a notional community committed to no values in particular other than the standards of instrumental rationality themselves.

A close reading of the judgment in *Bedford* reveals that the Court uses the expression ‘our basic values’ in one of two senses. At times, the Court seems to imply that those basic values are something intangible that transcends rules or principles against arbitrariness, overbreadth and gross disproportionality. This meaning of basic values predominates when the Court generically equates laws that run afoul of or violate our basic values to “inherently bad laws,”<sup>34</sup> and describes arbitrariness, overbreadth

<sup>34</sup> *Ibid.* at e.g. paras. 96, 101, 105, 116, 123.

and gross disproportionality as *ways* in which laws may so run afoul.<sup>35</sup> At other times, in contrast, our basic values are equated more precisely and mundanely to rules and principles against arbitrariness, overbreadth and gross disproportionality.<sup>36</sup>

These two uses of the expression may raise an issue of consistency, but that is not something I intend to focus on here. Considered carefully and on their own, both uses raise numerous questions about what our basic values actually represent. Understood in the former sense, our basic values are never defined or described, despite providing the lodestar that is supposed to have guided the adjudication of section 7 claims since the *Motor Vehicle Reference*. Understood in the latter sense, they do little to give substantive content to the principles of fundamental justice. If our basic values are precisely values against arbitrariness, overbreadth and gross disproportionality, it is begging the question to say that laws violate our basic values when they are arbitrary, overbroad and grossly disproportional.<sup>37</sup> Just as it is to say that laws are grossly disproportionate when they violate our fundamental norms – those norms having been previously defined to include, among others, a basic norm against gross disproportionality.<sup>38</sup>

This reading of the Court's reasons therefore suggests that its resort to 'our basic values' is mostly rhetorical, in addition to being somewhat circular. Considering that its own discussion devolves partly into tautological repetition, the Court's point that part of the jurisprudential debate is "semantic"<sup>39</sup> is more than a little ironic. Despite relying heavily on an idea of community in the abstract, how the Court draws upon basic values allows it to avoid saying much of anything about what it is that 'we' value, or about those to whom 'our' values belong. The narrative of values therefore contributes very little to the substantive content of the principles of fundamental justice.<sup>40</sup>

<sup>35</sup> *Ibid.* at e.g. para. 96, 101, 106.

<sup>36</sup> *Ibid.* at e.g. para. 96. The court states: "In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality."

<sup>37</sup> *Ibid.* at paras. 96 and 105.

<sup>38</sup> *Ibid.* at para. 109, 120.

<sup>39</sup> *Ibid.* at para. 116.

<sup>40</sup> I am not suggesting that arbitrariness, overbreadth and gross disproportionality, as principles of fundamental justice, lack normative content. On their own, those standards capture notions of fairness that have an important tradition in Canadian judi-

In short, while the Court's appeal to our basic values in *Bedford* suggests that a conception of who 'we' are is important to constitutional adjudication, that appeal also avoids associating 'our' community with anything in particular. Ultimately, the Court's insistence on our basic values leads straight back to the means-ends analysis that is part and parcel of the principle of proportionality.

#### IV. The Challenge of Community Imagination and the Value of Proportionality

The question therefore deserves to be asked: if 'our basic values' are of such little doctrinal consequence, why is their central role in the Court's account of fundamental justice under section 7 significant? I contend that that significance arises precisely from the paradoxical character of the Court's appeal to our basic values discussed in the previous two Parts – an appeal that is both pregnant with meaning but empty of content. The Court's equivocal appeal to basic values is emblematic of a fraught relationship between community and proportionality more generally. This inherent tension helps to shed light on a necessary but difficult task that is unavoidable for individual instances of proportionality review: the task of imagining the parameters and character of 'our' community.

The central role that 'our basic values' play in the Court's association of the principles of fundamental justice with means-ends rationality serves as stark reminder that judgments of proportionality can be neither rational nor legitimate except insofar as they are grounded in community.<sup>41</sup> Too often, scholarship on proportionality seems to forget or ignore that judgments about whether rights limitations are justified entail a

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cial decision-making and that surely have a significant role to play within section 7 of the Charter. Moreover, the Court in *Bedford* injects further substance into its interpretations of arbitrariness, overbreadth and to a lesser extent gross disproportionality when it expresses those principles in terms of the character of the connection between legislative objectives and effects, or ends and means, drawing on the work of Hamish Stewart and Peter Hogg. See *Canada (Attorney General) v. Bedford*, *supra* note 3 at paras. 117, 119-120. My reflections therefore relate specifically to the work performed by 'our basic values'.

<sup>41</sup> Mark ANTAKI, "The Rationalism of Proportionality's Culture of Justification" in Grant HUSCROFT, Bradley MILLER & Grégoire WEBBER, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 284.

consideration of what is a right state of affairs in a concrete community,<sup>42</sup> requiring that “one situate the would-be right-holder in a community of other actual and potential right-holders.”<sup>43</sup> Judgments of proportion give concrete expression to what justice in our community conclusively requires. To judge whether means and ends are in proportion, the need to appreciate the parameters and character of the community to which ‘we’ belong is unavoidable. Judges called upon to say what is proportionate and, in the case of section 7, what is fundamentally just, must therefore be able to imagine – indeed cannot help but imagine – the distinctive features of ‘our’ community, in terms of its commitments, its membership, and its approach to determining what is fair. Judges must have in their minds a picture of who it is that is included as part of their community, what those people value, and how they conclude whether relevant considerations are fairly balanced.<sup>44</sup> ‘Our basic values’ reminds us, time and again, that proportionality, notably as now embodied in the principles of fundamental justice, cannot be disassociated from community.

The emptiness of the Court’s appeal to basic values in *Bedford*, insofar as it ultimately refers to no values in particular, in turn underscores how difficult such a task is. In the face of pervasive value pluralism, the uncertain relationship between community and place characteristic of contemporary society,<sup>45</sup> and conflicting ideas about what justice should look like, imagining ‘our’ community’s justice commitments is a nearly colossal endeavour. And crucially, in light of the disassociation of constitutional adjudication from text characteristic of proportionality review,<sup>46</sup> the principle of proportionality itself offers little substantive guidance to courts confronting that challenge. Authorized and even encouraged to

<sup>42</sup> Grégoire WEBBER, “On the Loss of Rights” in G. HUSCROFT, B. MILLER & G. WEBBER, eds., *supra* note 41, 123 at 131.

<sup>43</sup> *Ibid.* at 130.

<sup>44</sup> These three features mirror the questions that, according to Nancy Fraser, challenge the normalcy of contemporary justice discourse. See generally N. FRASER, *supra* note 2 and in particular “Chapter 4: Abnormal Justice” at 48-75. The parallels between the challenges of proportionality review and discursive approaches to justice form the subject of a distinct part of my work.

<sup>45</sup> Ulrich BECK, *What is Globalization?*, translated by Patrick CAMILLER (Cambridge: Polity Press, 2000) at 74. See also M. CASTELLS, *supra* note 2.

<sup>46</sup> M. COHEN-ELIYA & I. PORAT, *supra* note 30 at 489-490.

“downplay the text”<sup>47</sup> of the constitution, judges required to determine whether means and ends are aligned and balanced have few authorities on which to rely to venture much of anything about ‘our’ community and what it values.

When perceived as a built-in restraint on judicial appeals to contentious values, this feature of proportionate judgment is sometimes considered a legitimating strength. Compared to other approaches to constitutional rights adjudication, proportionality analysis has been lauded precisely for promoting judicial decisions that disclaim comprehensive values in favour of mid-level constitutional principles. Viewed in this light, proportionality analysis is particularly amenable to public decision-making in plural societies.<sup>48</sup>

However, the narrative of ‘our basic values’ that features so prominently in *Bedford* seems to go one step further than conventional approaches to proportionality analysis. That narrative ends up forsaking any values at all and therefore represents a strikingly novel approach to the necessary challenge posed by community imagination. Indeed, despite being clearly linked to the overall rise in values-talk that characterizes constitutional adjudication modeled on proportionality,<sup>49</sup> the way values are invoked in *Bedford* actually constitutes a departure from the rest of the Supreme Court’s Charter jurisprudence. More or less in keeping with the practices of other constitutional and human rights courts, the Supreme Court of Canada has normally depicted values as objects of proportionality judgments to be weighed in the balance.<sup>50</sup> For instance, in the face of a constitution that values both freedom of religion and equality, or freedom of expression and the right to a fair trial, the Court turns to the framework provided by proportionality to help it decide how relevant values should be balanced against one another in a given situation.

In contrast, what the Court in *Bedford* presents as valuable to the community are the component elements of proportionality review itself.

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<sup>47</sup> *Ibid.* at 490.

<sup>48</sup> Benjamin L. BERGER, “The Virtues of Law in the Politics of Religious Freedom” (2014) 29:3 *J.L. & Religion* 378.

<sup>49</sup> See generally M. ANTAKI, *supra* note 28.

<sup>50</sup> Such a conception of values has been central to Charter adjudication in Canada at least since *R v. Oakes*, [1986] 1 S.C.R. 103. See *Oakes* at para. 64.

Taken together and expressed affirmatively, our so-called basic values against arbitrariness, overbreadth and gross disproportionality are essentially proportionality conceived as a value. In the process, proportionality is transformed from a metric – an approach to assessing whether government conduct is rationally and demonstrably justified having regard to a variety of extraneous constitutional values – to a *telos* or value unto itself.

The Court's account of the principles of fundamental justice in terms of values not only points to the fraught relationship between proportionality and community, but also signals a shift in the meaning of proportionality. Robert Alexy, one of proportionality's most influential theorists and proponents, defends its rationality and legitimacy partly on the basis of the 'common' point of view provided by a political community's constitution.<sup>51</sup> According to Alexy, such a point of view is required if judges are to determine whether values are fairly balanced.<sup>52</sup> But when values are equated to the standards of rationality intrinsic to proportionality review, reference to some meta-constitutional perspective on what is justified in this community – even for instance one as flexible and variable as a basket of Charter values – is essentially elided. Granted, the Court's approach is far from a renunciation of commitments entrenched in the Canadian constitution. But the centrality of values in *Bedford* ironically ends up re-affirming a purportedly value-neutral conception of proportionality as it applies to section 7, one that has already been criticized in the scholarly literature.<sup>53</sup> The picture of justice that emerges from 'our basic values' is accordingly an agnostic one, indifferent to the particular values of a concrete normative community, and aligned instead with a commitment to rational justification pure and simple.

Under the circumstances, by affirming the importance of community while declining the opportunity to specify its limits and character, the Court's insistence on 'our basic values' might best be understood as a deferral of, rather than a response to, the challenge of community imagination. 'Our basic values' point at once towards and away from community, and end up rendering a fuzzy picture of justice that sheds little light on what is right for *this* community in *this* specific case. The burden of community imagination remains, but it becomes implicit, and deferred until

<sup>51</sup> Robert ALEXY, "On Balancing and Subsumption: A Structural Comparison" (2003) 16 *Ratio Juris* 433 at 442.

<sup>52</sup> *Ibid.*

<sup>53</sup> A. KLEIN, *supra* note 5 at 396-397.



the act of deciding itself. If *Bedford* is any indication, the specification of those things and people to which 'our' community is committed may therefore only be given expression in the balance of principles – or should I say values – that combine to determine whether a particular instance of government conduct is or is not proportionate pursuant to section 7 of the Charter.<sup>54</sup>

### Conclusion

The double association of substantive principles of fundamental justice with means-ends analysis, on the one hand, and with basic values on the other, reflects a fraught relationship between proportionality-based constitutional adjudication and community. As taken up by the Court in *Bedford*, the 'our' of our basic values appeals to a conception of what 'we' stand for, and therefore works to anchor the principles fundamental justice in a notional understanding of community. But confronted to the uncertainty posed by contemporary pluralisms, those values end up leading straight back to proportionality.

The Court's approach, which effectively equates proportionality to a value, highlights both the necessity, and the difficulty, of the project of community imagination that the Court is called upon to undertake when adjudicating constitutional claims according to section 7. The Court's interpretation defers the task of what exactly runs afoul of our basic values, and the correlative challenge of community imagination, to the judgment of proportion. This suggests that, for better or for worse, community may be understood and appreciated in different ways depending on the circumstances. In closing, I suggest that it will be important in the future to attend more explicitly to how community is appreciated in individual cases. There is much at stake for constitutional adjudication in the answer to the question of who is part of this community, what this community stands for, and how this community decides. The answers given to these questions hold implications not only for the outcomes of section 7 cases but indeed for our – and I use the first person plural cautiously – collective understanding as a normative community.

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<sup>54</sup> For an expression of the relationship between proportionality and community that evokes similar themes, I am grateful to T.R.S. ALLAN, "Democracy, Legality and Proportionality" in G. HUSCROFT, B. MILLER & G. WEBBER, eds., *supra* note 41, 205 at 205-209.