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CONSTITUTIONAL STANDARDS OF REVIEW IN IRELAND AND CANADA: COMPARISON AND EVALUATION

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TRINITY COLLEGE DUBLIN

Thesis submitted for the degree of PhD in Law, 2013.

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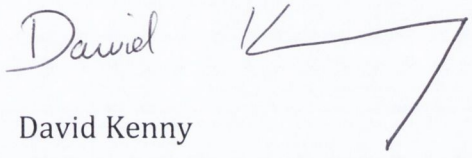
Signed: 

David Kenny

Summary and Methods

This thesis is a comparative, critical analysis of standards of review for legislative limitations of constitutional rights. Its primary focus is on Ireland, though Canada is also discussed in detail. It compares Irish and Canadian law, as they use a facially identical standard of review. It uses extensive theoretical analysis to inform critical analysis of the case-law in each jurisdiction. It concludes by bringing together both of these elements to draw conclusions about international standards of review and their incorporation into different legal systems, and finally to make constructive suggestions about the best standard of review for Ireland.

This thesis is the product of extensive and detailed analysis of primary and secondary sources. Part I of this thesis is theoretical, and involved interdisciplinary study of jurisprudence and philosophy on the nature of rights and their limitations, using secondary sources from these fields. Parts II and III involved detailed analysis of the text of the Irish and Canadian constitutions, as well as in-depth review of the case law of the Irish and Canadian courts. This is combined with insights from secondary literature from both jurisdictions to give a full picture of the constitutions and constitutional law of each country. Part IV combines the theoretical and inter-jurisdictional practical analysis to draw conclusions, using careful comparative law methodology, and highlighting and exploring structural and normative differences between the jurisdictions that may be relevant.

Part I explores the conceptual elements of standards of review. Reasoning from several different conceptions of rights, Chapter One aims to set out what are the conceptually essential elements of a standard of review. Chapter Two goes on to ask what sort of normative choices must be made to actually form an applicable standard of review; that is, how the different concepts of rights can be chosen between, and how the basic conceptual framework of a standard of review can be built upon. It seeks to keep these normative and conceptual elements separate and distinct.

Part II looks at standards of review in Canada. Chapter Three explores the origins of Canada's standard of review –the *Oakes* test– starting with the drafting of the Charter of Rights and Freedoms and following through to the advent of the standard, and changes to it that took place shortly thereafter. Chapter Four looks at the Canadian courts' struggle with the need to weaken the very strong standard initially enunciated, and attempts to use various mechanism to alter the strength of

review. Chapter Five looks at the test's evolution in Canada in subsequent years, and the reality of its application.

Part III undertakes the same examination in Ireland. Chapter Six looks at standards of review in Ireland in its early constitutional history, up to the point where the Canadian standard of review was co-opted into Irish law as the *Heaney* test. Chapter Seven examines the simultaneous arrival of a weaker, and uniquely Irish standard of review, asks why it exists, and looks at how its influence has spread beyond its initial remit. Chapter Eight looks at the evolution of the *Heaney* test in subsequent years, and how it has in fact operated in ways not suggested by its language.

Part IV brings the other three parts together. Chapter Nine compares the operation of the seemingly identical Irish and Canadian standards to illustrate that despite their similarity, different normative choices underlie the standards, and traces these to differences between the values of the jurisdictions. Chapter Ten contrasts the extent to which Irish and Canadian courts were transparent about the values that underlay their standards, to show that the Canadian courts were open when the Irish courts were not. Chapter Eleven sets out a normative case for a standard of review for Ireland, that seeks to remedy flaws identified in this thesis.

This thesis is about standards of review in Ireland, looking to theoretical analysis and to the law of Canada for insight that could not otherwise be gleaned, and also offers broader insights into the way international standards of review work around the world. It concludes that normative choices must always be made by courts incorporating or making a standard of review, unless they are willing to completely ignore the values of the jurisdiction in which they operate; that international standards of review may hide this reality; that this reality is hidden in the Irish example; and that this should change for Ireland to properly conduct judicial review of rights limiting legislation.

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In November of 2010, I presented elements of Chapter 8 of this thesis to the Constitutional Law and Policy Group of Trinity College Dublin. In April 2011, certain ideas included in Chapter 9 and 11, and certain general points concerning this work, were included in a presentation to the Irish Society of Comparative Law conference in UCD. In November 2011, a version of Part I of this thesis was presented to the Irish Jurisprudence Society. Some of the ideas in Chapter 9 were presented to the Law Student Colloquium in Trinity College Dublin in February 2012, and, in a different form, to UCD Constitutional Studies Group's conference "The Irish Constitution: Past, Present, and Future" in June 2012. I would like to thank all who made comments and suggestions at these various events, in particular Dr Brian Foley, Ms Estelle Feldman, Professor Gerry Whyte, Dr Eoin O'Dell, and Dr Niamh Cleary. I would also to highlight the contribution of the members of the Irish Jurisprudence society for their highly detailed and insightful feedback, which was very helpful.

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Errors and omissions remain, of course, my own. I have endeavoured to state the law correctly as of 13th August 2012.

David Kenny

14th August 2012

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INTRODUCTION

This thesis is a critical analysis of standards of review for the legislative limitation of constitutional rights. It seeks to ask: what are standards of review, and what can and should they do? At its most basic level, a standard of review is a reasoning process that is used to determine whether a limitation on rights is justified or unjustified.

This seems like an enquiry that should focus heavily on factors particular to the legal instrument that posits and protects the rights in question. However, more and more, reliance has been placed on an international standard of review, commonly called the proportionality principle. Now used in many countries, it is a worldwide principle of human rights protection, and it is the primary standard of review used in the two countries that will be discussed in this thesis, Ireland and Canada. The goal of this thesis is to ask how this standard of review works in these two jurisdictions. The standards used are facially identical, but are they employed in an identical fashion? If they are not, then what does that tell us about the standard of review? Can it have a truly global reach, with the same test being applied around the world, or is the test a mask for something else going on behind the scenes? The Chief Justice of Norway characterises the debate about the proportionality principle to be "an international debate on constitutional law method,"[1] and it is to this debate that I wish to contribute.

The novelty of this project is the way the analysis is structured. Some have tried to break down particular standards of review to see how they tick.[2] Others accompany an analysis of how review should take place with a normative theory of what rights are.[3] I attempt to look at it differently. I wish to examine this concept from first principles.

Rights exist and are limited in places so diverse and diffuse that no single theory of rights can be universally accepted in all of them. Yet, in all these places,

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[1] Carsten Smith, "Judicial Review of Parliamentary Legislation: Norway as a European Pioneer," [2000] Public Law 595 at 603.

[2] See the particularly fruitful efforts of Denise Réaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009; Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65 CLJ 174; and Ahron Barak's magisterial recent work, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012).

[3] Robert Alexy's work in the field is ground-breaking, none more so than *A Theory of Constitutional Rights*, (Oxford, 2002); Jurgen Habermas' *Between Facts and Norms* (Polity Press, 1996) is also instructive.

rights are limited. Therefore, explaining these standards by reference to hotly contested theories of rights is not sufficient. There must be, at some level of abstraction, a unifying set of ideas that explain what standards of review are. Certain things must follow from the fact of entrenched rights; the process of entrenching rights in a constitution or similar instrument must imply a set of values and principles. These are the conceptual foundations of any standard of review, and they can be found without taking as our starting point any particular standard of review, since they are invariably laden with normative baggage, and without accepting any one contested theory of rights. This is the subject of Chapter One of this thesis.

Having established these conceptual foundations, we can see what these conceptual requirements are, and what they are not. Those conceptual components are vague and do not form a complete standard of review; they require significant elaboration for them to be made into an applicable, complete standard of review, that could actually be used by a court. Decisions must be made which build on these foundations –and choose between several conceptually acceptable foundations– that do not have conceptually dictated answers. Normative choices must be made: about how rights are conceived of in a particular jurisdiction; about how rights are to be protected, about how probing the standard of review is to be; about how rights review should be reconciled with other constitutional priorities such as the separation of powers. These choices may be made by constitutional designers, and the answers may be clear on the face of the Constitution, or they may not be; they may be left to courts to decide how to develop standards of review based on their own conceptions of a constitution's values and priorities. The second chapter of this thesis will explore this, looking at the various conceptually acceptable normative decisions that could be made by courts and constitutional designers. The conceptual requirements will be kept separate from the normative considerations that follow.

This is important because the reality of standards of review has been rendered opaque. People speak as if the proportionality principle, now a truly international standard of review, is merely a developed version of the conceptual core of the standard of review.[4] It is spoken of as if the principle itself is conceptually

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[4] David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) is the chief proponent of this view; the proportionality principle is the titular rule. Bernhard Schlink recent case for the introduction of the principle into US constitutional law is similar in its stance. "Proportionality in Constitutional Law: Why Everywhere But Here?" 2012 22 Duke Journal of International and Comparative Law 291. E Thomas Sullivan and Richard Frase, *Proportionality Principles in American*

required; the normative choices that underlie the standard are ignored and forgotten.

My research is novel in severing the conceptually necessary elements of a standard of review from anything added subsequently. It shows that complete standards of review, such as the proportionality principle, are ultimately far more than mere expressions or instantiations of an ethereal concept. They are this, in that the same conceptual framework underlies them. However, they are also the product of many, varied normative choices about which conceptually acceptable premise should be adopted, and how those conceptual elements should be fleshed out and built upon. By choosing to view standards of review as many different perspectives on a static notion, the current literature ignores the huge role these normative choices play.

The merit of the distinction drawn in the first two chapters is that it allows us to approach the analysis of existing standards of review from a fresh perspective: freed from any normative baggage, aware of the bare conceptual requirements, we can see what normative choices are made to build a complete standard of review. We can see what work that standard does, and what values of the courts and the legal system have been infused in order to make it.

Parts II and III of the thesis will use this insight to analyse the standards of review looking at Ireland and Canada. Looking at two jurisdictions that are different but employ facially similar standards will be illuminating, as it will enable us to distinguish clearly the different normative choices that have resulted in divergences in practice. Comparisons between the jurisdictions will yield insights into those jurisdictions, but also into the proportionality principle that both legal systems purport to apply.

It is important to note, however, that this thesis is primary focused on Irish law. The detailed exploration of Canadian jurisprudence primarily serves as a point of comparison for critique of current Irish law and suggestions for its future

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Law, (Oxford University Press, 2009) purports to identify elements of the principle throughout American constitutional law, but in so doing confuse the conceptual basics of all standards of review with the particular components of the proportionality principle. Even Barak does this to an extent, though he is far more circumspect. Barak, while otherwise recognising the role of domestic values in constitutional adjudication, and warning against ignoring these values, still seems to think that the notion of proportionality is one that exists in the ether. The four step test known as proportionality is one way of trying to express this concept. Barak, note 2, at 131-132. It is an instantiation of this. He looks to historical sources of the idea of proportionality, as do others, (Moshe Cohen-Eliya and Iddo Porat, "American Balancing And German Proportionality: The Historical Origins," (2010) 8 IJCL 263) to try to show that its current form is an evolution of a fundamental idea.

development. In the course of this examination, some general observations can be made about international standards of review that go beyond these jurisdictional boundaries.

Part II focuses on Canada. In Chapter Three, I will explore the structure of the Canadian Charter of Rights and Freedoms, and the limitation clause that underlies the standard of review in Canada, to explore the normative choices made by the designers of that document. Then, the famous *Oakes* case will be analysed, looking in detail at the standard of review that was outlined in that case, and what normative choices can be seen from its language and its application. Finally, I will examine the modification of the test shortly after *Oakes* in the *Edwards Books* case, which reflected evolving attitudes of the Canadian courts towards deference, interventionism, and the strength of rights. It showed the test would be subject to extensive variability of application.

In Chapter Four I will examine the complex developments in the *Oakes* test related to deference and non-interventionism. Initially, the Canadian courts developed a system of categories, where certain classes of cases would be subject to stringent review, whereas others would not. These categories proved too blunt and unwieldy, and were gradually replaced by contextual factors that would justify deference to particular determinations. This shows the folly of trying to ignore the nuance of rights adjudication and shoehorn all cases into an inflexible formula. This experience holds lessons about deference and interventionism, and the reasons that can persuade courts to review rights restrictions in a less searching way.

In Chapter Five, I explore the evolution of the *Oakes* test, and the ways in which it was altered, in language and application, over time. This examination illustrates that the strong language of the *Oakes* test was dissonant with its application. Almost all elements of the test have proven to be weaker than they seemed. This tells us a great deal about the attitude of the courts, and the reality of the application of the test that they outlined.

In Part III, the Irish approach will be scrutinised. Since the mid-1990s, a *verbatim* incorporation of the *Oakes* test has served as the primary standard of review for Ireland, and this part of thesis explores the development of this test, and of other pertinent standards of review.

In Chapter Six, I examine the situation in Ireland before the incorporation of the Canadian test. Ireland had no articulate standards of review for most of its

constitutional history, but rather rights restrictions were assessed using inchoate and vague standards, such as asking whether or not the right had been unjustly attacked. From analysing such cases, the constitutional text, and extra-judicial writings of prominent judges, the normative choices adopted in the Irish constitutional order can be pieced together. I will then look at the incorporation of the *Oakes* test in the *Heaney* case, and see what normative choices were made at this juncture. In particular, it is important to examine whether the judge chose to incorporate any normative choices that were built in to the Canadian language, or to abandon them. This analysis, and examining the test's application, show that the *Heaney* case did little to elaborate on how the test was to work in Ireland, or explain how it related to the pre-existing constitutional law framework.

Chapter Seven focuses on the advent of the *Tuohy v Courtney* rationality test. The test, which grew up alongside the *Heaney* test, was an avowedly less interventionist standard of review. The reasons behind the test will be examined, as they bear similarities to some of the factors considered in Canada. However, owing to lack of clarity in the judgment, the *Tuohy* test soon spread far beyond its initial limits and became a watchword for less intensive review invoked by judges without any clear rationale or reason. It has the effect of diluting the *Heaney* test, and has lost its identity as an independent standard of review. It is an illustration of the difficulties the Irish courts had dealing with issues of deference and interventionism.

In Chapter Eight, I trace the development of the *Heaney* test in subsequent case law. The Irish courts have struggled to apply the test consistently. Few elements of the test have coherent and consistent application, and fewer have any real force. Sometimes the test is not applied in any form at all, being merely recited. In fact, it is difficult to say that *Heaney* brought any substantial changes to the manner in which Irish courts carry out rights review. It has largely been a new linguistic formulation of old practices – a linguistic veil that gives a sense of legitimacy to deferential, non-interventionist rights jurisprudence that lacks any coherence.

In Part IV, I bring together insights from the first three parts to draw conclusions about the nature of the test; the importance of dialogue and transparency in standards of review; and, finally, the best normative choices for Ireland to make in respect of standards of review.

In Chapter Nine, I draw together the insights from the previous parts of the thesis to illustrate one of the core contentions of this thesis: that the *Oakes/Heaney* test is not a complete standard of review. Ireland and Canada purport to apply the same standard of review, but there are huge differences between the case law of those jurisdictions that prevent one concluding that this is actually the case. By looking at the similarities and differences in the application of the tests, we can see what the test itself actually does, and can see how much room there is for courts to insert the normative convictions of courts or constitution. In Ireland, the normative values are certainly not the same ones that motivated the Canadian courts, and are in fact the pre-existing constitutional values that the Irish courts had long recognised and applied. There is nothing wrong *per se* in this; it is senseless to attempt to exclude domestic constitutional values, and to do so denies constitutions their role as expressions of national identity and values. The point is that this shows that there can be no such thing as an international standard of review, and that the *Oakes/Heaney* test is altered very significantly by domestic constitutional values. The language of the international standard of review does not reflect these domestic values, which are therefore hidden. If the language of a standard of review does not reflect the reality of its application, it is misleading, and this is serious indeed.

Chapter Ten pursues this line of thought in a different direction, looking at the extent of the transparency of the courts in applying such standards. Significant normative choices are made by the courts about the nature of rights protection, and about deference, interventionism, and the nature of judicial review. These can be made openly and clearly, allowing for judicial and academic commentary, which can help to legitimise these choices, and improve the judicial process; or they can be made silently and opaquely, with no opportunity for such dialogue. Canada did this right: its courts clearly and openly discussed the reason that underlay these choices, and it was refined by judicial dissent and academic commentary over the years, which fed back into judicial decision-making. In Ireland, by contrast, no such discussion ever took place. There was no clear appreciation of these choices in judicial decisions, and the choices made can only be disentangled with sustained analysis of a great quantity of case law. As a result academic commentary could not keep pace with these developments, and a constitutional rule on dissent stifled judicial dialogue. Hiding the normative choices being made is the wrong way to approach this process. This ensured that Ireland lost any possible procedural

benefits of an international standard of review, such as transparency and the enablement of criticism of the judicial method.

Finally, in Chapter Eleven, I outline a normative case for what I think the best standard of review would be for Ireland, based on my own views of the best way to resolve these normative choices, founded on the observations drawn throughout the thesis. The test I propose is different from the *Heaney* test, but not radically so. The most important change would be to have a standard of review that would be applied in a way that would resemble its language, and that would be openly and plainly justified in a discourse involving academics, judges, and others. The most important thing that a standard of review in Ireland should do is to start this dialogue, because it is something that has never taken place.

This thesis, then, does not seek to be either a champion or a staunch sceptic of this sort of international standard of review. It rather seeks to look at such standards for what they are. Some parts are conceptually essential; some parts are a result of normative choices that are necessary, but are not pre-determined. The reality of the internationalisation of standards of review is neither as good as its proponents would like,[5] nor as dangerous as detractors suggest.[6] In fact, the truth is that standards of review, such as the proportionality principle, are what we make of them.

NOTE ON THE LIMITS OF THIS THESIS

This thesis deals with a substantial area of comparative constitutional law, and limits must be placed on its scope in order to refine the question being asked.

Interpretation of Rights

In the course of this thesis, interpretation of rights will be touched on in the context of rights being limited by their interpretation. This is dealt with in particular in chapters 1, 2, and 9. These are called internal limitations on rights. However, the issues of constitutional interpretation and interpretation of rights are simply too great to be dealt with, this being its own discrete branch of jurisprudence and

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[5] David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Carswell, 1990).

[6] Grégoire C.N. Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23 CJLJ 179; Grégoire Webber, *The Negotiable Constitution*, (Cambridge University Press, 2009);, Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7 IJCL 468.

constitutional law. There is always some rights definition question, express or implied, in any rights case. It is clearly particular to each jurisdiction. Standards of review are used to determine whether a restriction on a right is legitimate, and therefore presupposes that the interpretative stage is complete. Therefore, in this thesis, I confine myself to examining the concept of definitional questions only when the definitional question also resolves the issue of limitation; that is, the right is subject to no limitation other than the scope of its definition. Broader questions about definition and interpretation may have interesting lessons for discussion of standards of review, but they will have to await further examination on another occasion.

Even then, in particular instances of internally limited rights, I have not been able to embark upon a full exploration of the processes used in their definition, as this is far too great a task to complete in this work.

Choice of Jurisdiction

This project was undertaken with a focus on Irish law. Ireland is a place where the proportionality principle has taken hold, and has been widely used, without much detailed academic analysis of the meaning and effects of that development. Moreover, Ireland's unusual history –adopting this test after decades of constitutional review, with a conservative judiciary– offers unique insights into the operation of the test that have not been explored, and that can have relevance beyond its borders.

As a comparator, Canada is the natural choice. The Irish standard was copied verbatim from Canada, and the standards are identically worded, making the comparisons that can be drawn between them meaningful. Canada, like Ireland, has a written constitution with entrenched rights. Accounting for differences between the constitutional structures in these jurisdictions is a crucial part of the thesis, and therefore differences are more likely to instruct than to mislead.

Alongside Canada, however, the jurisprudence of the European Court of Human Rights was cited in the adoption of the standard of review. Why not focus on this jurisdiction instead or as well?

As for why Canada is preferred, this is because I believe Canadian law was the more influential in this development. The test was copied from a Canadian case, and to this day, the Irish courts cite Canada, rather than the ECHR, for its

provenance.[7] There is little evidence that European Court jurisprudence has influenced the Irish courts in their application of the test.

Canada also has the benefit of being more comparable to Ireland, insofar as it is a common law legal system with a domestic written constitution that is enforced in a manner broadly similar to Ireland, with the differences between them being useful as points of comparison rather than problematic.

That is not to say it would not be constructive and enlightening to examine the case law of the ECHR; it surely would be. However, it is both too great a task for this thesis, and also would change the nature of the project, drawing in questions of the interaction of domestic and international human rights enforcement that are not at the heart of the question I am examining. It therefore must wait for another time.

Administrative Law Proportionality Principle

Both Ireland and Canada are struggling to decide what role the proportionality principle has to play in the review of administrative law decision-making. In Ireland, the Supreme Court, in the recent *Meadows* case, embraced the test in the administrative law context, though with little if any attention being paid to how, if at all, the administrative law variant of the test might differ from its constitutional counterpart.[8] Even more recently, the Supreme Court of Canada has decided that the principle is inapposite in the administrative law context.[9]

Insightful commentary has been offered on the Meadows case in Ireland.[10] Alan Brady has also written perceptively and at length on how courts in the United Kingdom might nuance their analysis in order to accommodate both legislative and administrative review under the same rubric.[11] Paul Daly has written an incisive analysis of Deference and its role in Administrative Law that touches heavily upon these issues in a general sense.[12]

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[7] *DPP v Damache* [2012] IESC 11.
[8] *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3.
[9] *Doré v Barreau du Québec* 2012 SCC 12 (CanLII).
[10] Alan Brady, "Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of Meadows," (2010) 32 DULJ 136; Paul Daly, "Standards of Review in Irish Administrative Law after Meadows v Minister for Justice, Equality and Law Reform," (2010) 32 DULJ 379.
[11] Alan Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach*, (Cambridge University Press, 2012).
[12] Paul Daly, *A Theory of Deference in Administrative Law: Foundations, Application and Scope* (Cambridge University Press, 2012). See also Paul Daly, "Blown Out of All Proportion: the Case Against Proportionality as an Independent Head of Review" in Cian Murphy and Penny Green (eds.) *Law and Outsiders: Norms, Processes and 'Othering' in the Twenty-First Century* (Hart, Oxford, 2011).

Undoubtedly, there is a great deal more work to be done on the import of the *Meadows* case, the manner of its subsequent application by the High Court, and the differing views of the Irish and Canadian courts in this burgeoning area. However, that is a different project; attempting to include administrative law in this project would have made it unwieldy, and distracted attention from its main focus on legislative review. I chose to address the older problems of standards of review in the sphere of legislative review before exploring the new problems appearing in administrative law.

NOTE ON LANGUAGE

The word proportionality, unfortunately, has many meanings. In the modern legal context, it is generally taken to mean the whole of the three-part *Oakes* Test or its regional variant. It is also used to describe the third limb of that test, the balancing limb, which is also called, by some, proportionality *stricto sensu*. In addition, particularly historically, proportionality has often referred to the concept of minimum impairment inherent in the second limb of the *Oakes* test.

This leads to confusion. In order to avoid such problems, I will use the following terms: the *Oakes* test will be used to refer specifically to the Canadian test outlined in that case. When referring to the test as applied in Ireland, I will refer to it as the *Heaney* test, after the case which first fully incorporated it. When referring to the test in a general sense, without regard to any particular jurisdiction, I will refer to it as the *Oakes/Heaney* test, or the proportionality principle. I will generally use the term "balancing test" to describe the third limb of the test. It should be borne in mind that judges of various jurisdictions do not conform to this approach, and so in quotations, "proportionality" may mean any one of these things, though it is generally apparent from context which meaning is intended.

A similar problem occurs in relation to the second part of the *Oakes/Heaney* test. It is generally described as "minimal impairment of rights." Hogg criticises this language as risking confusion that the test means that the restriction must be minimal as in insignificant or negligible, rather than minimal as in as the minimum amount.[13] I agree with his critique of this phrase, and so instead refer to it as the "minimum impairment" test, which is clearer.

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[13] Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-36. The Irish Supreme Court seem to make precisely this mistake in *Murphy v IRTC* [1999] 1 IR 12 at 26.

1 – The Conceptual Foundations of Standards of Review for Rights Limitations

This is the age of rights, a time where much political discourse is couched in the language of rights. Rights are said to protect and empower individuals and lead to better governments and governance. They reflect some tenet that certain interests and values are so important that they warrant a special status, be this legal or rhetorical, that puts them above any lesser interest.

Even at a conceptual level, however, rights pose problems: how can they be reconciled with popular governance, and the demands of a popular majority? Can goals pursued in the public interest restrict the private interests guarded by rights, and if so, to what extent? How can two rights be balanced when they conflict? These questions follow from any concession that rights are not absolute. Rights, unless absolute, must have limits. Indeed, even rights declared to be absolute almost certainly include inherent limitability, because the things they purport to protect are generally not entirely clear and require definition.[1] At a basic level, it must be asked: how do we know when there is a justified limitation on rights?

These questions exist beyond the legal world of courts and litigation. They follow ineluctably from the concept of rights. When rights clash in this abstract sense, various philosophical arguments might prevail: about the origin and nature of rights; about the greatest happiness for the greatest number; about the relationship between individuals and their communities. Attempting to provide philosophical answers to such questions is outside the scope of this project.

However, when rights are given substantive legal protection, in a constitution, convention, treaty, statute or some other legally enforceable instrument,[2] these problems take on a different character. The protection of rights in a legal instrument changes things, as that recognition and protection makes a statement about rights and how they are to be treated. Examining what purpose that

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[1] With that definition comes an obvious limitation, as any possible violation of the right that is held to be outside the rights' scope when it is fully defined is obviously not included within the scope of the 'absolute' protection. Take for example a purportedly absolute right to be free from torture; torture, not being a self defining concept, must be given a concrete meaning to decide if a particular course of action is torture. Even this absolute right is thus subject to limitation.

[2] From this point, I will generally refer to rights being recognised in constitutions for the sake of convenience, and to distinguish the type of right under discussion from lesser legal rights or entitlements. The analysis should apply to rights recognised in other instruments as well.

protection serves can help us attain more concrete answers than we could derive from the purely abstract question.

Those tasked with protecting rights –usually the courts– must decide how rights can be reconciled with or balanced against the will of the people as expressed in legislation enacted by their representatives. Rights are usually challenged and limited by laws and state actions,[3] which, in order to achieve a measure thought desirable by the people or their representatives, have restricted or delimited the rights of the individual. The question for courts is how far can the state go in restricting the right before the right is violated; how can limits on rights be defined and applied without losing the essence of the right? To put it another way, how can one prevent the task of limiting rights from becoming the piecemeal abrogation of rights by the state – a death by a thousand cuts?

To answer these problematic questions, courts have to look at the conceptual nature of rights, and decide what a right is. What does it mean to say that something is a legally protected, constitutionally recognised right, and what consequences flow from that? Courts then employ standards of review to decide whether or not a limitation is permissible with reference to the nature of rights. Many courts throughout the world have converged on the idea that where a right is said to be restricted by the state, the state and the individual appear before the court to advance their case. The standard of review establishes what the state or the individual would have to demonstrate to prevail over the other.

Academic analysis of this issue is lacking in a key respect. There is substantial literature debating what a right is, and how rights can be established and recognised. There is also a large body of literature on the topic of how courts in various jurisdictions deal with rights questions in practice. What is lacking is a link between these two: an analysis of what the legal recognition and protection of rights means, and how the mechanisms used by courts to assess rights limitations – standards of review– actually embody this notion.

In particular, the purpose of Part I of this thesis is to ascertain what elements of standards of review are fundamental to the legal protection of rights, and which are choices about values derived from particular legal orders. That is, I hope to delineate those elements of standards of review that are conceptually essential, and

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[3] As noted in the introduction, the focus of this thesis will be on the limitation of rights through legislation, as the issues presented by administrative action are somewhat different.

follow necessarily from certain conceptions of rights, from those that are normative choices, where a number of options are conceptually acceptable. This is something that the literature on standards of review has yet to explore.[4] There are many different standards of review, each having different priorities and focuses, based on the legal systems in which they grew up. There are also more global standards of review that have been accepted in many jurisdictions and seem to be unfazed by jurisdictional boundaries and the substantive differences between legal systems. By understanding which elements of a standard of review are fundamental and essential to the practice of balancing rights and state interests, one can assess standards of review in a much more searching way, and see whether the incorporation of standards obscures the forces underlying them.

This chapter will set out the conceptually essential foundations of any standard of review – what it absolutely must have. It is paving the way for another exercise, which will be undertaken in the next chapter, laying out the normative arguments that might sway constitution-makers or courts to adopt one approach or another when making normative choices about standards of review. It is critical that these distinctions are drawn and maintained. If we can distinguish that which is conceptually essential from that which is normatively chosen, we are in a much better position to undertake an analysis of standards of review in particular jurisdictions, and internationally. The work done here is essential to ground the later analysis of standards used in Ireland and Canada, and to allow observations to be drawn from the experience of these jurisdictions.

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[4] Several authors have made substantial contributions to the abstract question of how standards of review work, but none of these has attempted to sever that which is conceptually required from that which is normatively chosen. Alexy's description of what he calls proportionality is insightful, but is intimately bound up with his theory of rights and principles. His theory about rights limitations is only useful in figuring out how standards of review would work in a system that adopts his theory of rights or something very close to it, and is thus filled with Alexy's own normative convictions. Robert Alexy, *A Theory of Constitutional Rights*, (Oxford, 2002). Denise Reaume gives an excellent account of what the Canadian *Oakes* test might be designed to achieve. However, it takes the existence of the standard as its starting point, and her account cannot sever what is normatively added from that which is essential. Denise Réaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009. Ahron Barak's exceptional book, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012) is a hugely insightful account of the *Oakes/Heaney* test as applied around the world. It offers great insight into the meaning and operation of the test, but again uses the test as established in various jurisdictions as the starting point of its analysis. It therefore cannot sever that which is conceptually required from normative choices. *Cf* Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65 CLJ 174; Julian Rivers, "Proportionality, Discretion and the Second Law of Balancing," in George Pavlakos, (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007); Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7 IJCL 468; Vicki Jackson, "Being Proportionate about Proportionality," 21 Const. Comment. 803 2004.

The Logical Consequences of Protection of Rights

An Underlying Assumption: Individual Rights

It should be noted that the scheme under discussion here supposes an idea of rights that is contested: that rights are primarily for individuals. This view of rights is far from settled, and it is worth discussing the criticism that this model is too fixated on individual entitlements.

Raz, in his article "Rights and Politics,"[5] argues that rights are too often viewed in an individualistic way. He says conceiving of rights as individual is confrontational: "Rights set the limits of the private sphere, in which each individual is sovereign over his or her own affairs, as against the public domain, where the public interest, as determined by political action, prevails."[6] He says this view is "narrow and ... distorted"[7] He contends that "groups as well individuals possess rights,"[8] citing examples such as families and nations, though these groups "merit protection only to the extent that they serve individuals interests."[9] Group rights, therefore, are a realization of collective individual interests, which are advanced by promoting the interests of the group.[10]

Raz's account seems to counsel against individually enforceable rights; indeed, Raz later notes that there is often too much focus on enforcement in the discussion of rights.[11] We are concerned with the consequence of entrenching enforceable, individual rights. That decision to entrench such rights is a rejection of Raz's argument about the dangers of individualistic rights.[12] Therefore, to engage fully with Raz's argument would take us outside the scope of this work.[13]

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[5] Joseph Raz, "Rights and Politics," 71 Ind. LJ 27 1995-1996.
[6] *Ibid* at 32.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] Raz says that the criminal law acts to protect rights, and takes as an example the property rights protected by means of theft offences. The interests in prosecuting someone for a theft "transcends the concern for the interests of *that* person in his property," and represents "[t]he interest of other people in the common good of respect for property." *Ibid* at 33. A right in a given instance is given strength by the common good, a strength it "might not have enjoyed had my interest in it been the sole reason for it." *Ibid* at 34.
[11] *Ibid.*
[12] Raz notes that "individualist interpretations of constitutional rights have been particularly influential." *Ibid* at 34. These influential accounts likely act on the mind of a constitutional draftsman.
[13] However, it is important to note that it is possible for both individual and collective rights to be recognised in a constitutional order. Constitutional drafters could recongise the value of each of these, though this may create some problems from the point of view of enforceability, as Raz himself would probably concede. See *ibid* at 42, where Raz discusses the undue focus on the enforcement of

Conception of Rights

How one views rights will invariably affect the manner in which one approaches review of limitations of rights. In essence, there are two possible views: rights can be seen in a purely utilitarian sense, making the exercise of assessing limitations a utilitarian balancing act; or they can be seen in precisely the opposite way, as anti-utilitarian values. While both views are conceptually valid, the entrenchment of rights in legal instruments is perhaps more consistent with the latter.

Rights as Utility

The first way to conceive of rights is as utilitarian values, which derive their force from the extent of the utility generated from their protection. Rights exist because they are useful to certain people. In a purely utilitarian exercise in rights limitation, the process is simple: one establishes the utility generated by the (unlimited) right, or the disutility created by its limitation, and weighs it against the utility generated by the law that imposes a limit on the right. Whichever has the greater utility will be favoured.

This approach treats both rights and their limitations as desirable objectives commensurate with each other. They both derive their importance from the same source: the legal stipulation that they are desirable. The importance of rights is stipulated by their recognition in a constitution, whereas the law attempting to limit them has passed through a democratic process, which has expressly or implicitly stipulated that the limitation is important. The protection of rights is just one of many important goals, and whatever goal does the greatest good will be upheld in any given case. It strips rights of any aspiration to be high values, or "trumps" to be played against the popular will. They are simply utilitarian considerations that must expressly be accounted for, and their protection ensures that no law is passed that ignores the utilitarian cost of rights restrictions.

This conception of rights envisages rights as warning flags. If the state is taking a course of action that is restrictive of rights, the legal instrument that

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rights, and enforcement *via* the judicial branch of government. This suggests that Raz might feel that the broader conception of rights that he advocates may be ill-suited to the type of rights enforcement under discussion here.

entrenches the rights warns of the utility that individuals derive from rights, and the courts engage in a cost-benefit analysis to make sure the utilitarian benefits of rights have not been ignored. This is not an insubstantial benefit: certain theories of judicial review suggest that the primary role of courts is to defend those discrete and insular minorities that cannot effectively wield influence in the political process.[14] If the premise of such theories is accurate, and minority rights may be ignored by the state, then one can imagine the usefulness of utilitarian rights review.[15] The legislative balance of utility could be skewed by the insufficient regard paid to those whose rights were affected, because those individuals were not adequately represented in the political process. This envisages courts as reviewers of the utilitarian balancing of the legislative process, having regard to specific listed values that legislatures may be prone to ignore.

A standard of review for this approach to rights questions is thus conceptually simple: a court establishes how much utility is derived from the right, and how much utility is derived from its limitation, and makes sure that the balance struck has not disregarded the utility derived from the right.[16] That is, it must ask whether the legislature was justified in sacrificing the right in the name of the utility done by the restriction.

There is certainly something to this utilitarian view of rights; it is not nonsense. It is, however, a limited conception of the role of rights, and does not seem to best account for the entrenchment of rights in legal instruments. As we shall see, the entrenchment of rights in a constitution seems to afford them some anti-utilitarian value that is not conceptually compatible with this utilitarian conception of rights. It is, therefore, a normative choice to embrace or reject this conception of rights, but a choice that will almost always be resolved against utilitarianism when rights are subject to constitutional entrenchment.

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[14] For an outline of this concept, known as political process theory, see, amongst others, John Hart Ely, *Democracy and Distrust*, (Harvard University Press, 1980); Cass Sunstein, *Designing Democracy*, (Oxford, 2001).

[15] That is not to say that political process theorists would have to embrace utilitarian rights review; it is simply that the utilitarian conception of rights seems consistent with the core aims and goals of judicial defence of rights outlined in that theory.

[16] Conceptual simplicity does not make the task easy; it is not clear how this utility can be measured, and issues of incommensurability are patent. Incommensurability issues heighten questions of institutional deference; if precision in this balancing is not possible, should a court trust in the legislature's balance unless there is a major apparent error, or should it review the balance *de novo*?

Rights as Anti-Utilitarian Values

Another conception of rights is directly opposed to the model outlined above. It would insist that rights not be limited by reference to the utility of their violation alone. In this model, rights can and must withstand purely utilitarian assault; that is what gives them the character of rights and distinguishes them from other goals. This can be called the anti-utilitarian view of rights.

Historically, utilitarianism and rights have not mixed well.[17] Rawls rejected utilitarianism because it failed to "take seriously the distinction between persons."[18] This objection resembles the Kantian notion that people should not be used as means to an end, because, as autonomous beings, people are ends in themselves. The recognition of rights, and their entrenchment in positive law, seems to represent a rejection of utilitarian principles being the sole or controlling factor behind the protection of rights. The existence of the right seems to suggest that purely utilitarian analysis cannot determine the legitimacy of government action against an individual.

For something to warrant the status of a right –for it to be worthy of the name, or any other name connoting a recognised freedom or entitlement– it must be capable of withstanding attack from at least some utilitarian considerations. As Dworkin has persuasively argued, if a right cannot withstand utilitarian considerations of any sort, it is not a right at all. In "Taking Rights Seriously", he noted that the weight that rights are afforded should be defined by their ability to withstand utilitarian assault. Therefore a right

> cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency.[19]

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[17] Ever since Jeremy Bentham's terse dismissal of the Declaration of Independence, and its premise that natural rights were the basis of and limitation on government, as "nonsense upon stilts," it has seemed as if the two concepts cannot readily coexist. See HLA Hart, *Essays on Bentham*, (OUP, 1982) Ch. 3 at 53 and HLA Hart, "Between Utility and Rights," 79 Colum L. Rev. 828 1979.

[18] John Rawls, *A Theory of Justice*, (1971, Harvard University Press) at 187. Similar considerations underlie Robert Nozick's critique of utilitarianism in *Anarchy, the State and Utopia*, (1975, Oxford Blackwell).

[19] Ronald Dworkin, *Taking Rights Seriously*, Chapter 4: "Hard Cases," (1977, Harvard University Press) at 92.

If this is not the case, "the putative right adds nothing and there is no point recognizing it at all."[20]

This argument seems to follow logically from the fact of a right's recognition in a constitution – it is distinguished from other concerns in the ordinary political process. This seems to explain the idea of rights more effectively than a purely utilitarian conception. A right is a political aim that was thought too important to be disregarded by the ordinary political process, and also has an intrinsic value. There is merit in the right being exercised, and that merit is recognised in its special status as a right. The consequence of this is that the right is an end in itself, and is good for its own sake. It cannot, therefore, be violated simply for the sake of it.

A denial of rights cannot be a state end, because the law recognises the protection of those rights to be ends in themselves, and thus excludes any action where violating the right is the goal or end. This is obviously inconsistent with a utilitarian theory of rights, because such a theory does not suggest that any policy outcome is an excluded end. The Dworkinian notion of rights being insulated from utilitarian considerations suggests that unless at least some utilitarian considerations cannot overcome rights, there is no such thing as a right. This does not mean that utilitarianism is not a part of analysing rights limitations at all – there may be a proper role for certain types of utilitarian balancing depending on the strength that one affords this anti-utilitarian principle. What it does means is that any right must be able to withstand at least one type of utility – the utility derived from the violation itself. The restriction of the right cannot be an end. It may, on the other hand, be a means to another end.

Some examples help to illustrate the sort of utility that must be excluded in this model. First, it would be improper if the only utility derived from the rights limitation was the pleasure that one group derived from denying another group their rights. Imagine, by way of an example, a measure that restricted access to education for a particular group, where a right to education was provided for. If this measure was done purely because the group was disliked, and other people would derive utility in the form of happiness in seeing them excluded, that law is unacceptable: the denial of the right is the objective of the measure, and such utility

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[20] *Ibid.* Put another way, in a later essay, Dworkin says: "if someone has the right to do something then it is wrong for the government to deny it to him even though it would be in the general interest to do so." *Chapter 11: "What Rights Do We Have?" at 269.*

cannot be regarded as a legitimate basis for justifying the restriction on rights. It is unacceptable even if on aggregate the utility gained was much greater than the utility lost to the group that would go uneducated. That utility would not be concerned with any external goal or good, but rather with the utility derived by placing the denial of the right as an end in itself. If, however, there is other utility – say improved education standards for other groups– then that utility might be properly considered without lapsing into pure utilitarianism.

Secondly, some utility is derived *directly* from a denial of rights. Take, for example, the right to silence in the criminal process. When deployed on behalf of a guilty person, there is a clear utility in its restriction: the individual in question would be forced to speak, providing evidence of his guilt. That, however, is the end that was protected: the right was entrenched with the intention that it would vex the criminal process on occasion by prioritising the protection of silence. The fact that the right causes an obvious sacrifice in utility to the criminal process cannot be a reason for its limitation. If it could, the right would not be afforded any special value; it would rather be granted weight only when the balance of utility favours it. The only goal in that situation is to deny the right to silence and reap utility from that particular denial of rights.

It might, however, be possible to justify the denial of rights by reference to the utility accruing to an external goal. For example, the limitation of rights might protect the security of the state, if the suspect in question threatens that security,[21] or it might protect other persons at risk. Such utility, which is external to the right, can be weighed against that right, resulting in a narrower, restricted utilitarian balance.

From the premise that rights, at least when constitutionally entrenched, are to some degree anti-utilitarian, the basic elements of a standard of review for rights limitation can be established. To do this, we must ask how a court can assess the validity of a rights restriction while avoiding purely utilitarian analysis.

[21] *Heaney v Ireland* [1994] 3 IR 593.

Deontological and Teleological Conception of Rights Limitations and the Question of Purpose

From the anti-utilitarian premise, there are two ways one can look at rights limitations. The weaker approach (from the anti-utilitarian perspective) would suggest that some specific utilitarian considerations can be regarded when considering if a limitation on a right is justified, but such considerations are presumptively excluded unless they fit into that exempted category. The utility that is inconsistent with this conception of rights would be excluded; that is, any utility derived from the restriction of the right as an end in itself. Its consideration of utility and consequences is restricted to relevant consequences, so as not simply to engage in a purely utilitarian balancing exercise. This approach is still concerned with the consequences of the rights limitation, and so is a teleological or consequentialist view of rights restrictions. It considers utility, but stops short of pure utilitarianism.

The stronger of these approaches would demand that all utilitarian considerations be ignored, and the limitation of rights be justified by a means entirely divorced from consideration of utility. This is a deontological view of rights limitations, concerned with the correctness of the decision to limit the right, without regard to its consequences.

Under both models, the most basic question that a court must address in assessing a rights restriction is the purpose underlying that restriction: why is the right restricted? Objectives are central to the process because of the conclusion reached earlier that the recognition and entrenchment of rights precludes the restriction of rights being used as in end in itself. It follows that to restrict a right legitimately, the measure must be justified by reference to an objective that is something other than the violation of the right for its own sake. Some other objective must be present.

To respect the teleological conception, certain types of utility cannot be weighed against rights. Demanding that the limitation be justified by reference to an external objective ensures that the ultimate decision of the court is not influenced by the utility derived from restricting the rights of others for its own sake. The deontological view requires utility be excluded entirely, and this relies on objectives to replace utility in the balancing exercise; the right and objective are compared as abstract norms. Justifying rights by reference to another objective respects the anti-utilitarian view of rights limitations in each case.

Deontological View

The stronger anti-utilitarian view is deontological: rights must be respected unless a sufficiently important purpose justifies their limitation. The duty to respect rights is ceded only to a more pressing duty. A limitation is thus assessed by comparing its objective with the right. They are compared as abstract norms without regard to the consequences, and thus utility can, in theory, be cut out entirely. The objective of the law –the good it seeks to achieve– is, like the right, an abstract idea or norm. Such norms vary in importance, that importance being decided with reference to the prevailing values of a given legal system. A right, having been singled out as a norm with specific value, can only be overcome if the goal being pursued is a norm of a sufficiently high level that it can genuinely compete with the right. Of course, the right's strength will similarly vary, based on its importance to the legal order and the extent of its entrenchment.

Habermas advocates an approach that is broadly similar to this. In *Between Facts and Norms*, he says:

> not every right will win out over every collective good in the justification of concrete decisions. But a right will not prevail only when the priority of a collective good over a corresponding norm can itself be justified in the light of higher norms and principles.[22]

If the "deontological character" of rights is to be properly respected, he says, "they are withdrawn from such a cost-benefit analysis."[23] Habermas' identification of the problem of utilitarian analysis is clear. He sees rights "transforming into goods and values"[24] when they are balanced, with balancing then conducted "either arbitrarily or unreflectively."[25] Instead, he proposes that his theory can avoid this transformation, and avoid balancing altogether. The relative importance of the two norms –underlying the rights and the objective– must be assessed. This is a choice that might be in part guided by the legal system's own values and priorities, but will invariably require additional determinations on how the hierarchy of values should

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[22] Jurgen Habermas, *Between Facts and Norms*, (1996, Polity Press) at 259.
[23] *Ibid* at 260.
[24] *Ibid* at 259.
[25] *Ibid.*

be structured, how "all the norms fit together into a unified system designed to admit exactly one right solution for each case."[26]

The deontological approach requires the objectives of law be ascertained, because those objectives –public goods to be achieved– can be dealt with as abstract norms, on the same level as rights. Then the two norms are compared, and the stronger one prevails. It is thus the norm underlying the law, rather than the consequences and utility derived from it, that is weighed against rights.

Teleological View

The second, teleological view of rights limitations does have regard to consequences and utility, but does so in a way that avoids fundamental conflict with the anti-utilitarian nature of rights. By examining the objectives of the law, it limits the category of possible utility that can be weighed, thus suitably restricting utilitarian considerations. This approach reconciles rights with utility, allowing the consideration of certain kinds of utility without the analysis collapsing into a purely utilitarian balance. It sees rights as being consistent with some teleological restriction, but not any teleological restriction.

Here, one does not endeavour to exclude utility entirely from an analysis of rights limitations. Dworkin himself acknowledged that "the vast bulk of laws which diminish liberty are justified on Utilitarian grounds."[27] Rights are bulwarks against utilitarianism, but can be subject to utilitarian control once we restrict the sort of utility that can be considered in questioning whether a rights limitation is justified. A standard of review, then, tries to guide a court to consider utilitarian concerns in the appropriate way.

A standard of review can achieve this by considering objectives and their realisation. Pure utilitarianism can be avoided by seeking an objective for the limitation other than the utility derived solely from the violation of the right, an external good that the limitation seeks to achieve.[28]

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[26] *Ibid* at 261.

[27] Dworkin, note 19 at 269. See further HLA Hart , "Between Utility and Rights" 79 Colum L. Rev. 828 1979 at 837.

[28] It is important to note that this does not suggest that having an important objective is an absolute prerequisite to any law being passed, or a "condition of legislative action." Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57(2) University of Toronto Law Journal 383. It does not fetter the legislature's discretion to act however it wishes, even if it does so for trivial reasons. It is only when rights exist which the legislature is bound to respect, and when the legislature wishes to limit those rights, that it is fettered by the need to pursue some

The requirement that a law pursue an external objective limits, though does not remove, utilitarian analysis in rights balancing questions. Ultimately, a balance of utility would decide the issue, but not *any* consequential utility resulting from the law's enactment. The utility that would be considered in deciding if the right may be restricted under this conception would be limited to those consequences that actually follow from pursuit of that objective.

The deontological and teleological views of rights limitations take different approaches to assessing the validity of a rights restriction and the extent to which utility must be cut out. There is no "correct" view; each is a conceptually valid way of respecting a particular conception of the anti-utilitarian value inherent in legal entrenchment and protection of rights. Which one will be favoured depends on the strength of the anti-utilitarian principle in any given legal system, and on related normative arguments for and against each position that will be canvassed in the next chapter. As we shall see, these normative choices can be made at one of two stages: the design stage, when a constitutional order is being constructed, or the interpretation stages, where courts expand upon the nature of the constitutional order. In the former instance, the designer is not fettered, when deciding which choice to make, by any prior understanding of norms. In the latter, the court is somewhat fettered, as design choices may suggest or influence the making of subsequent choices even when it does not resolve them.

Ascertainment of Objectives

Whether a teleological or deontological approach is adopted, focusing on objectives allows purely utilitarian analysis of rights to be avoided. However, there are many outstanding questions about objectives that the foregoing reasoning does not clearly answer. What objective are we concerned with: the objective that is apparent from the law on its face (the objective intention) or the objective that actually dominated the minds of those who passed the law (the subjective intention)? [29]

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publicly oriented objective that is of a certain level of importance. When no right is limited, frivolity is unproblematic.

[29] One other view should be mentioned for the sake of completeness. Barak, note 4, at 298 argues that both purposes – the subjective and objective – must be accounted for. This is misconception of the issue, I think. First, he argues that the subjective motivation of the legislature must be found, though it does not seem that his account is deontological. For the reasons outlined in this section, I think he is wrong to suggest that this is a theoretical necessity rather than a normative choice, though his

The objective intention of a law is ascertained by looking at the law in question, and then inducing from those particulars what general goal the law set out to achieve. Essentially, the means are considered, and then reverse-engineered to ascertain the ends to which they were deployed. The subjective intention of the legislature can only be ascertained by a form of legislative "psychoanalysis,"[30] where the statements of legislators, government ministers and others are considered. This is the only way to establish what truly occupied the legislature's collective mind when the law was passed.

This deontological conception of rights limitations demands that the actual, subjective intention of the legislature be ascertained. Habermas would insist that the legislature's true objective be found, rather than any hypothetical one.[31] This is because the deontological approach gives normative weight to the objective. A hypothesised objective does not deserve that normative weight if it was not what the legislature genuinely intended.

This is not true of a teleological approach, where if the consequences are permissible under the best possible hypothetical objective, it is difficult to see why the true objective matters. The question is whether there exists sufficient utility – derived from some external objective– to justify the restriction, not whether that objective was in fact the reason for action taken. In any event, if the subjective intention of the legislature was to pursue an illegitimate objective, but there was another objective on foot of which the state could legitimately make the same limitation, little would be achieved by holding the measure invalid. With deontological approach, since the rights restriction is given legitimacy by the objective of the law without more, it is incumbent that the genuine motivation is the one considered, or the limitation might not in reality be justified.[32] Therefore, though the deontological approach conceptually requires subjective intention, the

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normative arguments may be persuasive. Secondly, in then insisting that the objective purpose also be considered, he is merely pre-empting the tailoring to the purpose test, which we will presently discuss. Barak sees this dual purpose analysis as important because it makes sure that what the law *actually does* is accounted for. However, tailoring analysis is designed to do this, making the dual objectives approach irrelevant.

[30] *US v Constantine*, 296 US 287, 298-99 (1935), Justice Cardozo dissenting.

[31] See Bernhard Schlink, *The Dynamics of Constitutional Adjudication*, 17 Cardozo L. Rev. 1231 1995-1996 at 1232. Schlink responds to Habermas' suggestion that the objective of the any measure should be laid out by the State explicitly rather than hypothesized.

[32] Additionally, discovering the true, subjective motivation of the legislature is also a way for the deontological approach to remain tied to the reality of the situation since it is largely unconcerned with consequences. The analysis remains largely divorced from reality, but it would be far more so if hypothesised objectives were able to justify the limitation.

teleological approach allows for either type of objective, and which is preferred will be decided by reference to normative argument.

Importance of the Objective

The second issue that must be addressed is the level of importance that is required of an objective. It is clearly necessary to establish that the objective is legitimate – that it be one that is not prohibited. As discussed above, violation of the right for its own sake is an illegitimate objective in either conception of rights limitations.[33] Above this conceptual minimum standard of legitimacy, a standard of review might call for a greater level of importance from the objective being pursued by the statute.[34] Whether or not to do this is a normative choice.

In both the deontological and the teleological views, the importance of the objective will be central to a final balancing exercise, discussed below. In the overall balancing test, the importance of the objective gives weight to the objective, and lends justificatory force to the rights limitation. In the deontological conception, it is giving weight to the abstract norm underlying the objective. In the teleological conception, weight is given to the utility derived from pursuit of the objective. This will be considered further in the discussion of overall balancing. The importance of the objective is therefore properly accounted for, and no preliminary enquiry is needed for either approach.[35] There are normative arguments for a separate

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[33] Legitimacy might be used in a broader sense than this: it might also include any objectives that pursue ends not permitted by some other aspect of the domestic legal order, such as another right or constitutional principle. Examples might include trying to entrench racial inequality by means of restricting freedom of speech of certain groups. There, the right is not violated for its own sake, but as a means to the illegitimate end of violating the rights of others. Another example might be the objective of targeting a single individual for punishment or favour, i.e. restricting the rights of someone to benefit a designated third party. This would fall foul of a prohibition on bills of attainder contained in many constitutional documents, either expressly or implicitly. See Article 1, s. 9 of the Constitution of the Untied States, and, in Ireland, *An Blascaod Mór Teo v Comissioners of Public Works in Ireland, Unreported, High Court, Budd J, February 27th 1998.* Any requirement of legitimacy in this broader sense is normatively chosen rather than conceptually required, and strongly influenced by the text and structure of the constitution.

[34] Dworkin suggested that perhaps only a particularly important aim should be allowed to violate rights. In Dworkin's words, "a goal of special urgency" rather than a more mundane objective might be required to justify a restriction on rights. Dworkin, note 19, at 92.

[35] Some theorists have argued that the deontological character and importance of rights should mean that some objectives lack sufficient importance to ever be compared to rights. See Mathias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos, (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007). They would suggest that objectives with patently insufficient normative weight should be eliminated at the outset. That might, in particular, have rhetorical force, and act as a strong statement of the importance of rights, and that is a normative argument in its favour. It is hard to see that this is conceptually required, however.

requirement, and these will be discussed in the next chapter, but it is not conceptually required.

Multiple Objectives and Generality of Objectives

Other restrictions on the kind of objectives that are recognised may be considered, such as whether several different objectives could be said to underlie the measure, or whether objectives should have to be stated with a certain level of specificity. In the teleological approach, it would be possible to recognise multiple objectives for the measure, and there are normative arguments for and against this, which will also be discussed in the next chapter. In respect of the deontological approach, the true object of the limitation –be that one objective or several– must be considered. This is because the normative weight of the limitation is to be compared to the right; the full normative weight behind the limitation should be considered, even if that derives from multiple objectives and norms. The fact that the true, subjective, motivation will be examined eliminates any risk that multiple objectives could be cynically used to justify poorly made laws.[36]

The matter of how general the objective may be is also of concern. In the teleological view, if hypothetical objectives are to be allowed, there is a conceptually required minimum level of generality in how that objective must be framed, in order to avoid the objective requirement being essentially circumvented. A problem occurs when the law's effect is stated as the objective, without any elaboration as to motivation. Take for example a law that criminalises the destruction of certain official documents, which is a limitation of a broadly defined right to free expression.[37] The objective of that law is the reason that State wishes the documents not to be destroyed. Simply preventing the destruction of those documents is not the objective; it is merely the effect of the law. That could not satisfy the objective requirement, as it is not an external motivation. Similarly, when ascertaining the subjective motivation of laws, the motivation for the restriction of rights, not the more general goal of the law, must be found.

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[36] The concern with multiple objectives is that when objectives are hypothesised, this can render rational even the most irrationally tailored laws. Each outlying element of the law, that does not clearly relate to the law's primary objective, can be justified by reference to another, separate objective, making even a very erratic or wildly excessive law seem rational. This will be discussed in the next chapter.

[37] This example is taken from the US Supreme Court Case of *United States v. O'Brien*, 391 US 367 (1968).

TAILORING

The centrality of objectives to the teleological conceptions of rights limitations requires that another element be accommodated a standard of review: an assessment of tailoring, a requirement that the law is in practice related to the objective that it is taken to pursue.

The reason for tailoring being essential to this process is to stop the important or legitimate objective being asserted to justify a rights limitation when that objective is not, in reality, furthered or achieved by the measure. The objective of a law sets out a logical vector – the direction and extent to which that law should operate in order to achieve that objective. If the law strays too far from that vector – either by departing from its direction or exceeding its extent– then the relationship between means and ends is lost. The first tailoring test examines if the means wander off the vector, go in a different direction. The second tailoring test asks if the means have exceeded the vector, gone farther than the objective would propel them.

The means used must go some way toward achieving the objective, because the teleological conception is concerned with the consequences of the measure, and therefore the pursuit of the objective must be taken out of the abstract and into reality. It also helps to clarify what utility is in fact related to the objective, which is essential to the teleological conception.

Tailoring and the Deontological Conception

It is a more difficult question as to whether or not a deontological conception is concerned with tailoring at all. The deontological approach is unconcerned with the consequences of the law. Tailoring, it could be argued, is analysing the consequences of the law, and is therefore not relevant to this approach.

Certain theorists, particularly Robert Alexy, would dispute that tailoring is not properly part of a deontological conception. Alexy outlines what he claims to be a deontological framework for rights protection, which includes forms of both sorts of tailoring outlined below. Alexy advocates the use of tailoring as optimisation of the norms that are ultimately being balanced.[38] Unless tailoring is shown, there is no

[38] Reaume, note 4, gives broadly a similar account of tailoring, as does Rivers, note 4, though they do not speak to the question of whether or not the deontological conception of rights limitations can accommodate tailoring.

guarantee that the right and the objective actually clash at all. There are two principles or norms at play; the right and the objective in question. It is essential to test tailoring, Alexy says, because if the means are not tailored, it is possible that the apparent clash between these two norms is illusory.[39] These assessments just ensure that the balance of the two norms should take place at all. They do not, of themselves, justify the measure. Therefore, Alexy believes his optimization approach respects the deontological nature of rights and takes account of the particular circumstances of each individual case.

Alexy may be correct in his contention that a deontological conception should consider tailoring. There is a distinction between considering consequences and utility in this secondary, optimisation sense as opposed to considering utility for the purpose of justifying the limitation of rights. It is not correct to say that a deontological stance cannot consider consequences at all; it is rather that those consequences cannot ultimately lend justificatory force to the restriction on rights. Optimisation only considers utility to ensure that there is a direct clash of norms, and it is not used in a justificatory sense. Satisfying tailoring requirements is essential to make rights restrictions *potentially justifiable*; it does not, to any degree, make them justified.[40] The optimisation elements of tailoring might properly form part of the deontological conception as well.

Tailoring to Purpose

The first concept within tailoring is a consideration of whether or not the law in question relates on any level to the objective of the law. It is possible that the law might seem to pursue a particular objective, but when the means invoked by the law are examined more closely, this is not borne out. If this is the case, the connection to the objective is broken. A standard of review must, then, assess means-ends rationality – that is, assess whether the means employed in the name of achieving the objective actually go toward that end. A law might fail this test because it is

[39] Both goals "taken together may be realized to higher degree to what is factually possible if [those means are] abandoned." Robert Alexy, note 4, at 398.

[40] However, this also limits the usefulness of the tailoring requirements in solving problems that are apparent with the deontological approach. Since tailoring can only be useful for optimisation, it cannot be used to determine weight for the final balancing exercise, because that would incorporate utility into the justification analysis.

redundant, could not be effectual in reality, or was based on a misconception of the problem.[41]

If only certain aims can justify certain conduct, then it must be tested if those aims are actually being pursued by the means ultimately chosen for that purpose. If the objective cannot be said to underlie the law, despite the fact that it appeared to, and one can no longer be certain that the limitation of rights is not justified on purely utilitarian grounds. It is not possible to be sure that unacceptable objectives are not in fact underlying the law. Additionally, this process ensures that the law's consequences and resultant utility are clearly linked to a permissible objective. Tailoring to purpose helps to make sure that the utility achieved by the law, that is to be considered in an overall balance, flows from the legitimate external goal being pursued. It is therefore a necessary part of the teleological conception of rights limitations: the teleological approach is concerned with consequences, and tailoring requirements stop the process from being entirely abstract, ensuring that some relevant consequence actually does flow from the limitation.

Strength of Connection/Closeness of Tailoring

Some sort of tailoring must be shown to ensure that the objective of the law is actually reflected in the means purporting to pursue it. But this requirement might be satisfied by fairly loose tailoring. Similarly, the tailoring of the law could be over- or under-inclusive, including persons or conduct not obviously related to the objective, or excluding persons or conduct that should have been included having regard to the objective. If the tailoring requirement is loose, these anomalies will be overlooked.

A more stringent view of tailoring could be demanded; the means may have to be "well tailored" or "narrowly" or "closely" tailored. The stricter this standard,

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[41] An interesting example of a legislative misconception leading to defective means is given by Dieter Grimm note 28, at 389. A German hunting law required falconers to take a gun shooting test. Falconers, however, do not use guns to hunt falcons, as the legislature apparently believed, but rather hunt other animals using falcons. BVerfGE 55, 159 (1980). This law, in theory, led to safer hunting practices, but in practice could not have done so. This also highlights that laws can be irrational pursuant to seemingly rational decisions due to false beliefs. If the legislature acted on a genuinely held belief that was, in fact, false, there is a sense in which it *acted* rationally: it had good reasons, based on its beliefs, to act in that way. However, though the legislature acted rationally, the *law* is irrational: once the truth is discovered, the law continues to maintain the stance taken by the legislature that was premised on inaccurate assumptions. The law is irrational, as it lacks good reason for the action it takes. This is true even if the legislature that passed the law was acting rationally and with apparent reasons.

the less under-inclusiveness or over-inclusiveness it would tolerate. Such anomalies in the means would illustrate a lack of fit between the objective and the means chosen to pursue it. This is turn could lead to the loss of the connection altogether, as is more likely in over-inclusiveness cases; or the weakening of the connection: though the means would still pursue the objective, they would pursue it only partially, and therefore the objective, in context, would be of lesser force than if the means had been better tailored. Similarly, more arduous tailoring requirements would be more likely to demand probability of efficacy, and not tolerate means that could be thought effective on their face, but which do not achieve the objective in practice.

A loose level of tailoring would probably satisfy the conceptual imperative to assess tailoring to an acceptable level, and any increase in strength above that is a matter for normative argument.[42]

Tailoring to the Right

Tailoring to purpose asks if the means chosen ultimately reach the end required for it to be able to justify a limitation on rights. This does not offer us all the information necessary to say that the law is well tailored: we know only that the means arrive at that end; we have not yet considered how they get there. This is where the other element of tailoring, necessity of the choice of means, comes into play, because even if the objective is achieved, it does not follow that the means can justifiably violate rights. The right and the objective must be shown to clash before they can be balanced. The means must be tailored to the right as well as the ends, to ensure that the means actually chosen are the means that secure the objective in the most direct way. Until we know that, we cannot know that the objective and the right actually conflict in a way that would justify the restriction of the right.

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[42] I wish to add one caveat. Tailoring to the objective tests the rationality of using the means chosen to achieve the desired end. A higher tailoring requirement might be conceptually required if substantive rather than procedural rationality is needed. Procedural rationality would require a fully informed and well-thought out deliberation as to whether or not the method adopted actually achieves the objective for the decision taken to be rational. Substantive rationality would require that the substance of the decision be rational, entertaining the possibility that a procedurally rational decision could still be irrational. If one took a loose stance on tailoring to the objective, it seems that substantive rationality is not fully considered; it is rather assumed in the absence of persuasive evidence to the contrary, on account of the fact that legislatures act in a procedurally rational way. Therefore, one cannot be sure that the decision is substantively rational with the looser standards of tailoring. However, I cannot think of a reason why substantive rather than procedural rationality would be conceptually required.

Say objective A can be achieved by means X. These means involve a restriction of rights. If that is the only way to realise a particular goal, then the right and the objective clash. However, what if the means chosen are not the most direct ones? What if another set of means, described as means Y, present a similarly direct, or more direct, way to accomplish the same goal to the same extent, and means Y do not require that the right be violated? That would suggest that the means actually chosen, means X, were chosen in spite of the fact that they violate rights, and were not necessary to achieve the objective. In that case, it is not true to say that the right has been limited in the name of objective A. Instead, the right has been limited for no reason at all, or for the sake of it, because the limitation was avoidable and was not required for the objective's sake. We have established that it is not permissible to restrict rights without an external objective; the status of rights precludes that.

In cases such as this, the right and the objective do not actually clash, and the rights limitation makes a nonsense of this conceptual framework. Therefore, a second tailoring requirement is introduced, that asks if the rights violation was necessary.

Few, if any, real life situations will be as clear-cut as this hypothetical scenario. There may be few cases where alternative means could produce a precisely identical result; some difference will have to be apparent, given that the alternative is less restrictive of rights, which necessitates some alteration in the means. Moreover, even if the results might in fact be identical, there may be doubt as to whether or not this is the case. How strong, then, should the tailoring requirement be? Should it be strong enough to see past these differences, or should it be limited to the perhaps fanciful scenario above? This is a normative question, and will be addressed in the next chapter.

An Overall Balance

I have highlighted two basic ways that rights limitations can be conceived: in a deontological sense, and in a teleological sense. Each of these, I suggest, ends in a balancing exercise. This is a crucial part of the examination in both conceptions, as without balancing, the rights restriction could not be said to be justified. The identification of an objective shows that something other than purely utilitarian considerations were at play. The tailoring tests ensure that this objective was actually pursued, and that the restriction of rights was an essential part of its

attainment. Only with balancing, however, are rights given anything other than this bare minimum conceptual weight.[43] As Reaume puts it, "it should be impossible for a court to uphold legislation without a rigorous analysis of [balancing.]"[44]

Deontological Conception

The deontological conception of rights limitations requires that a balance be conducted between the right and the objective, meeting as abstract norms. Only if the objective is the greater norm can the restriction be justified. For this to take place, there must be some metric, some way to assign weight to the norms in question. This will presumably be influenced by domestic constitutional values and priorities.

It is not clear how values can be weighed without any reference to utility. Alexy gives each norm or principle a "concrete weight."[45] It seems that this notion, however, might encompass some regard to utility.[46] Habermas claims that his theory can straddle this divide, allowing for rights to fall somewhere *between facts and norms*. He would not call this a balancing exercise, as he says the goal of adjudication is not to balance, but to decide which action or claim is the right one.[47] Whether or not this can be done in reality is an open question, and it may be that few if any courts purport to conduct this sort of reasoning. However, the argument that this is

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[43] From this, there may be an argument for a teleological approach to rights limitations that did not involve a balancing exercise. It might be conceivable that a standard of review could insist on some utility being derived form an external objective, thus respecting the anti-utilitarian nature of rights in the most minimal sense, but not being concerned with how much utility is so derived, and how it relates to the damage accruing to the rights holder from the restriction on rights. This would presumptively favour any effective pursuit of a public good without balancing against the harm of the measure. Even if this is conceptually statable, it is not, I think, consistent with the constitutional entrenchment of rights, as it affords them almost no weight. To respect the value that constitutional protection places on rights, balancing is required for justification to be shown.

[44] Reaume, note 4, at 13.

[45] See Alexy, note 4, at 403-404.

[46] This concrete weight is established by reference to the extent to which the norm or principle is realised in any given factual circumstances. In giving examples of this, Alexy reveals himself to be taking utility into account, making his theory not deontological in nature. Where he speaks about the intensity of harm to rights and interests that must vary with the utility and disutility created. No other metric is suggested. *Ibid.*

[47] Though he admits norms can shift in relation to one another, they must do so coherently, so that "all the norms fit together into a unified system designed to admit exactly one right solution for each case." *Habermas,* note 22, at 261. Thus, the norms can be subject to shifts between cases, taking on fact-specific characteristics, but those are not linked to utility. Zucca would suggest an *a priori* decision about the importance of values, and each case would involve only the application of that hierarchy of values to the specific case, rather than balancing taking place in each case. See Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, 2007). See also David Martínez Zorrilla, "Constitutional Dilemmas and Balancing," 24(3) Ratio Juris 347 (2011).

impossible, if taken too far, becomes an argument of radical incommensurability, which, as discussed below, falls outside the scope of this thesis.

Teleological Conception

The teleological conception requires a stage in the analysis where an overall balance is carried out to decide which prevails: the right or the limitation. They do not meet as simple expressions of their overall utility, as they would if rights were utilitarian. Nor do they meet as abstract concepts to see which is the more important, as the deontological approach requires. Instead, teleological balancing is something close to half-way between these two. Whether the utility achieved from restricting the right is sufficiently great to justify that restriction, having regard to the disutility that would be suffered by the rights holder, will be the operative question. However, the utility derived from the rights restriction will not be measured in absolute terms. As with the deontological conception, the objective of the measure is what is important, though in this case the objective is used to refine the considerations of utility, rather than being the focal point of comparison itself. Only utility derived from a legitimate external objective will be considered against the disutility of the restriction on rights; no kind of secondary or indirect loss of utility is entertained, and all utilitarian considerations are presumptively excluded unless directly tied into the objective.[48] In this way, the teleological approach attempts to reconcile anti-utilitarian rights with quasi-utilitarian rights restrictions.[49]

Utility here will be qualitative as well as quantitative. More strongly entrenched rights may be said to result in more disutility when they are denied.

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[48] This exclusion of utility need not be asymmetrical, applying only to the utility derived from the objective and not utility derived from the right. It would be possible to limit the utility considered from the right's side as well. Perhaps only that disutility occurring to those who hold rights should be considered. A secondary, negative effect that does not impinge on rights might not be properly considered, as it would give too much weight to the side of rights, by considering disutility beyond the scope of the rights in question. This seems like the fairest way to conduct the balance, but since the objectives of rights limitations are not anti-utilitarian values, it cannot be said to be required.

[49] The teleological approach is odd in demanding this seemingly contradictory approach. It seems that the deontological approach, and the utilitarian approach, would be consistent with a view of rights as either utilitarian or anti-utilitarian. However, as we shall see, in practice, neither of these consistent approaches seems to be adopted by courts. The teleological approach to limitations attempts to find a middle path between these two, and many constitutional instruments seem to suggest an approach of this sort. Perhaps this reflects contradictory moral instincts: an urge to see rights as deontological, but a need to conduct review restrictions with regard to utility. The teleological approach allows us to reconcile these two tools of moral reasoning in a way that is workable, if not as conceptually consistent as the other approaches.

Similarly, the nature of the objective and how pressing it is might influence the view of the utility derived from the limitation, giving more weight to the consequences of pursuing more important objectives. The weighing of utility is therefore nuanced with consideration of the importance of the competing values.

Various problems are apparent in this exercise: how is utility to be calculated and compared, and which of the utilities is the greater? How one can know how much utility or disutility is derive from a particular course of action? This could be both speculative and contested. Similarly, the manner in which different types of utility can be compared is not clear: how can one compare the disutility suffered by someone whose free speech or association rights are limited as against the economic cost to a wider group of people of those rights being exercised?

There is no clear answer to the above questions. These will be answered, to whatever extent possible, by reference to normative argument.

Arguments of Incommensurability

Arguments of incommensurability face all types of balancing exercise, but are especially pronounced in the teleological and deontological balancing tests. It can readily be argued that judges will, in these circumstances, simply follow their personal views of the correct result rather than balancing conflicting utility or values. Some of these are normative arguments about how balancing should be conducted; others are more fundamental. It could be argued that judges are introducing personal views intentionally or unintentionally. They may be cynically pretending to balance, and in fact just imposing their own views, or it might be that those views are subtly influencing their judgements without any realisation by them of that fact.

More radically, it could be said that judges have no choice but to rely on their personal preference for a particular measure to stand or fall, because there is no other way that the courts could decide these issues in balancing. This is a conceptual argument of radical incommensurability, or absolute relativism, and in practice, is an argument against any balancing taking place.

When arguments about the incommensurability of norms or utility become too pronounced, they lose their force in the context of this discussion.[50] If norms or

[50] Adler is a strong proponent of the incommensurability view. John Adler, "The Sublime and the Beautiful: Incommensurability and Human Rights" [2006] PL 697. Tsakyrakis, note 4, takes a similar

utility such as would be involved in this process are genuinely incommensurable, the argument stands against *any* judicial balancing.[51] It is therefore is beyond the scope of this thesis. The argument counsels against judicial review of legislation generally, and this thesis pre-supposes a constitution or other document that allows judicial review of rights-infringing legislation. The argument has therefore been resolved.[52]

Burden of Proof

Another element of judicial review of rights limitations is the burden of proof. A standard of review has to place the burden of establishing its elements on one party, who will lose in default of sufficient evidence, and must indicate to what extent that party must prove these elements. The burden of proof in rights limitation cases can be placed on the state, on the individual whose rights are allegedly infringed, or on both to different extents. For the moment it suffices to say that it is not possible to be neutral on this issue: the burden of proof must be placed somewhere; there must be some presumptive stance of validity or invalidity that prevails unless successfully challenged. A court cannot consider rights limitations without answering these questions, explicitly or implicitly, and it is thus a basic

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approach. Arguments that are this extreme become attacks on the notion of judicially enforceable rights generally, because if these matters are genuinely incommensurable, the legislature cannot know the answer any more than a court can. The argument then becomes one in favour of legislative rather than judicial authority over rights matters on democratic grounds. See for example Grégoire Webber, *The Negotiable Constitution*, (Cambridge University Press, 2009), who rests his proposal for greater legislative involvement in the definition of rights on a premise of incommensurability in balancing. However, this thesis presupposes that this argument has already been resolved against these concerns.

Cf Cass Sunstein, "Incommensurability and Valuations in Law" (1994) 92 Michigan Law Review 779. Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer," 45 Hastings L.J. 813, (1994) at 817 also attacks this sort of radical incommensurability, saying that it suggests a kind of agnosticism about morality which is not reflective of human intuition. Most recently, Da Silva has argued that this sort of argument confuses incommensurability does not imply incomparability, and that the lack of a uniform metric does not mean that values cannot be compared and balanced. See Virgílio Afonso Da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision," (2011) 31(2) OJLS 273.

[51] Moreover, if these values are genuinely incommensurable, the legislature cannot weigh them any more effectively than the courts. No expertise argument can coherently apply in that circumstance; there is no expertise that enables the comparing of the incommensurable. The sole argument against the conduct of balancing exercises by the courts is then a democratic legitimacy point: if impossible weighting must be done, better have it done by a body accountable to the people. That argument is not an insubstantial one. However, it is merely a normative argument against judicial review of rights-restricting legislation on the ground of democracy that may be accepted or rejected by a society based on their own conceptions of democracy and the importance of rights.

[52] For our purposes, this democratic legitimacy argument failed to sway those who enacted that document; they chose to prioritise judicial safeguards on rights over these democratic concerns. The argument that these choices should not be carried out by an unelected body was clearly not chosen by those who wrote the constitutions or other documents which we take as our starting point.

component of a standard of review. On whom this burden should be placed, and how heavy that burden should be, are normative decisions.

Deference and Interventionism

Distinguishing Deference and Non-Interventionism

It is important in this context to separate the concepts of deference and non-interventionism. At its core, deference is a belief that a particular institution or body has, by reason of its status, authority, or expertise, a strong claim to having made a correct or good decision. A court defers to such a body where the court feels it is not in a better position to assess the issues before it than a body who previously looked at such issues and reached a conclusion. The court favours upholding that decision, even if it might not have made that decision had it been considering the issue from scratch.

Deference is a choice not to substantively interfere with a *particular* choice or decision made by other persons or bodies, to subordinate one's reasoning to theirs to some degree. Deference therefore relates to outcomes of particular judicial enquiries. It does not relate to whether or not to enquire at all, or how to enquire. Moreover, it must be capable of being overcome: if deference is so extensive that, no matter how wrong the choice made it will not be questioned, then it is not deference, but rather a choice not to intervene.

A choice not even to enquire into an aspect of a decision, to change the enquiry, is not deference, as it bears no relation to the decision made by the other person or body, nor can it be overcome in certain cases. It is a choice not to intervene in the process. A decision not to intervene in particular matters comes at a higher level than deference, and is a more abstract decision. It relates to all cases, not to particular choices or determinations.

Non-interventionism can be motivated by valid normative arguments outlined in the next chapter, which are often the same concerns as would underlie particular deference to particular types of decisions.[53] However, even when similarly motivated, the notions must be kept distinct. What I describe in this thesis

[53] However, it is important to note that it can only argue against any review more searching than the conceptually required minimum previously outlined. To allow it to go further than that would deny the need to protect rights that is presupposed when constitutions and other rights-instruments protect them. Such arguments are beyond the scope of this thesis.

as "non-interventionism"[54] is not a motivating factor – it is rather the product of series of choices about how much courts involve themselves invalidating legislation for rights violations.

A decision not to intervene results in the question not be asked, or being asked in a different way, rather than treating a particular answer differently. For example if, in considering tailoring to the right, courts decline to look to alternative measures, and instead ask whether the means chosen could have been limited in some way, that would alter the nature of the enquiry to make intervention less likely. This choice could not be overcome in certain cases – alternatives would be off the table. It is not a choice to subordinate one's reasoning to that of another body in the context of a particular determination.

It would be a matter of deference, on the other hand, for a court, when examining tailoring to the right, to determine that it was sufficient for the legislature to have chosen one of a range of alternatives that was reasonable, rather than conforming to the court's view of the best choice. This considers the particular choice in context, and defers to it within certain boundaries that could be overcome in appropriate cases.

However, it is also important to acknowledge the interrelation of these concepts. All choices about deference have an impact upon the level of interventionism, as clearly such choices alter the manner and extent of court involvement in certain cases. In the sense that interventionism is a product of a series of choices, deferential choices are a subset of non-interventionist choices. However, they are a distinct subset: not all choices that vary the level of intervention are choices to defer; broader, abstract choices about the nature of review have nothing to do with deference.

The crucial difference relates to the determination-centric nature of deference. The importance of the separating these concepts is to avoid mistaking all

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[54] I have chosen to use this term for the phenomenon I describe despite the fact that the widely used language of "judicial activism" suggests a similar phenomenon. The problem with the language of activism is twofold. First, I will largely be discussing decisions *not* to intervene, and the opposite of activism –judicial passivity– suggests an inertia that belies the fact that judges must choose to be non-interventionist rather than it being a default position that must be actively departed from. Secondly, activism is an unfortunately loaded term that seems invariably to carry a pejorative meaning. Oran Doyle notes that activism is usually regarded not only as a description of how often judges intervene, but also a judgment that such intervention is illegitimate. Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004) at 26. I wish to avoid the normative question of the appropriateness of judicial intervention in this particular discussion, and so the language of activism must similarly be avoided.

non-interventionist choices for deference. Deference, unlike other non-interventionist choices, cries out for contextual application. It is centred on particular determinations, and therefore must be reconsidered in different contexts. It differs from other non-interventionist choices, in that it is more likely to be changed and reviewed, and applied only in certain contexts deemed appropriate. Non-interventionist choices are more permanent and static, less likely to be reconsidered and contextually varied. These broader choices about the strength of review fundamentally alter the structure of the standard of review, and must be considered separately to contextual deference.

Even some of the best discussions of the intensity of standards of review do not distinguish deference to particular decisions from non-interventionist choices. Both Kavanagh[55] and Foley[56] speak of deference when discussing more abstracted decisions not to intervene. Many objections to deference are more accurately described as complaints about decisions not to intervene.[57] This distinction is central to this thesis.

Deference or not; intervention or not

It is essential to decide whether or not any deference will be offered in the context of review of rights limitations and, if so, in what way. Defence might apply to normative value judgments, policy choices, assessments of empirical evidence, an

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[55] Kavanagh defines deference as "a matter of assigning weight to the judgment of another, either where it is at variance with one's own assessment , or where one is uncertain of what the correct assessment should be." Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) at 185. However, her discussion clearly includes elements that deal with the idea of interventionism generally, when she says that the variance in the application of the proportionality test in the United Kingdom is primarily a question of the application of deference. *Ibid* At 238. She might be right insofar as the application of the test from one case to another is concerned, but this ignores the role that non-interventionist factors play in defining what the test means in the first place, and defining its scope. See also David Beatty, *The Ultimate Rule of Law*, (OUP, 2004) at 156-7, who makes a case against non-interventionism while purporting to discuss deference.

[56] Foley says deference, in its broadest sense "describes a situation where a decision making body, which we will refer to as "*A*", decides a case, "*C*", not on the basis of its own independent assessment, but by treating the decision of some other decision making body, "*B*", in respect of *C* as, in some respect, authoritative for its own (*ie A's*) decision." Brian Foley, *Deference and the Presumption of Constitutionality*, (IPA, 2008), at 80. However, Foley often ruminates on matters that are clearly decided far above the level of a particular case; for example, spatial distinctions. See *ibid*, chapter 6.

[57] Critiques of spatial distinctions, where entire areas are carved off as not reviewable, are complaints about interventionism, as they do not relate to specific decisions. See for example Kavanagh, note 55, at 154; Foley, note 56, at chapter 6; TRS Allan "Human Rights and Judicial Review: A Critique of Due Deference" (2006) 65 CLJ 671.

assessment of the probabilities of a speculative effect actualising, or any one or more of these determinations. On the other hand, no deference at all may be offered.

It is conceptually essential that this be addressed: deference may be offered or not, but there is no way to be neutral as to deference. The approach could be entirely non-deferential, probing and revising every decision; highly deferential, only questioning certain decisions in extreme circumstance; or anywhere along the significant spectrum in between.

Interventionism is a product of each normative choice made about the standard of review, as these choices determine whether and how to ask certain questions. There is no way to be neutral on such issues, and any choice necessarily takes a stance.

Deference and interventionism are fundamental components of the assessment of rights limitations, but the conceptual framework outlined here imposes few restrictions on what form this deference can take. Arguments for various forms of deference being offered are normative arguments, to be dealt with in the next chapter.

However, an important point must be noted: extreme non-interventionism on a conceptually essential element is conceptually precluded. This would involve the unquestioning acceptance of legislative judgment on the issue. This would remove the idea that there was any anti-utilitarian value in rights, as the courts would not intervene even if the rights limitation were imposed on purely utilitarian grounds.[58]

Conclusion

This examination has endeavoured to discover the conceptually essential elements of judicial review of rights limitations. It has sought out the basic questions that must underlie any standard of review that purports to decide whether or not a limitation of rights is a legitimate restriction or an illegitimate violation. To do this, I have reasoned from several different conceptions of rights, and discovered what analysis is needed to ensure that they can be limited without being disregarded.

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[58] Problematically, it might be possible to adopt an absolutely deferential standard that appears more potent, thus misleading observers into thinking that the decision maker could be overturned when in fact they could not be. This would be even more pernicious again, as the court would not merely be deferring absolutely; it would be deferring absolutely and validating the decision as if it were subject to some substantive oversight.

The result of this investigation shows that the anti-utilitarian nature of entrenched rights requires that certain basic questions to be asked. By investigating the objective of laws that limit rights, and then assessing whether or not the means used in the law tend to achieve that objective, one can ensure that purely utilitarian concerns can never justify a limitation of rights, and the anti-utilitarian nature of rights can be respected.

This exercise has allowed the severance of normative choices from the conceptually essential elements of any exercise in justifying a limitation on a constitutional right. The normative choices that may be made on foot of, and between different versions of, these fundamental elements will be the subject the next chapter. However, it is very important that they are kept distinct. Only by distinguishing what is conceptually required from that which is done by normative choice can we put ourselves in a position to discuss critically standards of review for rights limitations. Maintaining that distinction, and analysing those standards by reference to these conceptual requirements and normative choices, will allow us to better understand these standards; to see what sort of approach to rights limitation underlies them; to see when concepts are obfuscated, ignored, or confused; to see when a normative decision is passed off as a conceptual necessity. This process paves the way for a more searching examination of standards of review than would otherwise be possible.

2 – Normative Choices in the Formation of Standards of Review

The last chapter set out the foundations of judicial review – the basic conceptually necessary components of review of rights limitations. However, that which the foregoing analysis failed to tell us is significant; those foundations do not form a complete standard of review. They require normative choices to be made before a standard of review can be completed and applied.[1] It follows necessarily from the premise of non-absolute protection of rights, and judicial review of rights limitations, that certain questions must be asked. However, the form of those questions does not follow from that premise: the level of persuasiveness the answers must provide, the level of deference that should be afforded to particular determinations, etc., are not clear. These factors will be decided by reference to normative argument carried out in the context of a particular legal system. Having examined the conceptual foundations, we can now look to the normative choices that are made between conceptually acceptable possibilities, and see the impact that normative judgments have on standards of review.

Since this thesis is concerned with the judicial application of standards of review in different jurisdictions, it is important to identify the normative arguments that might underlie these choices, and identify the point at which they will likely be made.

Normative choices of this type may be made at either of two stages: the design stage or the interpretation stage. The design stage is that point at which the constitution or rights-instrument was drawn up. Constitutional drafters are not fettered by anyone else's prior normative choices; they can make these choices however they wish. This is not true of the interpretation stage – that is, when the courts come to apply the document, and look for its meaning. Courts are bound to stay within any limits placed by the constitution, and so are fettered in this respect. However, when the design stage choice is not definitive, courts exercise normative judgement in interpreting the document.

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[1] Rivers, commenting on the theory of Robert Alexy, notes the incomplete nature of Alexy's standard of review, but probably undersells the extent of the normative choices that must be made: "[T]he doctrine of proportionality is not already specifically designed for implementation by courts, but forms a general rationality test for the limitation of rights. Only when coupled with a theory of institutional competence and legitimacy can it adequately be implemented by courts." Julian Rivers, "Proportionality and Variable Intensity of Review," (2006) 65 CLJ 174 at 182.

In each section, I will first outline the various possibilities that could follow from the conceptual necessities identified in the last chapter. Then I will outline at what stage –the design stage or the interpretation stage– these issues are likely to be resolved. I will then canvass the arguments in favour and against particular choices. Finally, to highlight how these issues arise in later chapters, I will note the approach of the Canadian and Irish courts, and the stance that will ultimately be taken in the closing chapter of this thesis as to what the best normative position is in the Irish context.

Conception of Rights and Limitations

Utilitarian or Anti-Utilitarian Rights

A key distinction outlined in the last chapter is that between utilitarian and anti-utilitarian conceptions of rights. It was argued rights could conceptually make sense as purely utilitarian considerations. Against this, and in favour of an anti-utilitarian conception, it was argued that enforceable rights suggest something more than utilitarianism. This normative choice will most likely be made at the design stage, or be heavily influenced by decisions made at that stage when constitutional drafters conceive of what rights should be. Indeed, it may be the decision to entrench rights of itself precludes a utilitarian conception of rights.

Strong individual rights argue against the utilitarian view, as the individual entitlement is not a key concern in the utilitarian conception. Strong rights language and rhetoric, and a strong desire to defend the individual, will point away from a utilitarian conception. The institutional design of the organs of government may also be influential. If there is a strong separation of powers, courts may be loath to read the instruments as requiring them to take on a utilitarian balancing function that is in essence identical to the legislature's, for fear of the powers of government eliding with one another.[2] The institutional roles in a strong separation of powers do not envisage courts being an upper legislative chamber with a power of constitutional veto over any legislation that they feel was ill-advised. Courts claim to be engaged in a legal process that is different from the legislative process, and utilitarian balancing

[2] A utilitarian conception of rights suggests that when courts consider rights questions, they are balancing the utilities on all sides, and deciding whom the balance of utility favours, just as the legislature did when passing the law.

may be too similar.[3] As noted in the last chapter, the mere fact of constitutional entrenchment may resolve this argument.

As we shall soon see, courts in Ireland and Canada do not take a utilitarian approach, adopting an anti-utilitarian conception of rights. When arguing about the best standard of review to apply in Ireland, I will argue that the utilitarian approach is not the most preferable one, and will advocate an anti-utilitarian approach. This is because the nature of the rights protected by the Irish Constitution seems to suggest something more than a utilitarian balance.

Teleological or Deontological Conception of Rights Limitations

If an anti-utilitarian approach is favoured, it must be decided how strong that anti-utilitarian stance is. A teleological approach to rights limitations, concerned with utility in a limited way, or a deontological, duty-based approach, which rejects the need for utility to be considered at all, are both conceptually possible. Again, this determination is most likely to be made at the design stage, or heavily influenced by decisions made at that stage. The strength of the constitutional rights, and the manner in which they are described, will be key factors in this determination.

In favour of the deontological approach is the argument that it insulates rights from utility completely, and therefore respects the anti-utilitarian nature of rights in a more complete way than the teleological approach, which limits, but does not eliminate, consideration of utility. The strength of the normative conviction that utility and rights should not mix will influence the choice.

In favour of the teleological approach, it can be argued that courts should not avoid utility *entirely*. Some consideration of utility is needed to weigh rights and interests. The need to conduct a delicate balancing exercise with real world concerns requires considerations of consequences that invariably relate to utility. It

[3] Review of legislative determination of utility could create significant institutional competence issues. Courts would be called upon to make difficult and speculative decisions about the utility or disutility resulting from a particular action when they are not necessarily better placed to make such judgments. The judicial task would differ in no respect to the legislative task. Deference to the original decision maker may be offered in that instance, limiting the courts to review of the rationality of the balance struck. These are normative issues, to be resolved by any legal system that wished to implement a utilitarian conception of rights. Indeed, the institutional competence concerns raised by review of utilitarian balancing may be a normative argument against a utilitarian conception of rights in any country with a strong separation of powers and functions.

is difficult to see that any of the theorists who purport to exclude utility from deontological balancing do this successfully.[4]

I think that the deontological approach is impractical, and unlikely to be favoured. I do not believe that it is adopted in Ireland or Canada. I will argue in the final chapter that the approach is not workable for courts, even if it is conceptually open, and that the teleological approach is preferable.

Internal or External Conception of Rights Limitations

There are also two variations in respect of how rights can be limited. It is possible for a constitutional document to envisage wholly "internal" limitations, or at least some "external" limitations. As Alexy puts it, there are two conceptions of rights limitations: the external conception, which imagines that there are two parts to every right recognised –a right and a limitation– and the internal conception, which rather sees only one entity, the right as limited by its context.[5] It is possible that rights may be limited in an exclusively internal fashion. It is not, however, possible to have exclusively external limitations, as any right will necessarily contain some internal limitation: all rights will be qualified implicitly by their definition. Both of these approaches are conceptually acceptable.[6]

The choice between these variations will likely be made at the design stage, but could also be left open to interpretation. It will turn, to some degree, on how rights are framed by constitutional drafters. A document might expressly adopt an external conception, by indicating that a right is protected, but might be overcome in the name of certain other considerations or goals. That would preclude a wholly

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[4] I am not sure if the deontological approach is possible in practice. Robert Alexy is a proponent of a deontological conception of rights. However, in spite of Alexy's insistence to the contrary, his model is not deontological, at least not in the sense used in this paper. His model cannot, despite his claims, be said to excise utility entirely. This becomes increasingly apparent in his attempt to flesh out the process of balancing. To avoid an entirely abstract balance, Alexy gives each norm or principle a "concrete weight." This concrete weight is established by reference to the extent to which the norm or principle is realised in any given factual circumstances. In giving examples of this, Alexy reveals himself to be taking utility into account, making his theory not deontological in nature. See Robert Alexy, *A Theory of Constitutional Rights*, (Oxford, 2002) at 403-404 where he speaks about the intensity of harm to rights and interests that must vary with the utility and disutility created. No other metric is suggested. This will be discussed in the final chapter; see Chapter 11, note 7 and accompanying text. These reservations make the conceptual acceptability of the deontological standard questionable, but I am not confident enough that this process is not possible to rule it out entirely.

[5] *Ibid* at 179.

[6] Barak thinks either approach –a wholly internal approach or a combination of internal and external limitations– is conceptually acceptable; he says his preferred approach, combining internal and external limitations, is not a "conceptual necessity." Ahron Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012) at 24.

internal conception. If a right is stated to be absolute or not subject to qualification, that would suggest that only internal limitations are possible. If no express limitations are given, but nor are they ruled out, then it is open to the courts to decide how the right may be limited. Courts, in interpreting the document, might decide that rights can be limited generally by reference to other values in the document or legal system. Consequently, there is also scope for courts to make this normative choice in some cases.

The extent of the differences between a wholly internal and an external model of rights limitations should not be overstated. The distinction between them may be primarily rhetorical. Some internal limitation questions will be contested and difficult to determine, and the courts will have to use techniques similar or identical to those used in external limitations to resolve these questions. Several commentators share this view.[7] A lack of rigor in one aspect simply leaves more to be done by the other.[8]

In favour of wholly internal limitations, such an approach suggests rights can never be legitimately restricted; once a right is properly defined and delineated, any restriction on it is invalid. Jackson argues that this could have benefits, particularly in respect of a right against torture.[9] She argues that allowing external limitations on that right would lead to an undesirable sense that torture could be justified, and could gradually weaken the norm against it. Internally limited rights may be perceived as stronger, because of the additional rhetorical power of saying that they cannot be limited.[10]

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[7] Kavanagh describes the difference between analysis applied to qualified and unqualified rights as being "one of form rather than one of substance – the type of judicial reasoning is, in each case, substantially the same." Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) at 263. Barak argues that when a wholly internal (or single stage) approach is used, considerations of objectives and the public interest goal being pursued must be considered in the context of definition, making the process very similar to external limitations. Barak, note 6, at 75. *Cf* Richard Falon, "Individual Rights and the Powers of Government" 27 Ga L Rev 343 (1993).

[8] See Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-6. Hogg notes that, in Canada, in the event that a Charter right is broadly interpreted, more work would have to be done at the limitation stage. Similarly, setting a high threshold for limitations will necessitate a narrow, strictly purposive reading of rights. If rights are very broad and their limitation difficult to justify, the Charter rights would likely be excessively strong having regard to the values of the Canadian people. Hogg suggests that it may not matter, in substance, which approach is chosen. It does matter in respect of how judicial review is carried out, as broader rights with broader limitations will make judicial review "more pervasive, even more policy-laden and even more unpredictable than it is now." At 38-7.

[9] Vicki Jackson, "Being Proportionate About Proportionality" 21 Const. Comment. 803 (2004) at 856.

[10] Webber also makes a case for this sort of approach, objecting to external conceptions on the basis that it extends rights everywhere but protects them very poorly. His advocacy for a single-stage

Additionally, the internal model reduces the number of *prima facie* restrictions of rights. With a very broad right –say the right to equality– a primarily external approach would treat any inequality in the law as presumptively a breach of that right. However, most inequalities drawn in the law are justified by legitimate differences between people and circumstances. An internal conception would not regard all inequalities as presumptively invalid until justified. That might be a more accurate reflection of the scope of the right.

In favour of the external conception, one can argue that this approach brings transparency and clarity to a clash of values, and avoids rights being limited for unclear definitional reasons.[11] It also gives the right presumptively broad scope, and scales it back as necessary, giving rights a broad ambit, which shows the importance of rights and the need to justify limitations.[12]

Ireland and Canada adopt a dual model of limitations, with both internal and external limitations on most rights. Ireland does have some rights that are primarily or exclusively subject to internal limitation, such as equality and trial in due course of law, whereas Canada does not. I will later argue that a hybrid of these approaches is probably best. More focus on internal limitations than is seen in Canada might be beneficial, but internal-only limitations in Ireland have led to confusion. Therefore a strong internal approach, combined with an external approach, is the more desirable.

OBJECTIVES

The Importance of Objectives

There are several conceptual possibilities for how objectives are to be dealt with. The first is whether there should be a preliminary threshold test in addition to

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process involves giving the legislature a role in teasing out the precise meaning of open-ended rights. See Grégoire Webber, *The Negotiable Constitution*, (Cambridge, 2009). His case is fascinating, but ultimately rests its critique of the external approach on an argument of radical incommensurability, placing it beyond the scope of this thesis. Thus, his argument in this context is best deployed to the rhetorical value of not having a great many rights subject to a great many limits.

[11] Barak's strong normative case for this approach relies on the value of transparently laying out these concerns. A single stage interpretative approach would consider the same factors, but obscure them. Barak, note 6, at 76-77. Emiliou argues that the separation of rights and limitations avoids the "danger of arbitrarily restricting freedom by way of an ad hoc definition of basic rights." Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (Kluwer, 1996) at 53. In essence, the risk of rights being restricted by opaque definitional reasoning should be avoided.

[12] Alexy, note 4, at 179 argues that this should make the external approach appealing to those who indorse a strong defence of individual rights. However, Jackson's argument about the rhetorical force of illimitable rights might provide similar appeal for the internal conception. See Jackson, note 9.

a consideration of objectives in the balancing exercise. The second is whether the objective should have to be of a certain level of importance – from "legitimate" to "compelling", or anywhere in between.

Since there is a separate balancing exercise to be conducted, it matters less whether or not there is a preliminary importance requirement.[13] Whether or not it has to be important to any particular degree seems to be largely irrelevant, as importance will be crucial in determining balancing. This is a fine distinction, and one that is unlikely to be made at the design stage, though there is one instance where design might require a preliminary objective analysis.[14] It will usually be for courts at the interpretation stage to make this decision.

Some normative arguments can be put forward in respect of having an additional importance requirement at the preliminary stage. This would ensure that the objective was of sufficient weight and importance to balanced against rights *at all*, and eliminate insufficiently important objectives at an early stage. [15] Even if this threshold were overcome, that would not mean the objective was sufficient to justify the specific rights limitation in question –which will be decided by balancing– but rather that the objective was sufficiently important to justify *some* rights limitations.

Against the presence of preliminary objective analysis, it might be argued that this analysis could cause confusion. Passing this initial hurdle might give the measure an air of legitimacy and persuade courts that the overall balancing test was less important than it is.[16] Additionally, it can be argued that nothing is added by the requirement, and it duplicates work that must be done in balancing.

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[13] However, the situation is different if the objective stage is also taking on the role of the balancing test. This possibility is discussed more in the context of balancing. See below. In that case, a specified level importance is set for a limitation of rights; if that threshold is met, then the substantive question of the legitimacy of the restriction would be resolved, and the measure will be justified unless in practice the means used in the law stray from the objective. The objective stage therefore carries a great deal of the justificatory force of the standard of review. A high standard of importance is essential for the standard of review to have any force at all.

[14] The drafters of the constitution or other document containing rights might choose specific objectives that can be relied on to limit the right, and decline to allow limitation on any other grounds. This could also be done by the courts, but it is perhaps less likely that courts will enumerate an exhaustive list of permissible objectives in this manner. The preliminary stage would therefore ensure that the objective of the measure was within this permissible category, but it would still have to be determined if the specific interest in the case at hand was strong enough to overcome the right.

[15] See Mathias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos, (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007). Barak makes a similar argument at 246-7.

[16] Denise Reaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009 at 8. Hogg's suggestion that this enquiry should stand in for balancing shows that this danger is a real one. See Hogg, note 8, at 38-43.

Second, assuming that a separate importance requirement is favoured, it could be a high or low level of importance that is required, or indeed anything in between. Again, this is a decision that will likely be made at the interpretation stage, but constitutional design could insist on a certain level of importance, for example by dictating that only certain objectives can be sufficient to restrict rights.

In favour of a higher standard of importance, one could argue that it protects rights more effectively. A higher importance requirement will cause more laws to fail this step of the analysis, because some laws cannot be deemed to advance sufficiently important objectives, thereby protecting rights to a greater degree. Beyond that, the level of importance required will affect other parts of the standards of review, particularly related to hypothetical objectives. Secondary arguments in favour of higher importance can be advanced, based on the benefits this would have for the other elements of the standard of review. This is best discussed in the context of those other elements.

Both Ireland and Canada have adopted a preliminary importance inquiry. In neither jurisdiction has a high level of importance been enforced. I will ultimately argue that an importance requirement is useful in Ireland, particularly having regard to the use of hypothetical objectives. However, I will argue that it can only be meaningful if the level of importance is actually insisted upon in practice.

Hypothetical or Actual Objectives

It was previously established that deontological view of rights restrictions require the true, subjective intention of the legislature to be known, as only then could one be sure that forbidden objectives did not motivate the law. With the teleological approach, subjective motivations may be examined, but it is also conceptually permissible for objectives to be hypothesised to explain the law instead.[17] This decision is one that is likely to be made by the courts at the interpretation stage, being a nuanced point of rights limitations that constitutional drafting will rarely address. However, certain elements of the design of the

[17] This is because hypothetical objectives to not compromise the standard of review entirely in that sense. Hypothetical objectives can fail to pass muster. Tailoring to the objective can indirectly scrutinise laws for illicit objectives. See below, text accompanying note 34. Additionally, if the importance required is variable in respect of the right in question and the impact of the measure on that right, then hypothesis cannot render the enquiry useless; it will not be apparent, until the balancing exercise is complete, whether the objective was of sufficient importance to justify the limitation. In both these cases, the strongest possible objective may be hypothesised, but that may not be sufficient to allow the law to pass muster.

constitution could influence this decision, such as the constitution's conception of the rule of law or the separation of powers.

The arguments for hypothesis are largely the arguments against looking to the subjective intention of the legislature. First, it is impossible to know the mind of the legislature; there is no mind to know. A group of people acting collectively have no unitary intention. Any intention found will invariably rely on the stated intention of certain individuals, such as ministers or prominent parliamentarians. This does not necessarily reflect the intention of the entire body, and may be thought objectionable under certain conceptions of the rule of law.[18]

Additionally, illicit, invalid or trivial purposes will rarely be admitted to, so for the courts to really ferret out such objectives, a more searching psychoanalysis of the legislature is required.[19] This will invariably turn on suspicion, or political inference – what can be surmised about what the legislature was really trying to do. Such suppositions may be thought inappropriate for courts to make.

Second, rejecting subjective purpose enquiry does not mean that statutes motivated by illicit aims will never be held unconstitutional; it simply means that the purpose must be established objectively. When there is no other conceivable motivation for the statute, the courts will hold that the objective was illegitimate. It is not a subjective examination of the State's purpose that determines this, but rather an objective consideration of the purpose of the statute, and the conclusion that no legitimate purpose can be hypothesised.[20] Such circumstances will be rare; only flagrant violations will be invalidated in this manner.[21] This will be more likely

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[18] A legal system that had a particular conception of the rule of law might be inclined to favour an objective view of intention, and hypothesise objectives. This would alleviate a fear that relying on subjective intention *in lieu* of something derived from the words of the law itself might be a violation of the maxim that government is of laws and not of men. The Irish Courts seem to subscribe to this idea quite strictly, both in respect of constitutional law and statutory interpretation. The most definitive statement is *Crilly v Farrington* [2001] 3 IR 251, dealing with the use of parliamentary debates in the interpretation of laws, and followed in the constitutional context in *Controller of Patents v Ireland* [2001] 4 IR 229.

[19] As Justice Cordozo once noted in the United States, psychoanalysis does not readily lend itself to "unaccustomed fields." *US v Constantine* 296 US 287, 298-99 (1935), Justice Cardozo dissenting.

[20] For example, in the famous United States case of *Gomillion v Lightfoot* 364 U.S. 339 (1960), the objective of the redrawing of the electoral boundary of the town was clearly racial gerrymandering, as the district was turned into a extraordinarily peculiarly shaped area and removed almost all black residents from the district. As Bickel notes, "No one, least of all counsel for Alabama, was able to invent any purpose at all that the gerrymander might have served other than the forbidden one." Alexander Bickel, Alexander Bickel, *The Least Dangerous Branch*, (Yale University Press, 1962) at 210-211. No probing inquiry into the minds of legislators was necessary – the purpose was patent.

[21] I shall argue later that there may be another way to ferret out indirectly statues that pursue illegitimate objectives, using the tailoring to the objective. If that is correct, it would mean that though

to happen if the purpose hypothesised must be of a particular level of importance, and so is an argument in favour of a higher importance threshold.[22]

Finally, if one established an invalid objective for an otherwise valid enactment, striking it down on this basis is of questionable value, since it could be re-enacted on identical terms.[23]

Against this, and in favour of subjective purpose enquiry, it can be argued that the true purpose of the legislature does matter. There is a moral difference between restricting rights for a valid and an invalid objective, even if the means used were indistinguishable. It also matters for an individual who is targeted by a law with an improper purpose; there is a benefit to such people in not having to suffer under such laws, even if they might have to endure the same treatment under a law enacted with a different objective.[24] Moreover, it can be said that the objectives of the parties driving the measure, such as government ministers, do colour the objectives of the group, and are valid considerations.

In Canada, subjective purposes are examined, though in reality, this lapses into hypothetical objective ascertainment regularly. In Ireland, the courts only consider hypothetical objectives. I will suggest that this is the better course for Ireland, given the longstanding values of its legal order.

Multiple Objectives and the Generality of Objectives

If hypothetical objectives are chosen, the courts must then decide whether or not multiple objectives and general objectives can be hypothesised. Both of these are

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few statutes could be struck down by reason of invalid purpose, many more such statutes could be invalidated on other grounds.

[22] If the importance requirement is high, it restricts the number of hypothetical objectives that the courts can consider, as some possible reasons for the law will not pass muster in respect of importance. The courts are more likely to find an illegitimate purpose in this situation, as legitimate explanations of the law may not be sufficiently important meet the bar. See Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004) at 118-120.

[23] If purpose were the sole reason for invalidity, then an identical enactment, passed pursuant to a different purpose, would pass muster. If the legislature were to re-enact the measure, while swearing that the illegitimate purpose has been banished from their minds, the courts would surely have to accept this. See, for example, the US case of *Palmer v Thomson* 403 US 217 (1971), where the city of Jackson, Mississippi, closed public swimming pools rather than racially integrating them pursuant to a court order. Though it was widely known that the purpose of the action was to avoid integration (see Paul Brest, *Palmer v Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation, The Supreme Court Review*, (1971) 95) since the city was entitled to close the pools for any number of other, legitimate reasons, which they claimed to be pursuing, the Supreme Court refused to examine whether or not the real purpose was discriminatory.

[24] Suffering a limitation on ones rights might be more tolerable if it were genuinely done in the public interest than if it were done, say, for reasons of personal animosity towards the rights holder; the intention underlying the law might matter in that respect.

conceptually acceptable, but pose problems if taken to extremes. This is a choice almost certain to be made at the interpretation stage, as it is not the type of matter that constitutions usually address.

In favour of multiple objectives, one could argue that they are a reality of legislative decision-making, and that different elements of a measure, or different applications of a measure, may in reality be motivated by different considerations. It could also be argued that, if the law is defensible on some ground, then perhaps that ground should be put forward, out of respect for the legislature.

Against this, one could say that multiple different objectives allow for the rationalising of irrational laws. A law restricting a right may be broadly justified by reference to an objective, but the entire scope of the law may not fit within that objective. The law might target conduct in a manner that is selective and underinclusive, or indiscriminate and overinclusive, having regard to the objective. To avoid such under- or overinclusiveness, another objective could be offered, which would explain why the portions of the law are overbroad, or justify why the law excluded certain elements that should be covered to achieve the objective. Accepting additional objectives lowers the standard of tailoring that is required in practice. One could argue that when hypothesis results in implausible string of objectives, it has gone too far, and lost any link with reality.

There is a similar issue with objectives that are too general.[25] The theory outlined in the previous chapter is concerned with the reason why rights were infringed. With every measure, there may be broader goals and objectives that underlie the measure as a whole, but do not necessarily relate to the rights restriction specifically.

Two problems arise when the objective hypothesised is too general. First, it renders the tailoring to the objective test somewhat meaningless. A very general objective will clearly be connected to the measure. There is no room for the test to applied with any rigor, and in a sense, the analysis is being circumvented. Therefore, the objective should not be defined so generally that it cannot be said to be the reason for *restricting the right*. Secondly, there will be an advantage in the balancing

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[25] It is important to distinguish general objectives from objectives that merely state the law's effects. General objectives are still external to the measure, and thus are not *per se* illegitimate. An objective that merely states the effect of the law as the reason for its enactment is a very different proposition; it is not external to the right, and is *per se* invalid by reference to the theories offered in the previous chapter.

stage if the objective is described at a very high level of generality. The law will get the full credit for the entire measure in the balancing exercise against the rights in question. In reality, it should only get credit for that portion of the law that cannot be achieved without the restriction of the right. This can be achieved in part by definition of the objective, and in part by a process of refinement related to the examination of tailoring to the right, which will be discussed later.[26] For the time being, it suffices to say that very general objectives can obscure this process.

In Canada, the courts should not have to address the multiple objectives problem, as they purport to look at subjective purposes. However, Canada has addressed concerns about overly general objectives. Ireland has not addressed either of these matters, and both multiple and general objectives are hypothesised. I will argue that Irish courts have not taken these risks seriously, and have erred in their failure to address these issues.

Tailoring to Purpose

The Closeness of Tailoring to the Purpose

Tailoring to the objective, as outlined in the previous chapter, is an incomplete concept. Various normative arguments can be deployed in favour of increasing the closeness required above the minimum standard of having any connection between the objective and the means. This is a decision that is likely to be made at the interpretation stage, because constitutions are unlikely to address this sort of issue directly. As ever, the interpretation stage can be influenced by factors decided upon during constitutional design, such as the strength of the rights protection, etc., but courts will have significant room to choose whichever option they find most normatively appealing.

A stricter approach, requiring that the means be very narrowly or closely tailored, could be useful in several ways. First, a stronger stance on this form of tailoring would help ameliorate the problems posed by hypothesising objectives. When objectives are hypothesised, the examination of means-ends tailoring seems to have no role to play. The ends were hypothesised by reference to the means. Therefore, to ask the whether the means and ends are connected is senseless, as the way the ends were ascertained seems to guarantee this.[27]

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[26] See below, text accompanying note 43.
[27] Doyle, note 22, at 118.

Stronger tailoring gives bite to this examination, and avoids it becoming a tautological enquiry. If the requirement for tailoring is strong, means must not merely pursue the objective in some sense; instead they must be carefully and closely drawn to meet the objective in question. This leaves the possibility that an objective cannot be hypothesised that will be both legitimate/important enough and will sufficiently connect means and ends. The test can therefore be failed. This is also a normative argument for a greater level of importance in respect of objectives, as this would narrow further the range of alternatives that can be hyopthesised to uphold the law.[28]

Secondly, close tailoring would benefit a deontological and strong teleological stance. In the deontological conception, it would ensure that the measure truly pursued the objective that was being given normative weight. In the teleological conception, it would help screen out utility that was achieved by other than in pursuit of the approved ends, and hone even more precisely the utilitarian considerations that may be legitimately considered. One could be confident that the utility derived from the law relates primarily to the objective given, and that other utility is shut out.[29]

Thirdly, stronger tailoring helps to gauge how effective the means are in practice. This can help weigh the objective more accurately in the final balancing exercise, making for a more accurate and representative balance.[30]

Against this, it could be said that strong tailoring demands too much of the legislature. There may be an element of speculation or assertion as to whether certain means will, in fact, achieve the objective, or the extent to which the objective will be achieved. Similarly, there could be concerns that strong tailoring would

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[28] If the importance requirement were also significant, the court would then have to hypothesise an end that was both important and closely tailored to the means. There will obviously be fewer ends available that meet both of these criteria. See *Ibid* at 118-120. Therefore a case for closer tailoring is also a case for a stronger importance of objectives threshold.

[29] Only with a stronger tailoring requirement can one be sure that matters unrelated to the objective are not creeping into the analysis and being used to justify rights restrictions. With any loose tailoring requirement, all one can say is that the objective is being pursued by the means; it does not guarantee that something else is not being pursued as well.

[30] This obviously cannot be the case if balancing is conducted as a threshold test, as discussed above. However, there is also a strong normative argument for stringent tailoring when the objective stage of the analysis also serves as the balancing exercise. In that case, there is no final balance to be conducted between the right and the objective; the threshold test will give *prima facie* legitimacy to the restriction unless the tailoring test is failed. It is therefore very important to make sure that the objective is not strongly deviated from, as the strength of this objective, essentially in the abstract, is justifying a limitation of rights. If the measure has been legitimised, and then departs from the purpose in practice, this presents difficulties, and could even be conceptually problematic. Therefore, strong tailoring would be desirable.

interfere with the task of legislating, especially in relation to over- and under-inclusiveness.[31]

Over-inclusiveness occurs when the law targets those that, having regard to the objective of the law, should not be targeted. It is a risk in much legislation, because it is nearly impossible to tailor legislation precisely enough to ensure that no person is caught by the legislation that should not be.[32] Under-inclusiveness arises when the law does not go far enough, and should properly include more people than it currently does. Again, it is a frequent feature of legislation.[33]

The difficulties in legislation being perfectly tailored are obvious; many if not most laws require drafting to be broad and somewhat general, and this risks the improper inclusion or exclusion of people. These realities of legislating argue against stronger tailoring requirements that risk laws being invalidated because of these difficulties.

In Canada, tailoring to the objective was initially very strong, but gradually relaxed over time. In Ireland, this tailoring analysis is generally weak, but has shown strength on rare occasions. I will ultimately argue that Ireland's tailoring analysis should be stronger, in order to avoid the test becoming tautological, and in order to indirectly scrutinise objectives in the manner that will now be outlined.

Indirect Scrutiny of the Legitimacy of Objectives

It was noted above that tailoring to purpose may be tautological when objectives are hypothesised, unless the tailoring requirement is very strong. I wish to advance an argument that suggests that this might not be the case, why it might still serve a purpose.

Tailoring to the purpose serves to test the truth of apparent objectives where it cannot be established that the objective pursued was an illicit or invalid one.[34] If

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[31] Inclusiveness problems go to the law's tailoring to purpose, as the law includes those that it properly should not, having regard to the objective of the law..

[32] Sometime it will be inadvertence that causes over-inclusion. Other times, it will be simply impossible to avoid over-inclusion for the law to do what it needs to do, as certain persons may seem like apt targets, but specific or exigent circumstances will render them not so.

[33] This might arise because the legislature chose to pursue a policy of progressive realisation of a particular end or goal. This might be because of resource implications, practicality, or triage of legislative priorities. It might also arise out of inadvertence, with the legislature failing to see that its objective logically requires the law to apply to more people. It should be noted that exclusion from the scope of the law could be either good or bad for the excluded party. Exclusion may deny a privilege, or exclude one from the scope of a punitive or measure or sanction.

[34] This contention has been tentatively or indirectly made by some commentators. Kavanagh argues, in the context of rational connection in the United Kingdom, that if the law fails it means that "[e]ither

an objective is stated and accepted that is not the true purpose of the law, then the means actually used to achieve that supposed end might not match up; means and ends might be dissonant. Since another purpose, or perhaps no coherent purpose at all, underlay the restriction of rights, the means do not lie along the vector of the objective. The facial connection linking them runs no deeper, and while sufficient to ground a hypothesised purpose, is not sufficient to show that the means actually achieve the objective in reality. It is therefore not correct to say that hypothesis of objectives renders this tailoring enquiry moot in all cases, though the circumstances in which this use is realised may be few.

If a law is not directed toward the hypothesised, legitimate objective, but rather some other, illicit object, this will be more apparent the closer the tailoring that must exist between the objective and the law.[35] It will be increasingly difficult to hypothesise legitimate objectives that justify the law, as means and ends must show themselves to be closely connected; there is little room to hide a law that pursues a forbidden object. Therefore, stringent tailoring might be thought apt in a system that wished to have close scrutiny of rights restrictions, but opted to hypothesise objectives for laws rather than probing for subjective purposes.

This indirect mode of objective analysis might be preferred to the more transparent approach of challenging the objective directly. It is less disrespectful to tell the legislature that its law failed to pursue its objective than to tell it that it pursued an improper purpose. Also, it may not be possible to establish definitively that the legislature pursued an improper objective even if this is suspected. Indirect scrutiny may reveal the objective to be lacking in a way that direct scrutiny cannot.

There is some evidence of this phenomenon in both Ireland and Canada, indicating that both jurisdictions have at times chosen to use indirect rather than direct scrutiny of objectives. I will later argue that this should form a part of standards of review in Ireland.

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the alleged aim is not in fact the real or primary aim of the restrictive measure or, alternatively, if the aim is genuine, the means used to achieve it are ineffective or irrational." Kavanagh, note 7, at 235. Also also quotes Jeffrey Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review," (2000) PL 669 at 679: "Spurious or impractical aims will not suffice." Jackson, note 9, at 830 makes a tentative suggestion to the effect that means-ends rationality can screen for invalid objectives, and gives some examples in the US context. Barak, note 6, at 316, makes a similarly tentative suggestion to this effect. I have elsewhere suggested this possibility as the underlying purpose of rational connection. David Kenny, "A Dormant Doctrine of Overbreath: Abstract Review and Ius Tertii in Irish Proportionality Analysis" (2010) 32 DULJ 25.

[35] Placing the burden of proof on the State in this respect would also make it more likely that a law would fail if it pursued some hidden objective.

TAILORING TO THE RIGHT

Closeness of Tailoring to the Right

The second aspect of tailoring is another fundamental component of a standard of review that is incomplete, and could be applied in a variety of different ways.

First, it could look at alternatives, at whether or not the policy objective could be achieved by another route. Within this category, it could be very strict, allowing little to no impact beyond that which is strictly necessary, and demanding the least rights-restrictive means be chosen, regardless of whether or not they would be as effective. It could be applied less rigorously, to assess whether other means were available that were acceptably efficacious, if not as effective as the means chosen, which would have been less rights-restrictive. There would have to be a compelling reason for preferring the more intrusive measure. It could also be applied very loosely, so that only alternative means precisely as efficacious, where there was no other rational reason to reject those means, would render a law invalid.

Secondly, it could look at whether or not the means chosen could be more limited in their impact. All of the foregoing methods on some level consider alternatives, because they consider other sets of means different enough to have an impact on the effectiveness of the measure. But the test could be narrower; it could reject the notion that alternatives should be considered at all, and rather act as a rule that the means chosen must not be excessive when the excess portion of the measure adds nothing to its efficacy.[36] Having chosen the means, they should not be made irrationally overbroad, but any suggestion of a fundamentally different set of means would be rejected.

This decision would be made at the interpretative stage, perhaps influenced by choices made at the design stage, but leaving courts substantial discretion.

A stricter approach to tailoring to the right might be favoured in a system that strongly protected rights. Such strict tailoring ensures that rights can only be set aside when no other available option was open for achieving the public good.

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[36] Kavanagh equates excessiveness standards to "reasonableness" standards of review, where the correctness of the decision is not at stake, but rather whether it was reasonably made. See Kavanagh, note 7, at 240. However, Kavanagh is, at this point, eliding tailoring to the right and balancing, and an excessiveness standard is different.

However, even where rights are strongly protected, this strict approach may not be favoured, due to the need to reconcile defence of rights with the realities of legislative decision-making. Compromise, time pressure and disagreement mean that very few laws designed by a legislature will be perfect, or anywhere close to that, no matter how much care is taken.[37] A strict requirement that the means be the least restrictive would lead to many or most rights-restrictive measures potentially coming under fire.

In Canada, the approach to tailoring has varied greatly over time, as different normative arguments swayed the court at certain times. It shows the significant range of options available, and the complexity of the normative questions involved. Ireland has seemingly adopted a very narrow, excess-based approach. Ultimately, I will argue that the Irish approach would be appropriate, if it were combined with feedback into objectives.

Elision with Balancing and Objective Feedback

Whenever tailoring to the right goes beyond the narrowest rule against excess, and begins to consider alternatives, an element of balancing is introduced.[38] To decide if a somewhat less effective set of means should be preferred to the ones chosen because they are less restrictive of rights is in essence an assessment that the merits of the more invasive means are insufficiently great to justify the effect on rights. At the point where tailoring to the right becomes broader, it begins to take on the role and characteristics of the legitimising balancing test.

This presents a second normative choice that must be made: whether to incorporate balancing into tailoring (and if so, to what degree), or to keep it separate.

Against this elision it can be argued that when the exercises in tailoring and balancing are fused, it is less likely the nature and reason for each will be properly understood. If balancing works its way into tailoring, it can lead courts and academic commentators to fail to properly distinguish the modes of analysis in each case.[39]

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[37] See Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 SCLR (2d) 501.

[38] Rivers makes a point somewhat similar to this; Rivers, note 1, at 187.

[39] Kavanagh, note 7, at 235, elides the tailoring to the right and balancing in the context of the standard of review used in the Human Rights Act regime in Britain. As we shall see in later chapters, courts in Ireland and Canada have also fallen prey to this trap. See Reaume, note 16, on the importance of separating balancing exercise, focusing on the element of legitimacy that can only come from balancing.

Balancing that is done in the guise of tailoring may not always be apparent, and as Rivers notes, balancing that is "unnoticed ... is uncontrolled."[40] The value of transparency and clarity in standards of review is high, especially if one is concerned about the legitimacy of judicial action and the role of subjectivity in rights adjudication.[41]

More problematically, the elision of balancing and tailoring may be partial, but seem more substantial. Only at its very broadest –where every possible alternative measure was considered, and sacrifices in efficacy were properly considered by reference to the importance of the goal and the right– is balancing fully absorbed into the tailoring analysis. However, short of that, the essential weighing exercise is not fully replicated, but the elision between the tests may give a sense that the balancing exercise has been carried out in the context of tailoring, leading judges to pay insufficient regard to the need for a separate balancing test.

In favour of this approach, it can be argued that the independent role of balancing can be preserved in this situation; there is nothing inherent in the addition of balancing analysis to tailoring that means that independent balancing cannot be conducted. Courts and commentators should be able to distinguish these modes of analysis, and failure to do so is not a principled objection.[42]

Another argument in favour of it is that the concerns in this tailoring test – that a small sacrifice in efficacy might be appropriate in the name of rights, and that the availability of such alternatives is relevant– are pertinent to the balancing exercise. This is a valid argument. However, it does not necessarily require the introduction of balancing into tailoring. It might be better deployed toward arguing for a form of refinement of the objective in light of available alternatives.

In Canada, it is clear that balancing and tailoring have combined to a substantial extent. In Ireland, this has not happened as much, or as frequently, but some evidence of it may be seen. I will ultimately argue that in Ireland it is inadvisable to elide the tests.

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[40] Rivers, note 1, at 187.

[41] Reaume, note 16, makes a compelling argument for transparency, and illustrates that eliding the tests can be highly misleading.

[42] It could also be argued that once the parts essential elements of standards of review are accounted for, the manner in which they appear is irrelevant.

Feedback into Objectives/Refinement of Objectives

Tailoring to the right might have significance beyond the binary question of whether the tailoring is such as to render the measure invalid. Even if the scope of the tailoring test is limited, it can have a role in refining the objective.

Assessments of tailoring can refine the precise nature of the objective that is being achieved by the rights violation. The extent to which the impairment is truly necessary is relevant to the weight afforded to the objective in the balancing stage, because it tells us to what extent the right and the objective are fundamentally incompatible.[43]

In a narrow tailoring test –that does not consider alternative measures, or considers some alternatives alongside significant deference to the legislature– if the law passes muster, it does so not because there is no other way to achieve the end in question. Rather, it does so because the alternative means may be somewhat less efficacious, or too speculative in their efficacy. It is not true, then, to say that the objective cannot be achieved by any other means.

The argument for this approach is as follows: it is not appropriate to give the objective its full weight in balancing, as if it truly could not be achieved any other way.[44] The fact that there is an alternative, albeit not one sufficient to jeopardise the law's tailoring, should feed back into the objective of the law. The true weight of the objective is not that of the objective overall, but the difference between the extent to which the objective is achieved by the means chosen and the extent to which it would be achieved by the nearest alternative. The weight of the objective is whatever loss in efficacy the State would suffer if forced to adopt the less restrictive means. This also works in reverse, affording more weight if there are few alternatives.[45]

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[43] Alexy might see a role for consideration of alternatives to have an impact on the balancing exercise: "The existence of alternatives can play an important role in the balancing exercise which becomes necessary..." Alexy, note 4, at 76. Though note that alternatives in question here were alternative avenues of exercise of a right, free expression. This should surely work in reverse as well. See also Reaume, note 16, who advocates an optimality approach. This idea of optimality might be better achieved with refinement of objectives.

[44] Reaume makes a somewhat similar argument as a way of refining considerations under conditions of uncertainty. Reaume, note 16, at 19-21.

[45] The closer the means are to being the sole way the State can achieve its objective, the more weight the objective should receive. If there is actually no alternative means available to achieve the objective, then the Court is ruling on whether or not the objective can be pursued at all. That should weigh in the State's favour, as it is serious indeed to tie the hands of the legislature and say that certain important public goals can never be pursued.

That feedback into the objective would create a more accurate and honest reflection of what is being weighed against rights in balancing. It helps the courts consider what the rights restriction is needed to achieve; it avoids the fiction that the clash of rights against objectives is a zero sum game; it recognises that the reason the State restricts rights is rarely because the objective is otherwise unobtainable, but because it is more convenient, or more effective, or more apt to adopt the means chosen. Moreover, it avoids the potentially problematic addition of balancing to tailoring to the right analysis.

There is little evidence that this approach is adopted in either Ireland or Canada. However, I will argue that it should be adopted, especially given Ireland's conservative approach to tailoring questions.

BALANCING

Balancing as a Preliminary or Final Exercise

The first normative choice in balancing is whether the exercise is conducted after the other tests, or as part of an objective ascertainment process – essentially, as a high importance threshold that varies in relation to the right at stake.

Balancing at the objective stage works as follows.[46] Before any other analysis, the right infringed or restricted would be considered. Based on this right and its importance, a certain level of importance would be demanded of the objective of the restriction. This will vary as between different rights: the more important the right, the more important the objective must be to justify its restriction. If the objective of the measure is not sufficiently important, the measure is invalid. If the objective of the measure is sufficiently important, then the measure is presumptively justified. That does not end the matter, however, as the measure must prove itself sufficiently tailored to have an actual link to that important objective.[47] Only when the law is shown to be sufficiently well-tailored can it be said to be a legitimate restriction. Whether or not balancing is done before or after the tailoring process is a normative choice to be made at the interpretation stage.

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[46] A real life example of this sort of front-loaded balancing is provided by the tier of scrutiny approach to standards of review found in the constitutional law of the United States. See Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts" Vanderbilt Law Review, Vol. 59, 2006, 793; Robert C Farrell, "Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v Evans," 32 Ind. L. Rev. 357 1998-1999.

[47] As noted above, this sort of balancing approach might present a strong normative case for tighter tailoring requirements.

Hogg argues for preliminary balancing in Canada, and Barak rebuts this suggestion at length.[48] Robert Alexy and Denise Reaume[49] also argue against this approach, suggesting that the balancing analysis must follow the other tests. Viewing the tailoring analysis of the Canadian and German proportionality tests as *pareto optimality*, they argue that the balancing analysis must follow tailoring. Tailoring allows the courts to ensure that there is actually a clash between rights and the objective before adjudicating that clash.[50] It is also possible that examining a law's tailoring before the balancing exercise might lead to a more focused and accurate balancing exercise, as illustrated by the notion of objective feedback, discussed above.

On the other hand, the more rigid form of a preliminary balancing exercise might provide some more stability and clarity for those concerned that the balancing exercise is too fluid and leaves too much scope for opaque decision-making.

Neither Ireland nor Canada adopts this approach to standards of review, though other standards –such as tiers of scrutiny in the United States– do so. It is not an approach I will advocate for Ireland.

Reasonableness or Correctness Approach

Balancing is a crucial part of the standard of review, where much of the work of justifying the restriction is done. However, when weighing utility or norms, there is bound to be disagreement, dispute and uncertainty as to the correct balance. Courts, at the interpretation stage (though influenced by constitutional design), must decide how closely to examine the balance struck by the legislature.

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[48] Hogg, note 8, at 38-43, proposes this for Canada, and suggests this is why balancing has never really been carried out, as it is rendered moot by the threshold test. This has been subject to blistering criticism by two recent works of note: by Barak, note 6, at 247-249, and by McLachlin CJ in the Supreme Court of Canada in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567; 2009 SCC 37 Canlii at [75]. They are right to criticize Hogg, as the way the Canadian courts conduct objective analysis cannot possibly pass for balancing. Insofar as Barak goes further than that to suggest that such an approach is *per se* unacceptable, I would disagree. It would seem like an acceptable way to perform balancing if truly designed for this, which the Canadian test is clearly not.

[49] Alexy, note 4; Reaume, note 16.

[50] Their analysis seems to suggest that it would be inappropriate to structure the test any other way. Reaume suggests that balancing should only be conducted where it is shown to be necessary. Note 16, at 8-9. They may have good normative arguments in favour of their approach, such as the idea that the tailoring processes can help refine the considerations of the objective, in a manner similar to the objective feedback idea outlined above. However, it is not a conceptual requirement: it is entirely possible to have the balancing exercise frontloaded, so that it is done alongside the consideration of objectives. To the extent that other accounts suggest that this is improper (as opposed to sub-optimal) to carry out balancing in this way, I believe they are incorrect.

Rather than independently balancing, and demanding that the legislature's action reflect the correct balance, courts could choose instead to examine if the legislature's balance is clearly not correct. This would give leeway to the legislature, and indicate that the court did not believe that its determination of the balance was infallible and absolute. It would be reviewing the legislature's decision, not to ensure that it was right, but rather to ensure it was not plainly wrong.[51]

In favour of this, it can be argued that the legislature should not be entirely excluded from the defence of rights. Defence of rights is not a binary process, whereby striking down the law vindicates rights and upholding it limits them. The law itself may act in defence of rights, so that striking down the law would reduce the protection of the rights of third parties. It may be that balancing, as a process, cannot formulate one correct answer to questions as complicated as those involved in rights limitation. The goal of the process might not be to decide if the balance struck is the correct one, but rather whether the balance struck is incorrect.

Against this, it might be argued that a stronger, correctness-based balancing exercise should be undertaken, where only if the legislature struck what the court deems to be the correct balance should that be upheld. Strong protection of rights, and the vesting of the power to protect those rights in the courts, could be seen as supporting such an approach.

It is not clear what approach Canadian and Irish courts take to balancing, as the test is so rarely conducted. It might be suggested that this fact alone suggests a more lax reasonableness approach. Ireland also has a particular standard of review –the *Tuohy*[52] test– that specifically adopts a reasonableness approach. In advocating a standard of review for Ireland, I will argue that there is room for the *Tuohy* test as an additional standard alongside *Heaney*, once the reasons that one or other is favoured in a particular case are expressly set out.

Choice of Metric or Reasoning Process

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[51] This is often termed the difference between a "reasonableness" and a "correctness" standard of review. See Stephen Perry, "Second Order Reasons, Uncertainty, and Legal Norms" 62 Southern California Law Review 913. Several commentators have queried whether balancing will always lapse into reasonableness review. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," 96 Yale L.J.943 (1987); Nicholas Emiliou, "The Principle of Proportionality in European Law: A Comparative Study (1996). See also Jackson's critique of Beatty, in treating as matters of fact so centrally for balancing, even when these matters of fact are not at all clear. Note 9, at 821-822.

[52] [1994] 3 IR 1.

Choices must also be made about how the balancing exercise is to be carried out. In either a deontological or teleological approach, courts must find a way to balance competing factors. The importance of a particular norm, or the utility or disutility of a particular measure, are not always easy to assess or compare. Some scale by which to measure these factors is required, and a method by which to compare very different norms, or very different types of utility, must be found. This is a choice that is made at the interpretation stage, directly influenced by the design stage choice of a deontological or teleological approach.

Any metric agreed upon to assess these ideas would be contested, as would the results that would come from that metric, since these notions defy easy standards of measurement. As Tsakyrakis says "there is no way to accept the notion that values are commensurable without a moral argument, that is, an argument that relates them and justifies degrees of priority."[53] Measuring values has to involve a moral or normative discussion of these values and their importance. If no uniform metric is adopted, similar concerns will arise. In the absence of any standard measuring system, it will surely be argued that courts are undertaking an exercise in discretion.[54] As noted in the last chapter, however, these arguments lose their force in this discussion when they suggest radical incommensurability.[55]

Balancing does not have to be -and perhaps cannot be[56]- a precise, scientific process - some reasoning process by which to balance would be acceptable.[57] As Waldron notes, "often when people talk about *weighing* or *balancing* one value, principle, or consideration against another, what they mean is not necessarily Benthamite quantification but *any* form of reasoning or argumentation about the values in question."[58] Da Silva suggests that the reasoning process involved in comparison can be done even in the absence of a uniform metric or scale.[59]

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[53] Stavros Tsakyrakis, "Proportionality: an assault on human rights?" (2009) 7 IJCL 468.
[54] See Frank Eastbrook, "What's So Special About Judges," 61 U. Colo. L. Rev. 773 (1990); Aleinikoff, note 51.
[55] See Chapter 1, note 51 and accompanying text.
[56] See Aleinikoff, note 51, at 992-994; Virgílio Afonso Da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision," 2011 31(2) OJLS 273.
[57] For a detailed attempt to provide such a reasoning process, see Eveline Feteris, "The Rational Reconstruction of Weighing and Balancing on the Basis of Teleological-Evaluative Considerations in the Justification of Judicial Decisions," 21(4) Ratio Juris 481 (2008). See also Marko Novak, "Three Models of Balancing (in Constitutional Review)" 23(1) Ratio Juris 101 (2010).
[58] Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer," 45 Hastings L.J. 813, (1994) at 819. Feteris, note 57, puts forward transparency of reasoning, and the fact that it leaves judges open to critique, as one of the core benefits of her proposed model.
[59] Da Silva, note 56.

It is impossible to tell what approach has been adopted in Ireland or Canada, as courts rarely engage in balancing, let alone discuss their thought process. I will ultimately contend that courts should be willing to engage in an intuitive balancing exercise, guided insofar as is possible by the values of the constitutional order.

Burden and Standard of Proof

A burden of proof must be set, either explicitly or implicitly, as it sets a default position: unless the contrary is established, the party that bears the burden will lose.[60] Therefore, the burden of proof sends a message about the values and priorities of the legal system in question. It might be placed on the state; or on the challenger; or it could shift, placed on the challenger to prove the restriction of rights, and then, once that is established, move to the state to prove justification. This is choice that will likely be made at the interpretation stage, with the possibility of significant influence from constitutional design.

The strength of rights protection might influence where the burden is placed, with a system with very strong protection favouring a burden on the state to rebut any allegation of rights violation; rights would be too important to allow limitations the benefit of the doubt.

On the other hand, respect for the legislature and similar considerations might suggest that the burden should be placed on the challenger. This may manifest itself in a presumption that the legislature passed measures that were legitimate and justified. If such a presumption is adopted, then the burden of proof is likely to be placed on the person challenging that presumption.

The normative decisions about a burden of proof also encompass the standard of proof: the extent to which the party burdened must prove their side of the case. This has a broad range of possible strengths and can be used to make the placing of the burden more of less onerous, and reflect the normative values underlying these choices more precisely. A court may place the burden of proof of rights violation on the applicant, and may also require a significant amount of proof

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[60] This is why conceptions of the burden of proof as dealing purely with "facts" are incorrect. See Barak, note 6, at 436. It determines a winner in the case of uncertainty. It a burden of argument as well as one of fact. If the arguments of those on whom the burden lies fail to persuade a court, then that side loses by default, even if the issue is a "legal" one rather than a factual one, and even if the court is not satisfied that the other side has established that it is substantively in the right. Barak's notion of the burden of persuasion, at 437, might accommodate this, but he claims that this does not lie on either party, or shift. I disagree; it can do either of those things.

and persuasion before it will deem rights to be violated, out of respect for the legislature. A court that is more concerned with rights protection, but also concerned about limiting intervention, could place a weak burden on the applicant, and so on. This allows a court forming a standard of review to take a nuanced approach, balancing different normative concerns.

Interventionism and Deference

The difference between deference and non-interventionism was noted in the last chapter, and the practical significance of this distinction is apparent at this juncture. Normative choices about how stringently to apply elements of a standard of review are interventionist or non-interventionist choices. Choices to defer to legislative determinations when applying the standard are deferential choices.

It is a non-interventionist choice to choose a low level of importance of objectives rather than a high one. It is a deferential choice to say that it will suffice that the objective could reasonably be thought important, even if the court might not have thought it so.[61] It is a non-interventionist choice to choose a loose level of tailoring to the objective rather than a close one. It is a deferential choice to say that it is sufficient that the legislature could reasonably have thought the measure to be related to the objective.[62]

Tailoring to the right also turns on questions of deference and interventionism. It is a non-interventionist choice to decline to review alternatives, and adopt an excessiveness approach. Deference may play a role where a court does look to alternatives, as there may be many possible ways to achieve similar goals, and the legislature's choice to favour one over another might be thought worthy of deference on the grounds of expertise and institutional function involved in such

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[61] There may also be deferential and non-interventionist choices in relation to how objectives are ascertained. For example, if courts adopted a general policy when coming up with hypothetical objectives, they could, as a matter of policy, prefer the legitimate one even if it were somewhat less plausible than an invalid one. That would not be a matter of non-interventionist choice. On the other hand, deference might also be offered in cases of doubt as which to which is the most plausible, or as to its legitimacy.

[62] Empirical deference also has a role to play. Questions of efficacy of the measure will arise; there may be an element of speculation or assertion as to whether certain means will, in fact, achieve the objective, or the extent to which the objective will be achieved. The courts may offer empirical deference to the legislature in respect of any uncertainty.

decisions.[63] A deferential stance –that the legislature must pick a set of means not obviously deficient in tailoring, say– might be adopted.

These considerations can also be reflected in the burden and standard of proof, with the question of who should prove restriction of rights and the justification of that restriction, and the extent to which they must prove it, having a profound effect on the level of interventionism.

The rationales underlying decision about deference and non-interventionism may be similar, and can both reduce the potency of the standard of review. The decision not to intervene, however, is more abstract, and more significant, in that it alters the standard of review, and cannot be overcome.

In Ireland and Canada, deferential and non-interventionist choices have had a significant influence on standards of review. The Canadian position has evolved from a more non-interventionist categorical approach to a deferential, case-by-case approach. I will ultimately argue that Ireland has made two mistakes in this regard: first, in making too many non-interventionist choices; and secondly, and more importantly, in not explaining adequately its choices in this regard, and the reasons for making them.

Rationales for Deference and Non-Interventionism in Standards of Review

Deference and non-interventionism are not binary choices, but a series of choices that may be made in relation to different issues, and the justifications for deference and non-interventionism are several and varied.[64]

It is important first to note that there are three distinct manners in which a court can defer[65]: empirical deference, normative deference, and structural deference. Empirical deference defers to the legislature on questions of fact; normative deference defers to the legislature's ability to make a choice that is better

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[63] Other arguments for deference may also be apposite: the precise efficacy of the measures being speculative, the legislative assertion that another set of means would differ in some key respect from the means chosen might be difficult to call into question.

[64] For detailed discussion of the rationales for deference, see, in particular, Kavanagh, note 7, Chapter 7. See also Aileen Kavanagh "Deference or Defiance? The limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008); Alison Young, 'In Defence of Due Deference' (2009) 72 MLR 554; Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds.) *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003); Brian Foley, Deference and the Presumption of Constitutionality, (IPA, 2008).

[65] These are taken in large part from Alexy, note 4.

or more normatively correct; and structural deference defers to the legislature's choice in the event that the course of action chosen is neither necessary nor prohibited.[66]

I will outline five common rationales for deferential and non-interventionist choices: arguments from the separation of powers; arguments from democratic legitimacy; arguments from expertise; arguments from speculation and uncertainty in decision-making; and clash of rights or stalemates. These are not entirely discrete categories of justification; they overlap and buttress one another.

(i) Separation of Powers

The first rationale derives from the separation of powers, and the strength of that value in the domestic constitutional order. The stronger the feeling that the organs of government should be separate, the more likely it is that there will be an unwillingness to doubt the good intentions or contested judgments of the legislature in any review of legislation.[67]

The legislature, having been granted dominion over the making of legislation, is deserving of respect for that authority, and courts may be loath to let rights review trample on that respect. Quite aside from the fact that the legislature may be expert in that role, it is a body that has been expressly granted an institutional function, and should be trusted to carry out that function. Courts might be slow, then, to suggest that an objective behind a statute was improper or illegitimate or unimportant. They might instead presume the contrary unless and until evidence is presented.

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[66] *Ibid* at 393. Structural deference exists in setting ends, setting means, and balancing, when there is a stalemate between the conflicting values.

[67] At its most extreme, this form of deference would lead a court not to review legislation for rights violation at all; the fact of the legislature's decision would justify the limitation, as the legislature's assessment of the legitimacy and necessity of the restriction would be determinative. However, in such circumstances, rights would not be justiciable; courts would have no role in protecting them, and they thus fall outside the scope of this thesis. That highly deferential system should thus be distinguished from systems like the Human Rights Act regime in the United Kingdom; there, courts are not denied the power to review the decisions of the legislature, they are merely denied the power to rule them invalid. Thus courts do not defer entirely to legislative determinations of necessity, but rather in the event of a disagreement between courts and the legislature on rights issues, the settlement in the United Kingdom gives the final say to the legislative branch. That is an issue of constitutional structures and functions, but does not concern deference. An entirely separate question would be whether such a weak form of judicial review encourages the courts to defer to the legislature, or has the opposite effect and encourages less deferential review, in the knowledge that the legislature will have the final word on the issue.

Of course, this will not necessarily be the case, and some systems may have a significantly weaker notion of the separation of powers, especially when rights are at stake. In such a system, the institutional factors point away from deferential or non-interventionist review. It can also be argued that granting the power to review legislation to the courts took account of this concern, and chose to disregard it to some extent.

It is important to distinguish this rationale from others, such as democratic legitimacy. The separation of powers rationale does not rely on the legislature's role as a democratic or deliberative body. It relies instead on the idea that the constitution gave the power to legislate to this body, and that should be respected in and of itself. As such, it applies with equal force to all measures, and is a fairly static factor. It is therefore more likely to lead to non-interventionism, altering the standard of review fundamentally. However, it can also be a rationale for normative deference in particular instances, as courts may hold that separation of powers concerns may be more acute in particular areas, requiring additional care.[68]

(ii) Legitimacy and Democracy

It might also be argued that legislative decisions are more legitimate than those made by courts because of the nature of legislative authority and the manner in which those decisions are made, suggesting normative deference and non-interventionism.

The legislature has democratic legitimacy that courts usually lack. The legislature generally reflects to some degree the popular will and is accountable to the people. Here, respect is due to the other organs because of their democratic character, motivated by the process by which the decision was made rather than its substance. The correctness of the substance is assumed from the nature of the process.

It can also be argued that legislative decisions are worthy of deference because they are taken after a process or discussion and debate, where ideas have withstood the ability of legislators to challenge and change them.[69] Again, this is

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[68] This separation of powers rationale might underlie the presumption of constitutionality in Ireland, and explain the lack of it in Canada. This will be discussed in Chapter 11.

[69] This is the centre of Foley's argument. See Foley, note 64, Chapter 10. For a discussion of the value of deliberation in democracy See Jurgen Habermas, *Between Facts and Norms* (Polity Press, 1996). See also the response by Raf Geenens, "The Deliberative Model of Democracy: Two Critical Remarks"

likely to be presumed because the institutional design of legislatures is deliberative; courts will probably not examine the reality and quality of this deliberation. Courts, on the other hand, are not deliberative; they have the opportunity to hear few voices, and might be hesitant to substitute their conclusions from more limited debates for those reached in a deliberative process.

These concerns can lead to deferential and non-interventionist choices. They are applicable to all legislative decisions to some extent, and may influence the structural make-up of the standard of review. However, they can also influence deference. Deference might be offered when deliberation has been particularly thorough in a given case. Deliberation may be particularly acute for those decisions involving policy alternatives and selection of the most appropriate mechanism to tackle particular problems. The legitimacy provided by democracy may also countenance structural deference, in the event of a course of action being neither clearly justified nor clearly unjustified.

(iii) Expertise

Expertise justifies deference and non-interventionism because of an assumption about the substantive quality of a decision made by the legislature. This is a deference directed toward its judgment – the basis of its belief that a particular measure is necessary, will be effective etc. The legislature might be presumed to be good at making these legislative decision because that is, after all, what the legislature does best, or because the courts are even worse at making such decisions.[70]

This rationale can also justify both deference and non-interventionism. It will be relevant to non-interventionism if the legislature is considered generally more expert in an absolute sense, thus justifying a normative stance that legislative decisions have significant merit and should not be strictly reviewed.[71] Expertise is

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(2007) 20 *Ratio Juris* 355.

[70] The extent to which this view is held depends on the nature of the legislative and political systems, as well as concerns about institutional role, and could vary greatly between different political systems. The debate on expertise might be defined based on a distinction between matters of principle or matters of policy, or it may not. For the principle and policy distinction, and critiques of its use in the deference debate, see Kavanagh, note 7, at 183-186; Foley, note 64, at 123. The issue of policy-making in this debate also involves issues of speculation and empirical deference, discussed below.

[71] Kavanagh seems to imply that the principle/policy distinction could lead to the view that substantial deference is required in all cases of policy (or, by my terminology, would suggest a non-

likely to have a role in relation to empirical and structural deference in respect of the legislature's belief about a contested fact or an uncertain outcome.[72]

The legislature will likely not have to establish that it is expert: the fact that it is given the role of law-making in the constitutional order will be sufficient to ground expertise-based deference. However, that presumption might weigh more heavily in some areas than in others. Even more deference will be forthcoming when the decision relates to something that is peculiarly within the competence of the elected branches. Contrarily, if the issue is one peculiarly within the knowledge, competence and institutional ambit of the courts –criminal justice, for example– the courts may be less willing to defer to legislative decisions on the issue.

(iv) Speculation and Uncertainty

Empirical deference comes most often from a situation where the measure in question is speculative or uncertain in its effects. It may be difficult or impossible to tell how particular measures will work in practice, and whether or to what extent a measure will have the desired effect. The result is uncertainty, and often decisions will be made without full knowledge of the consequences, on the basis of speculation or assumptions. The legislature may lack precise empirical proof for all of its beliefs. It may have to act on the basis of suppositions, common sense, or belief. Deference may be offered in acknowledgment of this reality of governance.

Courts may disagree about the speculations made by the legislature, but the nature of the decision is such that the courts cannot maintain that their beliefs are better than the legislature's. This deference therefore gives the legislature the benefit of the doubt. The extent of this will vary, and at some point the legislature cannot be right, regardless of uncertainty.

It seems to me that this species of deference does not actually stand alone, but must always be accompanied by another rationale for deference. The need to speculate does not make the legislature's speculation better than the courts'. Therefore, there must be an ancillary rationale in order for the legislature's decision

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interventionist stance). Note 7, at 186-7. She dislikes this prospect of this general expertise based non-interventionism.

[72] When the effectiveness of a measure is speculative, the legislature and government may have made the best estimation they could, on the basis of research and consultation with relevant groups. Courts, generally speaking, have neither the capacity nor the inclination to begin an investigation into matters of this complexity. Court may scrutinise legislative findings in this circumstance, but may do so will less rigor. See Choudhry, note 37, Reaume, note 16.

to be preferred. It might be that the legislature is better at speculation –that is, deference by reason of expertise. It might be that the courts consider speculation more legitimate when carried out by the elected branches – that is, democratic deference. It might be that such speculations are considered part and parcel of the legislature's job description – deference by reason of the separation of powers. Or it might be that neither the courts nor the legislature are better – structural deference resulting from a stalemate. In any event, speculation will not stand alone, but will be accompanied, either expressly or implicitly, by another rationale.

(v) Clash of rights/Stalemate

A stalemate occurs when there is no right answer to a given question, and both arguments have equal force.[73] Alexy argues that in this circumstance decision-makers deserve structural deference: they should be allowed to choose either option, as there is no right answer.

Examples of stalemates would include where there is a precisely equal balancing between the effect on rights and the objective being pursued, in either a teleological or deontological approach, or where the assessment is so speculative or uncertain that no right answer exists, and two determinations are equally plausible. These are both exemplified in Alexy's argument.

When a right is at stake on both sides of a judicial determination, this can lead to a stalemate. Alexy sees the limitation of constitutional rights in the name of protecting other constitutional rights as unusual, but when it occurs "constitutional principles are at play on both sides."[74] This is more likely to lead to what he calls a "stalemate" in the final balancing exercise, when the weight of the right limited is equal to that of the goal pursued. When this occurs, Alexy says that since the values are equal, neither solution is wrong. The legislature therefore has discretion in its balancing; "it is up to the legislature to decide whether it wishes to enact alternative regulations which might be better or more just."[75] The *status quo* as set by the legislature prevails if there is a clash of values that leads to a stalemate.

Alexy adds to this theory by positing a level of uncertainty that comes with assessment of what particular rights require. This uncertainty can be empirical or

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[73] For a recent philosophical analysis of this problem, see José Juan Moreso, "Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism," 25(1) Ratio Juris 31 (2012).
[74] Alexy, note 4, at 396.
[75] *Ibid* at 411.

normative; it can relate to uncertainty about facts or uncertainty about norms.[76] Therefore, when the balancing exercise does not provide a clear victor, the legislature is given discretion to "take decisions according to its own evaluations,"[77] even though the matter concerns constitutional rights. When "resolving competing constitutional rights," neither right must be protected less than the level that the "constitution states must be granted as a minimum."[78] Beyond that minimum, the balance struck is at the discretion of the legislature.

Alexy accepts that this means sacrificing the level of rights protection in some cases. This legislative discretion "means allowing for the possibility that rights might not be realized to the greatest extent relative to what is factually possible."[79] He thinks that this is justified because of the democratic legitimacy of the legislature.[80]

As seen in Alexy's description, several rationales for deference come together. A stalemate is unlikely to occur unless there is some uncertainty or speculation involved. Moreover, to justify deference in this instance, Alexy relies on the legislature's democratic credentials.[81]

Combination of Factors

It is clear from the foregoing analysis that these rationales for deference and non-interventionism often overlap, and that several may come together to motivate a particular decision. Take, for example, decisions on economic matters or matters involving taxation and expenditure that affect rights. Legitimacy and democracy concerns may arise in respect of taxes and wealth distribution. Expertise factors may be relevant in terms of large-scale distribution of wealth and resources and management of the economy. The separation of powers may indicate whether these matters should be exclusively afforded to one branch. There may be uncertainty in terms of how other allocations or schemes would affect various interests or alter the

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[76] *Ibid* at 414.
[77] *Ibid* at 415.
[78] *Ibid.*
[79] *Ibid* at 416.
[80] *Ibid* at 416-7. He calls this a procedural principle which states that the democratically elected representatives should make as many decisions as possible.
[81] Other normative arguments can be deployed instead of democracy, such as an argument for certainty in cases where stalemate decisions arise. There might be a benefit in the legislature's settlement being upheld in order to minimise confusion and guarantee certainty. Otherwise legislative settlement in close cases would be on insecure footing and faith in the law will be compromised.

results the state is pursuing. All of these factors may come together to justify the choices made by the courts.

Against Deference and Non-interventionism

Deferential and non-interventionist choices are in no way conceptually essential; normative arguments can be made against them.

The most obvious critique of deference and non-interventionism is that they inhibit review of legislative action that restricts rights, and therefore reduce the protection and value afforded to rights. This is surely the entire point of the constitutional commitment to rights, and so the introduction of these elements serves to undermine it. To eliminate deference entirely, this argument must establish that the concern for rights is more important than any of the normative arguments for deference and non-interventionism outlined above.

More nuanced critiques would argue that the degree of deference and non-interventionism should not be too great, because they can threaten the integrity of the standard of review. The more deferential the courts are to the legislature, and the less they are inclined to intervene, the more likely it is that an invalid restriction on rights will be tolerated by the courts, as the scrutiny that the law is subjected to is not sufficient to discover the problem. The stronger the commitment to rights, therefore, the less deference and non-interventionism that should be tolerated.

It can also be argued that deference and non-interventionism can mask other concerns. Allan notes that choices to defer could be motivated by judicial agreement with the substance of the decision, and a desire to uphold it, without this being acknowledged.[82] The standard of review would therefore shift based on personal preference rather than genuine concerns about the rationales outlined above. Deference and non-interventionism could also mask non-review; under the guise of legitimate normative arguments against searching review, courts could retreat beyond the theoretically required minimum, and abandon entirely their protection of rights. This might be possible while still going through the motions of review, and giving the appearance of protecting rights, when that is in fact not the case.

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[82] T.R.S. Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 CLJ 671 at 682. Allan says that deference is "rarely neutral" and deferring likely disguises "an endorsement of the views acceded to, though implicit rather than fully or persuasively reasoned."

Deference as Agreement

There is a risk that in attempting to curb the negative effects of deference, one can actually eliminate deference entirely. This can happen if one insists that deference should be offered only when it has been earned in particular instances – for example when the legislature illustrates that it has expertise in a particular area. Allan suggests something similar to this when "judges should "defer" to the conclusion of other persons only to the extent that the reasons offered in support of those conclusions prove persuasive."[83] However, what Allan is suggesting here is, in a real sense, not deference at all. Deference is only meaningful if one defers to decisions one would not reach oneself. Allan's model would offer deference only when the courts were convinced by the reasoning of the legislature; where the courts thought the legislature was correct. As Kavanagh notes, "[w]hen we agree with someone on a particular issue, we do not "defer" to them. Rather, we simply assess the pros and cons of the issues ourselves, and come to an independent conclusion which matches the other person's conclusion."[84] What Allan proposes is non-deferential review dressed up as deference.

Conclusion

The foregoing normative choices have to be made in order for a functional standard of review to exist. The question is how courts deal with these choices in incorporating standards of review. The normative decisions in question can be made by the designers of the constitution, or by judges when interpreting that document.

At the end of this examination, we can say what is essential in a standard of review, either through conceptual necessity, or, in spite of several conceptual possibilities existing, being practically essential. In practice, the realities of entrenched constitutional rights mean that an anti-utilitarian conception of rights will be required. However, when it comes to rights limitations, I think the deontological approach is not practical, there being no clear way to conduct a balance without recourse to utility, and the teleological approach will win out in practice. From this, what is required from a standard of review is: that rights restrictions must actually pursue and achieve an objective that is worth the sacrifice. The tailoring enquires ensure that the objective is actually pursued by the measure,

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[83] *Ibid* at 676. *Cf ibid* at 684, where he suggests that deference only falls due when certain principles are met by the decision-maker.
[84] Kavanagh, note 7, at 169.

and that the right needed to be restricted for its attainment. The balancing test plays the crucial role of testing that the pursuit of the objective is actually worth the cost of restricting rights. To take rights seriously, this examination of the overall justification of the measure must be conducted. The precise outlines of these tailoring and balancing tests, however, must be decided by reference to normative choices.

Two things are clear from this account: a huge number of highly significant choices must be made for a standard of review to be fully realised; and that in many cases, these significant choices will be made by judges. Judges will generally have a significant amount of freedom in how to make these determinations, as constitutional design will rarely provide definitive answers. Constitutions may influence these decisions through the values enshrined in those documents, but the recognition and realisation of these values also rests in the hands of the judiciary, as the interpreters of the constitution. It is foolish to pretend that they merely recognise constitutional values, because they also shape them in the manner of their interpretation.

Judges therefore have a huge responsibility in this process. They might make these normative determinations once, at the time when the standard of review is being established, and make them clearly and patently so that their impact can be seen. It is also possible that they could be made *sub silentio*, with the impact obscured, and making difficult to ascertain what normative values have been favoured. Moreover, some of the choices might be left outside the scope of the standard of review as articulated, allowing judges to make these choices on a case-by-case basis. This option risks great variance in the standard of review; it is not complete until the courts make these choices when an actual dispute or controversy that comes before them. That risks the standard of review being altered by the judge –consciously or subconsciously– to achieve a particular result in that case. This is not to say that a judge could not achieve a desired result in an established standard of review; she surely could. The point is that the manipulation in the latter case will be more obvious than in the former, as an established standard of review would be departed from or altered.

Some standards of review, such as the "proportionality principle," the *Oakes/Heaney* test, are held out as global standards of review, ready-made processes

to determine the validity of rights limitations.[85] The test's global reach gives it credibility; the fact that it is used so widely gives the impression that it is a credible and respectable standard of review to adopt.

But does this global standard of review answer these normative questions? Some of those who adopt it assume that it does, that it is a standard of review with clear, fixed elements, in which case all normative decisions would have to be made before the test was incorporated in any given legal system. If that is that case, we must ask what normative values it contains, and why so many countries are willing to incorporate them. A one-size-fits-all approach to rights limitations would fail to accommodate the values of each particular legal system.[86]

However, it is also possible that it does not answer all of these normative questions. It might be a partial standard of review, not directly applicable until domestic courts make normative choices about how it should apply based on domestic values. It may be merely a loose assemblage of the basic ideas underlying rights review without answering the difficult normative questions that are required to actually create a standard of review.

A third possibility is that proportionality principle is the latter of these two options, but is seen to be the former. In that case, it includes a variety of normative judgments made by the courts at the time it is incorporated (or after that time), but these may be hidden behind its seemingly uniform language. Normative choices might be treated as if they are part and parcel of the test as incorporated, when in fact they are not. Key normative decisions may be made behind the scenes, which significantly affect how rights are dealt with, without proper discussion and debate. What work is done by the proportionality principle and what work has been done by the courts may be difficult to ascertain.

With the normative and conceptual framework of standards of review laid bare, it is to this proportionality principle, and its application in Ireland and Canada, that we now turn our attention.

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[85] See David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004).
[86] See Jackson, note 9, at 858.

3 – Standards of Review in Canada: S. 1 Limitations and the Development of the *Oakes* Test

With the abstract analysis of Part I complete, it is now time to bring this conceptual and normative insight to bear on judicial practice. In this Part, I will look to Canada, where the famous *Oakes* test was formed.

In this chapter, I will examine the origins of the *Oakes* test. Its development is intimately bound up with the development of the Canadian Charter of Rights and Freedoms, and so the process by which the Charter came to incorporate a "limitation clause" alongside its entrenchments of rights will be examined first. This will help identify the theories underlying the protection and limitation of rights in Canada, and shed light on the normative choices about standards of review made by the designers of the Charter. I will then look to early cases dealing with the Charter, illustrating the initial attitude of the courts and setting the stage for *Oakes*. Next, I will assess the *Oakes* case, and examine the normative choices made and explained at the time of incorporation of the standard. Finally, I will look at the case that followed *Oakes*, *Edwards Books*, and examine how the *Oakes* test was altered only months after it was first enunciated. My aim is to begin to sketch out how the *Oakes* test, and its modification in *Edwards Books*, reflected the changing normative views of the Canadian Supreme Court about deference, interventionism, and the strength of rights. This will be the starting point for analysing the subsequent development of the test in Canada.

The Charter and the s. 1 Limitations Clause

The Charter of Rights and Freedoms in Canada was a radical departure for the Canadian constitutional order, moving toward a system of judicial intervention in legislation. A series of substantive rights guarantees was introduced, almost all of them individual rights,[1] and the courts were tasked with the function of protecting

[1] The Charter has some limited recognition of collective rights in the form of the language rights in ss. 16 and 23 in particular and, arguably, the endorsement of affirmative action for disadvantaged groups in s 15(2), though this could be seen as an exception to equality rather than a group right. S 25 of the Charter also provides that the Charter shall not abrogate or derogate to "any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" On the whole, these rights have been of limited application, and have often been treated in a manner similar to individual rights, but having less force because they are shared. See Michael Hartney, "Some Confusions Concerning Collective Rights," (1991) 4 Canadian Journal of Law and Jurisprudence 293. See also

them, and finding legislation inconsistent if needs be. The need to place limits on rights is specifically recognised, and controlled, by the very first substantive statement of the Charter. After a short preamble,[2] s. 1 reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Even before the rights themselves are set out, the Charter makes clear that rights are subject to general limitation. However, the scope of that limitation is itself limited; the charter tries to set down criteria by which those limitations may be judged. It can thus be said that the limitation of rights in the Canadian Charter is as central as the rights themselves: the rights are guaranteed, and limited, in the same breath. This was intentionally done, and is a significant indication of the way rights and limitations are conceived.[3]

The language of the limitations clause is telling. First, the Canadian Charter unquestionably adopts an external conception of rights limitations. Hogg says that s. 1 "contemplates that judicial review of legislation under the Charter should proceed in two stages,"[4] one to determine if a right has been restricted, the other to determine if the restriction is justified. "The first stage involves the interpretation and application of the provisions of the Charter to define the guaranteed rights. The second stage involves the interpretation and application of s. 1 of the Charter."[5]

Secondly, the phrase "subject only" means that the limitations in this clause are the only acceptable way to limit rights.[6] The limitations clause is the only criterion by which a rights limitation can be judged to be legitimate.

Wendy Moss, "Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act: Resolving Conflicts Between Collective and Individual Rights," (1990) 15 Queen's LJ 279.

[2] "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law..."

[3] See Janet Hiebet, "The Evolution of the Limitations Clause," 28 Osgoode Hall L. J. 103 1990 at 121. Hiebert notes that the previous drafts of the Charter had the clause in less prominent position, but that the clause was moved in an attempt to appease those who were wary of entrenchment of rights.

[4] See Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-2.

[5] *Ibid.*

[6] Unless of course the Charter itself provides for specific limitations relevant to a particular right; see for example, mobility rights in s. 6. The override clause of s. 33 also allows parliament to pass a law in derogation of its obligations under the Charter. However, that could not be said to be a limit within the Charter, but rather a permissible abandonment of the Charter's commitment.

Thirdly, the phrase "demonstrably justified" seems to place a burden of proof on the State to justify any restrictions on rights (though not, necessarily, to bear the burden in respect of the first stage of the analysis, asking whether a right has been restricted at all). Limitations are presumptively invalid until justification is provided. Fourthly, "prescribed by law" demands express legal basis for any limitation.

The other two requirements –that the limitations be reasonable and justified in a free and democratic society– are extremely vague. Interpretation by the courts would be essential to make the clause effective.

The general limitations clause was apparently inspired by the limitations clauses in the European Convention on Human Rights.[7] The precise terms of the clause resulted from an in-depth dialogue about precisely how rights should be protected in Canada, and the clause was a Canadian innovation on the idea of rights limitations.[8]

The debate on limitations of rights was closely linked to the debate about the constitutional entrenchment of rights in the late 1960s.[9] Placing a constitutional obligation on provincial and federal governments to respect rights would radically alter the notion of legislative supremacy, which prevailed in Canada at the time.[10] Many provincial governments strongly opposed the idea, as an assault on legislative supremacy, but others, less strongly opposed to the plan, expressed concern that the proposals for entrenchment of rights did not envisage specific limitations.[11] It was clear that the provincial governments would not accept entrenched rights without express limitation in some form.[12]

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[7] The Convention, and the International Convenant on Civil and Political Rights, were both said to be influential. Berend Hovius, "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?" 17 Ottawa L. Rev. 213 at 214. Janet Hiebert, note 3, at 104.

[8] Hiebert, note 3, at 104

[9] The idea was mooted in the late 1960s by the Liberal government of the day, as part of a process of constitutional reform. This development came less than a decade after the Canadian bill of rights was enacted, a sub-constitutional measure to entrench rights in legislation. It was considered novel that such rights might be entrenched at constitutional level.

[10] Hiebert, note 3, at 105-108.

[11] *Ibid* at 109 and 111. Pierre Trudeau, the then Justice Minister, had suggested a detailed list of restrictions could accompany each right, in a manner similar to the ECHR, but said that he preferred to not include such express limits, and leave the question of limitations up to the Courts. Only in times of emergency could rights be limited. Pierre Trudeau, "A Canadian Charter of Rights," (1968) at 17.

[12] Hiebert, note 3, at 111-112.

While the Constitution Conference of the late 60s and early 70s did not lead to the entrenchment of constitutional rights, it did come close, with accord being briefly reached on a Charter of Rights that provided for a general limitation clause, which would allow limitation, by federal or provincial government, of all rights therein for reasons broadly in line with the limitations found in the European Convention.[13]

It was not until 1980 that substantial agreement was reached. The constitutional conference had a draft of the Charter, which, in a compromise between the Liberal government and the Provinces, had the following limitations clause:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.[14]

However, the limitation clause faced new opposition from rights advocates and civil liberties groups.[15] It was felt that, with the limitation drawn in this way, the legislature was free to disregard rights in too many instances, frustrating the intention and benefit of entrenching these rights at all.

There are three major changes between the final language of the Charter's limitation clause and this early draft. The effect of these three changes is significant, and "each tended to raise the standard of justification"[16] required for a limitation.

First, the reference to a parliamentary system of government was deleted; parliamentary supremacy would not be a factor in the consideration of any given limitation.[17]

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[13] The clause is quoted in Hiebert, note 3, at 113. The limitations included public order, safety, health or morals, national security and the protection of the rights of others. Hiebert notes that "a clear relationship had emerged between the provinces' willingness to support the principle of entrenched rights and the scope of limitations on those rights."

[14] *Ibid* at 119. The phrase "with a parliamentary system of government" had been appended to the federal government's draft in order to mollify the provinces.

[15] When the proposed wording was discussed before the Special Joint Committee of the Senate and the House of Commons on the Constitution, it was severely criticised by most of the committee's witnesses, from lawyers and academics to civil liberties groups and policemen. Their opposition ranged from flat rejection of the idea to acceptance of the notion of a general limitations clause, so as it could be more narrowly drawn. *Ibid* at 122.

[16] Hogg, note 4, at 38-2.

Secondly, the "generally accepted" standard was removed, to be replaced by the stronger demonstrable justification language. The idea of general acceptability was very loose, and implied a measure of popular or widespread acceptance, which is a characteristic of most legislation. This would do little to protect minorities or marginal individuals who might be personally very severely affected by rights limitations, when these limitations might be acceptable to most. In place of this, the new clause required active justification of measures, and the standard of justification is much higher than acceptability.

Thirdly, the limitations were required to be prescribed by law, ensuring that administrative actors could not justify limiting rights. Only parliamentary laws could justify limitations, something not necessarily guaranteed by the previous wording.

The language of the previous draft of the limitations clause was one that could have suited utilitarian analysis of rights. Its notion of general acceptability provided no particularly special status to rights. Its focus on parliamentary democracy indicated that parliamentary balancing of rights concerns was appropriate and acceptable. The idea that rights should withstand at least some generally acceptable measures is quite anti-utilitarian, and the express rejection of the contrary position strongly suggests an anti-utilitarian stance. The debate over the limitations clause was, as Hiebert puts it, a fundamental divergence of opinion over "whether legislatures or courts are best suited to make policy decisions about the appropriate limits on protected rights when they conflict with governmental requirements in the name of collective interests."[18] The ultimate decision to leave adjudication in the hands of courts is indicative of a rejection of a utilitarian view of rights, in which legislatures would be best placed to resolve these issues.

However, the acknowledgment for the need for reasonable limits, and the focus on the needs of a democratic society, balanced the need to defend rights with the needs of society, suggesting a teleological rather than deontological conception of rights limitations.

The anti-utilitarian nature of rights is preserved in the judicial process, at least. In order to appease the provincial governments, who were opposed to a strong charter, the government grudgingly gave ground in respect of legislative override in

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[17] s. 33's override clause, which was added at roughly the same time, formally preserves that supremacy, but removes it from the limitation analysis. It granted a separate power for federal and provincial legislatures to enact laws notwithstanding their violation of charter rights.
[18] Hiebert, note 3, at 128-9

later negotiations.[19] The legislature can still treat rights in a utilitarian fashion if they derogate from the Charter and remove the possibility of judicial intervention.[20]

The Judiciary and the Limitations Clause

Before the advent of the *Oakes* test, the Canadian Supreme Court had begun to examine the scope of the Charter and the rights contained therein. These early cases clarify the scope and meaning of the clause, and show the Court's progression toward the three-part test that was enunciated shortly thereafter.

In *Attorney General of Quebec v Quebec Protestant School Boards*[21] the Supreme Court held that there could be infringements of rights so great that they cannot be seen as a limit pursuant to s. 1. The challenge was to the Charter of the French Language in Quebec, which limited admission to the province's English speaking schools to those who were educated in English in Quebec, excluding English speakers from other provinces. This ran foul of s. 23(1) of the Charter, guaranteeing admission to minority language schools to any person educated in a minority language anywhere in Canada. The measure in this case was held to deny the right so completely that the Court would not even consider s. 1 justification.[22] Shortly after the advent of the *Oakes* test, the Court backed away from this stance, saying that while in the rare case of severe denial this distinction may be invoked, usually s. 1 will apply to even very severe restrictions on the rights.[23]

This short-lived doctrine could be seen as the Court being concerned about the application of the limitations clause. In the aftermath of *Oakes*, and the stringent test laid down in that case, it was surely more apparent that there was little risk in subjecting measures such as this one to s. 1 analysis, as it would not withstand s. 1 analysis. Perhaps, as Hogg suggests, it would be best to reclassify this case as focusing on an invalid objective.[24] Here, the objective of the law was to eliminate the

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[19] *Ibid* at 130. Hiebert stresses that the wording of the limitation clause was final when negotiations on the override clause began.

[20] S. 33(1) of the Charter reads: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Further subsections expand on the operation of the override and the time limitation on it.

[21] [1984] 2 SCR 66; 1984 CanLII 32 (SCC).

[22] [1984] 2 SCR 66 at 88. See Hogg, note 4, at 38-11. Hogg criticised this approach as unworkable, there being no obvious way to distinguish between a limitation on one hand and a complete denial on the other.

[23] *Ford v Quebec* [1988] 2 SCR 712;1988 CanLII 19 (SCC).

[24] Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-11.

right entirely. The point of rights, of course, is that their elimination cannot legitimately be the goal of the measure.

Another early case that struggled to come to terms with limitations was *Singh v Minister for Employment and Immigration*.[25] The applicant had arrived in Canada and claimed to be a refugee pursuant to the UN Convention on the basis of persecution in his country of origin, and was denied refugee status by the Minister. Half the six-judge Supreme Court[26] said that he was entitled to an oral hearing on the matter pursuant to s. 7 of the Charter.[27] In so doing, those judges rejected the contention that the cost of such a measure could justify denial of the right, or that utilitarian concerns more generally could justify a denial of rights:

> I have considerable doubts that the type of utilitarian consideration brought forward by Mr Bowie can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees in the Charter would be illusory if they could be ignored because it was administratively convenient to do so... Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling that any advanced in these appeals.[28]

Though this pronouncement was limited to s. 7 fundamental justice,[29] it took a strict stance on how rights limitations were to be justified, rejecting the idea that administrative convenience could justify choosing a policy that restricted rights over one that did not. It also affirms the Charter's rejection of pure utilitarianism, in saying that rarely if ever would utilitarian considerations of convenience be sufficient to restrict a right as important as s. 7's protection of fundamental justice.[30]

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[25] [1985] SCR 177; 1985 CanLII 65 (SCC).

[26] The other three judges agreed a hearing was required, but did so pursuant to the older, non-constitutional Bill of Rights.

[27] S 7 provides for process guarantees, collectively known as guarantees of fundamental justice. It provides: "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."

[28] [1985] SCR 177 at 218-9, per Wilson J.

[29] This limitation on the finding might be more clearly seen in the later case of *Re BC Motor Vehicle Act* [1985] 2 SCR 486; 1985 CanLII 81 (SCC), where a British Columbia Law providing for absolute liability on anyone who drove while their license was suspended, even if the license holder was unaware of the suspension. Lamar J held that such laws offended the principles of fundamental justice when the result of a conviction would be imprisonment. He said that in such cases, administrative convenience would suffice to justify the restriction only in exceptional circumstances such as "natural disasters, the outbreak of war, epidemics and the like." At 518. As we will see below, *Edwards Books* accepted that administrative convenience might justify tailoring discrepancies outside of the s. 7 context.

[30] However, this does not clarify the strength or scope of that rejection of utilitarianism, and does not advocate a deontological approach, as it is only some utilitarian considerations that are being rejected here.

The most significant case to come before the Court in this period was *R v Big M Drug Mart*,[31] the forerunner of *Oakes*. At issue in this case was the Lord's Day Act 1906, a Sunday closing law, under which Big M had been prosecuted for selling goods on a Sunday. The Court unanimously held that the Act violated the freedom of conscience and religion guaranteed by s. 2 of the Charter, and was not justified by s. 1.

The Court's major objection to the law was that it lacked a secular purpose. The purpose of the law's maintenance on the statute book may well have been a secular desire to have a common day of rest. However, that was not the intention with which the law had been passed. The legislators of 1906 had clearly had a religious purpose: to compel observance of a religious rest day.[32] That purpose was not permissible, being precisely the sort of goal that s. 2 of the Charter was designed to prevent. In binding "all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians."[33] With such a motivation, it was unnecessary to look to the law's effects: "either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."[34]

Big M clearly established a threshold test for the legitimacy of objectives: "The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct."[35] Moreover, the case rejected the idea that objectives could be hypothesised. The government had suggested that even if the law was originally motivated by the improper, non-secular purpose, it was maintained on the statute book for the secular aim of creating a common rest day. The Chief Justice rejected what he called the "Shifting Purpose."[36] Amongst other reasons,[37] he felt Canadian law was concerned with subjective

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[31] [1985] 1 SCR 295; 1985 CanLII 69 (SCC).

[32] This purpose was apparent on the face of the Act and in its title, and previous case law had taken that as the purpose of the Act. Dickson CJ said that finding that the Act was motivated by "a secular purpose is, on the authorities, simply not possible."1985 CanLII 69 at [78].

[33] 1985 CanLII 69 at [97].

[34] 1985 CanLII 69 at [80].

[35] 1985 CanLII 69 at [81].

[36] 1985 CanLII 69 at [89].

[37] He was concerned that it might leave statutes open to review if they were enacted and upheld as constitutional pursuant to a valid purpose, but then later were maintained for an invalid purpose, which he felt would undermine the doctrine of *stare decisis* and encourage repeated challenges to statutes. 1985 CanLII 69 at [90]. This is a curious argument, as it seemingly rejects the premise that unconstitutionality can creep; that is, arise slowly from changed circumstances. Dickson CJ seems to think that a law is either unconstitutional at the time it is passed or it is not, and this does not change.

motivations, with the idea of a shifting purpose being in "stark contrast to fundamental notions developed in our law concerning the nature of 'Parliamentary intention'. Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."[38] The secular effect of the law could not be used to justify it as a valid limitation. To do so would allow the law to prevail "because it achieves the secular objective the legislators did not primarily intend."[39]

In the absence of a legitimate objective, the Court did not need to expound further upon the s. 1 limitations clause and the standard of review it would entail. However, the Court did give some insight into how it would develop:

> Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable – a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.[40]

It would not be long before Dickson CJ was given the opportunity to expound and expand these principles.

THE *OAKES* TEST

The *Oakes* test has evolved a great deal since it was first outlined. However, the *Oakes* case is of great significance, because "despite two decades of doctrinal elaboration, qualification and modification, still provides the basic framework within which limitations analysis is conducted." [41] Whatever subsequent developments have taken place, the wording of the test outlined in *Oakes* still guides review of rights limitations.[42]

While this may be sensible from an intention point of view, surely a significant change in the effect of a law can alter its constitutional status. What was once a reasonable restriction could be made unreasonable due to external changes.

[38] 1985 CanLII 69 at [91].

[39] 1985 CanLII 69 at [141].

[40] 1985 CanLII 69 at [139].

[41] Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1" (2006), 34 SCLR.(2d) 501 at 505.

[42] See further David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Carswell, 1990); Andrew Petter and Patrick Monahan, "Developments in

How exactly Dickson CJ formulated his now legendary proportionality test in *R v Oakes*[43] is not precisely known.[44] We cannot know if he had examined the jurisprudence of Prussian administrative courts or the philosophy of Aristotle, where the idea of assessing proportionality is said to have sprung.[45] Nor can we be sure if he took inspiration from the German Constitutional Court's similar methods, to which the *Oakes* test bears close resemblance,[46] or the jurisprudence on the European Convention on Human Rights, which played a role in the drafting of the limitations cause.[47] Whatever its influences, courts around the world have cited *Oakes*, making it perhaps more important in the development of standards of review than any of its inspirations.[48]

The *Oakes* case was a constitutional challenge to section 8 of the Narcotics Control Act. David Oakes was caught with vials of cannabis resin and was charged with intended trafficking, under s.4(2) of that Act. Oakes protested that the vials were for personal use for pain relief. Section 8 provided for a shift in onus onto the accused to prove that he was not in possession for the purpose of trafficking. Mr Oakes took a constitutional challenge to the law, claiming that the reverse onus created by the presumption of possession for purposes of trafficking violated the presumption of innocence guaranteed to him under section 11(d) of the Canadian Charter of Rights and Freedoms. The Supreme Court unanimously held that the section did violate the right of the accused, and could not be justified under the section 1 limitations clause.

Normative Choices

The test outlined by the court was an extremely strong one. Some elements of the test were largely dictated by the text of s. 1. The strength of the test, however, was clearly not so dictated. The Court in *Oakes* forged its famous test while making

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Constitutional Law: the 1986-1987 Term" (1988) 10 SCLR 61; Andrew Petter and Patrick Monahan, "Developments in Constitutional Law: the 1985-86 Term," (1987) 9 SCLR 69.

[43] [1986] 1 SCR 103; 1986 CanLII 46 (SCC).

[44] Deiter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," (2007) 57(2) University of Toronto Law Journal 383.

[45] Moshe Cohen-Eliya and Iddo Porat, "American Balancing And German Proportionality: The Historical Origins," (2010) 8 IJCL 263. See also Ahron Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012), Chapter 7.

[46] See Grimm note 44.

[47] See above, note 7.

[48] Choudhry says that courts in Australia, Fiji, Hong Kong, Ireland, Israel, Jamaica, Namibia, South Africa, the UK, Vanuatu and Antigua have all cited the case. Choudhry, note 41, at 502. See also Barak, note 45,Chapter 7.

major normative determinations about the nature of rights in the Canadian Charter, regard the protection of such rights to be very strong. This was derived from a particular interpretation of the text, which says that since the limitation clause guarantees rights before placing limits on them, rights come first.[49] Though it was not elaborated upon, it is presumably premised on the idea that the guarantee of rights coming before the criteria for limitation in s. 1, in the opening words of the section, indicates a "primacy" of rights.[50]

This may be a fair interpretation of the text, but this is far from the only reading; one could say that since the general limitation on rights comes before any substantive enumeration of rights, that limitations have primacy over rights. Clearly, the Court chose to interpret the Charter as having these priorities – these were not choices made at the design stage. The significant wrangling that went on over the scope of limitations indicates that the position chosen in s. 1 was probably intended to be more nuanced, and probably more favourable to the State's efforts to limit rights. The choice to place limitations first had symbolic value for those who opposed the strength of the charter.[51]

The course chosen in *Oakes* may have been one reasonably open to the Court, but it involved normative choices about the level of interventionism and deference that the Court thought appropriate, favouring a high-level of interventionism and seemingly little deference. I will highlight these specific choices as I analyse the different parts of the test.

However, despite its seeming strength, the practical application of the *Oakes* test in the case did not always display as much bite as it suggests on its face. Later in the chapter we will look at a case that represents the first substantial retreat from the strictness of *Oakes*, and see these normative choices abandoned in favour of less stringent standards and less judicial intervention.

The Burden of Proof

The Court chose to place the burden of meeting the test squarely on the State:

> The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic

[49] See 1986 CanLII 46 (SCC) at [63].
[50] Hogg, note 4, at 38-5.
[51] See above, note 3.

> society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit.[52]

The standard of proof required of the State is "proof by a preponderance of probability."[53] Though rejecting a higher standard than this, such as beyond reasonable doubt, he noted that "the preponderance of probability test must be applied rigorously. Indeed, the phrase 'demonstrably justified' in s. 1 of the *Charter* supports this conclusion."[54] Dickson CJ also envisaged courts being strict as to how the State should meet that burden: "Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit." [55]

This choice was clearly guided by the words used in the limitation clause: limitations must be "demonstrably justified," mandating that the limitation clause's invocation can only succeed after an active demonstration of justification by the State. However, Dickson CJ seems to go beyond this textual mandate in his rigorous application of the standard of proof, and in describing the necessary requirements for a justified limitation as "exceptional criteria."[56] However, as we shall see, this "stringent standard of justification"[57] could not even be maintained in Oakes itself.

Important Objectives and a Free and Democratic Society

The *Oakes* test for determination of s. 1 limitation issues had two parts, with the second having several subcomponents. The first part demands the government's purpose or objective in passing the law in question must be "pressing and substantial in a free and democratic society before it can be characterised as

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[52] 1986 CanLII 46 (SCC) at [66].
[53] *Ibid* at [67].
[54] *Ibid.*
[55] Ibid at [68].
[56] *Ibid* at [66].
[57] *Ibid* at [65].

sufficiently important."[58] It must be a serious interest "in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection."[59] The nature of the interest must be in conformity with the free and democratic society envisioned by the Charter and mentioned in section 1. The Court elaborated on the nature of that society in the following paragraph:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[60]

The free and democratic society requirement for justification of rights limitations is obviously derived directly from the language of the Charter's limitation clause, and would invariably feature in any standard of review designed around that clause. The Court's reasoning seems to demand two separate tests: first, it must be must be important, and the level of importance required seems to be high. Secondly, that objective must accord with, or not be inimical to, the nature of a free and democratic society. Though Dickson CJ's elaboration of some values of a free and democratic society reduces some of the vagueness inherent in that notion, it does not eliminate it.

Hogg notes that implicit in the Court's analysis is that "some kinds of considerations can never justify limits on rights."[61] This had already been established, albeit in a limited context, in *Big M*, where the Court held that improper purposes could render laws unconstitutional.

The level of importance required seems to be high: "a collective goal of fundamental importance" is required.[62] However, the articulated strength of this

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[58] *Ibid* at [69].
[59] *Ibid.*
[60] *Ibid* at [64].
[61] Hogg, note 4, at 38-5.
[62] 1986 CanLII 46 (SCC) at [65].

requirement is undermined by the analysis the court actually undertakes in the *Oakes* case; there is a dissonance between what the court says and what the court does.

The Court decided the objective of the statute by accepting the statements of the Crown on this subject: "According to the Crown, s. 8 of the *Narcotic Control Act* is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing."[63] There was no independent analysis by the court of what the objective might be. Considering the articulated standard of proof that Dickson CJ seems to place on the state in respect of this test, it is unclear why the State's assertion was accepted without question or discussion.

The second problem was that Dickson CJ accepted the largely "self-evident"[64] importance of the measure. No analysis or significant evidence bolsters the conclusion, save for the bare citation of two reports indicating that drug trafficking is a "considerable concern"[65] to the State, and the assertion of the judge that drug trafficking produces "grave ills."[66] This makes the placing a significant burden of proof on the State, and requiring that the objective be of fundamental importance, seem somewhat hollow. The Court in *Oakes* said only the most clear evidence would suffice to meet the State's burden, yet in that case, the burden was met by way of self-evidence. [67] No explanation is given for this deference to the State's determination.

The third problem is that "puzzlingly, [the Court] made no attempt to tie this objective to the values of a free and democratic society."[68] The fact that Canada and other nations had pursued this objective for some time seems to settle this dispute: "Throughout this period, numerous measures were adopted by free and democratic

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[63] *Ibid* at [73].
[64] *Ibid* at [76].
[65] Ibid at [73].
[66] Ibid at [76].
[67] Choudhry notes that the parties in *Oakes*, having no notice of the requirements of the newly articulated test before judgment was handed down, would not have been able to present a factual record to the Court that would have facilitated this analysis. Note 41, at 523. However, there was nothing to stop the Court from conducting some inquiry itself, which it did not do. Also, the importance of objectives was established in previous cases such as *Big M Drug Mart*. Nor is any quarter given in respect of displaying rational connection, which the State failed to do in this case, leading to the law being struck down. If lack of notice was the reason for the court's reluctance to conduct a serious enquiry here, it should, *a fortiori*, have stopped a rigorous application of the rational connection limb, which was less established from the previous s. 1 jurisprudence.
[68] Choudhry, note 41, at 506.

societies, at both the international and national levels."[69] Apparently, the necessity of measures in a free and democratic society need only be proven if the measures are novel – any measures previously adopted will be grandfathered in. One could say that an approach such as this one was specifically rejected by the drafters of the limitations clause when they eschewed the language of "generally accepted" in a democratic society in order to move to "demonstrably justified."[70]

The objectives limb of the *Oakes* test did not retain its strength in the case in which it was expounded.[71]

The Tripartite Means Test

The second part of the test asks whether the means used to pursue this interest are proportionate.[72] This part of the test is trying to elaborate on the nature of a "reasonable limit" that the limitation clause allows. There are three elements of this determination:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."[73]

If the law passes all these tests, then it is proportionate and is upheld. If it fails even one, then it is disproportionate and is struck down.

The *Oakes* test seems to reflect affirm a commitment to a teleological conception of rights limitations. The standard is, in its balancing limb, concerned with the effect on rights; it is clearly concerned with consequences.

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[69] 1986 CanLII 46 (SCC) at [73]

[70] See above, at note 14.

[71] We know now that the Supreme Court would, soon afterward, reduce the importance threshold significantly, with "sufficiently important" replacing the strong rhetoric of *Oakes*, though a stronger test later had a resurgence. See Choudhry, note 41, at 510. This development will be discussed in later chapters.

[72] 1986 CanLII 46 (SCC) at [70].

[73] *Ibid* at [70]. Emphasis original.

(i) Rational Connection Between Means and Ends

The first limb of the test outlined here – the rational connection test– is a strong tailoring to the objective requirement. The means must be "carefully designed" to achieve the objective, and must not be arbitrary, unfair or based on irrational considerations. "Careful design" seems to require very close connection and tolerate little error. Checking against arbitrariness and irrational considerations make it clear that the means must in fact pursue the objective. The "unfairness" criterion is odd; this seems to go outside the area of tailoring and rationality and into the area of justification. This is not elaborated upon at all in the judgment. This addition is not congruent with the nature of the tailoring to the objecitve enquiry.

Two comments should be made about the potent nature of this test. First, it is clearly a result of the normative choices made by the Court. Nothing in the text of s. 1 could be said to require a standard so stringent, and it can be seen as another sign of the commitment of the *Oakes* Court to prioritise the defence of rights ahead of their limitation.

Secondly, the test is so strong that it could make legislating very difficult. When tailoring is increased in strength, it gives little room for manoeuvre in respect of legislative action: any sort of under- or over-inclusiveness now threatens the law's validity, as these lapses in tailoring may mean that the law is no longer carefully drawn. In reality, the general nature of laws, and the fact that unforeseen circumstances often arise, capturing people within the scope of the law that may not belong there. It might be useful to have such stringent tailoring from time to time, for rights of very special importance, which can only be violated in the most exceptional circumstances.[74] To implement such tailoring for all laws in all cases, regardless of the objective or right in question, indicates a highly interventionist stance. Little if any reasoning or argument is given to support this perhaps extreme normative choice.[75]

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[74] See for example the strict scrutiny standard of review in the United States, which requires very narrow tailoring in respect of very important rights issues such as equal protection on the basis of race, and laws restricting freedom of speech by reference to its content or viewpoint. Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts" Vanderbilt Law Review, Vol. 59, 2006, 793.

[75] It is not clear what arguments might have underlain this choice. Since the Chief Justice was adamant that subjective purposes should be examined, rational connection does not serve to indirectly scrutinize suspect hypothetical objectives. Its sole role, therefore, is ensuring that there is some basis and truth to the claim that the law supports the objective in practice; laws that are ineffective or arbitrary will lose their connection to the objective, and consequently their justification.

In the end, it was lack of rational connection that doomed the law in *Oakes*. The Supreme Court held that section 8 of the Narcotic Control Act was overinclusive, there being insufficient nexus between mere possession of a stated quantity of drugs and an intention to distribute to justify placing a reverse onus of proof on the accused, thus deny him his right to be presumed innocent.

> [P]ossession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the *Narcotic Control Act* is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.[76]

Several comments should be made in respect of this finding. First, it is clear that the law might have passed this test had the bar not been set so high. Under the test outlined here, almost any overinclusiveness will raise issues. Secondly, this does not seem to be an irrational measure; it is not, say, inferring that one is a drug dealer in the total absence of drugs. Rather it is saying that possession of drugs raises a presumption of supply until it might be shown that supply was not, in fact, intended. Any quantity used to draw this line will be arbitrary to some degree. Surely this measure did further the objective of combating drug trafficking.

Moreover, almost every conceivable measure of this sort will include at least some people that did not in fact intend to supply drugs. That, of itself, cannot be the objection, as the accused would be allowed an opportunity to establish his or her innocence of trafficking. To object to this as irrational is to object to any limitation of the presumption of innocence because it risks an innocent person losing the presumption. This risk might make cause the law to fail balancing, or be held to be an overly rights-restrictive way achieving the objective. However, it does not render the law irrational; the law rationally risked the innocent losing this presumption.

The fairness element, which conceptually is not a part of this tailoring analysis, seems to have had an impact in this decision. The law in this case defied not

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There must have been some reason that Dickson CJ thought that this could not be accomplished with a less stringent tailoring test.

[76] 1986 CanLII 46 (SCC) at [78].

only rationality, but fairness as well, according to the Chief Justice. He relies on the fact that the consequence of the law is imprisonment for life; the rationality of the law is not impacted by the consequences for the affected party. That is a matter that might properly be taken into account in balancing, but not at the assessment of rationality.

It seems that the application of the rational connection limb was as potent as its articulation. With a standard so strict, many laws would be at risk. We will later look at how this test was relaxed soon afterwards.

(ii) Minimum Impairment of Rights

The second step of the tripartite test received almost no elaboration in the *Oakes* case. Since the law failed rational connection, the enquiry ended there, and Dickson CJ made no general comments about this test. All we can glean from the case is the very strict wording used to describe it: the means "should impair 'as little as possible' the right or freedom in question."[77] Nor did the case he quoted in support of this, *Big M Drug Mart*, elaborate beyond these words. On its face, it seems like a very stringent requirement of tailoring to the right: the right must be impaired to the minimum extent necessary, and this is not qualified to any degree. This seems highly interventionist, but without any elaboration it is impossible to know what was intended.

(iii) Balancing

Finally, the balancing test was briefly discussed by Dickson CJ. The Chief Justice made it clear that this balancing was the core of the test:

> The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be

[77] 1986 CanLII 46 (SCC) at [70].

> justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[78]

This passage stresses the importance of a balancing test, and the insufficiency of the other limbs without it. The core of the *Oakes* test, in theory at least, is not the means-ends testing that it includes but the final balance of rights and state interests.

We are given scant indication of how the balancing might be done; the values and principles of Canadian society underlie the ultimate standard of justification for rights limitations.

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[79]

These values, which also underlie properly chosen objectives, may render objectives and rights more commensurable, as they are ultimately both manifestations of the same core values.

However, despite the stated centrality of this analysis to the *Oakes* test, balancing is very often eschewed in Canada.[80] According to the above statements, the *Oakes* test without balancing is Hamlet without the Prince; it is a standard of rights adjudication that essentially does not examine the right – the right is only protected as a by-product of means-ends analysis. This means that constitutional rights become little more than triggers for heightened rationality, and do not really demand justification for their limitation. The importance of balancing was stressed in *Oakes*, but may have been forgotten subsequently.

The Inflexibility of *Oakes*

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[78] *Ibid* at [71].
[79] *Ibid* at [64].
[80] See Grimm, note 44. Denise Réaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009, and Hogg, note 4, also make this point. There is an extensive discussion of this in Chapter 5, text accompanying note 149-157.

Choudhry notes another important way that the practice of *Oakes* departed from its rhetoric. In spite of the acknowledgment the Oakes test would vary with circumstances,[81]

> the test in *Oakes* itself was framed in abstract terms which did not invite courts to differentiate its application in future appeals that might differ radically from *Oakes* itself, either with respect to the rights at play or the policy context.[82]

The *Oakes* test was set out as very strong, and gave no indication of how or whether it would change to accommodate particular circumstances: say, occasions where the legislature might be owed deference, or where the rights interest was less compelling. Instead, the test on its face seemed to be highly interventionist, offered little deference, and gave no indication that this should change in subsequent cases.[83] It is set out as a test to be used in any s. 1 analysis. Again, as we shall see, this did not last.

The *Oakes* test has an enduring legacy, but in fact the test as outlined in that case did not survive for long. The normative choices made by the Court –to have a very interventionist standard of review and offer very little deference– were quickly undermined or reversed. Various limbs have been watered down, and deference has been offered, to make the *Oakes* standard significantly weaker. This process began shortly after *Oakes*, and was spearheaded by Dickson CJ, who had only recently formulated the *Oakes* test.

Edwards Books and the Dilution of the *Oakes* Standard

R v Edwards Books and Arts Ltd[84] was decided six months after *Oakes*. It was the start of a series of both subtle and express qualifications of the *Oakes* test, an indication that the Supreme Court might have bitten off more than it could chew. *Edwards Books* was a challenge by Jewish (and other) retailers prosecuted for violating the Sunday closing laws of Ontario, included in the Retail Business Holidays Act 1980. The case had reached the Ontario Court of Appeal when the *Big*

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[81] 1986 CanLII 46 (SCC) at [70].
[82] Choudhry, note 41, at 506.
[83] However, there was some deference on display in the application of the test as regards objectives that was not suggested by the language of the test.
[84] [1986] 2 SCR 713; 1986 CanLII 12 (SCC).

M case was decided. The retailers claimed that the law burdened their religious rights under s 2 of the Charter in making them choose between restricted business hours and observance of the Sabbath. The Supreme Court acknowledged that burden, but held that it was proportionate under s. 1 of the Charter.

Unlike the *Big M* case, the Court found there was a secular purpose underlying this law, which was absent in the former case. The purpose at the root of this law was to give a "uniform holidays to retail workers."[85] Having looked at legislative history, the title of the Act, and the Law Reform Commission's report that led to the enactment, Dickson CJ was "unable to conclude that the Act was a surreptitious attempt to encourage religious worship." [86] The Act exempted recreational business; the absence of such an exemption would have made the goal of encouraging uniform recreation less plausible.

The analysis of objectives in this case is searching and subjective, with the intentions of the legislature probed and scrutinised for a possible improper purpose such as the ones that doomed *the* law in *Big M*. It seems to be broadly in line with the tenor of *Oakes*.

The assessment of the importance of the objective, however, was weak. Repeating the *Oakes* standard, Dickson CJ now realised the need for some flexibility in the application of the test: "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards."[87] In fact, the *Oakes* test did set up fairly rigid and inflexible criteria; what the Court did here was changing those.

Dickson CJ illustrated this flexibility by subtly weakening the standard of proof expected of the State. The only evidence presented to the Court was a report of the Ontario Law Reform commission that was over 15 years old. Though acknowledging that statistics and other information in the report would have become obsolete with age, the Chief Justice felt this could be taken into account when assessing its weight.[88] This report held that it was "absolutely essential"[89] to preserve a uniform rest day to preserve the communal leisure activities, what might

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[85] *Ibid* at [62].
[86] *Ibid*. This conclusion was bolstered insofar as the Act provided for secular holidays as well, with the judge unwilling to infer that these were included in order to mask a surreptitious religious purpose. 1986 CanLII 12 (SCC) at [63].
[87] *Ibid* at [122]
[88] *Ibid* at [124]
[89] *Ibid* at [125]

be deemed an interest in preservation of social capital. The Chief Justice thought "self-evident the desirability of enabling parents to have regular days off from work in common with their child's day off from school, and with a day off enjoyed by most other family and community members."[90] This self-evidence apparently derived from the fact that several communal leisure activities were "amongst the simplest but most profound joys that any of us know."[91] Clearly, the demand made in *Oakes* (though not necessarily followed through on in that case) that the State justify the importance of its objective with substantiated evidence was not to be strictly applied. The self-evident importance of objectives can meet this supposedly substantial burden.

Dickson CJ noted that "[i]t would have been preferable to have had more recent evidence."[92] The State had sought leave, a week before the Supreme Court hearing, to adduce additional evidence, such as surveys and opinion polls. "The motion was denied in view of the possible prejudicial consequences of admitting it into evidence at the eleventh hour."[93] Perhaps the lack of scrutiny of importance can be explained by this set of events.

There was, additionally, a total lack of discussion about why this objective might be necessary in democratic society – the Chief Justice was satisfied that an interest such as this one was not "unimportant or trivial"[94], and no other analysis was undertaken.

Edwards Books also weakened the rational connection and minimum impairment limbs of the *Oakes* test. The tailoring of this act was called into question. First, it targeted only the retail industry. Secondly, it discriminated as between different retail enterprises, based on size and type. The Court did not think that either of these objections undermined the rationality of the means chosen. Noting that some people would have to work to provide sufficient leisure activities for others, the Court held the tailoring to be adequate:

> In drafting its statute, the legislature can, if it wishes, create categories of retail business which are exempted, even though some unexempted

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[90] *Ibid* at [126]
[91] *Ibid.*
[92] *Ibid* at[123]
[93] *Ibid* at [123].
[94] *Ibid* at [126].

> businesses may sell some of the same products. Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the *Charter*, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concerns for the drafters of such legislation.[95]

This may be a fair viewpoint, but it was not the one expressed in *Oakes*. A tailoring requirement as strong as the one exhibited in *Oakes* would surely not see administrative convenience as sufficient reason for otherwise irrational tailoring.

Whereas, in *Oakes*, legislative means had to be "carefully designed" to achieve the ends in question, here they "need not be tuned with great precision." Minor overinclusiveness condemned the statute in *Oakes*; the under-inclusion here is dismissed as unproblematic.[96] No reason was given for the departure, nor was the change in stance highlighted.

The minimum impairment limb was modified in a more express fashion, diluted by the addition of the word "reasonably." Whereas, in *Oakes*, the absolute language of "as little as possible" was used in respect of rights, this was transformed in *Edwards Books* into "as little as is reasonably possible."[97]

The Court asked was there "some reasonable alternative scheme which would allow the province to achieve its objectives with fewer detrimental effects on religion."[98] There was already an exemption in the Act for retailers with no more than seven employees, a square footage of under 5,000, and which closed on Saturday. The Court rejected that the law failed to minimally impair rights by not extending that exemption to all with a sincerely held religious belief about the Sabbath, primarily on the basis that it would involve the State in assessing the sincerity of religious belief. They similarly rejected an employee-centric exemption from Sunday work as there would be subtle coercive pressure operating on such an employee's decision to assert his or her rights. This is a curious way to deal with minimum impairment of rights; it rejects a measure that would safeguard religious

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[95] *Ibid* at [130].

[96] Choudhry notes that it had been thought that under-inclusion would be treated the same way as over-inclusion had been, and that the same arguments of convenience could have been deployed in Oakes, "given the obvious utility of reverse onuses and to the effectiveness of criminal prosecution."Choudhry, note 41, at 507.

[97] 1986 CanLII 12 (SCC) at [131].

[98] *Ibid.*

rights more effectively because in some cases the safeguard would not be fully effective, even though it would put rights-holders in a better position.

The Court's conclusion on minimum impairment was broader than this, however:

> In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(*a*) interests of those affected the Legislature engaged in the process envisaged by s. 1 of the *Charter*. A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.[99]

Dickson CJ believed that the legislature had to make some effort to avoid the impact on this law to the free practice of religion, but held that the existing, limited exemption was a "satisfactory effort"[100] to achieve this. Even if this was the logical way to develop the minimum impairment test, Choudhry again asks "why similar factors were not even signalled by the Court just a few months earlier [in *Oakes*]."[101]

This more deferential and less interventionist approach is primarily justified by reference to the practicalities of law-making: Dickson CJ acknowledged that "legislation must, to some degree, cut across individual circumstances in order to establish general rules."[102] A note of caution was struck that was not present in his statements in *Oakes*:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.[103]

The concern about wealthy litigants availing of the Charter was clearly a concern about the law in question, but the point is more general: unless the Court resiled

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[99] *Ibid* at [147].
[100] Ibid at [148].
[101] Choudhry, note 41, at 508.
[102] 1986 CanLII 12 (SCC) at [137].
[103] 1986 CanLII 12 (SCC) at [141].

from its highly interventionist position in Oakes, the Charter could become a tool of post-legislative political opposition.

The *Oakes* standard was once again diluted in the application of the final balancing limb, the analysis of which is as follows:

> In view of the extent and quality of the abridgment of rights flowing from the legislation, I have little difficulty in applying the third element of the proportionality test. The infringement is not disproportionate to the legislative objectives. A serious effort has been made to accommodate the freedom of religion of Saturday observers, in so far as that is possible without undue damage to the scope and quality of the pause day objective. It follows that I would uphold the Act under s. 1.[104]

The third limb of the test, which involves entirely different analysis from the first two, is essentially ignored. The mere fact of the law's successful passage through the second test is seen as a hallmark of its proportionate balance of rights and objective, without any balancing being conducted. This is extremely strange because Dickson CJ had gone out of his way in *Oakes* to make it clear that the passage of the prior limbs did not of itself justify the limitation of rights, and a final balance was essential.[105]

Assuming, *arguendo*, that there could be a case in which the proportionality of a law was self-evident, this is not such a case: that an interest in preserving leisure time is more important than freedom of religious practice is not at all clear. It is an abandonment of the most crucial part of the *Oakes* test.[106]

Without doubt, *Edwards Books* backed off the strict proof that seemed to be demanded by *Oakes*, and consequently, away from the language in section 1 of demonstrable justification. It also introduced more deference, and adopted a less interventionist reading of the substantive limbs of the test. This was achieved by way of reworking of the application of the test, and in the case of minimum impairment, by way of changing its wording. Over the years, both of these

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[104] 1986 CanLII 12 (SCC) at [151].

[105] See above, at note 78.

[106] As will be discussed elsewhere, this creates a potentially dangerous problem of setting up a rights adjudication standard where the rights infringed are essentially not considered at all, save for a question of whether they could be interfered with to a lesser extent. This is surely not an acceptable way to treat constitutionally protected rights.

mechanisms have been used to change the *Oakes* force and effect of the *Oakes* test, as we shall see in later chapters.

Conclusion

The reasons for the diminution of the *Oakes* test's strength are not entirely clear. Some explanation focuses on the distinction between the criminal and civil law applications of the test, suggesting that a lack of categorisation in *Oakes* means that the Court set out as a general test what was in fact a test tailored for criminal process rights.[107]

Choudhry, on the other hand, characterises this retreat as a realisation on the part of the Court of "enormous institutional dilemma" created by the failure of the *Oakes* test to consider "the reality of policy making under conditions of factual uncertainty."[108] This approach characterised the failure of Oakes to pay heed to risks of strong judicial intervention because of the general difficulties inherent in legislative decision-making, and the hazards of holding legislatures to very strict standards.

Whatever the explanation, there was a clear dissonance between *Oakes* and *Edwards Books*, and between the *Oakes* test as articulated and the *Oakes* test as applied. This left the Supreme Court open to a withering contemporary criticism, that underlies objections to the *Oakes* test to this day: that the two faces of the test shown in the first two cases allowed the Canadian courts to pick and choose their level of scrutiny. When sympathetic to a law, courts can use the *Edwards Books* standard to "step aside and basically allow the legislature to do what it wants" while still keeping the nominally strict *Oakes* test "on the shelf waiting to be dusted off for use... any time that the Court wants to strike down a law."[109]

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[107] See, for example, RM Eliot, "The Supreme Court of Canada and Section 1 – the Erosion of the Common Front" 919870 Queen's LJ 277 at 339.
[108] Choudhry, note 41, at 503.
[109] Andrew Petter and Patrick Monahan, "Developments in Constitutional Law: the 1986-1987 Term" (1988) 10 SCLR 61 at 95.

4 – Dealing with Deference and Interventionism: the Struggle with Categorisation and the Rise of Contextual Analysis

In the wake of *R v Edwards Books*,[1] various academic commentators attempted to figure out what had taken place. The Supreme Court had vastly changed a standard of review that had been outlined only month earlier in *R v Oakes*.[2] This chapter looks to the explanations for this divergence, and deference and interventionism in Canadian constitutional law.

Here, I wish to look at the attempts to explain this development of the *Oakes* test, and outline the narrative of how the courts struggled with these issues. The courts initially attempted a process of categorisation: that less interventionist standards of review apply depending on whether or not a case came with a certain category. After struggling with these categories for a time, there was a gradual relaxation of these categorical distinctions in favour of a more fluid, contextual consideration of whether or not deference should be offered.

Having outlined this development, I then wish to look at the rationales deployed by the Canadian courts, which were initially used to set the boundaries of categories, and later became contextual factors in consideration about when deference should be offered. The categorical distinctions over-simplified these considerations, focusing on one distinctive factor, and ignoring the fact that oftentimes, several of these factors might combine in a given case, but that at other times they would not apply, despite the fact that the case fell within a category that would assume that they did. Contextual analysis allowed these to be fully considered in each case.

The debate over deference and interventionism in the application of the *Oakes* test provides insight into the test, and the difficulties in applying a universal test to the variety of cases that a constitutional court has to address.

Categorisation : Criminal and Civil Cases

Academic Response to *Edwards Books*

Contemporary writings quickly focused on the changing of the *Oakes* standard in *Edwards Books*. Robin Elliot, writing shortly after the judgments, noted

[1] [1986] 2 SCR 713; 1986 CanLII 12 (SCC).
[2] [1986] 1 S.C.R. 103; 1986 CanLII 46 (SCC).

that the strictness of the *Oakes* test in respect of tailoring to the objective was untenable:

> Most legislation is over- and/or under-inclusive to some extent, and unless the Supreme Court is going to use the Charter to ban over- and under-inclusiveness entirely – which is inconceivable since it would bring effective government to a complete halt – some method of drawing a line between acceptable and unacceptable forms of over- and under-inclusiveness will have to be established.[3]

Elliot highlighted that the Chief Justice drew no line in this respect. However, he noted that that the consequences that faced Mr Oakes and his ilk –a criminal conviction and prison sentence– were very severe. This severity might explain why the over-inclusiveness of the *Oakes* law was unacceptable to Dickson CJ; his decision was "influenced, if not dictated by, his concern that innocent people might be convicted of a serious criminal offence."[4]

Elliot went on to highlight that Dickson CJ had, in *Edwards Books*, said that the legislature would be given room to manoeuvre in respect of regulating business practices:

> Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the *Charter*, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concerns for the drafters of such legislation.[5]

When the legislation in question relates to business regulation –which rarely raises rights concerns– then those considerations can justify loose tailoring even in the rare cases where rights are infringed.

One could view this as a distinction being drawn between the situation in criminal cases and other cases. Business regulation, the court presumes, does not often put rights at risk, but this is true of most of non-criminal laws. It is criminal laws –with their potential for hugely serious consequences for individual rights– that the court presumes need more judicial intervention, as they regularly put rights at risk.

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[3] Robin Elliot, "The Supreme Court of Canada and Section 1 — the Erosion of the Common Front" (1987) 12 Queen's LJ 277, at 318.
[4] *Ibid.*
[5] 1986 CanLII 12 (SCC) at [130], partially quoted in Elliot, note 3 at 328.

Alternatively, one could see this as the first of potentially many categories between which the standard of review may vary. Criminal cases are just one example of cases where the impact of over-inclusion is strong; business regulation is an example of where the impact is weak. This would suggest that many cases might be capable of such categorisation, and a wide spectrum of categories could be found to exist as case law developed. Rather than being merely a distinction between criminal and non-criminal cases, that distinction is the starting point for a series of more nuanced distinctions based on presumed impact.

Both of these approaches would create broad categories based on presumptions about certain types of cases. It assumes certain impacts will result from certain types of law based on *a priori* categories. Categorisation results in variation of the level of interventionism in particular types of cases, because it does not look to particular decisions or determinations.

Elliot astutely noted that the Court's attitude could be a result of the Supreme Court's views on liberty and collective welfare. He saw the *Oakes* test as a continuation of a line of liberal authority, albeit with a concern for collectivist instincts, that saw the State primarily as the enemy of liberty.[6] Petter and Monahan also made this observation, and illustrated that this could have led to the criminal/civil law divide in respect of s. 1 analysis.[7] The Supreme Court, at the time of *Oakes*, had been "operating on the assumption that liberty can be equated with an absence of government."[8] This view was bolstered because, until that time, the cases decided under the Charter "involved claims made in the context of criminal defences, or claims in which the interest of those who relied upon a particular governmental action were not voiced during the course of litigation."[9] This caused the Supreme Court to

> discount the role the government plays as a promoter of liberty, and overlook entirely the degree to which all forms of social ordering, including so-called "private" ordering, are dependent upon state action.[10]

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[6] Eliot, note 3, at 318 and 335.

[7] The authors were scathing of the dilution of the *Oakes* standard, describing the standard as having given way to "a wary pragmatism and dismissive deference." Andrew Petter and Patrick Monahan, "Developments in Constitutional Law: The 1986-1987 Term", 1987 10 SCLR 61 at 64.

[8] Petter and Monahan, note 7, at 67.

[9] *Ibid.*

[10] *Ibid.*

Edwards Books –dealing as it did with a law enacted to help retail workers and their families– and other cases decided in the same period, illustrated that this view was, at best, incomplete.[11] The subsequent dilution of the *Oakes* test, the authors argued, was recognition that "liberty is a relative value that operates within, not outside, a regime of state action."[12]

This approach was acknowledged in the concurring judgment of La Forest J in *Edwards Books* . He admitted that the achievement of the objective was not free of costs, and acknowledged "that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some."[13] He said that "attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected."[14] In order for the legislature to deal with these "conflicting pressures", it must be given "[r]easonable room to manoeuvre."[15] The choices that had to be made in this case required "in-depth knowledge of all the circumstances. They are choices a court is not in a position to make."[16] These circumstances existed in *Edwards Books.*[17]

Petter and Monahan go further in linking their insight about liberty to the Court's attitude to criminal and civil cases. While *Edwards Books* was a substantial retreat, it was not "universal."[18] They note that not one of eight non-criminal Charter cases that came before the Court in the 1986-1987 term (of which *Edwards Books* was one[19]) succeeded before the Supreme Court. There were, in the same period, eleven criminal law Charter cases, six of which were successful.[20] While there could

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[11] See in particular *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 1986 CanLII 5 (SCC); a case about restrictions on secondary picketing by unions, where the Court struggled over the issue of whether charter rights should apply to common law rules about private interactions.
[12] Petter and Monahan, note 7, at 67.
[13] 1986 CanLII 12 (SCC) at [182].
[14] *Ibid.*
[15] 1986 CanLII 12 (SCC) at [183].
[16] *Ibid.*
[17] The measure in *Edwards Books* was directed toward helping individuals working in retail to have a day of rest. In so doing, it risked interfering with the religious practice of those who observe the Sabbath, and tried to create some exceptions for that purpose. However, for every exception it created, it achieved the goal to a lesser extent, as it rendered less uniform the days on which people were free for leisure activities. At some point, the legislature considered that a broader exemption would compromise their goal and exclude too many people from the uniform rest day, denying retail workers the full benefits of that objective, which comes from its uniformity. The protection of rights requires the abrogation of other liberties that the law is trying to create or defend.
[18] Petter and Monahan, note 7, at 68.
[19] *Edwards Books* was a criminal case insofar as the action arose in the context of a prosecution under the Sunday closing law. The substance of the case, however, did not involve a criminal law claim.
[20] Petter and Monahan, note 7, at 68-69

be many explanations for this, the authors buttress this correlation by noting that "the cases in which the Court's rhetoric and reasons have been most deferential have all been non-criminal cases."[21]

There are several explanations for why courts might be more prone to intervention in criminal than in civil matters. Petter and Monahan suggest that "[s]upervision of the criminal process is a staple item on the judicial menu."[22] Moreover, the criminal process might have seemed to the judges to vindicate their conception of liberty. In criminal cases the effect on individual liberty is profound, and the liberties of those that the criminal law protects are remote, and not usually acute in the context of criminal process claims. While the criminal law as a whole clearly defends the interests of society, it can still achieve that goal while maintaining a level of fairness. Petter and Monohan suggest, more cynically, that the conception of liberty that pits the individual against the State remains fatuous in criminal cases; it is simply "easier to maintain the illusion" in such cases.[23]

Irwin Toy

Petter and Monahan and Elliot were prescient in their critiques. The criminal justice distinction was acknowledged by the Supreme Court in *Irwin Toy v Quebec*;[24] both the judicial expertise and liberty rationale were cited in support of this distinction.

The case concerned a challenge to broadcasting legislation in Quebec, which prohibited the broadcasting of commercial advertisements directed at children under the age of thirteen. This legislation was challenged on the basis of the right to freedom of expression under section 2 of the Charter. A majority of the Supreme Court ultimately held that the right to commercial expression was justifiably limited in this case in the interests of protecting children from the more coercive influences of advertising.

In upholding this limitation, and finding that the means chosen impaired the right to freedom of expression as little as possible, Dickson CJ drew a distinction between civil and criminal matters, relying on a judicial expertise rationale. Dickson CJ said that in criminal matters, or indeed "whenever the government's purpose

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[21] *Ibid* at 69.
[22] *Ibid.*
[23] *Ibid.*
[24] [1989] 1 S.C.R. 927, 1989 CanLII 87 (SCC).

relates to maintaining the authority and impartiality of the judicial system," courts could regard the means chosen with closer scrutiny, "given their accumulated experience in dealing with such questions."[25]

However, Dickson CJ also characterised his approach in *Edwards Books* as relating to the cases of "striking a balance between the claims of competing groups."[26] He mentioned factors in such cases that might warrant deference: assessment of conflicting scientific evidence, or decisions about resource allocation. Less intervention was appropriate generally, because the state was acting as a guardian of liberty as well as restricting it. But when dealing with the prosecution of crime, "rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed."[27] Dickson CJ viewed the criminal process as binary, with society in general on one side, and the individual on the other: "There might not be any further competing claims among different groups."[28] In such cases, the Court can adequately, and with certainty, assess the question of least drastic means, and close judicial scrutiny in criminal cases would therefore be justified.

While there is a sense in which this analysis is appealing, there is another sense where it is lacking: the State's action in prosecuting crime protects and vindicates the liberties of those victimised by crime, or those who might be victimised in future. In that sense, does the criminal process not balance competing interests as well? The Court did not engage with this issue on a meaningful level in *Irwin Toy*; it was taken as read that the State acts as the singular antagonist in such cases.

There are several ways such an outlook could possibly be justified. First, though there is a societal interest in the prevention and prosecution of crime, the consequences to individuals charged with crimes are so severe that the Court might have thought State action needed to be strictly controlled. Secondly, the Court might have thought that, unlike *Edwards Books* and its ilk, where the law in question was clearly deployed to the end of preserving a particular liberty, the liberties and interests the State defends by prosecuting people under the criminal law are remote

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[25] *Ibid* at 70-71.
[26] 1989 CanLII 87 (SCC) at 70.
[27] *Ibid.*
[28] *Ibid.*

and belong to the community at large rather than to any individual.[29] In the former case, protecting these liberties is –or seems to be– a zero-sum game. In the latter cases, the liberties the law protects are more remote and more speculative, and therefore it does not seem that protecting the liberties of individuals requires any sacrifice.

Thirdly, and relatedly, a line can be draw between criminal rights cases that generally involve process (like *Oakes*) and those that involve substance. The liberty interests of those protected by the criminal law may not be in play at all in process cases. In *Oakes*, the claim was not that the prosecution of drug trafficking was a violation of Charter rights; had that been the case, there would have been liberty interests at play on the other side, as keeping people free from drug crime would have proved impossible should the claim succeed. Instead, the claim was that drug trafficking could not be prosecuted with the reverse onus of proof laid out in the law. The goal was not to restrict the scope of the criminal law, but rather to make the criminal law operate in a fair manner. Therefore, the liberty interests of those victimised by crime are not fully engaged when the process of criminal prosecution, rather than the substance of the criminal law, is at stake.

It is not clear which, if any, of those views underlay the Court's decision in *Irwin Toy*. That made it difficult to establish the limits of this principle, and would cause problems in future cases.

Irwin Toy's distinction between criminal and civil cases was a significant step toward rationalising the divergence between *Oakes* and *Edwards Books*, and giving some structured approach to when the more stringent variant seen in *Oakes* would apply. The Court did not completely abandon its former jurisprudence. In criminal cases, where the conflict between liberty and state action was most acute and the court's expertise was great, that strict standard of *Oakes* would apply. However, when the law in question had less severe consequences for individual liberty, and was directed at protecting the liberties of others, this close scrutiny was misplaced. Courts would intervene less often in such cases, and adopt a less interventionist

[29] In *Oakes*, the liberties protected by the law are remote; they are the interests of those who are affected by crime, in the past or in the future, or the even more remote one of society as a whole being free from crime. It is difficult or impossible to say that these interests are worse off –or the extent to which they are worse off– because the law allowing a reverse onus of proof in drug supply cases was struck down.

standard of review, because "Democratic institutions are meant to let us all share in the responsibility for these difficult choices."[30]

However, this development was the beginning, rather than the end, of the effort to deal with these questions. Both of these considerations – expertise and liberty– are variable, and other concerns, such as the democratic legitimacy of the courts, are evident in the judgment as well. The limits of *Irwin Toy* fell to be addressed in subsequent cases. This further begs the question of whether there are other categories of cases in which judges have particular expertise or legitimacy, or other categories of cases where the State is the singular antagonist of the individual.

Problems with the Criminal Category

The Supreme Court soon encountered cases where it was unwilling to apply its criminal/non-criminal distinction. More problematically, instead of using these exceptional cases to refine the rule, the reason for these cases being outside of the *Irwin Toy* categories were not clearly discussed.

The category system was undermined by the Supreme Court judgment in *R v Chaulk*.[31] *Chaulk* was a challenge to a reverse onus clause, similar to the one struck down in the *Oakes* case, in the context of the defence of insanity. Chaulk and his co-accused were teenagers charged with murder carried out during a burglary. They confessed to the crime, but at trial, claimed that they were criminally insane, suffering from a form of paranoid psychosis. Their condition was such that though they were aware of the existence of the law, they considered themselves above it and not bound by it, and thought they had the right to kill the victim. This defence was rejected by the jury and both were convicted. They challenged the constitutionality of s. 16 of the Canadian Criminal Code, which provided for the defence of insanity, and stipulated that, until the contrary is proven, all persons shall be presumed to be sane. They claimed that this violated the presumption of innocence, guaranteed by s. 11(d) of the Charter. In addition, they argued that the trial judge had erred in directing the jury that understanding that an act was "wrong," a prerequisite for criminal capacity, meant only understanding that the act was legally wrong.

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[30] 1989 CanLII 87 (SCC) at 70.
[31] *R v Chaulk* [1990] 3 S.C.R. 1303; 1990 CanLII 34 (SCC).

The appellants won the latter point, with the majority of the Court finding that understanding that the act was morally as well as legally wrong was required for the purposes of criminal capacity. However, they lost their constitutional argument, and the restriction on the presumption of innocence was held to be a justified limitation under s. 1.

Writing for the majority of the Court, Lamer CJ acknowledged that the presumption of innocence was restricted by the measure in question. He found the limitation to be a reasonable one, however. The objective of the reverse onus provision was to avoid the Crown taking on the "impossibly onerous burden"[32] of disproving any claim of insanity raised by an accused. The lack of concrete information about the brain and mental conditions made disproving insanity a "nearly impossible task."[33] This objective was sufficiently important to warrant the limitation of a right, and the means chosen were rationally connected to that objective.

The most important question was "whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively."[34] Lamer CJ cited *Edwards Books* and *Irwin Toy*, and said that these cases

> indicate that Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.[35]

Lamer CJ held that the alternatives suggested, such as the shifting of an evidential rather than a legal burden, or compulsory submission to Crown psychiatric examination, would not achieve the objective pursued as successfully as the one chosen, or were too speculative as to their efficacy, it being "impossible to know what the effects of this alternative would be until it is put into practice."[36] Parliament had chosen these means, and

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[32] 1990 CanLII 34 (SCC) at 38
[33] *Ibid* at 39.
[34] *Ibid* at 42.
[35] *Ibid.*
[36] *Ibid* at 44.

> it is not the role of this Court to second-guess the wisdom of policy choices made by Parliament. In enacting s. 16(4), Parliament may not have chosen the absolutely least intrusive means of meeting its objective, but it has chosen from a range of means which impair s. 11(*d*) as little as is reasonably possible.[37]

Finally, Lamer CJ acknowledged that this burden could be to the detriment of the individual in question, but cognisant of the importance of avoiding an impossible burden, held that it was ultimately proportionate.

The problem with the *Chaulk* case is not that it is wrongly decided. Simply because one reverse onus provision fell in *Oakes* does not mean that all such provisions are invalid; the particular circumstances of insanity might well justify the limitation. The problem is that insanity was not held out as a case where a criminal rights restriction would be upheld despite the close scrutiny of the courts; instead, the strong *Oakes* standard of review, affirmed in *Irwin Toy* as appropriate for criminal cases, was abandoned in the criminal context in favour of the weaker *Edwards Books* test. More deference was offered in respect of uncertain efficacy, the standard of proof was relaxed, and the minimum impairment test diluted. As well as the weaker "as little as reasonably possible" formulation, the *Chaulk* variant of the test is even less interventionist than *Edwards Books*. Lamer CJ was only willing to consider an alternative that would achieve the end "as effectively"[38] as the means chosen by the legislature; no sacrifice in effectiveness would suffice. No reason was give for this departure from the *Irwin Toy* distinction.

The criminal/non-criminal distinction was strained in other cases.[39] Choudhry points to the case of *R v Downey*[40] as an example of the failure of the distinction. Downey was charged under s. 195 of the Canadian Criminal Code with living on the avails of prostitution, having helped his companion run an escort agency by answering phones and performing banking functions. He did not have any other employment. Under s. 195, it sufficed for the prosecution to prove that the accused lived with or was habitually in the company of prostitutes. In the absence of contrary evidence, this would be taken to prove living on the avail of prostitution. He unsuccessfully challenged this provision at trial as a violation of the presumption

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[37] *Ibid.*

[38] *Ibid* at 42.

[39] See also *R v Wholesale Travel* [1991] 3 S.C.R. 154; *1991 CanLII 39 (SCC)*, where a similar approach to *Chaulk* was adopted.

[40] [1992] 2 S.C.R. 10; 1992 Canlii 109. A very similar law was recently struck down by the Court of Appeal for Ontario; *Bedford v Canada* 2012 ONCA 186.

of innocence in the Charter, and was convicted. His appeal to the Supreme Court failed, despite the fact that it was, in Choudry's words, "a reverse onus provision largely identical to the one challenged in Oakes."[41]

Like *Chaulk*, the majority of the Court accepted that the presumption of innocence was restricted, but found that the restriction was justified under s. 1. Cory J said the objective of the provision was to target those who entice and encourage others to engage in prostitution – in a word, pimps. It was clear that targeting pimps was an essential part of the fight against the social ills of prostitution. However, one might expect that there would be some tailoring problems, as in *Oakes*. Like the former case, there is no necessary connection between living with or habitually associating with prostitutes and being a pimp. The presumption was highly over-inclusive. However, the Court did not find this problematic. The majority reasoned that the conviction of pimps was difficult or impossible without the co-operation of prostitutes, which was often not forthcoming.[42] Cory J also said he had "no concern"[43] that innocent people being wrongfully convicted in spite of the reverse onus, as contrary evidence could be presented. There is little analysis of why this over-inclusiveness was rational, yet the over-inclusiveness in *Oakes* was not, nor is there any analysis of why it is necessary to target anyone who lives with or is habitually in the company of prostitutes when many such people will not be pimps or living off the avails of prostitution.

As for minimum impairment, the Court followed *Chaulk* in saying that the government need not choose the absolutely least intrusive means.[44] For the final balancing test, the Court focused on the evils of prostitution, and the need to prosecute pimps to protect prostitutes and combat the deleterious societal effects of prostitution. The fact that this measure was a "relatively minor"[45] infringement of rights was also relevant in finding it to be a fair balance.

In the majority's analysis, there is no attempt to explain why the level of scrutiny here is not the very vigorous analysis used in *Oakes*. Instead, a much lower level of scrutiny is applied, with a very broad law being upheld on the basis of scant evidence and little consideration of alternative means. The reverse onus clause

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[41] Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 505 at 516.
[42] 1990 CanLII 34 (SCC) at 35.
[43] *Ibid.*
[44] *Ibid* at 35-36.
[45] *Ibid* at 37.

challenged bore a striking resemblance to the one in the *Oakes* case, which was found to be impermissibly over-inclusive. The judges in dissent found this law to be similarly over-inclusive.[46]

The *Downey* case could be seen as a challenge to the system of categorisation drawn up by the courts, and refutation of the idea that criminal cases place the State in the role of the antagonist to individual liberty. The majority focused on the aid this law provided for prostitutes, a "vulnerable segment"[47] of society, in allowing pimps to be convicted without the testimony of prostitutes, and preventing a situation where prostitutes would be threatened with violence if they did testify.[48] The law was therefore "aimed not only at remedying a social problem but also at providing some measure of protection for the prostitute."[49] This could be seen as a criminal law acting to protect the liberty of others in a less remote way, making the law more analogous to *Irwin Toy* and *Edwards Books* than to *Oakes* when it came to the liberty of others being protected by the law. Unfortunately, this is not put forward in this manner in the judgment, and there is little evidence to suggest that it was a deliberate stance adopted by the Court as an exception to the categorisation in *Irwin Toy*; it is perhaps more likely that the *Downey* Court did not fully consider civil/criminal categorisation.

A more direct critique of the *Irwin Toy* distinction came in the landmark case of *RJR MacDonald v Canada*.[50] This case concerned the Tobacco Products Control Act, which restricted the advertising and promotion of tobacco products. RJR MacDonald and other tobacco companies challenged the power of the federal government to pass such laws, and further argued that the laws violated their Charter right to Freedom of Expression under s. 2. The law not only prevented expression through advertising, it also mandated expression, by forcing companies to display health warnings that were not attributed to the government. Readers might infer that it was the company's viewpoint rather than the government's.

Whilst the power to pass the Act was affirmed, several sections of the Act were found to be an unconstitutional restriction on free speech. In the view of the

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[46] La Forest J would have stuck down the law for casting "too wide a net" without any evidence being proffered by the State to say why such a wide scope was necessary. *Ibid* at 11. McLachlin J said that the law had the potential to "catch such a wide variety of innocent people in its wake" that it could not be said to be rationally tailored. *Ibid* at 46.

[47] *Ibid* at 38.

[48] See *ibid* at 35; 37.

[49] *Ibid* at 38.

[50] [1995] 3 S.C.R. 199; 1995 Canlii 64 (SCC).

majority of the Court, the law did not minimally impair the right to free expression, as the government did not produce evidence to show that an outright ban was necessary and that less intrusive regulation would be inapposite. Similarly, the government did not establish that the non-attribution of health warnings to the government was an essential part of the measure. While acknowledging the important role that deference might play in s. 1 analysis, McLachlin J was keen to stress its dangers and its limits:

> Deference must not be carried to the point of relieving the government of the burden which the Charter places on it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.[51]

In this context, McLachlin J noted that there was a distinction drawn in *Irwin Toy* between cases where the law was balancing interests and cases where the law pitted the individual against the State, and the level of scrutiny that was appropriate in each. She then noted:

> However, such distinctions may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential.[52]

McLachlin J's point is a good one, and one that might have been made in *Chaulk* or *Downey*. The criminal law distinction is not a simple one; some criminal laws may protect liberties as well as restrain them. The Court was aware of those in *Downey*, but its system of categorisation did not adapt to accommodate this reality.

Even if it was not done with full elaboration or consideration, the *Downey* case posed a serious threat to the *Irwin Toy* category. It illustrated that even in criminal process cases, the interest of others can be defended by the law in question. By deploying a reverse burden in this case, the State was, according to the Court, protecting the welfare of prostitutes who were vulnerable. It was a purely

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[51] *Ibid* at [136].
[52] *Ibid* at [135].

procedural matter, yet the liberties of others were being defended. The State was not the singular antagonist of liberty it was usually thought to be. Cases involving substance and those involving process had seemed to be a workable distinction, but *Downey* shows it not to be. Moreover, and adding to the confusion, in cases similar to *Downey*, no deference was shown despite the fact that the same arguments would seem to apply.[53] Choudry notes that the Court's failure to appreciate the interests protected by the criminal law in some cases (which it arguably did in *Downey*) led to direct legislative reply in later statutes.[54] With the category losing its integrity, and scepticism expressed in *RJR MacDonald*, it was clear that the criminal category drawn up in *Irwin Toy* would not persist for long.

Other Categories

There were other attempts made to categories cases, and determine the level of interventionism that was appropriate in each. These fared little better than the criminal/civil distinction.

Vulnerable Groups

One approach suggested that a less interventionist standard apply when the interest pursued by the law aimed to protect vulnerable groups in society. Perhaps the converse should also be true, and less interventionist standard should apply when the rights *restricted* belong to vulnerable groups, for reasons such as those that underlie Ely's political process theory of judicial review.[55] Colker[56] suggested

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[53] See, for example, *R v Seaboyer* [1991] 2 S.C.R. 577; 1991 CanLII 76 (SCC) where a law that restricted cross examination of rape victims about their sexual history was struck down by the Supreme Court. McLachlin J, writing for the majority, noted the possibility that the more lax standard should apply, because there might be competing interests in this case. She held that even were that the case, the law was too broad to pass minimum impairment. At 64.

[54] Choudhry, note 41, at 520. He cites *R v Seaboyer*, [1991] 2 S.C.R. 577 1991 CanLII 76 (SCC), where, in a subsequent law, the legislature highlighted that in the statute's preamble that sexual offence laws shield the rights of security of the person, privacy and equal protection of the laws for victims of sexual offences, and that such laws aim to balance the rights of both victim and accuser to the greatest extent possible. Choudry says this was done "clearly with a view to directing the Court to defer in future constitutional challenges." *Ibid.*

[55] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). Colker points out an inverse political process theory at work in the Canadian courts: when minorities and vulnerable groups have managed to secure protection through the political process, the courts should be wary of interfering with that protection in the interests of protecting the rights of more powerful groups. However, there is less evidence of standard political process theory: that vulnerable groups' rights deserve protection from courts because they are often not well represented in the political process.

[56] Ruth Colker, "Section 1, Contextuality and the Anti-Disadvantage Principle", 42 U Toronto LJ 77 at 84

that this principle was suggested by the Dickson CJ in Irwin Toy and adopted in *R v Keegstra*.[57]

The first time this trend can be seen is in *Edwards Books*, where Dickson CJ warned of the Charter becoming a tool for better situated group –in that case, employers– to erode the liberties of the vulnerable –in this case, employees.[58] At several points, he refers to employees as being vulnerable and subject to various pressures.[59] In *Irwin Toy*, Dickson CJ again highlighted the importance of protecting vulnerable groups, mindful that the law in that case was aimed at protecting children from the coercive pressures of advertising.[60] He cited his opinion about certain groups in business regulation being especially "needy." In *Downey*, Cory J stressed the vulnerability of prostitutes and the relationship of violence and control that often existed between prostitute and pimp.[61] This might have influenced his decision to adopt a less interventionist standard of review, even in a criminal case.

R v Keegstra[62] was a challenge to a prohibition on wilful promotion of hatred against an identifiable group. The accused, a teacher from Alberta, had been convicted of that offence, having conveyed anti-Semitic messages to his students. The Supreme Court upheld the law, finding it to be a justified limitation on the s. 2 right to free speech. In so doing, Dickson CJ stressed that the legislature had acted to defend the rights and interests of vulnerable minorities. Dickson CJ noted that, in *Oakes*, the Court had held that one of the core principles of the free and democratic society envisaged by the Charter was the "inherent dignity of the human person."[63] He had no doubt that this law was enacted to protect and defend vulnerable groups.[64]

Colker argues that these cases illustrate that when the statute that restricts rights is deployed to aid vulnerable groups, the courts are less willing to intervene. There is something to this, as this concern with vulnerability is apparent in the

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[57] [1990] 3 S.C.R. 697; 1990 CanLII 24 (SCC).
[58] "In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons." 1986 CanLII 12 (SCC) at [141].
[59] 1986 CanLII 12 (SCC) at [69]; [128].
[60] [1989] Canlii 87 at 70: "Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function."
[61] 1990 CanLII 34 (SCC) at 38.
[62] [1990] 3 S.C.R. 697; 1990 CanLII 24 (SCC).
[63] 1990 CanLII 24 (SCC) at 44.
[64] See *ibid* at 52, 53, 56.

Court's rhetoric. However, it is not clear from the face of the judgments how differently the legislature is treated if it is protecting the liberties of vulnerable groups as opposed to the liberties of other groups. Perhaps it is a modifier of the "conflicting liberties" approach, but there was no indication of the extent of such a modification.

There are also a host of other issues with this vulnerable groups approach. Colker notes that *Keegstra*, anti-Semite though he might have been, was also part of a minority group whose right to free speech was being restricted by the State.[65] Even if his minority was not thought deserving of protection, he was not a member of powerful group in society; far from it.

Ultimately, in *Dunmore v Ontario*,[66] the Supreme Court recognised that where a vulnerable group is protected by the law, but another vulnerable group has its rights limited by the law, there is no relaxation of the standard of review, not even that usually done when the legislature balances interests.[67] This is confusing, to say the least.

There has been some support for a more interventionist standard where the person whose rights were restricted was a member of a vulnerable minority. Choudhry cites one case where this may have happened, and several dissents where such views were tentatively expressed.[68] The *Dunmore* case, advocating strict review where the interest limited and those protected both belong to vulnerable groups, must be premised on this theory to some extent. However, it was never a principle fully embraced by the Court in the manner one would expect if this vulnerability principle were a cornerstone of Charter jurisprudence.

Strong and Weak Rights

Another category focused on the strength of the rights in question. If a right was weaker, or more peripheral, then perhaps the standard of review would be more limited. Stronger, more central rights might warrant more stringent scrutiny. The criminal/non-criminal distinction could be seen in this light, by ranking

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[65] Colker, note 56, at 109.

[66] *Dunmore v Ontario 2001 SCC 94 (CanLII), [2001] 3 SCR 1016.* See Caroline Libman, "The Dunmore Departure: S 1 and Vulnerable Groups," (2003) 13(2) Constitutional Forum 30.

[67] The groups in that case were small family farmers on one side and farm workers on the other.

[68] Choudhry, note 41, at 513. He cites the case for the possible adoption of this principle is *UFCW Local 1518 v KMart Canada* [1999] 2 S.C.R. 1083; 1999 Canlii 650 where the Supreme Court refused to defer to a legislative prohibition on secondary picketing because those who were targeted by the restriction were from a vulnerable group.

criminal rights as more central and important than others, though there is no evidence in the judgments that this was a factor in the drawing up of that category. It could also be another modifier of the more general conflicting interests approach.

Choudhry cites the example of internal ranking of various free speech claims within the s. 2 protection of freedom of expression as an example of category. Obscenity, hate speech, defamation, and commercial speech, for example, were not accorded as much weight as core political expression.[69] Consequently, when regulating those areas, the State was given more leeway than when it was regulating more important classes of speech. This was possibly another factor underpinning the landmark *Irwin Toy* decision, as that case involved commercial expression.

There are several problems with this approach. First, it is of dubious value. This prioritisation of certain rights might be something that can rationally be done within a freedom of expression guarantee, but it would obviously be harder and more controversial to do this in other contexts, as it makes *a priori* assumptions about the effects and harms of certain rights violations. It does not consider the rights restrictions in context, but ranks based on presumptions.

Secondly, the categories drawn in the free speech context are, themselves, dubious. Hate speech often contains political content, albeit from a political viewpoint that is abhorred. Defamatory speech can also be used to good political ends; such speech might be highly politically pertinent but for the fact that it cannot be proven to be true. Should that speech then be further divided, with defamatory speech of a political nature receiving more protection than that concerned with less important matters? Even with less obvious examples like obscenity, arguments have been put forward saying that sexual speech had significant political impacts, which can in particular affect the lot of sexual minorities by controlling and influencing social mores and sexual norms.[70] Like the other attempts to draw categories, this approach ultimately provides little guidance.

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[69] Choudhry, note 41, at 515.

[70] See Choudhry, note 41, at 517; Lise Gotell, "Shaping *Butler*: The New Politics of Anti-Pornography" in Brenda Cossman, Sharon Bell and Lise Gotell (eds.) *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (University of Toronto Press, 1997); Lara Karaian, "Troubling the Definition of Pornography: Little Sisters, a New Defining Moment in Feminists' Engagement with the Law?" 2005 17 Canadian Journal of Women and the Law 117.

From Categories to Context

Over the years, various categories were drawn up to establish a framework for when more- and less- interventionist standards of review should be offered. Many rationales underlay these categories, from the basic differences between criminal and civil cases, the expertise of the judiciary, the importance of the right at stake, and the extent to which the legislation protected the liberties and interests of others. None of these categories was without issue, as we have seen; it reductively considered these as binary factors that lead to either strong or weak review. Eventually, this system of categorisation fell by the wayside, to be replaced by a more fluid notion of contextual deference. It is not that the rationales behind these categories were abandoned completely. It was rather that they transitioned from being rigid categories, that resulted review being very potent or very weak, to being contextual considerations that would decide whether or not deference was appropriate to particular determinations. This alters review in a more subtle and significantly less blunt way than the former approach.

The acknowledgment of the importance of context, and the undermining of the criminal/civil distinction, in *RJR MacDonald* was a step toward this. A more definitive rejection of categories came with *Thompson Newspapers v Canada*.[71] The case involved a free speech challenge to a law restricting the publication of opinion polls in the final three days of a federal election campaign, taken by one of Canada's major newspaper conglomerates. The challenge was rejected by the lower courts but upheld by the majority of the Supreme Court. When conducting the s. 1 analysis, Bastarache J, writing for the majority, said that all elements of the *Oakes* test had to be applied "with a close attention to context."[72] The majority, in many ways, endorsed the ideas underlying the categories drawn up by the courts; they simply did not want them to be applied as categories.

The judge said that with the contextual approach, the vulnerability of the group that the legislature set out to protect, and whether or not the measure is protecting the interests of an identifiable group from attack by a more powerful group, is an important consideration for the Court.[73] He further acknowledged that difficulty in knowing or measuring the harms and effects of various measures was a

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[71] [1998] 1 S.C.R. 877; 1998 CanLII 829 (SCC).
[72] *Ibid* at [87].
[73] See *ibid* at [90]; [112].

legitimate consideration,[74] and that the strength of the constitutional protection of speech could vary depending on the nature of the speech.[75] However, he was not satisfied that any of these contextual considerations were at play here. The speech in question was core political expression; Canadian voters were not a vulnerable group; there was evidence that voters would not be widely misled by inaccurate polls.[76]

In addition to this, there was an express rejection of categorisation by the majority of the Court. The scepticism of the criminal/civil category that McLachlin J expressed in *RJR MacDonald* was echoed and expanded upon by the majority in this case:

> [I]t is difficult to draw a sharp distinction between legislation in which the state is the antagonist of the individual, and that in which it is acting as a mediator between different groups. Indeed, nothing in these cases suggests that there is one category of cases in which a low standard of justification under s. 1 is applied, and another category in which a higher standard is applied. In my view, these cases further the contextual approach to s. 1....[77]

Bastarache J in essence concluded that the distinctions that previously drew categories between types of cases were, in fact, "all factors of which the court must take account in assessing whether a limit has been demonstrably justified."[78] The *Thompson Newspaper* case rejected that the process of categorization seemingly begun in *Irwin Toy* had ever begun at all. It was, in fact, a consideration of contextual factors. Therefore, the case did not fully abandon the former line of case law that we have explored; instead, it cast those cases in a new light. Where previously categories were drawn, and less interventionist standard of review were used, now context would prevail, with all factors considered in totality to see if particular determinations were worthy of deference. The complexities of the case could now be taken into account, rather than a category being thrown into turmoil when a case came along that straddled a divide, such as a criminal law that clearly defends the interests of a vulnerable group, or seemingly low-value speech that in fact had a political character.

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[74] See *ibid* at [113]; [115].
[75] *Ibid* at [91].
[76] *Ibid* at [117]-[118].
[77] *Ibid* at [90].
[78] *Ibid*.

In the later case of *Lavoie v Canada*,[79] Bastarache J restated that the *Oakes* test "will be applied with varying levels of rigour depending on the context of the appeal."[80] He considered that since interests were being balanced, "some degree of deference is required in the application of *Oakes.*"[81] On the other hand, he noted that the group whose interests the law defended was not a particularly vulnerable one, and that there was no complex scientific evidence in question. One can take from this that the amount of deference the judge extended in this case is not particularly great.

The departure from categorisation evident in the *Lavoie* case has made it subject to some criticism. Without expressly demanding a categorical approach, Johnson's critique of *Lavoie*, which centres on deference not being adequately justified and too freely given, amounts to a critique of the move in *Thompson Newspapers* to a more contextual approach.[82] He says "deference cannot be allowed to vaguely hover over the circumstances of a given appeal."[83] The changes that took place after *RJR MacDonald,* he believes, led to "unpredictable and arbitrary results."[84]

However, Johnson fails to grasp the extent of the difference between these two approaches. The attempt to create categories was an alteration of the standard of review; the standards were more interventionist in certain categories, and less interventionist in others. It made broad, *a priori* assumptions about certain types of cases, and altered the standard of review for those types of cases accordingly. This was shown to be a very blunt approach. The categories were not fully thought out, and so cases arose where the category would insist on a more or less interventionist standard being applied where this was not appropriate in the circumstances of the case. The move to contextual considerations does allow deference to "hover over" cases, but it does so in order to avoid inappropriate and blunt variations in the level of interventionism. It acknowledges that some of these concerns are better dealt with in the context of particular decisions rather than as higher-level, often oversimplified assumptions about different classes of cases.

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[79] [2002] 1 S.C.R. 769; 2002 SCC 23 (CanLII).
[80] *Ibid* at [53].
[81] *Ibid.*
[82] Alyn Johnson, "Abdicating Responsibility: the Unprincipled Use of Deference in *Lavoie*," 42 Alta. L. Rev. 561 2004-2005.
[83] *Ibid* at 569-70
[84] Leon Trakman, William Cole-Hamilton, Sean Gatien, "*R v Oakes* 1986-1997: Back to the Drawing Board," 36 Osgoode Hall LJ 83 at 107.

I will later argue that the contextual approach ultimately adopted by the Court was perhaps improved by the lessons learned during the years of categorization.

Relevant Contextual Factors

The rise and fall of categories provides insight into the factors that are relevant in a contextual approach, and gives us a broader understanding of the relationship between the deference, interventionism, and standards of review than the narrative of categorisation by itself. I will canvass these factors and discuss the rationale underlying each. As we will see, these factors are not analytically distinct, and they overlap in a variety of significant ways.

Expertise

The first rationale for deference seen in Canada was the expertise rationale. This was one of the concerns underlying the criminal/civil distinction in *Irwin Toy*. Criminal matters, and those involving adjudication and the judicial process, are matters within the peculiar competence of the courts. The lack of particular expertise in most areas of civil law might explain a desire to defer; the Court would claim no special expertise in the retail labour issues central to the *Edwards Books* case. Choudhry suggests that expertise underlay the additional deference shown by the Court in other labour relations cases.[85]

Scarcity of resources, and the expertise required to decide upon their distribution, was evident in the jurisprudence of the Supreme Court.[86] David Wiseman has argued that lack of expertise in management of finances has resulted in judicial reluctance to intervene in respect of many social and economic entitlement cases, though these decisions also involve concerns about the democratic legitimacy of courts and problems of incomplete evidence and are not solely based on competence.[87] This was seen in Dickson CJ's comments in *Irwin Toy*.[88]

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[85] See Coudhry, note 41, at 512. The cases in question are *McKinney v University of Guelph* [1990] 3 SCR 229; 1990 CanLII 60 (SCC) and *R v Advance Cutting* [2001] 3 S.C.R. 20; 2001 SCC 70 (CanLII).

[86] See, for example, *Irwin Toy* [1989] Canlii 87 at 70 and 71.

[87] See David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument," 2006 51 McGill LJ 503 at 505. Wiseman acknowledges, at 508, that legitimacy plays a separate role in adjudication of matters involving resources and social entitlements. Additionally, Some of the cases cited in his analysis, for example *Chaoulli v Quebec*

Deference might be appropriate when decisions are made by the legislature in area which it is considered to be expert. When considering this as a contextual factor, the comparative advantages of particular organs of government in drawing up policy now seem to manifest in a different way.[89] Rather than simply thinking the legislature more expert, the Court has instead focused on the way in which legislative choices are made, and offered deference in the respect of the standard of proof required of the State accordingly, or focusing on the democratic character of legislative choices. These concerns, taken together, underlie a great deal of the deference shown to the legislature by the courts.

Speculative Measures and Evidence

Rather than focusing on expertise in and of itself, the Canadian courts have extended deference to legislative consideration of speculative or inconclusive evidence. This deference has manifested in the relaxation of the standard of proof required of the State when justifying limitations of rights. Grounded by the "demonstrably justified" language of s. 1, the *Oakes* Court required significant empirical proof of contentions the State made in its attempts at justification. Evidence needed to pass various parts of the test should be "cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit."[90] McLachlin J in *RJR MacDonald* said that the *Oakes* test was "an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions."[91]

This focus on empirical proof turned out to be problematic. As Choudhry puts it:

[2005] 1 SCR 791; 2005 SCC 35 (CanLII) might fall more comfortable under the next category of speculative or inconclusive evidence, since the Court expressed difficultly in evaluating the social science evidence about private healthcare placed before it.

[88] See *Irwin Toy* [1989] Canlii 87 at 70, where discussing the problem of conflicting and well founded demands on the resources of the State, he said "Democratic institutions are meant to let us all share in the responsibility for these difficult choices." As we will see in the next section, Dickson CJ also had an extensive focus on indeterminate, complex evidence.

[89] Wiseman would argue that almost all of the factors discussed here are various challenges to the competence of the court, and that ultimately, lack of expertise underlies the entire scheme of deference. See Wiseman, note 87. As I will argue below, a clash of interests rationale could have force that is independent of competence, such that even if the courts were undeniably better at making decisions on such matters, deference might still be appropriate.

[90] 1986 Canlii 46 (SCC) at [68].

[91] 1995 Canlii 64 (SCC) at [133].

> Public policy is often based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available.[92]

It was hardly irrational for the Canadian courts to demand cogent proof from the State; indeed, it fits well with the language and tenor of s. 1. Rather, it was the practical effect of this burden that was problematic. Empirical proof seemed a fair demand in theory, but, in practice, there are many areas in which the State will not have such proof, and can never hope to have. To insist that the State justify every measure, and any choice to eschew alternative measures, by reference to empirical, scientific evidence is to condemn many if not most laws to failure. It would, in the words of La Forest J, make it "impossible to govern."[93]

In *Irwin Toy*, there was an issue of inconclusive proof. It was acknowledged that though the State could establish that children aged between two and six years could be manipulated by advertising, the evidence as to the effect of advertising of children up the age of thirteen –the age at which the restriction was lifted– was inconclusive. Dickson CJ was willing to defer to the legislature's determination of the issue:

> If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.[94]

Proof of the reasonableness of an assessment is, of course, not proof of the fact itself. The Court defers to the decision.

This accommodation has not abandoned the requirement for the State to adduce proof entirely;[95] it has merely offered deference in certain cases where empirical proof would be difficult or impossible, and therefore whosoever bore the burden to produce it would invariably lose. When strict empirical proof is not

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[92] Choudhry note 41, at 524.
[93] 1995 Canlii 64 (SCC) at [68], quoting a judge in the lower court.
[94] [1989] Canlii 87 at 66.
[95] Choudhry notes that in *Ford v Quebec* [1988] 2 S.C.R. 712; 1988 CanLII 19 (SCC), the Court held that a complete absence of evidence as to the minimum impairment and proportionality limbs of the *Oakes* test could not be sufficient.

forthcoming, other evidence must be offered to show that the legislature made a "reasonable assessment."

This deference is not absolute: the non-empirical or inconclusive proof the State can adduce might not be enough to justify the State action. In *RJR MacDonald*, McLachlin J said the State, in order to meet its burden of proof, could draw "rational inference from evidence or established truths."[96] Proof might be provided "by the application of common sense to what is known."[97] Her standard was that the State must produce a "reasoned demonstration"[98] with these various types of evidence. On the facts of the case, though the evidence presented did prove some link between advertising and consumption of tobacco, it was insufficient to justify the breadth of the measure, which banned use of tobacco trademarks on any non-tobacco product, including cigarette lighters, and did not attribute health warnings to the government.[99]

The Supreme Court extended deference to the legislature and relaxed the standard of proof required from the State because it came to acknowledge that the legislature had to operate with imperfect knowledge and could not always have empirical proof to justify its actions. There is an expertise concern here: as Dickson CJ noted in *Irwin Toy*, for the courts to draw a new line where no precisely correct line can be drawn would be to substitute one imperfect assessment for another.

However, the Court's assessment might not be any worse than the legislature's;[100] there must be an additional element justifying deference in this instance. It may be democratic legitimacy; when all other things are equal, the legislature's representative function means that its decisions have increased legitimacy.[101]

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[96] 1995 Canlii 64 (SCC) at [128].

[97] *Ibid* at [137]. It should be noted, however, that there is a limit to the extent to which Canadian courts will accept this "proof by common sense." For a detailed analysis of this issue, see Choudhry, note 41, 528-530.

[98] *Ibid* at [129].

[99] *Ibid* at [158]-[159].

[100] Alternatively, it might be that the Court is making a deeper point about expertise; that since assessing imperfect evidence and forming policy is essentially what legislatures do, and therefore they do, in fact perform better imperfect assessments based on partial evidence, inference and common sense.

[101] In *McKinney v University of Guelph*, La Forest J said that the impact of measures such as mandatory retirement were "not matters capable of precise measurement." [1990] 3 SCR 229; 1990 CanLII 60 (SCC) at 84. Such decisions "must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch... This

With the demise of categories, this case-by-case deference to particular determinations, based on the necessarily incomplete nature of the proof and evidence available, is very important. It provides leeway to the state in difficult cases without requiring a categorical dilution of the standard of review itself.

Conflicting Liberties, Interests, and Rights

Alongside the expertise rationale, less intervention in civil law cases was justified by reference to conflicts of liberty. This idea of balancing conflicting interests is very much tied in with the other factors under discussion such as expertise, assessment of speculative evidence and democratic legitimacy. [102] However, it is a standalone consideration bolstered by its relevance to these other factors.

The fact that another person's liberty –a person who is not before the court– is at stake if the legislature's course of action is overturned, is enough to warrant judicial caution. However, in addition to this, the evidence underlying the decision may be complex and inconclusive; the legislature might have expertise in balancing interests and liberties of different sectors of society; the conflict of competing interests may be an indissoluble stalemate, and the most legitimate solution may be one endorsed by a popularly accountable legislature. In those circumstances, restraint is also warranted because the legislature's resolution of the issue may be substantively better than the courts'. Depending on how these concerns combine, the response to conflicting liberties could be deference or non-interventionism.

The problem with non-interventionism grounded on the conflicting interests category is that it has the potential to weaken review in almost every case, because almost every law protects someone's interests on some level. The Canadian courts came to gradually realise this as the criminal/civil category set up in *Irwin Toy*

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does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty." Ibid.

[102] In *Irwin Toy*, *Dickson CJ* expressly linked the balancing of different interests to expertise, assessment of speculative evidence and democratic legitimacy. "When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function." [1989] Canlii 87 at 70.

began to collapse. [103] A more workable distinction might have considered the remoteness of the interest or liberty, which at least would have allowed the Canadian courts to separate those criminal cases where the State was an antagonist to liberty and those where it was directly defending the liberty of others.

A further potential modifier is the strength of interest or liberty the law is defending. In particular, the law could be deployed in defence of other constitutional rights, which would potentially demand even less interventionist review to ensure that in the course of vindicating the constitutional rights of some, the courts do not trample the constitutional rights of others. However, despite some hints at such an approach, it has not been fully developed.[104]

It is possible that the conception of liberty taken in *Oakes* underlies many of the difficulties with the *Oakes* test. Richard Moon puts forward an interesting argument, which suggests that the *Oakes* test's variability in speech cases can also be traced back to the Supreme Court grappling with cases where the individualist conception of liberty seen in *Oakes* proved to be inapposite:

> [I]n freedom of expression cases, the Court is not simply balancing separate interests and giving priority to one value of right over another. Rather, it is making a complex judgment about the realization of individual agency and identity in community life.[105]

Speech, being communication between individuals, has the power to enlighten and inform, as well as mislead, manipulate, harass, and horrify. The Supreme Court's model of liberty would seek to draw a line between these two characteristics, but Moon argues "there is no bright line to be drawn."[106] Consequently, he suggests the *Oakes* test had to be altered to accommodate this reality. He further suggests that

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[103] Cases like *R v Downey* illustrated that even procedural elements of the criminal law, such as burdens of proof, can be deployed in deference of the interests of others.

[104] La Forest J in *Edwards Books* said that "attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected."1986 CanLII 12 (SCC) at [183]. Choudhry suggests that *"Keegstra* can be understood as a case in which legislation protected the rights to freedom of expression of racial and religious minorities by protecting them from the harm of silencing, and *Edwards Books* a case where Sunday closing legislation protected the right to freedom of religion of Sunday-observing retail employees." Choudhry, note 41, at 514.

[105] Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limitations" 2002 40 Osgoode Hall LJ 337 at 365.

[106] *Ibid.*

the problems developing a consistent approach to applying *Oakes* in equality cases is a symptom of the same problem.[107]

The conflicting interests or liberties rationale was initially used as a way to justify a less interventionist standard of review in certain cases. The failure to limit it, however, threatened to deny scrutiny in almost every case. The Canadian courts struggled with this reality, but failed to limit it by reference the remoteness or importance of the liberties the law defends. After the collapse of categorisation, this rationale may be focused more on deference, causing the courts to accept legislative determinations either because they are superior to their own, or are based on speculation or uncertainty.

Vulnerable Groups

Another contextual factor the Canadian Courts will consider in affording deference to the legislature is the extent to which the group defended by the law is a vulnerable group in society.[108] This rationale could modify or nuance a conflicting liberties case, to make sure that the Charter was not used as a regressive tool for the wealthy to undo gains made in the democratic system by less well situated groups.

However, this approach had its own problems. Many groups could be classified as vulnerable, and at various stages children,[109] retail workers,[110] and prostitutes[111] were seen as vulnerable. Exactly what makes one vulnerable in order to trigger this rationale is not clear,[112] nor is it clear whether this vulnerability offers additional normative deference to the legislature's individual determination, or was to change the standard of review by making it even less interventionist. It may have been an attempt to modify the conflicting liberties rationale, but it only

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[107] *Ibid* at 366.

[108] For a recent treatment of minority groups in legislative enactments, see Heather MacNaughton and Jessica Connell, "A Delicate Balance: The Challenges Faced By Our Democratic Institutions In Reconciling The Competing Rights And Interests Of A Diverse Population," (2011) 44 UBCLR 149. See also Caroline Libman, note 66.

[109] *Irwin Toy* [1989] Canlii 87.

[110] *Edwards Books* 1986 CanLII 12 (SCC).

[111] *Downey* 1990 CanLII 34 (SCC).

[112] This resulted in some uncertainty over whether or not this rationale was actually at play in certain cases. See Choudhry, note 41, at 513, who notes that this rationale might explain additional deference afforded to laws protecting religious minorities in *R v Keegstra* and laws protecting women in *R v Butler* [1992] 1 S.C.R. 45; 1992 CanLII 124 (SCC) but that it was never explicitly put forward by the Court. He further notes that the vulnerability of smokers may underlie La Forest J's opinion in *RJR MacDonald*.

added to confusion surrounding it, and its role in the post-categorisation consideration of contextual factors is unclear.

Democracy and Legitimacy

A deep concern about legitimacy of court actions versus the democratic function of legislatures underlies many of the factors under discussion here.[113] After all, the Charter envisages a free and democratic society; democracy is one of the core values that the Charter is founded on. Dickson CJ said in *Oakes* that the "very purpose for which the Charter was originally entrenched in the Constitution" was to ensure that Canada was and would always be such a society.[114] In considering competence and expertise, and the weighing of conflicting evidence, it is clear that the courts feel that if they are no better at answering difficult questions than legislatures, their answers to those questions are not as legitimate as those provided by democratic branches of government. Dickson CJ sees the difficult task of reconciling conflicting interests, and distributing scarce resources, as one of the key representative functions of legislatures. [115] The vulnerable groups category discussed above also has a strong representation element, as the courts are loath to undo victories won by those groups in the democratic process.

This concern has been relied on by the Supreme Court, though with less direct elaboration than one might wish. However, it has also been aware of its own institutional functions, and as McLachlin J said in *RJR MacDonald*, has tried to ensure that this concern does not result in the courts abdicating their own constitutional role of ensuring the government stays within the "limiting framework" of the Charter.[116]

Of course, it can be questioned whether or not the courts have successfully balanced these concerns, and Martha Jackman has argued that, in fact, the courts'

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[113] In his judgment in *RJR MacDonald*, La Forest J tied almost all of these factors to the fact that the legislature was composed of elected representatives of the people: "Seen in this way, it is clear that the Act is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate." 1995 Canlii 64 (SCC) at [70].

[114] *Ibid* at [64].

[115] *Irwin Toy* [1989] Canlii 87 at 70.

[116] 1995 Canlii 64 (SCC) at [136]. She also made it clear that recognition of the socio-economic context of a particular piece of legislation could not be taken so far as "treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge." At [134].

stance has undermined democratic values in particular cases.[117] She bemoans the fact that the Supreme Court has not properly considered the extent to which vindication of rights can enhance democracy rather than undermine it.[118] This would be a misconception similar to the Court's initial view on the relationship between individual liberty and the laws of the State; rather than always restricting and undermining democracy, judicial review and the vindication of rights can serve to enhance it.

To deal with this as a contextual factor, democratic legitimacy could be used to defer to a legislative choice in the event of uncertainty, or a clash of conflicting values. It could also stand alone, with more "democratic" decision receiving more deference. This would involve the court assessing the extent and quality of legislative deliberations.

Strength of the Right

The Canadian courts briefly engaged with the idea that certain rights, being less important than others, should prompt a less interventionist standard of review. This had significant problems, which were discussed above. However, there is a far more fundamental problem with this rationale: it is not a rationale for deference at all; it can only justify a change in the level of interventionism, or deny deference that would offered pursuant to some other rationale.

The strength of the right at question does not alter the particular decision made by the legislature. It does not make the legislative decision more -or less- correct. It does not affect the competence of any body. This is not a rationale for deference; it does not give any reason why the decision reached by the legislature is one that the courts should respect and submit to. It is rather a suggestion that courts be less interventionist because some rights are less important.[119]

If this rationale is to play a role after the demise of non-interventionist categorisation, perhaps it could be seen as a counterargument to deference. When the right in question is particularly strong, and deference might otherwise be offered for some other reason, the former consideration can overbear the latter. Viewed this

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[117] Martha Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under s 1 of the Charter," 34 Osgoode Hall LJ 661.
[118] *Ibid* at 663.
[119] For further arguments that preferred rights should not be a reason for deference, see Brian Foley, *Deference and the Presumption of Constitutionality*, (IPA, 2008) at 118-119 and Chapter 5.

way, this is telling courts not to defer when rights are strong because the consequences of that are more severe. It does not justify deference when weaker rights are at play. There must be some other rationale, say expertise or a clash of interests, to do that. Weak rights are therefore not an argument for deference; strong rights are an argument against it.

Conclusion

We will shortly examine the ways in which the *Oakes* test changed over the years; as we will see, there has been a great deal of change in the standard of proof required of the State, and the importance of empirical evidence. The struggle with interventionism, deference, and categorisation, however, tells the broader story of how the Canadian Supreme Court attempted to rationalise the divergence in its early s. 1 jurisprudence.

The *Oakes* test was premised on the idea that all Charter cases could be dealt with by a generic, unitary formula, which took the facts of a case into account but did not vary the substance of the test in different cases. Later, the Court seemed to realise that this premise was faulty; laws defend liberty, not merely restrain it; courts are sometime no better at making decisions than legislatures, and are sometimes worse; empirical proof for elements of the standard of review would not always be available.

Initially, the Court's response was essentially to alter the test to make it less interventionist. But it also tried to limit this change, by making the less interventionist standard appropriate in only some categories of cases. This process was unsuccessful because though the Court had begun to understand that highly interventionist judicial review would grind the operation of government to halt, it did not yet appreciate how difficult it was to make *a priori* judgments about categories of cases that were consistent and applicable across the board.

Eventually, the Court came to realise that the factors they were considering could not be distilled into the binary choices that categorisation required. What resulted was a confusing oversimplification of complex problems into blunt and poorly tailored categories. The demise of categorisation was the gradual realisation that many of these factors were too complex to be treated this way. Instead of fundamentally altering the standard of review, making it less interventionist, the courts began to offer deference to particular determinations, based on the presence

or absence of certain factors. By changing previously rigid categories into flexible contextual factors, courts could consider whether particular determinations might warrant deference, rather than assuming that all cases in that category were identical.

Of course, there may be problems with this approach. The contextual nature of the new inquiry leads to greater possibility for unprincipled departure from previous cases and principles, relying on the context of the case to differentiate it. This is certainly a potential problem. However, departure from past cases does not have to be unprincipled and arbitrary if it is genuinely guided by contextually appropriate considerations. Moreover, one of the problems with non-interventionist categories is that they are inflexible; increased flexibility is an essential part of any solution.

Whatever the flaws in the categorisation approach in Canada, and even if contextual consideration is a better model to undertake, going through the process taught some very valuable lessons. First, it warned against attempts at universality in the application of the *Oakes* test, and showed the importance of context in applying the various elements of the test.

Secondly, the judgments of the courts, bolstered by a thriving academic literature on the subject, explored when less intervention might be appropriate, and when courts should be deferential to legislative judgments. Courts were able to better understand how these factors played in to a given decision, and therefore better consider them in the contextual approach that was ultimately favoured by the courts. If a contextual approach had prevailed from the outset, these factors might not have been so well understood. The contextual approach would therefore have been more likely to become an opaque exercise, with neither judges nor those reading their judgments understanding the factors that were being taken into account.

Thirdly, it perhaps shows the folly in trying to deal with variability in the applications in standards of review through fundamental alterations to the standard of review. There are too many factors to account for, and even seemingly workable distinctions, such as the one between criminal and civil cases, were shown to be problematic. Inflexible rules cannot account for these nuances, and case-by-case deference is needed, rather than broad decisions to change the level of interventionism of the standard of review.

Having seen how the Canadian courts struggled with deference and interventionism, we must now see how the *Oakes* test changed as it was applied, and how it reflected these developments.

5 – The Evolution of the *Oakes* Test in Canada

We have already seen how the Oakes test came about in Canada, and traced the deference that the Canadian courts used to gradually alter it. This chapter will conclude the discussion of Canada by looking at how each part of the test was applied by the Canadian Supreme Court, and what each part of the test has been used to do. Through this, it can be established what the *Oakes* test really did; what changes it underwent; what parts have proven to be central; and what parts have been largely forgotten.

At the outset, it is important to observe that the Oakes test has not been applied as strictly as its language would suggest. Each part of the test has undergone changes and alterations, often departing in some sense from the original text, either patently or more subtly. Some of this weakening has been the result of contextual deference; others are non-interventionist changes to the test, or non-application of the test.

There are four trends to track in looking at the objectives part of the test. First, there has been no clear metric to measure the importance of objectives, and as a result the strength of this requirement is questionable. Second, the Court has held that subjective purposes should be considered. However, the Court has failed to be consistent in this, and certain cases suggest that objective motivations have been considered. Third, the courts have grappled with the idea of a shifting purpose –a law enacted for one reason, but maintained for another– and, again, have struggled to maintain consistency. Finally, there have been concerns expressed about framing objectives too generally. These many issues make the objectives jurisprudence of the Canadian courts very complex, and somewhat different to the strong, stand-alone test that was envisaged in *Oakes*.

The rational connection test was extremely strong as outlined and applied in *Oakes*. Almost immediately, this position began to weaken, and this gradual erosion will be explored. In addition, the standard of proof set out in *Oakes* has been in large part abandoned for this test, and the self-evidence of rational connection has been sufficient in some cases. More fundamentally, there is an outstanding question as to whether or not rational connection serves as any kind of restraint on legislative action at all, and whether it has any force.

The minimum impairment test has two histories, which are in stark contrast to one another, and even seem contradictory. First, the minimum impairment test was highly diluted in *Edwards Books* and subsequent cases, falling far from its seeming strength in *Oakes*. Second, the minimum impairment test has proven at times to be surprisingly strong in spite of this, being the part of the *Oakes* test most frequently being used to invalidate legislation. Several explanations for the varying strength of this test will be offered, including an extensive analysis of the Canadian courts' strong stance against blanket bans. Having found these rationales wanting, the possibility of the minimum impairment test combining with the proportionality balancing stage will be examined.

Finally, the balancing test in *Oakes* has proven to be a big nothing, having never been used independently to strike down the law. In theory, however, it should be absolutely central to the *Oakes* analysis. The failure of this test will be examined, and some explanations suggested. This will involve a closer analysis of the overlap of minimum impairment and balancing; an analysis of the consequences of a law failing balancing, and why that might make courts wary of invoking it; and an exploration of what the appropriate relationship between minimum impairment and balancing might be, and how the Canadian courts' pursuit of that may have led to these difficulties.

Objectives

The first part of the *Oakes* test, establishing an important objective, is one of the most crucial. The test has strength of itself: an objective must be important in order to pass muster. However, even more significantly, every subsequent step of the *Oakes* test analysis turns on the objective of the law. As such, the objective set out in this first step will significantly impact the rest of the test.

Importance

The *Oakes* test affirmed the need for of an independent assessment of importance for any objective put forward to justify a limitation on rights, which had been first established in *R v Big M Drug Mart*.[1] In setting out the test, Dickson CJ

[1] [1985] 1 SCR 295, 1985 CanLII 69 (SCC) at [81]: "The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct." See Chapter 3, text accompanying note 31-40.

quoted *Big M* to the effect that the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"[2] He provided some minimum guidance as to how this would work. To be sufficiently important, the concerns had to be "pressing and substantial"[3] and not trivial, and also not "discordant with the principles integral to a free and democratic society."[4] On its face, this seems to suggest "rigorous scrutiny" of objectives.[5]

This rigorous scrutiny has not come to pass, however. Indeed, this part of the test "has been satisfied in all but one or two of the Charter cases that have reached the Supreme Court"[6] and these are cases that predated the *Oakes* test.[7] Moreover, the importance of objectives is often found to be basically self-evident. In *Oakes*, the importance of combating drug trafficking was, "to a large extent, self-evident."[8] In *Edwards Books*, evidence on the importance of a communal rest day was sparse, but the Chief Justice accepted the "self-evident desirability" of communal rest days.[9] This self-evidence apparently derived from the fact that communal leisure activities are "amongst the simplest but most profound joys that any of us know."[10] Self-evident importance is an accepted proof of importance.

An objective has almost never been found to be insufficiently important or too trivial to pass this stage of the *Oakes* enquiry. It might be that no law with such an objective has ever made its way before the courts. It might be that the courts would be loath to accuse the legislature of acting for trivial or illegitimate reasons if other possibilities are open; they might hypothesise the objective to some degree, or

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[2] *Oakes* [1986] 1 S.C.R. 103; 1986 CanLII 46 (SCC) at [69] quoting *Big M* at [139].
[3] *Ibid* at [69]
[4] *Ibid.*
[5] Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-23.
[6] *Ibid.*
[7] These cases were discussed in Ch 3. First, in *Quebec School Board* the Court held the objective to be, in essence, the denial of the right. If the case was about objectives, that means that the Court also implicitly rejected either that the measure aided Quebec's pursuit of a "distinct society" based around the French language or held that the objective of achieving such a society was not legitimate. However, in the later case of *Ford v Quebec* [1988] 2 SCR 712; 1988 CanLII 19 (SCC) the similar, if perhaps broader, objective of protecting the vulnerable position of the French language was recognised as legitimate. The law in question, mandating that public signs be in French only, was ultimately struck down as disproportionate. See Hogg, note 5, at 38-24. Second, in *Big M*, the objective was to restrict freedom of religion, which was directly incompatible with Charter values. However, as will be discussed below, this was held to be the objective of the law because of two unusual features of how the objective was ascertained, which may explain why this sort of problem has not recurred in subsequent cases.
[8] [1986] 1 S.C.R. 103; 1986 CanLII 46 (SCC) at [76].
[9] 1986] 2 SCR 713; 1986 CanLII 12 (SCC) at [126].
[10] *Ibid.*

accept the government's submission on what the objective is, which will surely meet the importance requirement.

What is clear, however, is that the *Oakes* test's assessment of the importance of objectives has not taken on the independent strength that the *Oakes* case suggested it should have. Choudhry notes that the language which embodied this strength –"pressing and substantial"– has given way to lesser language in certain cases.[11] The objective was in one case required only to be "valid"[12] and in another case "sufficiently important."[13] Validity, in particular, might be a more honest reflection of what the courts actually require of an objective under the *Oakes* test.

Though it seems like a significant departure from the interventionism in *Oakes*, the work done by the separate importance requirement was largely rhetorical. The rhetorical benefit of adopting a dual approach was that certain objectives could be rejected out of hand. Whatever justificatory work might be done by means of this independent importance requirement should also be done in the final balancing test, where the importance of the objective is again considered. An insubstantially important objective would have very little chance of being successfully balanced against any violation of rights.

This feature of objective analysis has potentially deleterious consequences. The fact that the objective has been endorsed as sufficiently important to justify, in principle, limiting rights, might make the overall balancing analysis seem less important. Since the objective is considered, in principle, sufficiently important to justify rights restrictions, weighing the objective against the right appears to be redundant. This argument has been advanced by a leading Canadian commentator.[14] When the importance analysis is in practice extremely weak, however, it cannot justify failing to weigh the right against the objective in the final balancing exercise. This illusory importance assessment can therefore compromise the coherence of the standard of review. This will be discussed further in the context of balancing.

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[11] Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter's* Section 1" (2006), 34 SCLR (2d) 501 at 509-10.
[12] *R v Whyte* [1988] 2 SCR 3; 1988 CanLII 47 (SCC).
[13] *Prostitution Reference* [1990] 1 SCR 1123; 1990 CanLII 105 (SCC).
[14] See Hogg note 5, at 38-43. As discussed below, suggests that balancing is irrelevant in light of the existence of the important objective requirement. A recent article has drawn on Hogg's observation, amongst others, to suggest the abolition of balancing in certain cases. See Chanakya Sethi, "Beyond Irwin Toy: A New Approach to Freedom of ExpressionUnder The Charter," (2012) 17 Appeal 21.

Subjective and Objective Intention

Academic commentators noted that the Chief Justice gave "very little guidance"[15] as to how objectives would be ascertained. The judgment in *Oakes* did not indicate how the objective could be found, or how narrow or broad it should be.

The *Big M* case indicated, even before *Oakes*, that the legislature's subjective motivations for a law would be sought out, and objectives would not be hypothesised. The title of the Lord's Day Act and its surrounding history left the Court in no doubt that finding "a secular purpose is, on the authorities, simply not possible."[16] Dickson CJ said that "[p]urpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable."[17] It follows from this that objectives cannot be hypothesised, and that the relevant objective is the objective at the time of passage of the Act, not a motivation for its continuance in force or the motivation that the legislature might have were it to pass the Act today.

Despite the insistence in the *Big M* case that the true subjective motivations of the legislature are important, this has not always led to intense scrutiny of legislative motivations. In *Oakes* itself, the objective was ascertained from the Crown's submission on the matter.[18] There was no independent analysis by the court of what the objective might be. Considering the articulated standard of proof that Dickson CJ seems to place on the state in respect of this test, this seems unusual. The hypothesisation of objectives had been rejected in *Big M*. It is unclear why the Court in *Oakes* accepted the State's assertion without question, or how the Court could be sure that this was true intention of the legislature in that case. This undermines the strict requirement of subjectivity. Moreover, the Oakes test required "demonstrable justification" of the law; the failure of the Court to show how the objective was proven by the State is a failure in itself.

There is also an interesting consideration of objectives in *R v Chaulk*.[19] There, the Court in fact corrected the State's submission as to what the objective of the measure was. Two State Attorneys General submitted that the purpose of the

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[15] Christopher M. Dassios and Clifton P. Prophet, "Charter Section 1: The Decline Of Grand Unified Theory And The Trend Towards Deference In The Supreme Court Of Canada" 15 Advoc. Q. 289 1993 at 293.
[16] 1985 CanLII 69 at [78].
[17] 1985 CanLII 69 at [91].
[18] 1986 CanLII 46 (SCC) at [73].
[19] [1990] 3 SCR 1303; 1990 CanLII 34 (SCC).

reverse onus insanity deference at issue in that case was to attribute moral blameworthiness: it helped not to brand as criminals those who were morally blameless for their actions.[20] Lamer CJ said that this objective "miss[ed] the point."[21] The State's framing of the objective was more directed to the defence itself rather than the reverse onus of proving that defence; indeed, the reverse onus clause hindered the stated objective, making it more likely that a morally blameless insane person would be branded a criminal due to the inability to establish insanity. The reverse onus, in fact, was directed toward relieving the state of the otherwise impossible burden of disproving insanity in every case:

> The answer can only be that Parliament wished to avoid placing on the Crown the impossibly onerous burden of disproving insanity and to thereby secure the conviction of the guilty (who are not "sick") by defeating acquittals based on a doubt as regards insanity.[22]

Several points are worth noting about this unusual case. First, Lamer CJ rejected the State's suggested objective of the law because he found it implausible. However, he replaced it with one that was more plausible. One might have thought that if the objective of the law did nothing to explain the measure that restricted rights, as happened here, it would fail rational connection and be found to be invalid.[23] Instead, the objective is changed to one that ultimately justifies the restriction on rights.

Secondly, though such a course might have been advisable if it was established that the Crown had negligently mischaracterised[24] the true purpose of the statute's drafters, there was no evidence apparent in *Chaulk* to suggest that

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[20] *Ibid* at 37.
[21] *Ibid*.
[22] *Ibid* at 38.
[23] An example of this might be provided by *R v Benner*, discussed below at note 73 and accompanying text.
[24] Indeed, it may be that this characterisation of the objective was intentional. There were two issues in the *Chaulk* case: first, whether the statute required understanding that the act was morally as well as legally wrong, and second, whether the reverse onus clause was a justified limitation on rights. While the objective put forward by the Attorneys General made little sense in relation to the second issue, it may have assisted them in arguing the first point: that the correct interpretation of the insanity defence was that if the defendant understood the act was wrong in a legal sense, he or she was not insane, even if he or she did not understand the act to be morally wrong. If the purpose of the insanity defence is to distinguish those who are morally blameworthy from those who are sick, then that could indicate that any understanding of the wrongfulness of the Act should preclude the defence, as such a person was still bad and not merely sick. The objective pleaded therefore might have aided the State in this respect. The Court did not rule for the Crown on this point; having lost this point, the objective was recast by the Court to fit the second argument the Crown was making.

another objective had driven the legislature. Lamer CJ came up with the objective without any specific evidence that the legislature had this intention; rather he hypothesised from the means what the ends must be, as illustrated when he said: "The answer can only be..." He extrapolated an acceptable end by looking to the means.

I do not mean to suggest that there is no good case for hypothesisation of objectives in this manner. However, the practice is dissonant with the Canadian courts' stated attitude to objectives, which is focused on subjective intention. Indeed, the courts seem, at this point, to abandon their stated reliance on subjective motivations, and in fact use the objective motivation behind the law.[25] It undermines the contention that it is the subjective motivation of the law that really matters, and again fails to demand the demonstrable justification from the State that the *Oakes* test requires.

Chaulk also shows the risk of courts changing their own standards in particular cases. One wonders if a court that was more hostile to this specific law would have been as kind.

Shifting Objectives

The *Big M* case refused to consider shifting objectives. The government in that case had been forced, to avoid other constitutional problems, to argue that the purpose of the law had shifted over time.[26] Accepting a hypothesised objective in this case thus required the acceptance of the shifting purpose argument, something the Court was unwilling to do. Dickson CJ rejected shifting purpose arguments for several reasons,[27] one of which was that Canadian law was concerned with subjective motivations, with the idea of a shifting purpose being in "stark contrast to

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[25] Further evidence of this is found in examining the rational connection test, as discussed below.

[26] There was an additional possible constitutional problem with the Lord's Day Act, relating to Federal powers. For the Act to be valid Federal Legislation, it had to be justified within the Federal Government's criminal law power under s. 91(27) of the Constitution Act, 1867. It had previously been held that Sunday closing laws were included within that power because the common law had traditionally encouraged Christian behaviour.1985 CanLII 69 at [17]. Therefore, if the government contended that the purpose of the law was something other than encouraging religious observance, the law would be *ultra vires* the Federal Government. Therefore the government had to argue the purpose had shifted; an objective that would grant the law *vires* had been active at the time of its enactment, but a new objective now prevailed.

[27] His other concern that it might leave statutes open to review if they were enacted and upheld as constitutional pursuant to a valid purpose, but then later were maintained for an invalid purpose, which he felt would undermine the doctrine of *stare decisis* and encourage repeated challenges to statutes. *Ibid* at [90].

fundamental notions developed in our law concerning the nature of 'Parliamentary intention'."[28]

However, the rejection of shifting purposes was reconsidered in *R v Butler*.[29] The law in question –which banned the sale of obscene materials such as pornography– was originally enacted with the aim of preserving societal morality.[30] The fact that something was morally opprobrious was not, of itself, a sufficient justification for restricting freedom of expression. The protection of morality had to be shown to be part of "safeguarding the values which are integral to a free and democratic society."[31] The overriding objective of the provision was, according to Sopinka J, the avoidance of societal harms associated with obscene material, rather than merely imposition of morality.[32] He rejected that the Court had adopted a shifting purpose; he said that the objective of the law had always been the prevention of harms associated with obscenity, and the only shift was a "permissible shift in emphasis"[33] between the community standards of what was harmful when the law was passed and those obtaining at the time the challenge was heard. In the former time, the harm may have been the moral degradation of society; now, it was the harm that obscene pornographic materials might have on sexual equality that was of chief concern.[34]

This does seem, in fact, like a shifting objective, but whether or not *Butler* is inconsistent with *Big M* is not of great concern. What is significant is that in *Butler* the objective was ascertained in a manner that permitted it to be extremely broad. It was ascertained in a way that made it broad enough to accommodate both the original harm that was targeted and what Sopinka J saw as the current and most pressing harm. Of course, it would be equally possible –and perhaps more plausible– to treat the two harms as two more specific objectives rather than a shift in emphasis within a broader objective. To this extent, Sopinka J did hypothesise the objective to some extent: he chose to frame the legislature's motivation in a broad way rather than a narrow one, and so avoid conflict with the principles enunciated in *Big M*. This issue of generalised objectives deserves separate consideration.

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[28] *Ibid* at [91].
[29] [1992] 1 S.C.R. 452; 1992 CanLII 124 (SCC).
[30] *Ibid* at 47, per Sopinka J: "[I]ts dominant, if not exclusive, purpose was to advance a particular conception of morality."
[31] *Ibid* at 48.
[32] *Ibid* at 49.
[33] *Ibid* at 51.
[34] *Ibid* at 53.

The Generality of Objectives

In contrast to this, Hogg[35] highlights the case of *R v Zundel*.[36] Here, a majority of the Supreme Court held that it would not regard the purpose of a criminal law preventing the spreading of false news as having shifted from its original emphasis of the "prevention of deliberate slanderous statements against the great nobles of the realm"[37] to its use in the case in question, the prosecution of Holocaust denial.[38] McLachlin J felt that framing the law as aiming to prevent the harms resulting from falsehood was too broad. The shift in question was

> no shift in emphasis with regard to the purpose of the legislation – this is an outright redefinition not only of the purpose of the prohibition but also of the nature of the activity prohibited. To convert s. 181 into a provision directed at encouraging racial harmony is to go beyond any permissible shift in emphasis and effectively rewrite the section.[39]

Unwilling to impute a modern objective to the law, the court struck it down for failing to have a sufficiently important objective. This judgment therefore reasserted the shifting purpose doctrine and attempted to limit the extent of the loophole created. Aside from a few dissenting opinions, the soundness of the shifting purpose doctrine has not been contested.[40]

The danger of overly general objectives was again highlighted in *RJR MacDonald*:

> Care must be taken not to overstate the objective. The objective relevant to the s.1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the

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[35] Hogg, note 5, at 38-27.
[36] [1992] SCR 731; 1992 Canlii 75 (SCC).
[37] *Ibid* at 39.
[38] The law in question, s. 181 of the Criminal Code, which provided: "Every one who willfully publishes a statement, tale or new that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment a term not exceeding two years." Zundel had published a pamphlet written by a British National Front member entitled "Did Six Million Really Die?" that alleged the Holocaust was a fabrication. The Supreme Court found that the pamphlet's contentions were spurious, based on fabricated evidence and authorities.
[39] *Ibid.*
[40] In the *Advance Cutting* case, Bastarache J, in dissent, suggested that the *Oakes* test required the Court to look at the motivation currently underlying the law, not the historical intention behind its passage. 2001 SCC 70 (CanLII) at [45].

> objective is stated too broadly, its importance may be exaggerated and the analysis compromised.[41]

It is clear that the Canadian courts understand the dangers of broad and very general objectives. The statements in *RJR* indicate, in fact, an acute awareness that the only pertinent objective is the reason for rights being limited, not the objective of the measure overall.[42] Similar awareness of this danger was shown in *Sauvé v Canada*, when the court noted that "vague and symbolic objectives make the justification analysis more difficult" as they "tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms."[43]

However, two problems persist. First, in spite of this savvy awareness of the danger of overly general objectives, one still could not say that the objective analysis of the *Oakes* test has ever shown independent force. In response, one could argue that part of the work in finding illicit motivations may be done by the rational connection test, as we shall see below. Moreover, even if objectives do not fail the independent test of objectives, there may still be an advantage to the narrow definition of objectives when it comes to the application of the rest of the test.

The second problem is that the difference between a narrow and a broad objective is not easy to distinguish. Though courts have said on several occasions that objectives should not be too broad, it is not clear where that line is drawn. There is no guidance on the matter. Similarly, the difference between a shifting purpose and a shift in emphasis is not clear or easy to establish. It seems eminently possible that a court could choose a broad purpose when it wished to, as in *Butler*, or a narrow one on other occasions, as in *Zundel*.[44] It might not be readily apparent where this is appropriate and where it is not.

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[41] [1995] 3 S.C.R. 199; 1995 CanLII 64 (SCC) at [144] per La Forest J, dissenting. Emphasis original. The danger of loosely framed objectives was similarly accepted other judges, such as Major J at [207].

[42] A good example of this is also provided by the *Chaulk* case. As noted above, Lamer CJ rejected the objective submitted by the State because it explained the insanity defence itself, not the need for a reversal of the burden of proof in relation to that defence. Instead, the judge set out an objective for the reverse onus clause.

[43] [2002] 3 SCR 519, 2002 SCC 68 (Canlii) at [22]. In that case, the State had sumbitted that the denial of the right to vote was denied to prisoners to enhance respect for the rule of law, and to enhance the punishment surrounding criminal sanctions. As will be discussed below, the court doubted, but did not reject outright, these objectives.

[44] *Irwin Toy* [1989] Canlii 87 nuanced this further by stating that though *ex post facto* objectives could not be put forward by the State, the State could use the most modern evidence to show that the objective is important and pressing. The Court similarly conceded that an objective that was not pressing and substantial at the time of enactment could become pressing and substantial over time.

In summary, the Canadian courts have in essence abandoned objective assessment as a standalone test. There is little or no independent strength in this assessment. However, there is some rigour in how the Canadian courts approach the ascertainment of objectives. Purpose shifts are generally impermissible, and the subjective motivation of the legislature that passed the measure should generally be considered. Consideration of shifting emphasis also focused the courts' attention on another potential problem: objectives that are overly broad or general. Such objectives have the potential to frustrate not only the objective portion of the *Oakes* test but also the tailoring and balancing portions of the test. Awareness of these problems makes them less likely to occur, even if there remains some difficulty in distinguishing a legitimately broad objective from an overly general one.

Rational Connection

Rational connection between means and ends tests how well the means chosen are tailored to the objective pursued. In the words of *Oakes*, it tests if the means chosen are "carefully designed to achieve the objective in question."[45] As discussed previously, in the *Oakes* case, this tailoring requirement was applied with great vigour, and the law failed this test.[46]

There are three ways in which this test has been altered since *Oakes*: first, the express erosion of the stringent over-inclusiveness requirements of *Oakes*; second, the lax standard of proof; and third, the impotence of this limb of the test after the first two points have been taken into account, and the fact that very few laws have ever been invalidated pursuant to it. This latter point raises questions about whether rational connection in any way restricts legislative freedom of action in respect of limiting rights.

Eroding the Stringency of *Oakes*: Over- and Under-inclusiveness

The shift away from the strict standard set out in *Oakes* began *Edwards Books*, as outlined in a previous chapter. Dickson CJ abandoned the strict control on over- and

[45] *Oakes* 1986 CanLII 46 (SCC) at [70].
[46] *Ibid* at [77].

under-inclusivness.[47] The reasons for this are complex, and discussed in the previous chapter. Here, the extent and nature of the retreat will be examined.

The notion of careful tailoring and strict inclusiveness standards were replaced by the markedly weaker requirement that the means further the objective, and issues of over-inclusiveness were largely forgotten. In *Rocket v Royal College of Dental Surgeons of Ontario*[48] several dentists were prosecuted for violating a dental services advertising ban. They challenged the constitutionality of the ban, claiming it to be a violation of their s. 2 right to freedom of expression. The Supreme Court ultimately agreed that the law was unconstitutional. However, the Court held that that the law was rationally connected to the objectives –"promoting professionalism and avoiding irresponsible and misleading advertising"[49]– because these objectives would "clearly be furthered" by the law.[50] Furthering an objective is something altogether different from being carefully designed to achieve it. Several commentators have noted that this case took a more relaxed view of fit and inclusiveness than *Oakes* had.[51] As Dassios and Prophet noted, "it was certainly open to the court to reason that the broad prohibition on advertising caught advertising which did not mislead or otherwise detract from the image and repute of the dental profession." [52] The *Oakes* test had gone from abhorring over- and under-inclusiveness to finding that "any means which somehow furthers a *bona fide* legislative objective is rationally connected, notwithstanding any problems of fit or inclusiveness."[53] This "minimum rationality"[54] approach requires only a cursory link between objective and right.

R v Downey[55] provides another example of how far the *Oakes* standard fell in this respect. The law in question made a criminal offence of living off the avails of prostitution, and presumed, until the contrary was proven, that anyone living with a

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[47] "In drafting its statute, the legislature can, if it wishes, create categories of retail business which are exempted, even though some unexempted businesses may sell some of the same products. Legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the *Charter*, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concerns for the drafters of such legislation."1986 CanLII 12 (SCC) at [130].

[48] [1990] 2 S.C.R. 232; 1990 CanLII 121 (SCC).

[49] *Ibid* at 21.

[50] *Ibid.*

[51] Peter Hogg, "Section 1 Revisited" (1992) 1 NJCL 1.; Choudhry, note 11, at 511; Dassios and Prophet, note 15, at 298.

[52] Dassios and Prophet, note 15, at 298.

[53] *Ibid.*

[54] This term is used by Dassios and Prophet, note 15, Choudhry, note 11.

[55] [1992] 2 S.C.R. 10; 1992 CanLII 109 (SCC).

prostitute was living off such avails. The law was very similar to the law that was held to be over-inclusive in *Oakes*, but was upheld by the majority of the Court as a legitimate way to target pimps.[56] However, this law was breathtakingly over-inclusive having regard to the objective of prosecuting pimps; it presumptively targeted anyone who lived with a prostitute. Not everyone who lives with a prostitute is a pimp, and even then not everyone who lives off the avails of prostitution is a pimp. As McLachlin J said in dissent:

> the required logical link is lacking, rendering it both irrational and unfair. It cannot be said that it is likely that one who lives with or is habitually in the company of a prostitute is parasitically living on the avails of prostitution. It is a possible inference, reasonable in some cases, but not in all or even in most. Spouses, lovers, friends, children, parents, room-mates, business associates, providers of goods and services – all of these may live with or be habitually in the company of a prostitute.[57]

Despite these two problems of tailoring, the rational connection test was passed.[58]

The suspicion of over-inclusiveness in *Oakes* was not entirely removed, though it was substantially weakened.[59] Under-inclusiveness is also an issue of rational connection, particularly if close tailoring is required. Leaving out a substantial portion of those that logically should be targeted by reference to the objective brings the close tailoring of the law into question. However, under-inclusiveness was rarely taken seriously by the Canadian courts.

The case of *McKinney v University of Guelph*[60] introduced a doctrine of incrementalism. The case was a challenge to a mandatory retirement age of 65 on the grounds that it violated the equality guarantee in s. 15 of the Charter. In the course of finding the mandatory retirement age constitutional, the Court said:

> [A] Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance

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[56] The majority of the court held securing the conviction of pimps was crucial, as they perpetrated violence against prostitutes, and were responsible for many of its social ills. *Ibid* at 30.

[57] *Ibid* at 45. Interestingly, she had authored the majority opinion in *Rocket*, lowering the standard. La Forest J also dissented on broadly similar grounds. *Ibid* at 11.

[58] *Ibid* at 35. Cory J, for the majority, held that this was a necessarily broad measure, because convicting pimps was very difficult, with cooperation not forthcoming from prostitutes due to fear and intimidation.

[59] The line of overbreadth line of cases also kept it alive. See *R v Heywood* [1994] 3 SCR 761; 1994 CanLII 34 (SCC). Hogg, note 5, at 47-55–47-56.

[60] [1990] 3 S.C.R. 229; 1990 CanLII 60 (SCC).

> possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety.[61]

Under-inclusiveness can almost always be justified as the first step in an incremental process. Consequently, equality problems can be dismissed and tailoring anomalies explained by reference to a larger plan that may or may not ultimately be carried out.

The Standard of Proof

In addition to this clear and express dilution of the test, the Canadian courts have also been very loose in the proof they have required to establish rational connection. They have in essence accepted self-evidence as a means of establishing rational connection, further weakening the rational connection enquiry.

In *RJR MacDonald v Canada*,[62] the objective of the law banning the advertising of tobacco, was to reduce tobacco usage. After a lengthy trial, the trial judge found that tobacco use would decrease with or without a ban on advertising, and found the evidence to the contrary unpersuasive. Consequently, the law failed rational connection. However, the Supreme Court, though divided on the case in other respects, unanimously held that the law passed rational connection, either on the basis of a "common-sense connection"[63] or that evidence, though inconclusive,[64] "establishes that it is reasonable or logical to conclude that there is a causal link between tobacco advertising and unattributed health warnings and tobacco use."[65] Most of the elements of the law in the *RJR* case satisfied this test.[66]

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[61] *Ibid* at 96, per La Forest J. Note that the judge characterized this as an issue of minimum impairment, as the right to equality is impaired less severely, perhaps, by a well-tailored system. It would seem to me that, outside of the equality context, under-inclusiveness is an issue of rational connection, as including other people within a scheme does not necessarily lessen the restriction on rights of those already within the scheme, and calls the objective into question.

[62] [1995] 3 S.C.R. 199; 1995 CanLII 64 (SCC).

[63] *Ibid* at [86], per La Forest J in dissent.

[64] *Ibid* at [158].

[65] *Ibid* at [157] per McLachlin J.

[66] However, one element of the law did not survive rational connection. The prohibition on use of tobacco logos on non-tobacco products such as cigarette lighters was so tenuous as not to display any link based on common sense or logic. *Ibid* at [159].

Deference has also been offered in several cases to the determination made by the legislature that the means will achieve the ends. In *Lavoie v Canada*,[67] a case concerning citizenship-based employment restrictions in the Canadian public service, the majority of the Court held that the scheme was rational because parliament thought it to be the case, and the international community agreed:

> Parliament is entitled to some deference as to whether one privilege or another advances a compelling state interest. In this case, Parliament's view is supported by common sense and widespread international practice, both of which are relevant indicators of a rational connection.[68]

Why rationality is bolstered because of international practice is unclear; it seems that enough people acting irrationally could, by this logic, be found to rational. However, the primary basis for the finding of rational connection was that Parliament thought its aims were advanced by the measure.

McLachlin CJ dissented in this case on the basis of rational connection, offering arguments for why the measure in question undermined the State's objectives rather than furthering them.[69] The government "introduced no evidence" to support connection to the objectives it claimed to pursue.[70]

Through relaxation of the standard of proof and the granting of deference to the legislature, rational connection was further diluted. This also risks variability: self-evidence is not a clear-cut concept, and by not requiring proof to be adduced in some cases, it leaves open the possibility in cases like *Lavoie*, where rational connection seems far from self-evident, that the test will still be passed.

The Impotence of Rational Connection

The rational connection test as set out in *Oakes* was gutted by subsequent cases. What was left over after that process was a weak examination of tailoring to the objective. Consequently, very few cases have ever failed the rational connection portion of the *Oakes* test. Dassios and Prophet note that the application of the test is "marked by extreme deference."[71]

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[67] [2002] 1 SCR 769; 2002 SCC 23 (CanLII).
[68] *Ibid* at [59] per Bastarache J.
[69] *Ibid* at [9]-[18].
[70] *Ibid* at [16].
[71] Note 15, at 296.

Hogg suggests that only one other case has failed rational connection in this way:[72] *Benner v Canada*.[73] In *Benner*, Canada's citizenship laws were challenged by discriminating between those born outside of Canada to a Canadian mother as opposed to those born outside Canada to a Canadian father. The requirements for citizenship for the former class were more rigorous than for the latter. The justification put forward by the State was the need to screen potential citizens to guard against the entry of dangerous persons, an objective that the Supreme Court accepted to be important.[74] Mr Benner had failed to pass the more rigorous checks because of a prior murder charge which had resulted in him pleading guilty to manslaughter. However, Iacobucci J held that the law failed to pass the rational connection test; there was no convincing reason to distinguish between the dangerousness of persons based on whether their mother or their father was a Canadian citizen:

> The relevant question is whether the discrimination is rationally connected to the legislative objectives. We must therefore ask ... whether it is reasonable to make these demands only of children of Canadian mothers, as opposed to those of Canadian fathers. There is clearly no inherent connection between this distinction and the desired legislative objectives.[75]

The problem in *Benner* was one discussed in the context of objectives: stating the objective as the objective of the law rather than the objective of the particular part of the law that limited rights. Hogg suggests that the law should have failed at the objective stage: the objective offered was not related to the restriction, and the real reason for the distinction being drawn was a side-effect of the way in which the Citizenship Act had developed, which was clearly an inadequate purpose.[76] This highlights a perhaps more important observation: that rational connection's most useful function is indirect scrutiny of objectives.

One can sympathise with Hogg's contention that the rational connection test has "very little work to do,"[77] or with Dassios and Prophet's less charitable formulation of the same point: "It remains a mystery ... as to why this branch of the

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[72] Hogg, note 5, at 38-33.
[73] [1997] 1 SCR 358; 1997 CanLII 376 (SCC).
[74] *Ibid* at [94].
[75] *Ibid* at [95].
[76] Hogg, note 5, at 38-33.
[77] *Ibid* at 38-34.

Oakes test should even exist..."[78] However, as argued in detail in Chapter 2,[79] rational connection serves to test objectives where it cannot be established that the objective pursued was an illicit or invalid one. This can be seen in *Benner*, where the objective pleaded by the State had yielded no explanation for why the restriction of rights was necessary at all. Since another objective (or, in the *Benner* case, possibly no objective at all) underlay the restriction of rights, rational connection between means and ends was lost.

Bastarache J's dissenting judgment in *Advance Cutting* in fact provides another example of this sort of approach. The law in question mandated membership of a union in order to be certified as a competent construction labourer. Bastarache J did not believe the purpose put forward in that case – ensuring structured collective bargaining and the competency of workers– was genuine; he had "difficulty accepting that these are the true objectives of the impugned provisions."[80] Instead of finding the real motivation behind the statute, he seemed to accept, *arguendo*, the stated purposes, and proceeded to outline how they failed the rational connection requirements.[81] This shows how the acceptance of a objective that did not in fact underlie the law can lead to rational connection issues; one is searching for a link that does not, in point of fact, exist. Even though Bastarache J was likely conducting this as a hypothetical exercise, and had he not been in dissent might have attacked the objectives directly,[82] it still serves as an example of the usefulness of rational connection to perform indirect scrutiny of objectives.[83]

The problem with this theory is that if the objectives portion of the test were applied as it is supposed to be, it would not be necessary to use rational connection in this way. Hypothesised objectives are not allowed; the subjective motivation of the legislature is sought out; overly general objectives, which relate in fact to the law

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[78] Note 15, at 296.
[79] See Chapter 2, text accompanying note 34 and 35.
[80] 2001 SCC 70 (CanLII) at [46].
[81] *Ibid* at [46]-[47]. See Choudhry, note 11, at 510, footnote 53.
[82] However, he may have still preferred this indirect approach, as it is less disrespectful for the state to fail rational connection than to be told it lacked a valid motivation.
[83] This judgment was unusual as, even having expressly stated that the law lacked rational connection, the judge went on to find that: "Even if I did accept the stated objectives and found a link to exist, the [law] would fail to meet the requirements of the minimal impairment branch of the proportionality tests." *Ibid* at [46]; see also [48]. It is unusual to engage in the later stages of limitations analysis if a prior stage has been failed. Perhaps had Bastarache J been in the majority, he would have disposed of the case by finding no sufficiently important objective underlying the law.

generally and not to the reason for the restriction on rights, are not allowed. If these premises played out in practice, then there would be no need to assess the objective by means of this indirect scrutiny of means.[84] However, the fact that those premises do not always play out in practice, and objectives are hypothesised, means that there is some scope for indirect scrutiny of objectives.

Some cases clearly illustrates this point. *Figueroa v Canada*[85] concerned a challenge to Canadian Elections Act's prerequisites for registering a political party. To register, a party had to have at least 50 candidates nominated in electoral districts. Registration provided several advantages, such as the issuing of tax receipt for donations received outside of an election period, the pooling of unspent election funds, and the listing of party affiliation on the ballot paper. It was claimed that this restriction on party registration violated the s. 3 right to vote and be eligible for membership of the legislature. The Supreme Court agreed. The objectives of this restriction were to improve the electoral process, to protect the financial integrity of the regime of electoral financing, and to ensure a viable electoral outcome for Canada's form of responsible government. Though these were pressing and substantial, Iacobucci J held there was "no connection whatsoever between the 50-candidate threshold and the objective[s]" set forth by the Attorney General.[86]

In reaching this finding, Iacobucci J expressed grave doubts as to whether the final objective of ensuring a viable outcome was a valid one. This objective in essence suggested that from an objective and non-partisan viewpoint, there were certain electoral outcomes that suited the Canadian system of government and some that did not. The Court was clearly concerned about the implication of this:

> Legislation enacted for the express purpose of decreasing the likelihood that a certain class of candidates will be elected is not only discordant with the principles integral to a free and democratic society, but, rather, is the antithesis of those principles. Consequently, it is difficult to accept that the objective of ensuring that the electoral process results in a particular outcome is sufficiently pressing and substantial to warrant the violation of a *Charter* right.[87]

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[84] See Chapter 2, text accompanying note 34 and 35.
[85] [2003] 1 S.C.R. 912, 2003 SCC 37 (Canlii).
[86] *Ibid* at [64]. Iacobucci J dealt with each objective separately, so this quote actually pertained to the first objective of improving the electoral process. However, no connection existed between any of the objectives and the measure in question; see [73] and [85]-[86].
[87] *Ibid* at [80].

Despite these reservations, the judge decline to hold the objective invalid. Since the measure in question failed rational connection, he declined to decide on the contentious objective issue:

> For the reasons discussed below, I conclude that the legislation fails the proportionality branch of the *Oakes* test. As a consequence, I believe it prudent to leave the question of whether majority building is a pressing and substantial objective unanswered at this time.[88]

Here, the Supreme Court expressly declined to hold the objective of the legislation invalid, despite grave reservations. Instead, rational connection was used to illustrate that even if the objective were valid, this law did not pursue it.[89] The fact that rational connection was failed further indicates that the validity of this controversial objective aside, the legislation may have pursued another end altogether. Choudhry suggests the Court may have been concerned that the true objective of the measure was the invalid end of protecting "larger political parties from *electoral* competition to the detriment of the public interest."[90] Read this way, *Figueroa* is a case about how objectives can be assessed outside of the objectives limb of the test, illustrating the usefulness of the seemingly useless rational connection test. Again, had the Court really probed for the subjective motivation of the legislature, this indirect scrutiny would be unnecessary.

Similarly, in *Sauvé v Canada*,[91] the objectives underlying the denial of prisoners' right to vote were regarded as potentially too vague and symbolic to be valid, but in the end, the Court went on to consider rational connection, where, as the Court put it, "the difficulties inherent in the government's stated objectives become manifest."[92] The Court declined to declare the objective invalid, knowing that it would certainly not pass muster in rational connection.

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[88] *Ibid* at [83].

[89] It should be noted that Iacobucci thought the measure would fail the final balancing test as well as the rational connection test. *Ibid* at [87].

[90] Choudhry, note 11, at 510.

[91] [2002] 3 SCR 519, 2002 SCC 68 (Canlii).

[92] *Ibid* at [26]. Criticising the government's vague and general objectives, the Court noted: "Quite simply, the government has failed to identify particular problems that require denying the right to vote, making it hard to say that the denial is directed at a pressing and substantial purpose." However, "prudence" suggested the Court should continue on to the later *Oakes* test enquiries.

Certain other cases might also support this view.[93] On several occasions, in either majority or dissent, judges have argued that laws failed the rational connection test because they achieved results antithetical to the objective apparently pursued. One might strongly suspect that the laws in *M v H*[94] –where a statute excluded same-sex couples from the definition of a common law spouse– and *Vriend v Alberta*[95] –where an equality statute did not prohibit dismissal from employment on the basis of sexual orientation– were in fact motivated by animus toward homosexuals. The Supreme Court might favour finding that the law lacks rational connection than directly accusing the legislature of anti-homosexual bias. Similarly, the Supreme Court's finding in *Black v Law Society of Alberta*[96] may be best explained as an indirect expression of suspicion of legislative objectives.[97]

From this, we can see that despite its seeming impotence, the rational connection test in Canada has proven useful in respect of indirectly scrutinising objectives in lieu of analysing subjective motivations. This further illustrates that the subjective purpose enquiry that apparently takes place in Canada does not always apply, and that objectives are hypothesised from time to time.

Minimum Impairment

The minimum impairment limb of the *Oakes* test is perhaps the one that has undergone the most substantial shifts in the years since the test was enunciated. As noted earlier, this limb of the test was not explored in *Oakes*. However, from the description in *Oakes* –that this limb demanded the right be impaired as little as possible– there was an expectation that the limb would be exacting. As Hogg noted, the original formulation of the test "appeared to leave little room for even a narrow margin of appreciation."[98] *Edwards Books* showed this was not the case. In spite of this, and despite the fact that the test never took on the stringency suggested in *Oakes*, it has become the most potent and perhaps the most important part of the *Oakes* test; it is the "heart and soul of s. 1 justification."[99] Perhaps that says more

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[93] See also the dissenting judgment of McLachlin J in *Lavoie v Canada* [2002] 1 S.C.R. 769; 2002 SCC 23 (CanLII).
[94] [1999] 2 SCR 3; 1999 CanLII 686 (SCC).
[95] [1998] 1 S.C.R. 493; 1998 CanLII 816 (SCC).
[96] [1989] 1 S.C.R. 591; 1989 CanLII 132 (SCC).
[97] See discussion of *Black* below at note 125.
[98] Hogg, note 5, at 38-39.
[99] *Ibid* at 38-36.

about the failure of the Canadian courts to take seriously the final balancing enquiry than the intrinsic importance of minimum impairment.

The Dilution of Minimum Impairment

Choudhry notes that, unlike the subtle and silent alterations of other parts of the test, with minimum impairment "the Court explicitly acknowledged that it had departed, and would continue to depart, from the strictness of *Oakes*."[100] The stringency of the requirement was such that, unless it was diluted, "an imaginative judiciary, armed with the benefits of hindsight, could conceive of better legislative means in almost every case."[101] *Edwards Books* moved to a new standard: the right must be impaired "as little as is reasonably possible."[102] The question was whether or not the impairment was "reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."[103]*Irwin Toy* continued this erosion of the standard, now that demanding the legislature had a "reasonable basis"[104] for choosing one set of means over another. *Irwin Toy* clarified that the legislature can take action more rights-restrictive than the absolute minimum.[105]

This was further restricted in *R v Chaulk*[106] and *R v Downey*[107] where it was held that only means that achieved the ends as effectively as the means chosen could be considered to render the means chosen unacceptable. This ruled out the idea of degrees of efficacy being considered. Some commentators argue that achieving the ends less effectively is simply not achieving the ends; any sacrifice of efficacy is in fact sacrifice of the objective.[108]On the other hand, if no sacrifice in efficacy is

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[100] Note 11, at 511.
[101] Dassios and Prophet, note 15, at 301.
[102] 1986 CanLII 12 (SCC) at [131].
[103] *Ibid* at [147].
[104] [1989] Canlii 87 at 71.
[105] "While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."*Ibid* at 75.
[106] 1990 CanLII 34 (SCC).
[107] 1992 CanLII 109 (SCC).
[108] Davidov argues that anything that is different is not an alternative: "[I]t is not enough that there are some theoretical less-restrictive means. These means must be good enough to achieve the goal in full, *i.e.* to the same extent as the means chosen by the State." Guy Davidov, "Separating Minimum

allowable, few alternatives will ever be viable. All sets of means under consideration differ in some respect, because that difference allows rights to be infringed to a lesser extent.

The essence of this shift, as apparent from the introduction of reasonableness language, is essentially the abandonment of a search for alternatives in favour of a rationality-based approach. An acknowledgement that tailoring of this sort "seldom admits of perfection,"[109] the Canadian courts refused to consider whether other alternatives were preferable to the one chosen by the legislature, and instead looked at the reasons behind the choice in fact made.

This reduced the force of the test significantly, and was done for some of the reasons discussed in the last chapter. First, the legitimacy of courts choosing the best means to adopt, and the extent to which efficacy should be sacrificed, is questionable. While not abdicating responsibility for the protection of rights entirely, the courts decided that in-depth review of alternative means was not institutionally appropriate.[110] Secondly, there was a problem of speculative evidence and uncertainty. It would be difficult, if not impossible, for the State to justify with scientific proof why it chose one measure over another. It might be impossible, short of appeal to intuition and common sense, to illustrate that a particular means will be more effective when the legislature cannot be sure if this will be the case. The nature and extent of the speculation required in legislating for complex and uncertain issues means that a strict minimum impairment test would make the business of government very difficult indeed. The result was the move to a less interventionist test, and the introduction of contextual deference.

Variability in the Strength of Minimum Impairment

However, the gradual weakening of minimum impairment is only part of the story. The other part is the role of minimum impairment as the load-bearing pillar of review under the *Oakes* test. For all its weakness, the minimum impairment test is the limb of the Oakes test that most frequently invalidates legislation. Indeed, no

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Impairment From Balancing: A Comment on *R v Sharpe*," (2000) 5 Review of Constitutional Studies 195 at 4-5.

[109] *RJR MacDonald* 1995 CanLII 64 (SCC) at [160].

[110] As the Court said in *Commonwealth of Canada v Canada*, "some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive." [1991] 1 S.C.R. 139, at 248; 1991 CanLII 119 (SCC) at 117.

other part of the test –including the final balancing exercise– is nearly as potent in this respect as minimum impairment. This surprising duality must be explored.

(i) Variation within cases

There were still examples of strong, interventionist minimum impairment analysis alongside the non-interventionist trends, and this was apparent when judges dissented. Andrew Lokan said that, in spite of the vocal retreat from a stringent application of Oakes, "In certain cases, the Court – or at least some members of the Court – continued to be as interventionist as ever."[111] *R v Jones*[112] illustrated the divergences between the strong and weak approaches. The case concerned the prosecution of a fundamentalist pastor, who had been educating his three children, and some others, in his church. He refused to send his children to public school as required by the School Act of Alberta. He similarly refused to apply for an exemption from this requirement under the Act that would have required him to establish that he was providing the children with sufficient instruction. As a result, he was prosecuted for truancy under that Act. Mr Jones lost both of the arguments he raised, but by different margins.[113] What is significant for our purposes, however, is the treatment of minimum impairment.

Elliot notes that La Forest J's plurality opinion, when addressing the question of the s. 1 justification, does not consider the minimum impairment test at all.[114] Wilson J in dissent, by contrast, applied it quite strictly:

> The government adduced no evidence to establish that having the parent apply for a certificate was the least drastic means of ensuring that their children were receiving efficient instruction. The legislature, for example, could clearly have given the education authorities the power to inspect on their own initiative.[115]

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[111] Andrew Lokan, "The Rise and Fall of Doctrine Under Section 1 of the Charter" 24 Ottawa L Rev 163 at 181.

[112] [1986] 2 S.C.R. 284; 1986 CanLII 32 (SCC).

[113] His section 2(a) argument, about freedom of conscience and religion, was rejected by a margin of four to three, while his argument based on the s 7 liberty guarantee was supported solely by Wilson J.

[114] Robin Elliot, "The Supreme Court of Canada and Section 1 — the Erosion of the Common Front" (1987) 12 Queen's L.J. 277 at 323. As Eliot goes on to note, there are other aspects of La Forest J's anlaysis that also fall short of the standards laid out in *Oakes*

[115] 1986 CanLII 32 (SCC) at [70]. Wilson J was not, in fact, in dissent on this particular point, though she did dissent on the disposition of the appeal. She did not think the law was a restriction on the right of freedom of conscience at all. If it were, she would have found the restriction failed the *Oakes* test.

In the same case, some judges did not apply minimum impairment at all, while others applied it in a most exacting fashion. *Oakes* had been a "common front;"[116] this front was broken not simply because the *Oakes* test was departed from so radically, but because while often departed from, it was retained by other judges in some cases, varying wildly in its application. [117]

(ii) Suspicion of Blanket Bans

Minimum impairment analysis in Canada has also taken a strict stance against blanket bans, which are frequently struck down for failing this test.

In *R v Seaboyer*,[118] McLachlin J, writing for the majority, applied a very strong minimum impairment test. The law in question was a rape shield law, which essentially prohibited any cross-examination of the accuser on their sexual history, in a bid to prevent humiliating, misleading and irrelevant introduction of evidence. The appellants claimed that this violated their criminal process rights under the Charter. The shield law could have been tailored to exclude prejudicial evidence while allowing evidence that was relevant and probative of innocence. In absence of this "measured approach,"[119] the law could be said to pass minimum impairment, as it was not "appropriately restrained."[120] The dissenting judges in this case applied minimum impairment in its weaker form; they contended that the legislative choices made here –balancing the concerns of a fair trial against the interests in avoiding pointless and prejudicial examination of accusers about their sexual history– was, "at a minimum, in the realm of reasonable."[121]

In *Ford v Quebec*,[122] the law in question required that all public signs and commercial posters in Quebec be exclusively in French, and that all companies trade under a French version of their name, a clear restriction on freedom of expression. Though having a pressing and substantial objective, which it was rationally connected to, the measure did not pass minimum impairment, as the necessity of an

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[116] Elliot, note 114.
[117] There was even a significant divergence in *Edwards Books*, with Wilson J, in dissent, applying minimum impairment in a strong way, and criticising the majority for not doing so. *Cf* her dissenting judgment in *RWDSU v Saskatchewan* [1987] 1 SCR 460; 1987 CanLII 90 (SCC).
[118] *R v Seaboyer* [1991] 2 SCR 577; 1991 CanLII 76 (SCC)
[119] *Ibid* at 64.
[120] Ibid.
[121] *Ibid* at 159, per L'Heureux-Dubé J.
[122] [1988] 2 SCR 712; 1988 CanLII 19 (SCC).

absolute prohibition on the use of other languages was not illustrated: the less restrictive option of prominent display of French without banning the use of other languages entirely should have been preferred.[123]

Even when applying the weaker variant of minimum impairment, the courts have been intolerant of sweeping, blanket measures.[124] In *Black v Law Society of Alberta*,[125] Alberta's Law Society made new rules in response to the foundation by the respondents of an interprovincial law firm. The new rules forbade members who habitually resided and practised law in Alberta to enter a partnership with anyone who was not similarly resident and practising in Alberta. The respondents claimed that this intervention constituted a violation of their constitutional right to associate under s. 2(d) and the right to mobility under s. 6. The Supreme Court found in their favour on the latter point, but not on the former. In so doing, the Court adopted a less interventionist approach to minimum impairment, saying: "Section 1 does not advocate perfection."[126] In spite of this, the Court held the measure went too far:

> The fact that the appellant did not even consider anything less than a blanket prohibition is in my view revealing. There are many reasonable alternatives for obtaining the legislative purpose aimed at without so drastically affecting these mobility rights.[127]

The purpose of the law in question was held to be regulating competence and ethics among legal professionals. The Court could not see that interprovincial restrictions were necessary to do this.[128]

This suspicion of absolute bans has even been seen in cases where a rational explanation for the blanket nature of the prohibition seems to have been plausible. In *Edmonton Journal v Alberta*,[129] a law prohibiting the publication of any accounts of matrimonial litigation was held to be too sweeping a method of protecting the

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[123] "[W]hereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec ... requiring the exclusive use of French has not been so justified"*Ibid* at 78.
[124] Cf *Libman v Quebec* [1997] 3 SCR 569; 1997 CanLII 326 (SCC).
[125] [1989] 1 SCR 59; 1989 CanLII 132 (SCC).
[126] *Ibid* at 39.
[127] *Ibid* at 44-45.
[128] This could be another example of a case where the objecitve of the law was indirectly suspected to be invalid. The true purpose of this measure may have been to restrict interprovincial legal practice to safeguard the interest of the Law Society's members against interprovincial competition. That would not, presumably, have been a valid objective.
[129] [1989] 2 SCR 232; 1989 CanLII 20 (SCC).

privacy of individuals who were parties to such matters. The Court held that the ban seriously restricted freedom of expression and made the judicial process less transparent. Moreover,

> Any need for the protection of privacy of witnesses or children could be readily accomplished by far less sweeping measures. For example, it could be accomplished by the exercise of discretion by the trial judge to prohibit publication or to hold in-camera hearings in those few circumstances where it would be necessary to do so in order to protect the privacy interest of parties, their children or witnesses.[130]

It is clear that the Court felt the privacy interests protected by the law were insubstantial, such that judicial discretion would suffice to protect it in the few instances where it was at play. The legislature obviously disagreed with this assessment of privacy; it clearly believed that any reportage of such proceedings posed a threat to privacy. The alternative means suggested were radically different, and would be significantly less effective in maintaining privacy to the extent that the legislature thought appropriate. In saying that the legislature should have preferred those means over a blanket ban, the Court dismissed, without argument, the legislature's conception of privacy that underlay it.

In certain cases, the Court has specifically said that blanket bans are presumptively invalid, or will be very difficult to defend. In *Rocket v Royal College of Dental Surgeons*,[131] McLachlin J said that blanket prohibitions were "a method of legislative drafting almost certain to raise the spectre of *Charter* infringement."[132] In *RJR-MacDonald v Canada*,[133] she noted that

> it will be more difficult to justify a complete ban on a form of expression than a partial ban.... A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective.[134]

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[130] *Ibid* at 24.
[131] [1990] 2 SCR 232; 1990 CanLII 121 (SCC).
[132] *Ibid* at 24.
[133] 1995 CanLII 64 (SCC).
[134] *Ibid* at [163].

In neither *Rocket*[135] nor *RJR*[136] was this necessity established. There are even more examples.[137] It suffices to say that blanket bans meet significant resistance from the minimum impairment test.

(iii) Difficulty in Explaining Variability

The great variation in the application of minimum impairment cannot be fully and properly explained by reference to the categorisation process discussed in the previous chapter.[138] Though some of the unusual decisions in the minimum impairment category can be explained by reference to categories, others cannot.

For example, some cases where a strong minimum impairment test was applied were criminal in nature.[139] Other criminal cases, as discussed, took a deferential approach to minimum impairment.[140] Similarly, *Edmonton Journal* and

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[135] The Supreme Court found that an Ontario blanket ban on dental advertising (with limited, listed exceptions) was excessive having regard to the objective of maintaining proper standards in the dental profession and preventing misleading advertising. The ban could have been more narrowly drawn to allow non-misleading and useful advertisements while preventing problematic ones. While "conscious of the difficulties involved" in that task, McLachlin J was satisfied that drafting such a regulation would "not be impossible." [1990] 2 S.C.R. 232; 1990 CanLII 121 (SCC) at 24.

[136]McLachlin J suggested several alternatives, including a ban on lifestyle advertising that allowed purely informational advertising and advertising aimed at the brand preference of existing smokers, and a ban on any advertisements directed at children and adolescents. No evidence was presented to suggest that these would be less effective at reducing tobacco consumption than the blanket ban, nor did the government offer any substantial argument in this respect. *Ibid* at [164]-[167]. The Court was particularly dubious because there had been a study of alternative means carried out, which the Attorney General refused to disclose at trial. This suggested that the government could have produced evidence but did not, or that evidence did not support the blanket ban. Added to this, the Attorney General "contented himself with the bland statement that a complete ban is justified because Parliament 'had to balance competing interests' somehow." [167] The Court was unmoved by this scant argument.

[137] In *Libman v Quebec*[1997] 3 SCR 569; 1997 CanLII 326 (SCC) the Supreme Court held that the Quebec Referendum Act, which forbade any spending of money to campaign for or against a referendum, except spending by an official Yes or No campaign committee, was too broad a restriction on freedom of speech in banning all private spending, and denying to those who could not join the official committees any ability to speak.

In *Thompson Newspapers v Canada* [1998] 1 SCR 877; 1998 CanLII 829 (SCC), a law prohibiting the publication of opinion polls in the three days prior to an election was struck down. Instead of the "very crude instrument" of a blanket ban, the Court advocated publication of methodolgical data in all polls to achieve the end of avoiding voters being mislead.

In *Dunmore v Ontario* [2001] 3 S.C.R. 1016, 2001 SCC 94 (CanLII) the Supreme Court held that the blanket exclusion of agricultural labourers from industrial relations statutes was an excessive breach of the right to freedom of association. The goal of protecting farms from the devastating effects of strikes on seasonal industries could have been tailored to particular sectors of the agriculture industry or allowed some freedom of association while preventing strikes.,

[138] See Chapter 4.

[139] See R *v Genereux* [1992] 1 SCR 259; 1992 CanLII 117 (SCC), where saw Lamer CJ take an extremely strict view on procedures before a court martial: "I am of the opinion that a trial before a tribunal which does not meet the requirements of s. *11(d)* of the Charter will only pass the second arm of the proportionality test in *Oakes* in the most extraordinary of circumstances." At 67.

[140] See *Chaulk* 1990 CanLII 34 (SCC) and *Downey* 1992 CanLII 109 (SCC).

Dunmore v Ontario[141] to take but two examples, were clear cases of a clash of interests, which the legislature had considered and attempted to resolve. In spite of this, the minimum impairment test was strictly applied.

Contextual deference cannot be the sole explanation either, because while some cases of strong minimum impairment expressly eschew deference,[142] others strike down a law in spite of deference apparently being offered.[143] Of course, even when deference is forthcoming, there must be some cases where the law can fail minimum impairment regardless, as deference must be capable of being overcome. It is possible that some of these cases actually represent genuine failure to meet a lower standard. This is certainly what McLachlin J thought in the *Seaboyer* case; citing *Irwin Toy*, she said that even if one applied the more deferential standard, the measure would fail.[144]

The most common reason for strength in minimum impairment is where the means are a blanket ban. The explanation required for such a measure vastly eclipses that required for any lesser means. There may be arguments to support this.[145] However, even taking these arguments at their highest, there would often have been a decrease in efficacy with the removal of a blanket ban. This could have been argued in several of the major cases, such as *Edmonton Journal*.[146] It may also be very difficult or impossible to tailor out those that perhaps should be excluded, or to do so without risking the integrity and effectiveness of the measure.[147] These

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[141] [2001] 3 S.C.R. 1016, 2001 SCC 94 (CanLII)

[142] The Court in *Thomson Newspapers* said that since Canadian voters were not a vulnerable group, a law protecting them from misleading polls would not receive deference. *Thompson Newspapers v Canada* 1998 CanLII 829 (SCC) at [122].

[143] See above at note 125 and accompanying text.

[144] [1989] Canlii 87 at 64. *Cf Ford v Quebec* 1988 CanLII 19 (SCC) where the law was found to be unconstitutional in spite of an articulately deferential approach.

[145] With a blanket ban, there is no necessary implication that the legislature even tried to consider rights. Far from the least restrictive alternative, it has opted for the most restrictive, and this should raise questions. Moreover, there are few blanket bans that will be perfectly tailored; usually some of the people or conduct included within the measure could be excluded without risking the objective. It is therefore more likely that there is a minimum impairment argument to be made in respect of such a ban. When the burden of proof is placed on the State, this creates a significant task for the state to show that the blanket nature of the ban is necessary.

[146] Indeed, this consideration swayed the Court in *Canadian Newspaper Co v Attorney General of Canada* [1988] 2 SCR 122; 1988 CanLII 52 (SCC). Under scrutiny here was a law providing that, if requested to do so by either the alleged victim of sexual assault or the prosecutor of a sexual assault charge, a Court was mandated to prevent disclosure of the identity of the alleged victim. It was submitted by the newspaper that a discretionary measure would be less restrictive of their free speech rights. Lamer J, for the majority, held that the purpose of the ban was to encourage victims to report instances of sexual assault through alleviating fears of being identified. A discretionary ban would not provide sufficient assurance to achieve that aim, and so the law was upheld.

[147] That was argued by the State in *Dunmore v Ontario* [2001] 3 S.C.R. 1016, 2001 SCC 94 (CanLII).

considerations seemed not to move the Supreme Court in the blanket ban cases, despite the fact that they are considerations usually relevant to the minimum impairment analysis. It is hard to say that the standard applied to blanket bans is a similar standard to the one enunciated in *Chaulk* or *Downey*, which demanded equal efficacy of any alternative measure being considered. Insofar as it explains the minimum impairment test's strong application in certain cases, it is a manifest departure from the previously articulated standard.

Minimum Impairment Incorporating Balancing?

With no coherent explanation for the Court's switching between interventionist and non-interventionist minimum impairment analysis, another explanation for the variability of this review might be considered. As will shortly be discussed, the final, balancing limb of the test has almost never been properly applied by the Canadian courts. The balancing test might be considered normatively problematic; it requires difficult decisions on the weight and importance of conflicting values that will ultimately be contested. The minimum impairment test seems more technocratic. Unlike vague balancing, minimum impairment seems to be a more precise, legal enquiry, and presents a clear idea of what the state can do to redress the problem. It might seem easier to invalidate a law under the auspices of minimum impairment than to reject the law as being disproportionate in a balancing exercise.

However, while this might explain the variability of minimum impairment if true, it in fact undermines any possible rationale for favouring minimum impairment analysis as a substitute for balancing. Balancing is problematic because it involves difficult normative decisions; minimum impairment might be more attractive if it is a more mechanical inquiry. However, the variability in the standard of the minimum impairment test undermines any argument that using minimum impairment is more restrained or less problematic. Deciding that a law should receive more scrutiny in minimum impairment without any coherent and consistent rationale means that the law is disfavoured by the court after an assessment of its merits. This requires precisely the same normative judgment that one would seek to avoid by opting for minimum impairment instead of balancing. Variability therefore negates any benefits of this approach.

The complex relationship between minimum impairment and balancing will be explored further in the next section. It is impossible to know for certain why the strength of the minimum impairment test varies so greatly, and any answer to this will invariably be speculative. It may be impossible to avoid this sort of variation: Hogg argues that "there is no practical way to avoid uncertainty in the application of the requirement of least drastic means."[148] However, the lack of coherence does cast into doubt whether the Canadian courts have a clear or consistent idea of how the tailoring requirement should be applied.

Balancing

The final balancing portion of the *Oakes* test demanded proof of "proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'"[149] In *Oakes*, the balancing test did not have to be applied, but Dickson CJ did elaborate on the test:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[150]

In *Edwards Books*, he said the effects of the law "must not so severely trench on the individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."[151] Essentially, this test is to ask whether even a law well motivated and well-tailored can justify the restriction of rights. It asks: having regard to what the law is seeking to achieve, is it worth the cost?

It would seem that this should be the most crucial stage in the *Oakes* test. It is, after all, the test where the ultimate legitimacy of the rights restriction derives from.

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[148] Hogg, note 5 at 38-42.
[149] 1986 CanLII 46 at [70], emphasis original.
[150] *Ibid* at [71].
[151] *Edwards Books* 1986 CanLII 12 (SCC) at [122].

In Canada, the other examinations –into the objective and its importance,[152] rational connection, and minimum impairment– are important, but cannot legitimise the measure alone. They are prerequisites to the ultimate test of legitimacy that this balancing test provides. In *Canada v JTI-MacDonald*,[153] McLachlin CJ stressed the importance of the balancing test:

> Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.[154]

She reiterated these sentiments in a recent case, *Alberta v Hutterian Brethren of Wilson Colony*.[155]

In spite of its seeming centrality to the *Oakes* test analysis, the strength of the balancing test is illusory. I believe that McLachlin CJ is both right and wrong; she is right to say that proportionality balancing is crucial in spite of the reliance on minimum impairment; no other branch of the test performs the same assessment of legitimacy that the balancing limb provides. However, she is wrong to say that the fact that most cases are resolved by minimum impairment does not reflect upon the proportionality/balancing test. Though the Supreme Court "goes through the motions" of the balancing test, Hogg believes that "this step has never had any influence on the outcome of any case."[156] The fact that the balancing stage has done

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[152] As noted in the Part I, the objective stages can, in fact, replace the balancing test, but its lack of strength in Canada means it cannot do so. See Chapter 2, text accompanying note 46-50. Hogg, note 5, at 38-43–38-44, suggests that the balancing test is redundant in light of the previous elements of the *Oakes* test. In particular, he believes that the analysis of importance of the objective at the first stage of the test performs a substantially similar role. This misconceives the way that the objective stage works in Canada. As noted above, the courts do not conduct a sufficient examination of the importance of the objective, rather taking the importance of most objectives as read. The Canadian courts are therefore using the objective stage to test if the measure is possibly justifiable, not whether it justified. Only by having some regard to extent of the rights violation (and perhaps the importance of the right) could that initial objective analysis be a threshold balancing analysis that would stand in as a means of justification. This is clearly not what the Canadian courts do. Even having passed the objective and tailoring requirements, "[a]lmost all of the normative work of determining whether the objective justifies infringing the right remains to be done." Denise Réaume, "Limitations on Constitutional Rights: The Logic of Proportionality" Oxford Legal Research Paper Series Paper, No 26/2009 at 11

[153] [2007] 2 S.C.R. 610, 2007 SCC (CanLII).

[154] *Ibid* at [46].

[155] [2009] 2 SCR 567; 2009 SCC 37 Canlii at [76]. She stressed that the balancing test was the only one to give a "full account of the severity of the deleterious effects of a measure on individuals or groups."

[156] Hogg, note 5, at 38-43.

no independent work at any point since the inception of the test does make a statement about its importance and the reality of its application.

One only has to look to the Supreme Court's lacklustre and terse disposition of this test to see that it is not an important part of the *Oakes* standard in practice. In *Edwards Books*, Dickson CJ's entire consideration of the third step was as follows:

> In view of the extent and quality of the abridgment of rights flowing from the legislation, I have little difficulty in applying the third element of the proportionality test. The infringement is not disproportionate to the legislative objectives. A serious effort has been made to accommodate the freedom of religion of Saturday observers, in so far as that is possible without undue damage to the scope and quality of the pause day objective.[157]

The only real attempt to apply this test is to imply that the right in question is not heavily infringed and then assert the proportionality of the law; the subsequent comment, about serious efforts being made to accommodate rights, is irrelevant to balancing analysis, which is supposed to query whether the limitation, however minimal, is ultimately legitimate and justified. The fact that a measure minimally impairs rights might weigh in favour of legitimacy in the balancing analysis, but it cannot substitute for it.

The Relationship Between Balancing and Minimum Impairment

I believe the balancing test is underutilised in Canada because balancing is subsumed into minimum impairment analysis. This also explains, as noted earlier, why the strength of the minimum impairment analysis varies so greatly. If one adopted a very broad approach to minimum impairment, and looked to all sorts of possible alternative measures very different from the means chosen, that necessarily leads to balancing being conducted in this step. One cannot determine if a somewhat less effective alternative can be preferred to the means chosen without balancing the offset of efficacy against the right to some degree.[158] The approach of the Canadian courts vocally eschews that form of minimum impairment analysis, but when the Court departs from that vocal declaration, and starts considering broader alternatives balancing has been introduced into the minimum impairment test. This

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[157] 1986 CanLII 12 (SCC) at 151.

[158] Davidov has argued that "[i]f the state can prove that alternative means cannot achieve the goal as well as the means chosen by it, the examination moves to its last stage (balancing). Here – and only here – the alternative of compromising the objective is considered." Davidov, note 108, at 5.

explains why the balancing test has never been potent in Canada: it has been incorporated into minimum impairment test when required.

I think there are two explanations for why the courts eschew balancing as such and opt for minimum impairment instead: first, it is a somewhat less nebulous statement to say that the means impair rights to a greater extent than necessary as opposed to saying that in some abstract sense there is no justification for the action taken. Secondly, I believe there is a possible perceived consequence of a finding of disproportionality that might make courts wary of invoking the test.

(i) Minimum Impairment to avoid normatively problematic balancing

Balancing analysis is, by its nature, an opaque process. The Court is being asked to weigh up the effects on rights, whatever those should be, against the importance of the objective, weighted, presumably, by the extent to which the law attains that objective. The extent of the denial of the right –in Canada's seemingly teleological model, the disutility caused by the restriction– should be something easily established by an affected party. The good done by the objective –in the teleological model, the utility generated by the measure– could also be fairly readily established by the State. Obviously, there may be some difficulties when effects are unknown or speculative, but it is still a fairly straightforward process. However, finding some way to weight these ideas, and some metric by which to compare them, is a much more difficult proposition.[159]

As discussed in Chapter 2, balancing may therefore have to be an intuitive analysis, assessing how severe the rights restriction seems against how great the public importance of the goal appears to be.[160] This means that courts have to

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[159] Knowing the consequences of the rights restriction for both the right and the objective is only the first step, because those consequences must then be afforded weight by reference to the importance of these values. It is relevant not only how broadly the right was denied, but also how important the right is. A less important right, substantially denied, might not carry as much weight as a very significant right denied only in part. Similar concerns apply to objectives, with the possibility that a minor achievement of an extremely important goal might have a greater legitimising effect than the total realisation of a more minor goal. How those various weights can be calculated is not clear. Similarly, a metric for comparison of these values is not forthcoming. The good done by a rights restriction and the harm done to the right might seem incommensurable; it is up to judges to somehow overcome this incommensurability and balance these values. No guidance on this has ever been provided by the Canadian Supreme Court. Lamer CJ implied that these values were of a similar nature when he said "there must be a proportionality between the deleterious and the salutary effects of the measures." *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 889; 1994 CanLII 39 (SCC) at [95]. This implies that the effects are alike, which does seem to be self-evidently true.

[160] See Chapter 2, text accompanying note 53-59.

engage in a discretionary weighting that calls legislative choices into question, and it may be difficult to conduct such an exercise without recourse to judges' own values. Judges may feel uncomfortable with this role. Even if it is one they are assigned, there may also be a strong sense that the legislature and the courts perform different functions, or that if a value judgment has to be made, a body with stronger democratic credentials should make it. It might be that conducting this balancing exercise "pushes at the margins of the judiciary's institutional role,"[161] or that judges feel that this is the case, which has roughly the same effect.

For these reasons, minimum impairment may be used by courts as a substitute for balancing. Minimum impairment seems to be a more straightforward mode of analysis; it has a technocratic appeal. Saying that a measure fails the test is advising the legislature that it should have acted slightly differently, with slightly more care, seems like more of a judicial function, and does not require decision-making that seems as discretionary and potentially political as the balancing test.

However, behind the variable standards of minimum impairment, judges are weighing the general justifiability of the law, and adjusting the strength of the test to allow them to find unjustified law to fail minimum impairment, and justified laws to pass it. It is the ultimate illustration of the fact that the *Oakes* test's strength remains "on the shelf waiting to be dusted off for use... any time that the Court wants to strike down a law."[162] It is also no more legitimate to engage in the normatively problematic analysis of balancing behind the façade of minimum impairment. It is in fact less legitimate, as it is less transparent; the judge will be less open to criticism because the analysis is distorted by the fact that it is presented as something else entirely.

(ii) Does Failing Balancing Prohibit Certain Ends?

An additional reason that the balancing test might seem problematic is a possibility that failing balancing essentially prevents pursuit of the objective at all.

The consequences of a finding of minimum impairment are simple: the law is struck down, but can be remade in a less restrictive manner in order to protect rights to the greatest extent. The State has the option to pursue the goal by another

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[161] Dassios and Prophet, note 15, at 306.

[162] Petters and Monahan, "Developments in Constitutional Law: the 1986-1987 Term" (1988) 10 SCLR 61 at 95.

route. On the other hand, the consequences of a law failing proportionality balancing are not so clear. On one reading, if the means really do impair the right as little as possible, then there are no means that can be used to meet this objective; the best means available have failed. This could be seen to create a prohibited end, an objective the legislature can never pursue.

In reality, this is probably not the consequence of a finding of disproportionality, because the minimum impairment test probably does not look to all alternatives, but only those alternatives that were sufficiently similar to the means actually chosen. The end is probably not excluded. However, it might appear to be excluded, and that appearance might be something of which judges are wary.

An example of this is presented by the judgment in the *Thompson Newspapers* case. Having commented that the law would have failed the balancing test in the event that it had been reached, the Court added the following addendum:

> This is not to say that there is no possibility for Parliament to legislate with regard to the dangers that represent bad polls. As mentioned earlier, the present legislation was found to be defective not with regard to its purpose, but with regard to the fact that the means chosen to carry out that purpose did not satisfy the minimal impairment and proportionality tests.[163]

The Court went out of its way to clarify that finding the measure disproportionate did not render the end excluded. This illustrates that this possible perception of a finding of disproportionality does weigh on the mind of the judges. It might go to explain why the Court has never held a measure disproportionate in the absence of a prior failure of minimum impairment.

Evidence of Elision in the Case Law

Looking to case law, one can see some evidence that minimum impairment might be accommodating a hidden balancing test. Though the Supreme Court has never invalidated a law based on balancing alone, the Court has, having found that a law fails minimum impairment, frequently gone on to add that it is disproportionate. It is unusual that Canadian courts do this. One would expect, as happens in many cases that, having found the law to fail minimum impairment, the Court does not

[163] 1998 CanLII 829 (SCC) at [130].

engage in the rest of the analysis, since it is unnecessary to do so.[164] Instead, the Court has often engaged in proportionality analysis after it has struck down a law, and usually finds the law to have failed it.

For example, in the *Seaboyer* case, the rape shield law being challenged had already been found not to minimally impair the rights of the criminally accused, and so was struck down. However, McLachlin J did not stop there. She also found that the law was disproportionate, saying:

> [A] provision which rules out probative defence evidence which is not clearly outweighed by the prejudice it may cause to the trial strikes the wrong balance between the rights of complainants and the rights of the accused. The line must be drawn short of the point where it results in an unfair trial and the possible conviction of an innocent person.[165]

Other cases have reached similar conclusions.[166] In *Edmonton Journal*, Cory J said that the reporting restrictions on matrimonial court proceedings did not

> interfere as little as possible with the vitally important fundamental right of freedom of expression, particularly as it applies to informing the public as to pending court proceedings. Nor does it reflect that proportionality which is required between the effect of the measure and the attainment of the objectives.[167]

The measure was "a very substantial interference with freedom of expression and significantly reduces the openness of the courts,"[168] which could not be justified by the protection of privacy, especially when the Court thought that the number of instances where such protection was necessary was probably small.[169]

In *Thompson Newspapers*, the ban on publication of opinion polls in the three days preceding an election failed the minimum impairment test. However, the Supreme Court majority was also satisfied that the measure would fail

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[164] See for example Bastarache J in *Dunmore*, where having struck the down for failing minimum impairment, he said: "I am of the view that the wholesale exclusion of agricultural workers from the *LRA* is not a reasonable limit on freedom of association and that it is not necessary to balance the effects of this exclusion against its stated purpose." 2001 SCC 94 (CanLII) at [65]. Of couse, this also happened in Oakes, where the law failed rational connection, and no further analysis was undertaken.

[165] 1991 CanLII 76 (SCC) at 65.

[166] The same situation occurred in *Ford v Quebec,* where the Court held that the exclusive use of French was neither "necessary for the achievement of the legislative objective or proportionate to it." 1988 CanLII 19 (SCC) at 77.

[167] 1989 CanLII 20 (SCC) at 27.

[168] *Ibid* at 24.

[169] See above at note 129.

proportionality; the Court was dubious about the benefit of the law.[170] Since *Thompson Newspapers* is one case where the minimum impairment analysis went far beyond the scope of the Court's usual test, one wonders why they did not rely on the final balancing limb of the test to strike down the law.

Recently, in *Alberta v Hutterian Brethren of Wilson Colony*,[171] McLachlin CJ acknowledged, to some degree, that elision had taken place, and came out against it. She noted that the injunction to place balancing at the center of the Oakes test "has not always been strictly followed by Canadian courts." However, "[b]ecause the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them."[172]

There may be genuine concern about institutional competence, democratic legitimacy, and the normative problems presented by balancing. However, for the sake of the coherence of the their standard of review, the Canadian courts should apply a separate balancing test that does not completely elide with minimum impairment analysis. That is the only way that the rationality tests of tailoring can be kept separate from the legitimacy assessment of proportionality balancing. If there are normative issues created by balancing, those are best assessed and addressed if judges are clear and transparent in their approach to this test. Perhaps, in light of McLachlin CJ's recent comments about the centrality of balancing, this transparency will be restored.[173]

Feedback of Tailoring into Objectives

The Canadian courts are not wrong to regard minimum impairment concerns as relevant to the balancing analysis; they are merely wrong to allow it to stand in for that analysis entirely. Perhaps they are trying to feed minimum impairment concerns back into the objective of the measure, which thus affects the balancing

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[170] "In my view, the doubtful benefits of this ban are outweighed by its significant and tangible deleterious effects and therefore is not justified under the third stage of the proportionality analysis. The very serious invasion of the freedom of expression of all Canadians is not outweighed by the speculative and marginal benefits postulated by the government." 1998 CanLII 829 (SCC) at [130].

[171] [2009] 2 SCR 567; 2009 SCC 37 Canlii.

[172] *Ibid* at [76]. This was also followed by Deschamps J in *Toronto Star Newspapers v Canada* [2010] 1 SCR 721; 2010 SCC 21 at [50].

[173] However, *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567; 2009 SCC 37 Canlii, and other recent cases, have been subject to criticism that they prioritise pragmatism over principled reasoning. See Graham Mayeda, "Between Principle and Pragmatism: the Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court," (2010) 50 SCLR (2d) 41.

analysis, insofar as it allows the courts to strike a more precise balance. This can be seen both in the cases above, where the proportionality balancing test is failed after a failure in minimum impairment, and in other cases where laws have passed balancing with some reliance placed on minimum impairment concerns to justify this.

As discussed in Chapter 2, minimum impairment analysis has significance beyond the binary question of whether it is passed or failed, and can refine the precise nature of the objective that is being achieved by the rights violation.[174] The Canadian courts clearly understand this significance, and engage in this sort of analysis. First, when the Supreme Court conducts its balancing analysis, such as it is, it oftentimes mentions minimum impairment as an argument in the law's favour. For example, in *Chaulk*, Lamer CJ relied strongly on minimum impairment to justify his finding of proportionality:

> While the effect of s. 16(4) on the presumption of innocence is clearly detrimental, given the importance of the objective that the Crown not be encumbered with an unworkable burden and given that I have concluded above that s. 16(4) limits s. 11(*d*) as little as is reasonably possible, it is my view that there is proportionality between the effects of the measure and the objective.[175]

The same phenomenon can be seen in other cases.[176] While the mere fact of passage of minimum impairment does not justify the law, a law that actually is the best possible alternative (in a sense broader than the *Oakes* test provides for) can be a relevant consideration, because it gives additional weight to the objective. The Supreme Court may be engaged in objective feedback, rather than simply using the fact that the law passed the minimum impairment test to go to justification, which is not a relevant consideration.

Second, when the courts went on to consider balancing after a law had failed minimum impairment, it was often noted in the context of the balancing analysis that the could be achieved by another route. This clearly swayed the Court in its conclusion that the measure was disproportionate.[177] This, again, is an entirely valid

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[174] See Chapter 2, text accompanying note 43-45.
[175] 1990 CanLII 34 (SCC) 45-46.
[176] See *Edwards Books* 1986 CanLII 12 (SCC), and *Downey* 1992 CanLII 109 (SCC), amongst others.
[177] This can be seen in *Seaboyer* 1991 CanLII 76 (SCC), *Edmonton Journal 1989 CanLII 20 (SCC)*, and *Thompson Newspapers* 1998 CanLII 829 (SCC). See for *example Edmonton Journal* at 24, where in the

consideration, feeding back the fact of existent alternatives into the balancing analysis. But in many cases, these laws should not have failed minimum impairment in light of the previously articulated standards for that test. Instead, the Court should have allowed the law to pass minimum impairment, but used the existence of some alternative to sway the balancing analysis against the law. This would have properly separated the different elements of the *Oakes* test rather than eliding minimum impairment and balancing, keep the integrity and consistency of the minimum impairment limb of the test, and give independent life to the balancing test.

Conclusion

The *Oakes* test has had a series of highs and low, of peaks and troughs. Almost all parts of the test have retreated from the early, very strong outline of the test in *Oakes*, but have shown surprising strength in some cases. The objective analysis has never taken on independent force, yet has some limits on the generality of objectives that prevent the *Oakes* test from being circumvented by very broad objectives. The rational connection test, while seeming to be of little use, may have found a function in indirectly reviewing the objectives of the legislature. The minimum impairment test, at the same time as being repeatedly and vocally watered down by the Court, has been one of the very few parts of the *Oakes* test where laws have in fact been struck down. The balancing test is the only part of the test that has failed to have any independent use.

This tells us a great deal about the Canadian courts, and the standard they developed. It suggests that the *Oakes* test is very difficult to apply as enunciated; it does not do –and never has done– what it seems to do on its face. It has shifted and moved, and the strength of the test has been placed in a part of it that was not designed to bear that weight. Fully understanding these trends and realities helps to show the Oakes test for what it really is, for a standard of review is best known by its effects.

We must now look further, to how the test has been applied in Ireland, having been incorporated from the Canadian case law. When the experience of both

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middle of the balancing analysis, the judge noted again that "Any need for the protection of privacy of witnesses or children could be readily accomplished by far less sweeping measures."

jurisdictions is understood, it will allow for meaningful comparison, and give insight into the nature of this standard of review.

6 – Standards of Review in Ireland and the Origins of the *Heaney* Test

The last 20 years have seen the rise of articulated standards of review in Irish constitutional litigation. Before this, standards of review were haphazard, vague and opaque. Variations in practices and interpretation were common, making for a complex web of jurisprudence. The few attempts by academics, or judges writing extra-judicially, to untangle this web of principles and coherently explain standards of review in Ireland met with little success. It was into this milieu that the *Oakes* test stepped, incorporated in *Heaney v Ireland*.[1] It did not happen overnight, but built on prior cases that had adumbrated a standard of review somewhat similar to *Oakes*. It is this process of incorporation, and the previous standards of review that illustrate the background to it, that is the focus of this chapter.

Early Views on Constitutional Rights and Deference

In the first constitutional case concerning Bunreacht na hÉireann, Gavan Duffy J set out in the clearest terms that rights were to have limits. In *State (Burke) v Lennon*,[2] he laid out the rights protected by the Constitution, and said:

> These rights are, of course, qualified, because under modern conditions the rights of the citizen must be subject to legal limitations and absolute rights are unknown, or virtually unknown, in a democratic State.[3]

In that case, the judge held unconstitutional the internment provisions of the Offences Against the State Act.

In *Re Article 26 and the Offences Against the State (Amendment) Bill* 1940,[4] which was in essence an appeal from the judgment in *Burke*,[5] the Supreme Court took a conservative view of the constitutional rights protections, holding that the

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[1] [1994] 3 IR 593.
[2] [1940] IR 136.
[3] *Ibid* at 144.
[4] [1940] IR 470.
[5] The Supreme Court refused to hear an appeal on the merits of the decision on jurisdictional grounds. The Oireachtas therefore passed a law amending the Offences Against the State Act to reinsert substantially identical provisions on very similar terms, in the hope or with the knowledge that the President would refer the Bill for the Supreme Court's opinion on the contentions of Gavan Duffy J in *Burke*. See Gerard Hogan, "The Supreme Court and the Reference of the Offences Against the State (Amendment) Bill 1940" (2000) 35 Ir. Jur. 238.

balancing of rights was a matter for the Oireachtas, and essentially non-justiciable.[6] This highly non-interventionist stance did not long endure.[7]

A similar tone was struck in the landmark case of *Pigs Marketing Board v Donnelly.*[8] This case is widely credited with establishing the doctrine of the presumption of constitutionality.[9]

> When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established.[10]

Hanna J went on to say that when the constitution required the reconciliation of such rights with the exigencies of the common good, "the Oireachtas must be the judge of whatever limitation is enacted."[11] This presumption could be overcome, though he was clearly dubious of this prospect: "if a law is contrary to the common good, whatever that may mean, it must be clearly proved and I repeat that an Act is deemed constitutional until the contrary is clearly established."[12]

This presumption has had an enduring legacy, and remains a cornerstone of Irish constitutional adjudication. The effect of the presumption is to put the onus of proof on the plaintiff.[13] But the effect is actually deeper than that, as the

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[6] "The guarantee in that clause is not in respect of any particular citizen, or class of citizens, but extends to all the citizens of the State, and the duty of determining the extent to which the rights of any particular citizen, or class of citizens, can properly be harmonized with the rights of the citizens as a whole seems to us to be a matter which is peculiarly within the province of the Oireachtas and any attempt by this Court to control the Oireachtas in the exercise of this function would, in our opinion, be a usurpation of authority. "[1940] IR 470 at 481.

[7] In later cases, such as *In Re Philip Clark* [1950] IR 235, this statement was read in a more limited fashion, calling it a "rule of prudence" to be observed in the consideration of repugnancy. At 247. It was affirmatively rebutted, though not mentioned, in *Buckley v Attorney General* [1950] IR 67. See Gerard Hogan, "Unenumerated Personal Rights: Ryan's Case Re-Evaluated" (1990) 25(1) Ir. Jur. 95. Obviously, it was eschewed in later cases such as *Ryan v Attorney General.*

[8] [1939] IR 413.

[9] Brian Foley, "The *Bupa Ireland Case* And Constitutional Litigation," (2010) 45 Ir. Jur. (ns) 230; Brian Foley, *Deference and the Presumption of Constitutionality*, (IPA, 2008) at 18-19; Donal Barrington, "Some Problems of Constitutional Interpretation," in Deirdre Curtin and David O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law*, (Butterworths, 1992) at 176. The Supreme Court hinted at an approach such as this in the *Offences against the State Amendment Bill Reference.* O'Sullivan CJ suggested that the deference shown to the State would leave the challenger with a high burden if he or she were to claim constitutional repugnancy in circumstances where there was no express constitutional prohibition on the sort of law being considered. Such repugnancy would have to be "clearly established." [1940] IR 470 at 478.

[10] [1939] IR 413 at 417.

[11] *Ibid* at 422.

[12] Ibid at 422-3.

[13] See Barrington, note 9 at 173.

presumption of constitutionality reflects a deeper attitude of deference to the legislature and judicial non-intervention.

As Hogan and Whyte outline, the strength of the presumption is not static.[14] The presumption has been strongly stated in rights cases.[15] Its strength has been influenced by, amongst other considerations, the expertise of the legislature in respect of social and economic policy[16] and democratic legitimacy.[17]

LIMITING RIGHTS

Textual Origins

Rights in the Irish constitution are strongly stated. Strong language, grounded in the natural law tradition, seemed to reject any utilitarian analysis of rights, focusing on intrinsic value.[18] However, many rights are subject to significant qualification:[19] the right to equality before the law does not prevent inequality in state enactments that results from "due regard to differences of capacity, physical and moral, and of social function."[20] Certain rights, like liberty and inviolability of the dwelling, may be limited "in accordance with law."[21] Freedom of speech, assembly, religious conscious and religious practice are protected "subject to public order and morality."[22] Property rights may be delimited having regard to the "exigencies of the common good" with regard had to the "principles of social

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[14] Gerard Hogan and Gerry Whyte, *J.M. Kelly: The Irish Constitution*, (4th ed, Tottel, 2004) at 840-844.

[15] See Kenny J in *Ryan v Attorney General* [1965] IR 294, where he argued that the presumption applied "with particular force" to legislation balancing rights with the common good. This is particularly interesting in contrast to Canada, where no presumption of constitutionality exists in respect of laws infringing Charter rights, whereas it does in respect of other constitutional matters. See Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-10 and *Manitoba v Metropolitan Stores* [1987] 1 SCR 110; 1987 CanLII 79 (SCC).

[16] Kenny J in *MacDonald v Bord na gCon* [1965] IR 217 said that the courts' power to declare acts unconstitutional should be tempered by the "now accepted extensive role of the State in economic and social matters." At 235

[17] See Keane J in *Kavanagh v Government of Ireland*, [1996] 1 IR 321.

[18] For example Article 40.1 guarantees that all citizens, "as human persons," shall be equal before the law. Article 41 declares that the family, as a "moral institution" has "inalienable and imprescriptible rights, antecedent and superior to all positive law." Article 43 says that property ownership is a "natural right," antecedent to positive law, that comes from man's "virtue as a rational being." For exploration of this theme, see Oran Doyle, "Legal Positivism, Natural Law, and the Constitution," (2009) 31 DULJ 206; Oran Doyle, "Legal Validity: Reflections on the Irish Constitution," (2003) 25 DULJ 56; Declan Costello, "Natural Law, the Constitution, and the Courts," in Lynch and Meenan (eds.) *Essays in Memory of Alexis Fitzgerald* (Incorporated Law Society of Ireland, 1987) 105; Desmond Clarke, "The Role of the Natural Law in Irish Constitutional Law," (1982) 17 Ir. Jur. (ns) 187.

[19] For a more complete account, see Hogan and Whyte, note 14, at 1269 and Declan Costello, "Limiting Rights Constitutionally," in James O'Reilly (ed.) *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh (*Dublin , 1992).

[20] Article 40.1.

[21] Articles 40.4.1° and 40.5.

[22] Articles 40.6.1° and 44.2.1°.

justice."[23] The personal rights provision, Article 40.3, sets the State the task of defending and vindicating personal rights "as far as practicable"[24] which implies a limitation on what the State must do based on feasibility. The clause also tasks the State with protecting rights from "unjust attack."[25] However, there is no indication of how the justice of a limitation could be established.

Moreover, the Constitution frequently seems to be "giving a right on the one hand and taking it back on the other,"[26] such as when it staunchly protects the right of private property and also leaves it open to restriction in the common good,[27] or when freedom of speech is guaranteed and qualified by broad notions of public order and morality, and more specific restrictions.[28] However, certain rights are not subject to express limitation by the Constitution, such as certain Family rights in Article 41.

Certain concepts derived from the text of the constitution, in particular the notion of the common good and the idea of an unjust attack, have played a significant role in the rights limitation jurisprudence of the Irish courts. However, the textual origins of rights limitations were only one small part of the process of rights limitation, prompting Hogan to reflect that "there is a sense in which the actual text and the provenance of this text does not particularly matter."[29]

Extra-Judicial Writing

There has been little academic or extra-judicial theorising on how rights in the Irish Constitution should be limited. Before the advent of the *Heaney* test, which prompted some discussion of the propriety of using non-textual standards of

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[23] Article 43.2.
[24] Article 40.3.1°
[25] Article 40.3.2°
[26] KC Wheare, *Modern Constitutions* (Oxford, 1966), at 62. One TD in the Dáil Debates on the Constitution commented that the Constitution's protection of rights "consists largely of a moral homily in which various directions are given as to the lines on which the State should work in future. Where general principles appear, one finds that every one of them is qualified by following phrases, so that when attempting to interpret them one does not know what meaning is conveyed ... Instead of a clear statement as to the structure of the State and the right of individual citizens, we have a vague, indeterminate series of statements and sentences which to a great extent are opposed to each other and are almost contradictory." *68 Dáil Debates,* 14 June, 1937 *at Cols. 386,387.*
[27] See Gerard Hogan, "The Constitution, Property Rights And Proportionality" (1997) 32 Ir. Jur. (ns) 373; Wheare, note 26.
[28] For example: the education of the public opinion and the publication of blasphemous, seditious, or indecent matter Article 40.6.1°
[29] Hogan, note 27 at 371. Hogan was commenting on the use of proportionality in property rights.

review,[30] little attention was devoted to this question. However, important contributions were made by Mr Justice Declan Costello in extra-judicial writings.

Costello discussed the problems of rights limitations, focusing heavily on the common good. The idea of the common good was

> derived from the concept that a political community exists to provide a whole range of conditions (material, social, moral, cultural) so that each of its members can realise his or her development as a human person.[31]

The Constitution's conception of the common good, he said, was drawn from scholastic philosophy and thus "differs greatly from the utilitarian concept of the greatest good of the greatest number."[32] He called that conception "seriously flawed" both because it tries to measure pleasure and compare it to pain and because it "provides a theoretical justification for restrictions on the rights of minorities."[33] He also noted that the protection of basic rights was part of the common good.

Costello's rejection of utilitarianism is significant, as it indicates an anti-utilitarian focus in Ireland. However, his analysis becomes problematic when he tries to elaborate upon it. His example of a justified limitation was the limitation on property rights of factory owners for the sake of the common good done by protecting the environment. He expressed this aspect of the common good as a collective right, "the right of every member of society to enjoy a pollution free environment."[34] Furthermore, he said that for the limitation to be justified, there must be "a proper balance between"[35] the two rights.

This highlights several problems. First, there is a tendency for Irish courts to express many communal interests as rights, which tends to obfuscate analysis. There is surely not an individual right to a clean environment in the Constitution; it is rather a political aim, like any other, a part of Costello's natural law conception of the common good. Using rights language serves to confuse, as it does not make clear

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[30] *Ibid.* Hogan elsewhere pointed out the potential for the *Heaney* test to ameliorate the inherent "subjectivity of what constitutes an 'unjust attack.'" Hogan, "Judicial Review – the Law of the Irish Republic" in Brigid Hadfield (ed.) *Judicial Review: A Thematic Approach* (Gill & McMillan, 1995) at 340.

[31] Costello, note 19, at 178. Similar comments about utilitarianism and the common good were made by Costello in "Natural Law, the Constitution, and the Courts" in Patrick Lynch and James Meehan (eds.) *Essays in Memory of Alexis Fitzgerald*, (Incorporated Law Society of Ireland, 1987)

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

what special status a right has above any other political goal. As we shall see, this is a problem that regularly rears its head in Irish constitutional adjudication. Indeed, Costello J had criticised this tendency in an earlier judgment.[36]

Secondly, expressing the environmental protection interest as a right camouflages what is, for Costello, an unattractive fact: that the achievement of the common good in this instance could be very easily viewed as an in assessment of collective utility. If this is not how the environmental interest is to be judged, Costello J gave no indication of the correct method. Thirdly, having criticised the incommensurability problem inherent in utilitarian analysis of pain and pleasure, Costello J then proposes a balance between two "rights" which will be as difficult or more difficult to compare as pain and pleasure, with no indication of how comparison might be achieved. This difficultly will be even more pronounced if Costello were unwilling to consider the collective utility of the environmental protection interest and insist instead on comparing the values in the abstract.

Finally, it highlights a fundamental issue with the statements quoted above: Costello has allowed a restriction on the rights of minorities for the benefit of the majority. The minority here –factory owners– may not be a minority with which the Judge was particularly concerned, but that merely highlights the problems with his analysis. His theory allows restrictions on the rights of minorities, as any theory will.[37] Minorities, however defined and however vulnerable, do not enjoy absolute protection of their rights, no more than anyone else.

Costello's rejection of utility and utilitarianism, and his strong stance in defence of rights indicates that he might have conceived the Irish Constitution as taking a deontological approach to rights limitations. However, the example he used to illustrate his point showed that his own model lacked the ability to jettison utility. Similarly, his criticisms of utilitarianism– his basis for rejecting any consideration of utility– are not fully elaborated upon, and his suggestions show no sign of avoiding

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[36] See *Murray v Ireland* [1985] IR 532 at 540. This case will be further discussed in Chapter 7.

[37] He encountered this problem again, later in his article, when dealing with laws protecting public morality. He said that societies have the power to enact laws to protect public morals, but said that if those laws infringed a protected right of a minority, the power may have been invalidly exercised. *Ibid* at 181. However, just before this he highlighted *Norris v Attorney General* [1984] IR 36 as a good example of this power being used. At 180. Yet homosexuals were a minority group, and the surely enjoyed the personal right to privacy the Judge had discussed on the previous page. At 179. Perhaps homosexuals, like factory owners, do not fall into his unspoken definition of minorities. In trying to say that his theory allows for limitation of rights in the common good but does not allow for the limitation of minority rights, he is trying not merely to have his cake and eat it, but to eat his cake and still have it. It cannot be done.

the problems of incommensurability that he highlighted or avoiding justifying limits on the rights of minorities. He seemed to espouse and advocate a deontological approach, but, whether he realised it or not, his approach is teleological.

Writing elsewhere, Costello acknowledged that courts exercising a supervisory role over rights-restricting legislation meant that unelected judges were substituting "their views on how best to reconcile the competing aspects of the common good for those of the democratically elected representatives of the people," but ultimately "that is what 'judicial review' as enacted in the Constitution means."[38]

Costello made some observations about the way courts approach this process, and in doing so illustrates several elements of standards of review. It was probably the most comprehensive statement of the principles underlying rights limitations that had been made up to this point.

> The more restrictive legislation is of the exercise of constitutionally protected rights the stronger and more plausible and well established must be the reason advanced to justify it.... The principle of proportionality must not be breached and so a proper proportion must exist between the benefits which are likely to be conferred from the impugned legislation and the limitations which are imposed on the rights of the individual citizens.[39]

Here, Costello acknowledged the importance of the explanation for the rights restriction, and suggested that it would have to be more compelling for a more extreme violation of rights. Moreover, by referring to the reasons advanced to justify the restriction, he intimated that the burden of proof of justification of a rights restriction might lie on the State. A right, when infringed, must be justified by the infringer. He then clearly endorsed an overall balancing exercise, using the language of proportionality that he would later use in the *Heaney* case. Finally, he acknowledged that empirical deference is owed to the State where complex matters of fact must be decided upon to determine the justification of limitation.[40] It is a lucid and compelling outline of a standard of review.

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[38] Costello, note 31, at 117.

[39] *Ibid.*

[40] "And, finally, where a proper judgment on what measures are necessary to promote the common good depends on knowledge and study and assessment of complex social and economic condition the courts will exercise a deference to the organ of the government best suited to make such a judgement and will not interfere with it unless for clear and compelling reasons." *Ibid.*

In another extra-judicial article, Costello outlined a similar standard, stressing the difference between judicial and legislative roles.[41] Costello's standard of review in both articles focuses on objectives and an overall balancing exercise, and says little about tailoring. However, it is one of the very few discussions before *Heaney* about the need to balance rights and objectives.[42] It bears a striking resemblance to the then burgeoning Canadian jurisprudence on the *Oakes* test, particularly in its use of proportionality language; it seems likely that Costello was aware of the Canadian doctrine.

Judicial Perspectives

The judicial attitude to rights limitations soon left behind the non-interventionist stance of the *Offences Against the State Amendment Reference*. In *Buckley v Attorney General*, O'Byrne J was unwilling to accept the "far-reaching proposition" that powers of the Oireachtas in respect of rights limitations was not fettered.[43] However, simply recognising the power of the courts to review rights limitations did not provide any guidance as to how this would be carried out, nor by what standards these limitations should be judged.

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[41] "When an issue arises as to whether the exercise of a protected right has been unconstitutionally restricted by legislation, the judge does not consider what laws he would pass if he had been called upon to legislate on the subject-matter of impugned legislation. His consideration of the problem is entirely different. He must decide firstly whether the object of the legislation is one which would reasonably be said to further the common good and secondly, the nature and extent of the detriment which it causes the plaintiff. He may then be required to consider whether the detriment to the plaintiff is out of proportion to the object which the legislation is designed to achieve, or to decide whether the legislation is so restrictive as to amount to a denial of a protected right. A decision averse to the legislation amounts to a conclusion that the legislature has failed to reconcile properly two different objectives. It is not, however, an assessment of how the judge himself would have legislated had he been called upon to do so." Declan Costello, "The Irish Judge as Law-Maker", in Deirdre Curtin and David O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law*, (Butterworths, 1992) at 167. He also makes some comments about evidential issues at 166.

[42] As we shall see, many elements of standards of review can be seen, and were discussed, in Irish judgments, but balancing was not amongst them. Irish courts did not admit to engaging in this balancing of rights and interests. This extra-judicial acknowledgement is the closest thing to an articulation of balancing, and an acceptance of its crucial role in standards of review.

[43] "It is claimed that the question of the exigencies of the common good is peculiarly a matter for the Legislature and that the decision of the Legislature on such a question is absolute and not subject to, or capable of, being reviewed by the Courts. We are unable to give our assent to this far-reaching proposition. If it were intended to remove this matter entirely from the cognisance of the Courts, we are of opinion that it would have been done in express terms as it was done in Article 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas and are expressly removed from the cognisance of the Courts." [1950] IR 67 at 83.

It has long been established that rights protected under the Irish Constitution are not absolute.[44] The qualification of rights does not depend on an express textual qualification; it is as if the constitution has a "silent limitations clause."[45]. In an oft-cited passage, Kenny J laid out this notion in the seminal case of *Ryan v Attorney General*:

> None of the personal rights of the citizen are unlimited; their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of its citizens or unless there is no reasonable proportion between the benefits which legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen.[46]

Here, several ideas are put forward to explain rights limitations. The first is the idea of the common good, which runs throughout the Constitution from the Preamble to Article 45's directive principles of social policy, and is scattered through the rights provisions. Limitations may be carried out where the common good requires it. However, where controversial matters are at play, the Oireachtas has to choose, and only in two cases would that choice be interfered with: oppression of some or all citizens, or a lack of proportion between the public benefits and the effect on rights. This passage to a large degree foreshadows the later developments in standards of review, with its embryonic proportionality language. Indeed, the Supreme Court recently described Ryan as "an early example of the proportionality test raising its head in a constitutional action."[47]

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[44] See *Burke*, [1940] IR 136, discussed above at note 3. A possible exception is a right not to be tortured. In *W v Ireland (No. 2)* [1997] 2 IR 141, Costello J said that the "the right not to be tortured ... must be regarded as an absolute right which can never be abridged." He may have drawn inspiration from the unqualified right against torture in Article 3 of the ECHR. In the Irish Constitutional context, this would presumably be an instantiation of the right to bodily integrity or the protection of the person. In any event, these comments were obiter, and it is not clear where the right's absolute status was derived from. Moreover, such rights are limited by the definition of what constitutes torture, and there is no indication of what that would mean in this country. Another possible exception would be a right not to be put to death by the State, under Article 15.5.2, though this is not framed in the language of rights. Costello discussed his view on absolute rights in an extra judicial context. See Costello, note 31.

[45] Ahron Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012) at 135.

[46] [1965] IR 294 at 312. *Cf* Costello J in *Murray v Ireland* [1985] IR 532 at 538.

[47] *PJ Carroll v Minister for Health* [2005] 1 IR 295 at 318.

Only some of the ideas discussed by Kenny J are derived from constitutional text: the common good is clearly rooted in the text of the document. It could be argued that the notion of "oppression" could be linked to the notion of an unjust attack on rights. The proportionality element, however, has no textual grounding. One of the key problems with rights limitations is that some rights will have express textual limitations, whereas others will not, either because the text does not provide them or because they are not rights provided for in the text.[48] Therefore general grounds of limitation derived from the text, such as the common good or the idea of an unjust attack, have to be extrapolated out to provide for rights limitations more generally.

Kenny J, therefore, seemed to favour an external approach to rights limitations – that rights could be legitimately restricted by factors outside their scope and definition. Moreover, he accepted that such factors included, but were not limited to, those specifically enumerated constitutional limitations on rights.

The Supreme Court in *Ryan* was not as clear. O'Dálaigh CJ, giving the judgment of the Court, noted that the Court had not received advice from counsel as to the limits of the right to bodily integrity, the rights claimed by Mrs Ryan, which the Court had accepted.[49] However, the Chief Justice did not seem to endorse the idea of rights limitations that were external to the constitutional text. Since both courts took a narrow view of the right to bodily integrity, and found it not to be even *prima facie* restricted, we cannot be sure on their precise views on how to deal with limitations.

In *Murray v Ireland*,[50] Costello J reflected upon the qualified nature of constitutional rights. In dealing with the rights contained in Article 41, which appear to be largely unqualified, he said that the power to limit rights was not confined to the textual limitations, just as the rights protected by the Constitution went beyond those protected by the text:

> [T]he power to delimit the exercise of constitutionally protected rights is expressly given in some Articles and not referred to at all in others, but this

[48] Many of the rights questions tackled by the courts in this era involved unenumerated rights, such as the right to bodily integrity recognised by Kenny J in *Ryan*. See Gerard Hogan, "Unenumerated Personal Rights: Ryan's Case Re-evaluated" (1990-1992) 25-27 Irish Jurist 95; Desmond Clark, "Unenumerated Rights in the Irish Constitution," (2012) 34 DULJ 101.

[49] "Neither counsel offered the Court any assistance as to what the limits of this right to bodily integrity were." [1965] IR 294 at 345.

[50] [1985] IR 532.

> cannot mean that where absent the power does not exist. For example, no reference is made in Article 41 to any restrictive power, but it is clear that the exercise by the Family of its imprescriptible and inalienable right to integrity as a unit group can be severely and validly restricted by the State when for example its laws permit a father to be banned from a family home or allow for the imprisonment of both parents of young children.[51]

Costello J's logic is sound; the express limitation of some rights cannot be said to afford absolute status to those without such limits. In these cases, the Irish courts seemed to accept the notion of a general power to limit rights, and in practice most rights are subject to external limitations.[52]

In the past, the Irish courts seldom dwelt on the problems of rights limitations. As such it is not surprising that their approach was somewhat incoherent, since the principles underlying them had not been fully explored.

Standards of Review in Ireland Before *Heaney*

Margulies is correct when he says that the Irish courts' approach to standards of review is "all over the ballpark."[53] Before the 1990s, there was no articulated or coherent approach across Irish constitutional law. What can be found are certain elements of standards of review. Assessing these can give us some indication of how the Irish courts approached these questions, and what normative values underlay Irish constitutional adjudication.

Objectives

Many of the constitutional limitation provisions seem to encourage courts to look to purpose or objective. The idea of an "unjust attack," which is the cornerstone of rights protection under Article 40.3, surely requires an assessment of the reason for the "attack" to determine its justice.[54] The idea of delimitation of property rights in the interests of the common good clearly requires an examination of the purpose

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[51] *Ibid* at 538.

[52] As we shall see, some other rights, such as equality and access to the courts, are apparently subject only to internal limitations. See Chapter 9, text accompanying note 58-72.

[53] Martin B. Margulies, "Standards of Review and State Action under the Irish Constitution" (2002) 37 Ir. Jur. (ns) 23 at 30.

[54] See, for example, the property rights case of *Lawlor v Minister for Agriculture*, where Murphy J held that measures challenged "were in no sense unjust. They were neither capricious nor arbitrary." [1990] 1 IR 356 at 377.

of the measure to establish whether or not the measure falls into that category.[55] A restriction on freedom of speech or association might be justified if the motivation is the protection of public order and morality. Therefore, one would expect consistent focus on purpose in the context of rights restrictions.

Initially, the Irish courts failed to recognise the importance of this issue. This can be seen in the acclaimed case that definitively established the power of the courts to review the constitutionality of legislation: *Buckley v Attorney General*.[56] The purpose of the impugned legislation, the Sinn Féin Funds Act 1947, was to frustrate litigation taken by the Sinn Féin party of the time to claim entitlement to money raised by the old Sinn Féin party, which existed before the Irish civil war. The Act diverted the money to a trust fund, which was to spend the money as directed by the Act, primarily to the benefit of those who fought during the war of independence.

The Supreme Court held the measure to be invalid on the basis that it was an interference with the judicial power to decide cases, as well as an interference with constitutional property rights. The Court acknowledged that the State was permitted by the Constitution to regulate these rights by the principles of social justice, and delimit these rights by reference to the common good. However, it was not an argument that O'Byrne J entertained in this case:

> In the present case there is no suggestion that any conflict had arisen or was likely to arise, between the exercise by the plaintiffs of their rights of property in the trust moneys and the exigencies of the common good, and, in our opinion, it is only the existence of such a conflict and an attempt by the Legislature to reconcile such conflicting claims that could justify the enactment of the statute under review.[57]

At no point did the Court discuss the possibility that there was an argument from the common good to be entertained here. The Court did not look at the broader purpose of the measure. It did not examine how the monies were to be dispensed, and to what purposes they were put.[58] It did not undertake any inquiry as to whether there was a deleterious effect of the money going to the Sinn Féin party, which would explain the very specific confiscation.

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[55] See See Rachael Walsh, "The Constitution, Property Rights and Proportionality – A Reappraisal" (2009) 31 DULJ 1.
[56] [1950] IR 67.
[57] *Ibid* at 83.
[58] In fact, the Court said "The meritorious nature of these purposes is not a proper subject matter for our consideration." *Ibid* at 80.

It might be that the Supreme Court believed the primary purpose of the measure was simply to deny the owners of this property their rights. This, of course, would be an entirely impermissible purpose.

One explanation for this could be that the burden of proof placed on the State to show a purpose for the confiscation, but that would be dissonant with the common practice of the time, and the comments of the Court in the *Buckley* case, as will presently be discussed. Perhaps the most likely explanation of this feature of *Buckley* is that the Court simply failed to grapple fully with these issues given that Irish constitutional law was still nascent. This was, in essence, the beginning of constitutional review in Ireland. It is understandable that the Court would not at this point fully understand these issues.

Equality jurisprudence under Article 40.1 has focused heavily on objectives. This is particularly true following the development of a rationality test for equality cases that began with *Brennan v Attorney General,*[59] though was true of the preceding standard of "invidious discrimination" as well.[60] Barrington J introduced a rationality test which demanded that, for a discrimination to be lawful, the classification drawn must be in pursuit of a "legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly."[61] In later cases,[62] the Supreme Court came to see the benefits of Barrington J's approach,[63] and certain cases focused on the objective of the measure exclusively.[64]

Often, Irish judges would appreciate the importance of objectives, but give no indication whatsoever as to how these objectives should be established, or suggest

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[59] [1983] ILRM 449.

[60]However, it was also true before this case, when the preferred standard for equality determinations was the notion of "invidious discrimination." [60] It is clear that the notion of invidious discrimination requires a focus on objectives and the purpose of the discrimination. This formulation gradually fell into disuse, with the Supreme Court branding it "more likely to mislead than to help." *Murphy v Attorney General* [1982] IR 241 at 286. Barrington J acknowledged that his new test might simply a more direct expression of how the Irish courts always dealt with equality cases: "It may be that all discrimination between citizens not relevant to a legitimate legislative purpose is invidious." [1983] ILRM 449 at 483. See further Hogan and Whyte, note 14, at 1354-55.

[61] *Ibid* at 480. In *Brennan*, the impugned statute, the valuations Act 1852, was not intended to discriminate against the plaintiffs; in fact "there was no advertant discrimination against them." At 483. It simply had that effect through its arbitrariness and irrationality.

[62] The Supreme Court on appeal did not take up this issue, holding that Article 40.1 did not apply in relation to taxation of landowners, and deciding the case on property rights grounds. [1984] ILRM 355.

[63] Considering age discrimination in *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 IR 321 the Supreme Court, quoting Barrington J. in *Brennan*, held that: "The aged are thus entitled as human beings to protection against laws which discriminate against them, unless the differentiation is related to a legitimate objective and is not arbitrary or irrational." At 347-8.

[64] See *Mhic Mhathúna v Ireland* [1995] 1 IR 484.

any mechanism by which to test them. For example, in *State (M) v Attorney General*,[65] Finlay P held that portions of s. 40 of the Adoption Act 1952, which had justified denial of an Irish passport to a child citizen to enable travel outside the State, was an unconstitutional infringement of an unenumerated right to travel. He said that the right to travel was to be enjoyed without "arbitrary or unjustified interference."[66] As to justifications for interference, the Judge held that the right was subject to "obvious conditions which may be required by public order and the common good", for example, ceding a passport while on recognisance to appear before a criminal court. The Court is focused on objectives; the State had to explain the denial of the right with a non-arbitrary and coherent reason. There is little indication of how that should be done.

It is clear in other cases that the courts are willing to hypothesise the objective for the State. Oftentimes, the objective was simply stated without any analysis. On other occasions, a clear hypothesisation of the objective from the means can be seen. In *Quinn's Supermarkets v Attorney General*,[67] McLoughlin J in the High Court said that there was no evidence presented to the Court as to why the measure in question gave exemption of Kosher butchers from the general restriction on closing times. He found the objective of the measure –to accommodate practising Jews in buying meat– by looking to the means used; he said the objective could "reasonably be inferred."[68]

In *Somjee v Minister for Justice*,[69] Keane J inventively hypothesised the reason for the distinction drawn in Irish Nationality and Citizenship Act 1956. If a foreign man married an Irish citizen, he had to undergo a process of naturalisation in order to become an Irish citizen himself. The same was not true of a foreign woman who married an Irish man; she would become a citizen by an almost automatic process. Keane J rejected that this was an invidious discrimination on the basis of sex:

> I am entitled to presume that ... the Legislature was having regard to the social, economic and political condition which might prevail in the various jurisdictions from which alien aspirants for citizenship might come. It was open to the Legislature to take the view that, in some at least of these

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[65] [1979] IR 73.
[66] *Ibid* at 81.
[67] [1972] IR 1.
[68] *Ibid* at 5. Walsh J took this objective one step farther, perhaps, in saying that this measure was necessary to avoid violating the free practice rights of Jews. At 17.
[69] [1981] ILRM 324.

> jurisdictions, the likelihood of females being engaged in any of the activities which might be relevant in considering an application for citizenship was sufficiently remote to justify the automatic granting of citizenship to female aliens upon their marriage to Irish citizens. [70]

The motivation behind this measure was an apparent belief that alien males were more likely to raise immigration problems than alien females. Keane J did not know this to be the case; he felt entitled to presume it. This is highly deferential to the legislature, as its determination that the measure was worth pursuing leads the court to conclude that it was. The objective recognised was also very vague; the judge did not dwell on what sort of activities would be relevant in considering citizenship, which lay at the heart of the objective.

Another feature of the pre-*Heaney* case law is a tendency to doubt the objective of the measure without proper analysis. An example is provided by *Cox v Ireland*,[71] a case that will be discussed in detail later. The case concerned a law that enacted penalties and forfeiture on people working in the public service who were convicted of an offence scheduled to the Offences Against the State Act. Barr J in the High Court rejected many of the State's claims about the objective of the measure, because they did not stack up with the reality of its scope.[72] In the end, he settled on an objective that is merely descriptive of the law's effect: "I am satisfied that the nature and purpose of s. 34 is to impose penalties on certain categories of persons who are convicted by a Special Criminal Court of an offence scheduled by Part V of the Act."[73] This does not explain why the state might want to impose additional penalties on some people and not others.[74]

Instead of engaging the objective directly, the judge took issue with the arbitrariness of the law, saying that it cannot serve the common good when it is so "capricious."[75] Surely we must know what the government was trying to do before we can determine if it is arbitrary or not. It seems that the judge thought the measure was so arbitrary that it could not be effectively linked to *any* legitimate objective: "There is nothing in the section or elsewhere in the Act to establish or

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[70] *Ibid* at 327.
[71] [1992] 2 IR 503.
[72] [1992] 2 IR 503 at 511.
[73] *Ibid* at 512.
[74] This is not quite as tautologous as it seems, however, as it required the judge to reject the idea that this was merely a clause affecting employment rather than imposing a penalty, which is what the State had contended.
[75] *Ibid at* 513.

suggest, as alleged on behalf of the defendants, that its provisions are in the interest of the common good."[76] This was an indirect rejection of the objective of the measure.

The most troubling treatment of objectives is a failure to reject legislation where no purpose at all is apparent. The Supreme Court faced just such a statutory provision in *Doyle v Hearne (No. 2)*.[77] This case concerned a distinction drawn in the Intoxicating Liquor Acts between converted liquor licences and other liquor licences. One category of licences enjoyed absolute protection while the other did not. Finaly CJ could not, despite his best efforts, justify this distinction.[78] He conceded, essentially, that the distinction was purposeless. Yet this fact did not invalidate the measure:

> all persons who converted from a six to a seven-day licence pursuant to the provision... are being treated alike and that whilst it can be said that the section is discriminatory as between them and the persons who did not convert, it is not invidiously discriminating for this reason.[79]

Finlay CJ dismissed the equality complaint on the grounds that within the arbitrary and purposeless categories, formal equality was maintained.[80] This misses the point. The Court ignored the fact that limitations on rights, such as equality, must be justified by reference to legitimate state interests. Here, the Court conceded that none existed, yet rather than strike down the law as unconstitutional (or use the double construction rule to interpret the statute as not creating any distinction, as the plaintiffs were hoping for) it preferred to hold that equality within the discriminatory classes was all the Constitution required. This is an unusual case, and was the low point of objectives analysis in Irish law, calling into question whether the Irish courts appreciated the importance of objective analysis at all.

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[76] *Ibid.*

[77] [1988] IR 317. See Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004) at 121.

[78] "[I]t is difficult to conceive, without some imaginative speculation, of the exact reason why the legislature should have been prompted to protect in an absolute fashion certain licencees and to leave freed from absolute protection other licencee... However, I am quite satisfied that to construe the provisions... otherwise than I have done would not be justified, having regard to their plain and unambiguous meaning." [1988] IR 317 at 324.

[79] *Ibid* at 325.

[80] See Doyle, note 77, at 121.

Tailoring

Several pre-*Heaney* cases display an understanding of the importance of tailoring for rights limitation analysis. *Quinn's Supermarkets v Attorney General*[81] concerned the religious non-discrimination clause, Article 44.2.3°. Here, the plaintiff Supermarket was forced to close its butcher's counter at specified times pursuant to a ministerial order. Kosher butcher shops were exempted from this requirement in order to facilitate the Jewish practice of the Sabbath and not prevent Jews from buying meat on a Saturday evening, after sunset. The supermarket complained that this was a religious discrimination.

Walsh J in the Supreme Court held that the State was entitled to discriminate in this manner, as in so doing, the State was protecting the free practice of Jews, guaranteed by Article 44.2.1°. However, in the circumstances of this case, he found the order unconstitutional, because the discrimination here was excessive. The exemption was not limited to Saturdays, to enable Jews to buy meat after the Sabbath ended; it also applied on every other day, with no religious rationale whatever. In the words of Walsh J, "the discrimination is more than is necessary in so far as it relates to weekdays other than Saturday."[82] The discrimination was valid on its face, based on its objective, but went further than necessary in practice.

This is tailoring to the right analysis, but the strength of this tailoring test is not clear: the measure would have been equally effective at protecting the free practice rights of the Jewish community had it been limited to particular days. The rule was simply excessive, and under even the loosest tailoring analysis, such patent excess would be difficult to justify.[83]

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[81] [1972] IR 1.

[82] *Ibid* at 27. Margulies, note 53, at 34, observes that the law seems to have been found to be excessive.

[83] Hogan and Whyte, note 14, at 1378, suggest that a similar principle to the one applied in *Quinn's Supermarkets* was used by the Supreme Court in *O'Brien v Manufacturing Engineering Co.* [1973] IR 334. Here, Walsh J. considered an Article 40.1 challenge to a section of the Workmen's Compensation Act, 1934 that shortened the limitation period (from 3 years to 12 or 24 months) for bringing a personal injury action for those that had received money pursuant to the Act. The Court held that the discrimination in statute bars between those who had and had not taken payments under the Act was not of itself an impermissible one. However, Walsh J did consider the limitation period provided by the Act to see if it was impermissibly short. They found that it was not. However, the fact that they considered the *extent* of the discrimination, as a matter separate from drawing the discrimination in the first place, might be evidence of tailoring analysis of the actions taken pursuant to the discrimination drawnIt is worth noting that this regard to the extent of the discrimination was disfavoured by the Supreme Court in *Mhic Mhathúna v Ireland* [1995] 1 IR 484.

A clear example of tailoring to the right is seen in *McGee v Attorney General*,[84] Walsh J held that the 1935 Act banning the importation of contraceptives was an "unjustified invasion" of the unenumerated right to marital privacy.[85] The judge noted that the State might have justified the ban on the basis of exigent need to increase the population. He continued:

> That, however, is not the present case and there is no evidence whatever in the case to justify the State intervention on that ground. Similarly it is not impossible to envisage a situation where the availability of contraceptives to married people for use within marriage could be demonstrated to have led to or would probably lead to such an adverse effect on public morality so subversive of the common good as to justify State intervention by restricting or prohibiting the availability of contraceptives for use within marriage or at all. In such a case it would have to be demonstrated that all the other resources of the State had proved or were likely to prove incapable to avoid this subversion of the common good while contraceptives remained available for use within marriage.[86]

Here, Walsh J endorsed a very strong tailoring analysis, demanding that all alternatives short of a contraceptive ban be shown ineffective before the right could be restricted.[87]

Another example of this is *de Burca v Attorney General*.[88] This case challenged a property qualification for jury service, and a presumptive exclusion of women from jury service, as a violation of the equality guarantee. Considering the exclusion of women, who had to opt in to jury service, Walsh J held that women could not be differentiated from men on the basis of social function. He rejected that the clause in Article 41.2 about the woman's role in the home, or other generalisations about the role of women, could justify the exclusion:

> [w]omen fulfil many functions in society in addition to, or instead of, those mentioned in [Article 41.2.] Women are actively engaged in all of the professions, in most branches of business, in art and literature, and in virtually every human activity; this is scarcely surprising in light of the fact the women constitute approximately one half of the adult human race.[89]

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[84] [1974] IR 284. See Margulies, note 53, at 32

[85] *Ibid* at 314. This unenumerated right was strongly linked to the rights in Article 41, however.

[86] *Ibid.*

[87] Obviously, this was to some degree hypothetical, as these arguments were not seriously raised. However, it is significant that Walsh J would have presumptively required a significant demonstration of the lack of available alternative measures.

[88] [1976] IR 38.

[89] *Ibid* at 70.

What we can take from this is that the presumptive exclusion of women was too broad and too blunt – or to put it another way, too loosely tailored to the objective of protecting the woman's role in the home in Article 41.2. As *Margulies* notes, Walsh J "found – without putting it this way – that the exemption was not substantially enough related to the State's important objective of allowing women to be homemakers and mothers as contemplated by Article 41.2.1°."[90]

Tailoring was also present in property rights cases.[91] In *Blake v Attorney General,*[92] the Rent Restrictions Acts were challenged as unconstitutional. The Acts designated certain properties in Dublin as being subject to rent control, and the recovery of those properties by landlords was restricted. The properties were selected during the First World War, and had been affirmed in the subsequent enactments. Blake and the other plaintiffs in this case were landlords of some of the affected properties. They established that the market rents of their properties were between 9 and 19 times the rent-controlled amount,[93] and claimed that the Acts violated their constitutional property rights.

In the Supreme Court, the lack of tailoring was a core concern, because of the arbitrary nature of the selection of properties. The Supreme Court noted that no explanation for the selection of properties was apparent from the face of the legislation, or put forward by the Attorney General.[94] The means operated in too arbitrary a fashion to sustain a suggestion that the measure was redistributive of wealth or providing for the poor:

> Neither the means of the tenant nor the lack of means of, or the possible hardship to, the landlord may be considered in determining the permitted rent. Therefore, it is apparent that in this legislation, rent control is applied only to some houses and dwellings and not to other; that the basis for the selection is not related to the needs of the tenants, to the financial or economic resources of the landlords, or to any established social necessity;

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[90] Margulies, note 53, at 32.

[91] Walsh notes that some early property rights cases contained very loose tailoring. In *Attorney General v Southern Industrial Trust*, Lavery J accepted a very loose connection between the objective and means of a forfeiture provision, which in turn caused him to accept the application of that provision to the property of an innocent party; *Attorney General v Southern Industrial Trust* (1960) 94 ILTR 161. See Rachael Walsh, "The Constitution, Property Rights and Proportionality – A Reappraisal" (2009) 31 DULJ 1.

[92] [1982] IR 117.

[93] *Ibid* at 122.

[94] *Ibid* at 138.

> and that, since the legislation is now not limited in duration, it is not associated with any particular temporary or emergency situation.[95]

The lack of compensation was also of concern to the Court.[96] Taking all this into account, the Court concluded that the Act restricted

> the property rights of one group of citizens for the benefit of another group. This is done, without compensation and without regards to the financial capacity or the financial needs of either group, in legislation which provides no limitation on the period of restriction, gives no opportunity for review and allows no modification of the operation of the restriction. It is, therefore, both unfair and arbitrary.[97]

Both tailoring to the right and tailoring to the objective were displayed here. Tailoring to the objective was clearly visible in the judges' concerns about arbitrariness and a lack of apparent reason for the targeting of this particular group of people. Tailoring to the right was apparent in the criticism of the lack of time limits or compensation, which could have ameliorated the effect of the measure.

Finally, as noted above, Barr J in the *Cox* case was clearly concerned with the tailoring of the law; the judge's major problem was that the state interest in defending itself from subversion did not seem even remotely connected to seizing the property of Mr Cox and preventing him from teaching in community schools. The judgment is vague on these points, and it is difficult to say whether the judge felt there was no legitimate aim at all, or there was an aim that was insufficiently reflected in the means of the law, indicating poor tailoring.[98] This is perhaps an illustration of the close link between tailoring to the objective and objective ascertainment, particular where objectives can be hypothesised.

Some scepticism over tailoring to the right was apparent in *Attorney General v Paperlink*.[99] Here, Paperlink had offered courier services that violated the statutory monopoly on postal services given to An Post. In challenging this monopoly, they argued that

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[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid* at 139-140. Though this analysis was directed at the rent restrictions in Part II, the Court later held Part IV of the Act, concerned with reclamation of property by landlords, to be unconstitutional because of its close link to the designation of properties for control under Part II. At 140-141.
[98] The same could be said of the *Blake* case, especially in the High Court, where it might have been more accurate to say there was no legitimate aim whatsoever.
[99] [1984] ILRM 373.

> the advantages which were claimed for the present monopoly could be achieved by a different method of organising the postal service and one which would be 'less offensive' to the defendants' rights; in effect, one which would allow a courier service to be conducted by them.[100]

To entertain this argument, Costello J said, would be "wholly improper ... as it would involve the court in an unconstitutional departure from its role as laid down in the Constitution." [101] He rejected any tailoring to the right argument based on an alternative method of achieving the objective.[102] Moreover, he indicated that in some cases, consideration of such alternatives, and substituting the court's decision for the legislature's, would itself be unconstitutional in violating the separation of powers.[103]

Balancing

As noted above, balancing was articulated in Costello's extra-judicial writings.[104] However, I have found no case, before *Heaney*, where the courts expressly balanced the effect on the rights limited by a measure with the importance of the objective or the good done by the law.[105]

There are several instances where the courts stressed the importance of rights balancing. The case of *Fajujonu v Minister for Justice* [106] involved the deportation of non-national parents of a citizen child. Their deportation would result in the child being unable to reside within the State and enjoy the care and company of her parents. In this instance, the Court remitted the matter to the Minister to reconsider their deportation in light of the rights of the child citizen, which the Minster had not regarded in the first instance. Walsh J discussed the considerations the Minister would have to take into account:

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[100] *Ibid* at 390.
[101] *Ibid a*t 391
[102] "[T]his court is not the forum in which to decide whether a postal service organised on the lines advocated by the defendants' experts is one which meets the requirements of the common good." *Ibid* at 392.
[103] "[T]o carry out the inquiry which the defendants ask me to perform and, thereafter, make a determination on an alternative to the existing postal service would amount to an unwarranted and unconstitutional interference with the powers of government exclusively conferred on the executive and the Oireachtas." *Ibid* at 392
[104] See above notes 39 and 41 and accompanying text.
[105] It is, of course, quite possible that such a case exists, and I have not found it.
[106] [1990] 2 IR 151.

> [H]e would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and overwhelming in the circumstance so this case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable.[107]

Though balancing was in fact done by the Minister in this case, it is a clear example of balancing principles at work, and at least a partial endorsement of the use of such principles in constitutional adjudication. Budd J in *Dunraven Limerick Estates Co v Public Works* acknowledged the importance of comparing rights and state interests.[108] Finally, in *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975* suggested that the right to trial in due course of law "requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society."[109]

Though there are no clear examples of balancing, it is very likely that balancing analysis was done *sub silentio* in many rights cases. Indeed, the idea of rights being restricted in the common good, which is at the core of the Irish constitutional order, seems clearly to envisage balancing.

The Burden of Proof

Since the *Pigs Marketing Board* case,[110] and the advent of the presumption of constitutionality, it has been clear that the burden of proof in constitutional matters would rest, in the first instance, on the applicant seeking to establish constitutional invalidity.[111] It was possible, however, that the burden of proof might, on occasion, be shifted onto the State.

In *Buckley*, O'Byrne J addressed the matter in the following terms:

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[107] *Ibid* at 166.

[108] [1974] 1 IR 113 at 132. I would like to thank Rachael Walsh for bringing this case to my attention.

[109] [1977] IR 129 at 152.

[110] [1939] IR 413. See above at note 8.

[111] It might seem to follow from this that pre-1937 laws, which do not enjoy a presumption of constitutionality, would not place the burden on the applicant in the same way, but this is not the case. In *Norris v Attorney General*, [1984] IR 36 the burden of proof was placed on the claimant to establish a breach of rights even though the statute in question was passed before 1937. O'Higgins CJ held that pre-1937 laws operate "unless inconsistency is established, and the onus of establishing such is placed on the person who challenges their continued validity. This is not to say that such pre-Constitution laws enjoy any presumption of consistency or constitutionality. They do not." *Ibid* at 54. See Margulies, note 53, at 33. The Chief Justice's reasoning for the burden being on the applicant was based on the wording of Article 50.

> Where a particular law is not expressly prohibited and it is sought to establish that it is repugnant to the Constitution by reason of some implied prohibition or repugnancy, it has already been laid down in this Court that such repugnancy must be clearly established. Such a principle, in our opinion, springs from, and is necessitated by, that respect which one great organ of the State owes to another.[112]

Two points are of interest here; first, the burden clearly gives way in cases of express prohibition. This suggests that when something seems to be expressly prohibited by the Constitution, the State must prove that it is not so prohibited. More broadly, this statement could be read as leaving it open to a court to shift the burden to the State when presumptive invalidity is established.

Secondly, it is interesting to see how this burden applied in the *Buckley* case. As noted above,[113] the Court did not undertake an examination of why the Sinn Féin Funds Act might have been enacted in the common good. There was "no suggestion" of that, according to the Court.[114] This indicates that the burden of establishing the common good rested on the State, and the State failed to meet this burden.

One explanation would be that the burden of proof rested on the applicants to establish some presumptive constitutional violation –in this case, the restriction on property rights– and when that was done, the burden fell on the State to establish that the measure was in fact constitutional, which the State did not do. If this was the intention of the Court in *Buckley*, it was not made sufficiently clear, and consequently, the Irish courts' approach to the burden of proof has been somewhat erratic.

In *Ryan*, at the conclusion of the oft-quoted passage about the non-absolute nature of constitutional rights,[115] Kenny J added that "the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly establish applies with particular force to this type of legislation."[116] This passage clearly indicates that leeway is to be given to the State in matters of rights limitation, where "the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good..."[117] There is no indication that the presumption of constitutionality should give way where rights have been limited, as may have been suggested in

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[112] [1950] IR 67 at 80.
[113] See above at note 57 and accompanying text.
[114] [1950] IR 67 at 83.
[115] See above at note 46.
[116] [1965] IR 294 at 312.
[117] *Ibid.*

Buckley. Instead, Kenny J advocated a peculiarly strong presumption of constitutionality, with no indication that the State should bear a burden at any point.

A similar approach was adopted by the Supreme Court, but with an element of the *Buckley* Court's suggestion of a different approach where there was express or facial unconstitutionality:

> There is a presumption that a statute is constitutional and the onus of showing that it is unconstitutional rests on the plaintiff who attacks it. Where on the face of the statute nothing unconstitutional appears and the attack is based on its alleged effect, and the conclusion as to the effect has to be based on evidence of a disputed character, a plaintiff must fully satisfy the Court that its effect is such as he contends.[118]

The onus of establishing this lay on the plaintiff, but we cannot know if she also would have borne the responsibility of establishing that an infringement of the right was justified; neither court felt that right was *prima facie* restricted.[119]

Though it seems that the courts placed the burden of proof on the challenger, intermittently, laws have been struck down because of the failure of the State to offer proof. For example, in *McGee v Attorney General*,[120] Walsh J applied a very strict tailoring analysis, as noted above.[121] The burden of establishing the lack of alternatives fell squarely on the State: there was "no evidence whatever" to suggest justification, and "it would have to be demonstrated" that other means would have proved ineffective.[122]

Evidence and Empirical Deference

The presumption of constitutionality also grounded empirical deference. As Hogan and Whyte note, "The basis for the presumption is that the legislator must be presumed to have been aware of the limitations imposed by the Constitution."[123]

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[118] *Ibid* at 353.

[119] The *Ryan* case was disposed of, in both the High and Supreme Courts, by way of a finding that the plaintiff's right to bodily integrity was not infringed. A broader conception of this new, unenumerated right might have regarded the addition of substances to public drinking water as a *prima facie* violation of the right, albeit one that might be readily justified. If the burden of prof were to shift to the State where infringement of rights was established, the question of whether or not the right was infringed could have a huge impact on the outcome of a case.

[120] [1974] IR 284.

[121] See above at note 84.

[122] [1974] IR 284 at 314.

[123] Hogan and Whyte, note 14, at 402.

Foley quotes the case of *Educational Company of Ireland v Fitzpatrick (No. 2)*,[124] where Budd J said "The legislative body must be deemed to legislate with a knowledge of the Constitution and presumably does not intend to infringe it."[125] The courts therefore act on the assumption that the legislature acted constitutionally, in full knowledge of the Constitution, and not intending that it be infringed. Far from just putting the burden of proof on the challenger, this presumption leads courts to assume a level of legislative knowledge and judgment about a variety of speculative and factual issues that the legislature may not have had. It countenances very strong empirical deference to legislative judgment.

Ryan v Attorney General had a 65 day trial, such was the evidence presented to Kenny J on the risks of fluoridation of water. Ó Dálaigh CJ noted that most constitutional matters require little by way of evidence, and "judicial notice"[126] of certain facts was usually sufficient. However, the scientific matters before the Court in this instance were not "presumed to be within the knowledge of the Court, and, accordingly, the unconstitutionality of the Act ... cannot be determined except by reference to the particular evidence which is furnished in the case."[127]

The Court not only put the burden of proof on the plaintiff, but said that the plaintiff must take the brunt of any empirical uncertainty. When the conclusion of the Court must be based on "evidence of a disputed character, a plaintiff must fully satisfy the Court that its effect is such as he contends."[128] The State can therefore make judgements based on uncertain evidence and expect that this will not present problems if the measure is challenged. Though in the context of this case, the statement related only to evidence that the right was restricted rather than evidence that a restriction was justified, it is an important insight into how the Irish courts viewed question of evidence and empirical uncertainty.

T O'G v Attorney General[129] shows the limits of this deference. A widower wished to apply for adoption of a child that had been placed with him and his wife before his wife's death. No final adoption order had been made. He challenged s. 5 of the Adoption Act, which prevented the granting of an adoption order in favour of a

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[124] [1961] IR 345; Foley, Deference and the Presumption of Constitutionality, note 9, at 18.
[125] *Ibid* at 368.
[126] [1965] IR 294 at 343.
[127] *Ibid.*
[128] *Ibid* at 353.
[129] [1985] ILRM 61. For insightful analysis of this case and this issue, see Ann Sherlock, "Facts, Evidence and Opinion in Constitutional Litigation: The Experience in Ireland," (1991) 40 ICLQ 425 at 430-1. See also Margulies, note 53, at 37-38.

widower with no children. Evidence was presented to the Court that it was in the child's best interests to remain with the Plaintiff, and the boy's natural mother was in favour of the adoption proceeding. In defence of the measure, the Attorney General asserted that that the there was a distinct role in Irish society for male and female parents, and that the discrimination was drawn in recognition of this difference. McMahon J rejected this argument because it was not substantiated by proper evidence, and held the statute unconstitutional.

> No medical or psychological evidence has been adduced to explain the difference between these roles and its significance for the welfare of the child or to establish that the roles are mutually exclusive or that both are essential for the proper upbringing of children or to establish that there is any difference in capacity for parenthood between a widow and a widower.[130]

This law failed because the State did not justify the discrimination in question by reference to a legitimate aim or a rational categorisation. A bland assertion that the distinction was based on social functions was insufficient, at least when it was one not self-evidently true or lacked obvious connection to the discrimination drawn. The Court insisted that some medical or psychological evidence be presented, and in its absence, would not tolerate the law.

For a long time, standards of review in Ireland were erratic and inconsistent. It was not until the early 1990s that a reasoned approach began to take shape.

Towards an Articulate Standard of Review

Cox v Ireland

The development of an articulate standard of review began with the judgment of the Supreme Court in *Cox v Ireland*.[131] S. 34 of the Offences Against the State Act 1939 provided that any public employee convicted in the Special Criminal Court of an offence scheduled to that Act would lose his job and be disqualified from public employment for 7 years. Furthermore, any pension or superannuation allowance was forfeit upon conviction, with remission of this punishment being at the sole discretion of the government. Mr Cox was a community school teacher, who was convicted of possession of three firearms and a quantity of ammunition in the

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[130] [1985] ILRM 61 at 65.

[131] [1992] 2 IR 503. See Hogan and Whyte, note 14, at 1271; Foley, note 9, at 129-130. Hogan, note 27 at 387; Brian Foley, "The Proportionality Test: Present Problems," [2008] 1 JSIJ 67 at 71-72. David Kenny, "A Dormant Doctrine of Overbreadth: Abstract Review and *Ius Tertii* in Irish Proportionality Analysis," (2010) 32 DULJ 24; Richard Humphreys, (1991) 13 DULJ 118.

Special Criminal Court, and suffered these consequences. As noted above, Barr J in the High Court found the section unconstitutional.[132]

The Supreme Court, on appeal, similarly found the section to be unconstitutional, and did so in a way that showed objective ascertainment and significant tailoring analysis. Finlay CJ accepted that the State had a substantial interest at play here:

> The Court is satisfied that the State is entitled for the protection of public peace and order, and for the maintenance and stability of its own authority, by its laws to provide onerous and far-reaching penalties and forfeitures imposed as a major deterrent to the commission of crimes threatening such peace and order and State authority, and is also entitled to ensure as far as practicable that amongst those involved in the carrying out of the functions of the State, there is not included persons who commit such crimes.[133]

However, the Court then said that while in pursuit of those goals, the State must take care to direct means toward the objective, and not to violate rights any more than was necessary.

> The State must in its laws, as far as practicable, in pursuing these objectives, continue to protect the constitutional rights of the citizen.
> The final issue in this case must, therefore, be as to whether the provisions of s 34... [constitute] a failure of such protection not warranted by the objective which is sought to secure.[134]

Examining the Act, the Court noted that persons could be convicted of scheduled offences in the Special Criminal Court that were very serious or fairly trivial; failing to attach the name and address of an organisation to a poster on the one hand, or maintaining an army within the State on the other. There was no mechanism by which one could claim that one's conviction was for a trivial offence, and thus one was not a threat to the security of the State. Because of this,

> notwithstanding the fundamental interests of the State which the section seeks to protect, the provisions of s. 34 of the Act of 1939 fail as far as practicable to protect the constitutional rights of the citizen and are, accordingly, impermissibly wide and indiscriminate.[135]

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[132] See above at note 98 and accompanying text.
[133] [1992] 2 IR 503 at 523.
[134] *Ibid.*
[135] *Ibid* at 524.

The Supreme Court's analysis illustrates understanding of core elements of standards of review. There is a detailed analysis of the State interest, and it is compared to the means used in the law, and the operation of those means throughout the Court's analysis. The Court's reasoning in finding the law overbroad bears hallmarks of tailoring to the objective and the right. The law ultimately failed because it selected too broad an array of offences having regard to the State interest, and there was no mechanism to exclude people from the ambit of the law even if the scheduled offence of which they were convicted did not indicate any subversion on their part. The fact that the law was not specifically targeted at subversive offences called tailoring to the objective into question. There was also a deficiency in tailoring to the right, as there was no mechanism to remit the penalty for those unjustly targeted, which would not have infringed rights so greatly.

It has been said in many subsequent cases that *Cox* was the dawn of *Oakes*-style analysis in Ireland. The Supreme Court later said that the doctrine of proportionality "surfaced obliquely"[136] in *Cox*. Costello J in *Heaney v Ireland*[137] said: "*Cox v Ireland* is an example of a case in this country in which disproportionate means to obtain a legitimate object invalidated a statutory provision..."[138] On appeal, the Supreme Court described the High Court judgment in *Heaney* as applying "the proportionality test as adumbrated in *Cox v. Ireland*."[139]

Adumbration is an apt way of describing the *Cox* formulation when compared to the *Oakes/Heaney* test; it was a sketch of that more developed test, and a foreshadowing of a fully enunciated test; there was no sense of overall balancing that might have followed if the measure had withstood tailoring scrutiny, and it was also unclear how stringent the tailoring requirement was.[140] The significance of *Cox* is that it was one of the first cases where the Supreme Court articulated the reasoning behind its judgment on a rights limitation decision.

Re Article 26 and the Matrimonial Homes Bill

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[136] *Rock v Ireland* [1997] 3 IR 484 at 500.
[137] [1994] 3 IR 593.
[138] [1994] 3 IR 593 at 607
[139] [1996] 1 IR 580 at 584.
[140] The tailoring of these provisions was rather poor, so it is difficult to get a sense of strong the Court's scrutiny is, or would be in the event of a less glaringly flawed statute.

Two and half years after *Cox*, Finlay CJ again invoked a rough standard of review in *Re Article 26 and the Matrimonial Homes Bill, 1993*.[141] Section 4 of the bill decreed that the "matrimonial home," defined as the primary residence of a married couple, should vest in both spouses as joint tenants, regardless of any other legal arrangement, unless the spouses were already joint tenants or tenants in common with equal shares. A spouse who would benefit from the arrangement could, after receiving legal advice, apply to exclude application, and in the case of potential injustice, a court could refuse to apply the law on the application of the spouse who would not benefit from section 4.

The Supreme Court held that the Bill was repugnant to the Constitution. First, the Court examined the State interest in this legislative measure. The Supreme Court had, in a previous case, accepted that the objective pursued here, the sharing of property in marriage, was an important facet of the common good.[142] The Court in this case endorsed this objective, which was conducive to the stability of marriage and the protection of the institution of family. But the Court also noted that

> the right of a married couple to make a joint decision about the matrimonial home is one of the rights possessed by the family which is recognised by the State in Article 41, s.1, sub-s. 1 of the Constitution as antecedent and superior to all positive law and its exercise is part, and an important part, of the authority of the family which ... the State guarantees to protect.[143]

The key problem with this law was its tailoring, its "universal application."[144] The Court intimated that it would be acceptable to interfere with this right in instances of injury or oppressiveness to the interest of spouses or family members, or the failure of one family member to fulfil their familial obligations. However, even decisions jointly made by the spouses would be affected; it presumptively applied to all cases.

To avail of the statutory exemptions, a long-standing arrangement between two spouses would have to be reviewed, with legal advice taken, and a declaration would have to be made to maintain the *status quo ante*. In some cases, the Bill would

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[141] [1994] 1 IR 305. See Hogan and Whyte, note 14, at 1271. Foley, note 131, at 72.
[142] See the judgment of Finlay CJ in *L v L* [1992] 2 IR 77, where he stated at 107: "anything that would help to encourage that basis of full sharing in property values as well as in every other way between the partners of a marriage, must directly contribute to the stability of marriage, the institution of the family and the common good."
[143] [1994] 1 IR 305 at 325.
[144] *Ibid.*

"cancel a joint decision freely made by both spouses as part of the authority of the family and substitute therefor a wholly different decision."[145] Given the importance of the rights of the family protected in Article 41, the Court concluded "that such provisions do not constitute reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family."[146]

While, as in *Cox*, the core problem was with tailoring, there was also some indication of balancing here that was lacking in the former case, particularly the reference to "reasonably proportionate."[147] A standard of review was taking shape.

THE INCORPORATION OF THE *OAKES* TEST

Heaney v Ireland

It was in the case of *Heaney v Ireland*[148] that the *Oakes* test was formally incorporated into Irish constitutional law.[149] Heaney and McGuinness were arrested pursuant to s. 30 of the Offences Against the State Act 1939, suspected in connection with an explosion that had killed six people at a British Army checkpoint in Derry. During their detention, they were asked to give an account of their movements at the material times. Should they have refused to answer, or offered a false or misleading response, s. 52 of the Offences Against the State Act stated that they would be guilty of an offence, carrying a sentence no greater than six months' imprisonment. The two men were charged with membership of the IRA, of which they were acquitted, and with failure to account for their movements under s. 52, of which they were convicted. They challenged the constitutionality of this section, claiming it was an unjust interference with their right to silence.

Costello J began by taking an extensive look of the history of the right to silence, and concluded that the right to silence in detention is predicated on a fear of unfair or untrue confessions being extracted from a person whilst in custody.

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[145] *Ibid* at 326.

[146] *Ibid.*

[147] *Ibid* at 326. The Supreme Court also compared the harm done to the objective and doubted "that the potentially indiscriminate alteration of what must be many joint decisions validly made within the authority of the family concerning the question of ownership of the family home could reasonably be justified even by such an important aspect of the common good."

[148] [1994] 3 IR 593.

[149] See Hogan, note 27, at 389-391; Niall Buckley, "Merging Principles of Public Law: Towards Proportionality in an Irish Context," (2004) 39 Ir. Jur. (ns) 161; Foley, note 9, at 129-135; Oran Doyle, *Constitutional Law: Texts, Cases and Materials* (Clarus, 2008) at 33-34; Hogan and Whyte, note 14, at 1270-1274; Foley, note 131, at 74-76. Walsh, note 93, at 5; Doyle, note 77, at 111, 119-120.

Considering Article 38.1, he concluded that since the pre-trial process could have a huge impact upon the trial itself, and since the right to stay silent in custody was a potential source of unfairness, the right to silence in this sense was protected by the Article.

However, Costello J noted, this conclusion was the beginning, not the end, of the analysis: "Once it is established that an asserted right is a constitutionally protected right the court must then go on to examine the validity of the restrictions imposed on its exercise by the enactment impugned in the case."[150] The correct way to examine the validity of these restrictions was, he said, a "test of proportionality."[151] His formulation, quoting the *Chaulk* case,[152] remains the definitive formulation of the Irish version of the test.

> In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This test is frequently adopted by the European Court of Human Rights ... and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing in a free and democratic society. The means chosen must pass a proportionality test. They must:
> a. be rationally connected to the objective and not arbitrary, unfair, or based on irrational considerations.
> b. impair the right as little as possible, and
> c. be such that their effects on rights are proportional to the objective.[153]

While referencing the European Court of Human Rights' adoption of a similar test in assessing the compatibility of rights restrictions with the Convention, the judge chose to focus on the *Oakes* formulation.

Relying on *Cox*, Costello J intimated that this was a standard readily compatible with the Irish legal system. However, *Cox* had not fully embraced the Canadian standard of review; no previous case had. No other court had discussed the extent to which that test and the jurisprudence surrounding it should be incorporated into Irish law. No court had set out what particular normative

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[150] [1994] 3 IR 593 at 606.
[151] *Ibid* at 607.
[152] [1990] 3 SCR 1303; 1990 CanLII 34.
[153] [1994] 3 IR 593 at 607.

considerations the Irish legal system might value, and the impact that might have on the test as applied. His reliance on the prior adoption of some similar principles might have blinded him to the normative choices that underlie a standard of review.

It is surprising how little Costello J focused on the normative values that might be imported from Canada (or the ECHR) when he adopted the standard. No indication was given as to when or whether ever Irish courts should look to Canadian case law to guide the application of the test. Nor was any indication given as to how, if at all, the differences between the Irish and Canadian legal systems, and their unique constitutional intsruments, should be accommodated in the test.

Examining the text of the test incorporated tells us little. The Canadian/ECHR standard for objectives is perhaps the only part of the test given substance. The objective must be of "sufficient" importance to warrant overriding a constitutional right, a threshold criterion similar to the Canadian standard, which does not prejudice any later balancing. The meaning of sufficient importance is scarcely elaborated upon: it must relate to concerns pressing and substantial in a free and democratic society, but unlike *Oakes*, there is no discussion of the nature of such a society, or what might be considered pressing and substantial within it. There is no mention of how one can determine the meaning of this in an Irish context, nor any justification given for why this standard is compatible with Irish constitutional norms.

Outside that, other normative choices –such as whether or not to hypothesise objectives– are not answered by the text. One might suppose, given the Irish courts' general distrust of looking to subjective motivations,[154] that objectives would be hypothesised. However, given that this would be a significant departure from the manner of the test's application in Canada, this was worthy of discussion.[155]

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[154] See *Wavin Pipes v Hepworth Iron Co Ltd* (8th May 1981) High Court. Though affirmed since, this development might have been in doubt at the time Costello J was considering it due to developments in the United Kingdom. *Pepper v Hart* [1993] AC 593.

[155] It is not self-evident that the exclusion of this material in statutory interpretation means that it must be excluded in this context, where the rationale for the rejection of subjective intention in statutory interpretation does not apply. In statutory interpretation, the goal is to establish the intention of the Oireachtas and the debate over subjective and objective intent is about what the Oireachtas' intention truly is. That intent, once established, is not scrutinised. This situation is very different from the investigation of purposes in a constitutional context. Here, we are not simply interested in what the legislative objective was: we are also interested in whether or not it is important, and legitimate. We are conducting a searching enquiry of the objective once it has been established. It is thus not a given that subjective purposes should be excluded, and this should have been considered and discussed.

There is a common problem with the next two parts of the test: they do not specify how close the tailoring in question must be, just that it must exist. The rational connection test, an instantiation of objective tailoring, requires that the means used must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations. As with *Oakes* itself,[156] the language leaves open arrange of normative choices.

Similarly, the minimal impairment test seems strong on its face, but does not tell precisely how closely the means must be tailored to the right. To say the right must be impaired "as little as possible" seems to require that no alternative means would be available. Of course, alternatives always will be available, and the test is essentially not applicable unless some decision is made as to how much –if any– efficacy may be sacrificed in the name of minimising rights impact. The word "reasonably" –added to this formula in the later Canadian jurisprudence as an attempt to weaken this test–[157] is absent.

The balancing test is breathtakingly vague, lacking even the scant elaboration it received in early Canadian cases. The effect on the right must be "proportional to the objective." What precisely about the objective one is supposed to compare the effect to is left unsaid. It is the *importance* of the objective (and presumably the extent of its realisation) that is being weighed against the effect of rights, but the fact that this went unsaid illustrates the lack of explanation of the test.

Application of the Test in the *Heaney* Case

Examining how Costello J applied the test should give a sense of what this new standard of review was to mean. The moment of incorporation is very important, as it will invariably influence the application of the test by other courts, and should discuss, in clear terms, any normative choices made as to how the standard should apply. Sadly, this was not the case in *Heaney*.

(i) Objectives

Costello J first evaluated the objective of the Act and of the section. He notes that s. 52 only applies when Part V of the Act is in force,[158] which means that the

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[156] See discussion in Chapter 3.

[157] *R v Edwards Books* 1986 CanLII 12 (SCC) at [131].

[158] Part V of the Offences Against the State is activated only in an emergency, and this factor may have afforded additional weight to the objective in this case. See Chapter 8, text accompanying note 59-73.

government thought "the ordinary courts are inadequate to secure the effective administration of justice and the preservation of peace and order."[159] Costello J concluded that the objective of the measure was the prevention and punishment of subversive crime that undermined the authority of the State, which was "obviously one for which the parliament in a democratic society is entitled to legislate."[160]

It is evident that he was hypothesising an objective for this measure. His analysis takes into account the effect of Part V and its intended use, working back from that to establish what this particular element of the regime was setting out to achieve. It is difficult to quibble with his conclusion that protecting the State in a time of emergency, or preventing and investigating subversive crime, is a pressing and substantial objective. However, it is hardly the only one available. Doyle notes that Costello J had a choice in determining the objective: if he chose an objective that was very close to the means employed in the statute, that would make the statute more likely to pass muster under the rational connection test.[161] But in this case, as with many contentious cases, a closely related objective might border on illegitimacy, while a broader one, though less rationally connected, might be perfectly legitimate.[162] Costello J settled on an objective that managed to meet both criteria: assisting the police in investigation of serious crime is certainly legitimate, and also sufficiently closely related to the means.

Perhaps this was the most plausible objective that occurred to the judge, as well as the one that was both legitimate and closely related. However, we do not know this, as Costello J gave no indication of how objectives were to be hypothesised; about whether legitimacy should be prioritised over plausibility in some cases; about how inventive judges should be in imaging purposes; about at what level of generality objectives should be framed.[163] What is significant, of course, is that these issues were not discussed at all. The choice to hypothesise objectives, and the choices that must be made alongside that, were taken as read by Costello J.

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[159] [1994] 3 IR 593 at 608.
[160] *Ibid.*
[161] Doyle, note 77, at 119-120.
[162] Doyle's hypothetical example is the purpose of the compelled statement in s. 52 could be to aid the Gardaí in coercing the individual in question.
[163] This became an issue for the Supreme Court in *Heaney*, which failed to grapple with a sufficiently general objective for the measure. See Chapter 8, text accompanying note 41.

(ii) Rational Connection

Costello J dismissed the allegation that the section as overbroad and not sufficiently connected to this interest, failing rational connection.

> It is true that suspect may be arrested under s. 30 for an ordinary non-subversive type of offence if it is a scheduled offence and has not been committed for any political motive. It is unnecessary, however, for me to decide whether the powers under s 52 could be operated validly and constitutionally in such circumstances as in this case the plaintiffs had been arrested because of suspicion of their involvement in serious subversive crimes and the section was operated for the purposes for which parliament intended it to be used.[164]

He further dismissed, without analysis, the allegation that the section was arbitrary or irrational.[165]

Costello J's application of the test never examined the means used to ask if they achieved the objective of investigating and preventing subversive crime. He assumed that this was the case. The effectiveness of s. 52 was neither discussed nor justified. It might be that judge thought it self-evident that a suspect being compelled to answer questions would assist the police, but again this is not justified or explained. The strength of the tailoring analysis is unclear from this, but it is clearly weak.[166] As a guideline for future courts, it signifies that this test is not an important or searching one.

Costello J acknowledged that s. 52 is not perfectly tailored.[167] Suspects may have the section deployed against them even if they are being prosecuted for a non-subversive offence that happens to be scheduled, and even if they had no political motive whatever. This was an identical complaint to the one that won out in *Cox*, as the infirmity in the tailoring in both cases related to the overbreadth of the definition of a scheduled offence. While acknowledging that there may well be adverse affects on innocent parties, Costello J dismissed the overbreadth argument on the ground that the plaintiffs are not caught by the statute's overbreadth; they

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[164] *Ibid.*

[165] "I do not think that it can be said that these provisions are arbitrary or based on irrational considerations." *Ibid.*

[166] Perhaps Costello J understood the quasi-tautological nature of the test when it is applied to hypothetical motivations. However, if so, he makes a normative choice to apply the tailoring requirement in a manner so weak as to render it essentially tautological. A stronger tailoring requirement could be used as indirect scrutiny for legislative motivations.

[167] [1994] 3 IR 593 at 608.

are the very persons the statute sought to target. The same could have been said about Mr Cox in his case.[168] In rejecting this argument, Costello J implicitly made a normative choice to reject the approach in *Cox*, and refused to entertain an abstract argument. He did not consider whether that choice was appropriate, given the standard of review under consideration.[169]

(iii) Minimum Impairment and Balancing

Costello J considered the minimum impairment and balancing tests together. He looked at the reason the right to silence was protected at the pre-trial stage – according to his earlier analysis, to reduce the risk of unfair confessions– and notes that there are many other protections for the accused, such as right to legal advice and the judge's discretion to exclude confessions that are obtained in unfair circumstances, that might help prevent this problem. He concluded:

> Recalling the object which s 52 has been enacted to achieve, namely the investigation and punishment of serious and subversive crime, and having regard to the legal protections which exist which will minimise the risk involved in the operation of the section as outlined above... it seems to me that the restriction on the right to silence imposed by the section cannot be regarded as excessive and that it is proportionate to the objective which it is designed to achieve.[170]

Each limb of the test turns on different considerations, and, in running them together, Costello J missed the point of both.

The minimum impairment test could vary greatly in terms of strength and the sorts of alternatives that the courts should entertain as plausible alternative measures and the efficacy, if any, that should be sacrificed in the name of rights. The language used by the judge was quite strong, but as we saw in Canada, we might expect this to be diluted when it is applied in concrete cases.

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[168] Contemporary reports suggest that Mr Cox harboured two escapees of the Maze prison, who were apprehended near his home at the same time the weapons were found. See "Teacher jailed for possession of two pistols", *The Irish Times*, February 18th 1988. See Kenny, note 131; Humpries, note 131.

[169] This tailoring question has nothing to do with the plaintiffs in any particular case; it is an assessment of the statute itself. If the statute casts too wide a net, and potentially infringes the rights of individuals who are not on the vector of the legitimate interest of the statute, it may be invalid for that reason alone. Such overbreadth arguments are permitted in Canada. See *R v Heywood* [1994] 3 SCR 761; 1994 CanLII 34 (SCC). See further the discussion of this in Chapters 9 and 11, and Kenny, note 131, for a case for this sort of approach in Ireland.

[170] [1994] 3 IR 593 at 610.

This sort of inquiry was not unknown to Irish law. It was novel, however, that it should be set out expressly and in such strong terms. One would expect that the first case to incorporate a new standard of review would clarify its scope and strength. Instead, Costello J did not conduct this analysis at all.[171] It was effectively ignored. There was no enquiry into the necessity of these precise means, nor whether they were excessive, which would be expected even in a very weak form of tailoring to the right.

The final limb, measuring proportionality of effects and objective, was not applied in any significant way. Costello J merely asserted that there was proportionality to the objective. No suggestion was given of how the importance of the objective should be ascertained, how that should be weighted, or how the impact on rights should be ascertained. Problematically, the only justificatory work done by Costello J in considering the balance of rights and objectives was to diminish of the value of the right. He examined the other protections enjoyed by the accused that, while not protecting his right to silence, served the interest that he thought to underlie that right: preventing unfair confessions. Citing a list of other criminal protections that minimise the likelihood of unfairness, Costello J then concluded that the restriction on the right was proportionate.

First, this did not actually assess the extent of the denial of rights. The right to silence is the right that has been abridged, and its abridgment is significant. This analysis, by focusing on a more general protection, failed to grapple with the extent of the abridgment at all. Secondly, the analysis that did take place treated the right as no more valuable than its utilitarian contribution to another end.

A significant problem with *Heaney's* incorporation of the *Oakes* test is the failure to address the question of the anti-utilitarian nature of rights. Given his fierce rejection of utilitarianism in his extra-judicial writings, it is clear that Costello J would favour an anti-utilitarian view of rights. However, there is no discussion of whether, and to what extent, utility should be excluded; nor does his application of the test illustrate this. His only attempt at balancing was to diminish the weight of the right in question by playing down its importance in protecting an accused

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[171] It could be argued that Costello J's discussion of the other measures that aid the criminal process was a form of minimum impairment analysis. This is not the case. It is entirely irrelevant to the question of whether or not the right was impaired to the minimum extent possible. The fact that there were other rights the legislature could have restricted, but did not does not diminish the fact that the right in question was restricted. Nor does it make the actual restriction necessary. It cannot be said to contribute anything to minimum impairment analysis.

person from giving a false or unfair confession. That analysis attributes no weight whatsoever to the right in question, except for the utility it might generate toward another end. It violates the basic anti-utilitarian premise that rights are ends in themselves. The right to silence lacks any intrinsic value in this analysis, and so could only be dealt with in utilitarian terms.[172]

In fact, Costello J's arguments would best be deployed as a case against recognising the right at all. If the right to silence affords little or no additional benefit to an accused, why has it been protected? The right had not been expressly recognised under the Constitution at this point; the judge could have refused to recognise it on the basis of these arguments. Instead, he recognised the right to silence, afforded it no weight outside of the utility it generated toward another end, and concluded, without more, that it was justly abridged.

(iv) The Burden of Proof

The crucial matter of where the burden of proof should lie was not discussed. It can be inferred from his analysis that it rests upon the challenger; all parts of the standard were passed without any evidence being presented by the State, or at least without the judge discussing any evidence that might have been presented. If the burden were placed on the State, one would expect greater analysis of such evidence, since the default position would be departed from in upholding the law. It is unfortunate that Costello J did not discuss how the burden of proof had significant consequences for the test he was setting out. While his placing of the burden on the challenger may have broadly conformed with practice in Ireland, it was totally at odds with the practice of the Canadian test he had incorporated. This was a crucial normative choice that was made without elaboration, as if it were self-evident.

(v) Deference and Interventionism

A high level of deference and non-interventionism can be seen in the application of the test. Costello J seemed to defer to the legislative assessment of the importance of the objective, and the existence of a state of emergency. Costello J also seemed to defer to the State's belief in the efficacy of the measure, with the rational

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[172] This also contradicts Costello J's analysis of the right earlier in his judgment. To the Attorney General's submission that the right to silence could only be claimed by those who acknowledged guilt, Costello J said this was "based on a misunderstanding of the right to silence. Where the right to remain silent exists it is one enjoyed by both the guilty and the innocent." [1994] 3 IR 593 at 601.

connection test was dealt with in short order. The minimum impairment test was also applied in non-interventionist manner, with no enquiry into why the right to silence needed to be abrogated to achieve the ends of preventing subversive crime. The balancing test, insofar as it applied at all, was conducted in a most limited fashion.

The reasons for this deferential and non-interventionist approach are not discussed. Though in extra-judicial writings, Costello had advocated empirical deference on social and economic matters due to a mixture of expertise and imperfect knowledge,[173] no such justifications were offered for deference in *Heaney*. Some deference in these matters might be warranted on the grounds of expertise; in matters of subversive crime, where the State itself is under threat, judges might feel the government and the legislature will be best placed to make judgments about how to address such threats. However, Costello J made no reference to this expertise rationale, and if that were a factor, it should have been set out in the clearest terms, so that not all subsequent cases would be influenced by it. He might, on the other hand, have considered a non-interventionist standard of review is appropriate for Ireland, though that was in no way reflected in his extra-judicial writing. If so, that should have been discussed in the judgment so that academics and other judges could consider that contention, and question whether the Irish Constitution supports these normative choices. It is also possible that Costello J did not consider it at all, which would show a lack of regard for the role of normative choices in standards of review.

The *Heaney* case was a rough start for this standard of review. The *Oakes* test was imported from Canada without change. The elements that seem laden with Canadian constitutional values, such as the objectives stage, were expressly retained. The nature of the test was not elaborated upon, allowing only a scant glimpse of the how the test was to operate. This general lack of elaboration, combined with a non-interventionist or deferential application, and apparent placing of the burden of proof on the applicant, illustrate that the *Heaney* test is weak. However, we have no idea why the judge made it so.

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[173] See above at note 40.

Conclusion

Before *Heaney*, standards of review in Ireland were unclear, ill-defined, and inconsistent. The *Heaney* test promised to change all that. In the next chapters, we will examine whether *Heaney* did, in fact, revolutionise standards of review in Irish constitutional law. It is important to go into that examination conscious of what the *Heaney* judgment did, and what it failed to do. It failed to discuss fully the considerations that underlay it. It failed to clarify matters such as empirical deference and the burden of proof, which were rarely if ever clearly laid out in prior constitutional cases. It failed to elaborate on the strength of the tailoring exercises, or give guidance on the balancing test it set out. Of course, *Heaney* was just one case, and one cannot expect miracles. However, *Heaney* was not starting from scratch; it was being incorporated into a constitutional system with more than 55 years of prior experience in constitutional rights litigation. By not dealing with these questions, and showing how the new standard would fit in with the existing legal order, *Heaney* was always destined to confuse as much as to clarify.

7 – Conflicting Standards: The Rise of *Tuohy v Courtney* Rationality Review and its Elision with the *Heaney* Test

Only weeks after the *Heaney* test was enunciated by the High Court, and long before it gained formal recognition by the Supreme Court, that Court enunciated another standard of review: the *Tuohy v Courtney* rationality test. This was an avowedly non-interventionist standard of review, with the judgment setting out reasons for the low level of scrutiny, similar reasons to those that swayed the Canadian courts in some of the post-*Oakes* case law.

However, the Supreme Court did not set very strict guidelines or limits on the test and how and when it was deployed. Instead of being limited to the circumstances it seemed to be designed to accommodate, its influence has radiated out, and it has bled into the *Heaney* test. As Foley puts it, "the *Tuohy* decision became the standard by which later courts 'watered down' the potential for non-deferential application of the [*Heaney*] test."[1] He further notes that the courts shift between *Heaney* and *Tuohy* "without any real judicial explanation as to why these choices ... are justified, or in the worst cases, without even recognising that different cases have made different choices."[2]

In this chapter, I will trace these developments, from the advent of the test in the *Tuohy* test to its continuing elision with *Heaney*. I will suggest that the failure of the Irish courts to maintain a separation between these two tests has had unfortunate consequences for both. The *Tuohy* test has been denied independent identity, and its unique recognition of specific and limited grounds reasons for non-interventionist review were lost, as the case became a watchword for the applying a weakened version of the *Heaney* test. The *Heaney* test has lost any potency it might have had due to the elision, with potentially serious consequences for the protection of rights.

Tuohy v Courtney and the Advent of Rationality Review

The case of *Tuohy v Courtney*[3] is one of the seminal Irish cases on standards of review, but is lesser-known than *Heaney*. *Tuohy v Courtney* was a challenge to the

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[1] Brian Foley, *Deference and the Presumption of Constitutionality*, (IPA, 2008) at 129.
[2] *Ibid* at 130.
[3] [1994] 3 IR 1. See Brian Foley, "The Proportionality Test: Present Problems," [2008] 1 JSIJ 67, at 73-74; Foley, note 1, at 129-135; 156-159; Gerard Hogan and Gerry Whyte, *J.M. Kelly: The Irish Constitution*, (4th ed, Tottel, 2004) at 840-844 at 1270 et seq.

Statute of Limitations that barred civil actions after a period of time. The plaintiff had purchased a leasehold interest in land with forty-one years to run on the lease, and no provision to buy the freehold, or renew the lease on favourable terms. He did not know he was purchasing a leasehold, and believed it to be a freehold interest. His solicitor, the defendant, believed the plaintiff knew and understood the interest he was purchasing, but was negligent in not informing him.[4] The plaintiff did not understand the consequence of the negligence of his solicitor until some time had passed, and he tried to sell the property, which was worth significantly less than he had paid. By the time the plaintiff became aware of the injury that founded the cause of action, the limitation period had elapsed. There was no exemption in the statute for this possibility.

Finlay CJ in the Supreme Court acknowledged that the statute of limitations restricted the Plaintiff's rights, namely his right to litigate.[5] However, Finlay CJ held that this was not the only constitutional right in issue in the case. The defendant's right to be free of unjust or burdensome litigation is also engaged, as it was vindicated by the statute.[6] A balance of rights had been struck. In these circumstances, the Court believed it should be loath to intervene:

> The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their own view of the correct balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.[7]

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[4] Lynch J in the High Court found the solicitor was negligent, but that the action was statute barred. The Supreme Court did not address the negligence point.

[5] The court followed the (somewhat formalistic) analysis of the Supreme Court in *O'Domhnaill v. Merrick* [1984] IR 151, in holding that the plaintiff's right of access to the courts was not violated, as in practice the statute of limitations did not prevent him from filing an action in court, it simply gave the defendant an absolute defense once pleaded. Instead, the Court said the right to litigate, an unenumerated right under Article 40.3 previously recognised by the Supreme Court in *O'Brien v. Keogh* [1972] IR 144, was restricted.

[6] The *Tuohy* Court believes this right is found in the judgment of the Supreme Court in *O'Domhnaill v Merrick* [1984] IR 151. There, Henchy J held that an action was constitutionally barred, as to allow it would unjustly burden the defendant in making him defend an action after what he considered to be an inordinate and inexcusable delay. The trial would be rendered "palpably unfair" by the delay, which the defendant had not been responsible for. At 158.

[7] [1994] 3 IR 1 at 47.

In the instant case, the Chief Justice was not satisfied that the legislation was so unreasonable as to fail this less interventionist test. While he acknowledged that the plaintiff suffered a "severe apparent injustice,"[8] some hardship would inevitably result from the State's efforts to protect the rights of potential defendants and pursue its related interests, and in that case the Court's role was "to ascertain whether the extent and nature of such hardship is so undue and so unreasonable having regard to the proper objectives of the legislation as to make it constitutionally flawed."[9]

This standard of review is very different from *Heaney*; the *Tuohy* test has a very high standard for invalidation of the law, reflecting that the Court will rarely intervene in cases of legislation that balances conflicting rights.

The tailoring analysis engaged in by the *Tuohy* Court was not rigorous. The plaintiff made two points suggesting that his requested relief would not substantially interfere with the purpose of the statute, and indeed that his case was off the vector of the rights being protected. He said that this case was almost unique, and a saver for this circumstance would have a fairly minimal impact on the rights of defendants. Furthermore, there existed a residual discretion for courts to bar as unconstitutional litigation that is unreasonably delayed, even if it is brought within statutory time limits.[10] The Chief Justice did not think that "either of these contentions are of such strength as would make an inflexible time limit... clearly unconstitutional."[11] He said that the finality of the limitation period had already been eroded by several exemptions in the statue, and that the possibility of courts finding unreasonable delay would not abate the anxiety that a plaintiff might suffer.[12] This is a less interventionist standard than *Heaney*: one must not only demonstrate that the means are excessive; they must be so excessive as to be clearly unconstitutional, whatever that should mean.

The balancing exercise suggested by the Court is weighted very heavily in favour of upholding the measure. It must be contrary to reason and fairness, and the hardship imposed on the complainant must be both undue and unreasonable. The scales are tilted in favour of the validity of the limitation.

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[8] *Ibid.*
[9] *Ibid* at 48.
[10] This was the result in *O'Domhnaill v Merrick* [1984] IR 151, which the Supreme Court cited as the origin of this right.
[11] [1994] 3 IR 1 at 48-49.
[12] *Ibid* at 49.

In practice, the test also offers significant deference. The Court did not come to any independent conclusion on the substance of these issues; Finlay CJ simply said that the issues highlighted by the Plaintiff were considerations that the Oireachtas might have regarded when they made their ultimate choice, but that choice "can be supported by just and reasonable policy decisions and is not accordingly a proper matter for judicial intervention."[13] The court itself did not enter into the exercise of weighing these considerations, but rather accepted the legislature's determination.

Rationale Behind the Non-Interventionist Standard

The reasons why this test was adopted are clear on the face of the judgment. The Supreme Court believed that resolving this case required adjudication on the fairness of this statute's balancing of two competing rights, and any such adjudication must be done with special care. In the language and application of the test, there is a hesitancy to intervene to condemn the balance struck by the legislature. The balance must be substantially skewed, contrary to reason and fairness, to prompt intervention by a court. It is more akin to the administrative law notion of "*Wednesbury* unreasonableness"[14] than a genuine balancing of rights and other concerns.

It is not particularly controversial that there should be a less interventionist standard of review for certain constitutional questions. A searching standard of review is sometimes not appropriate due to concerns about the separation of powers, judicial competence, or democratic legitimacy. The *Tuohy* Court believed that the case before them was such a situation, because the legislation was not merely in pursuit of a state interest, but rather trying to protect another constitutional right. The two rights in question in this case were two specific, personal constitutional rights that had been previously recognised by the courts. In passing this law, the Oireachtas was

> essentially engaged in a balancing of constitutional rights and duties. What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly the constitutional right of the defendant in his property to be protected against unjust or burdensome

[13] *Ibid* at 50.
[14] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 1 KB 223.

> claims and secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.[15]

While the Court does regard the general state interest in preventing stale claims, the State's position is buttressed by the fact that the Court saw the legislation as deployed to vindicate the property rights of the defendant, which extend to the protecting him from unjust or burdensome litigation.

This "conflicting rights" justification for an interventionist approach to rights review was restated by the Supreme Court in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill, 1995.*[16] The Court acknowledged that the Oireachtas had engaged in a "balancing of constitutional rights and duties, including the right to life of the unborn, the right to life of the mother, the right to information, and other constitutional rights."[17] The Court said that when such balancing has taken place in a statute, the *Tuohy* test is the correct one to apply.[18]

The underlying theory of the Court was that when rights conflict, there is no simple answer to the question of how those rights can be reconciled; one right must lose out for the other to be vindicated. In cases of genuine conflict, where legislation has posited a solution, the courts' usefulness in rights adjudication is questionable.

However, the courts retain a power to review the balance for manifest unfairness, and do not abandon their responsibility to defend rights entirely. What results is a very strong presumption of non-intervention, with discretion to intervene if it is necessary to prevent irrational attack on rights. This presumption may be so strong that in practice it amounts to a failure to review. The addition of deference –with the Court considering whether or not there might be rational arguments for a particular choice rather than whether or not such arguments actually apply to the statute under review– makes it difficult to envisage a case

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[15] *Ibid* at 47.
[16] [1995] 1 IR 1.
[17] *Ibid* at 45.
[18] "Consequently, the approach to be taken by the Court in determining whether the provisions of the Bill or any provision thereof are or is repugnant to the Constitution or any provision thereof is not to impose its view on the terms of the Bill as passed by the Oireachtas but rather to determine from an objective stance whether the provisions of the Bill represent a fair and reasonable balancing by the Oireachtas of the various conflicting rights and are not so contrary to reason and fairness as to constitute an unjust attack on the constitutional rights of the unborn or on the constitutional rights of the mother or any other person or persons." *Ibid.*

where a statute would be struck down under this model.[19] This of course might present an even greater problem, as the courts claim to conduct review, giving infringements of rights the courts' stamp of approval, without exercising any meaningful restraint. Perhaps in those situations it would be better if the court admitted its impotence and inability to intervene, rather than to claim a competence that it is unwilling to use.[20]

In short, *Tuohy* suggests that judicial determinations are no better than legislative ones when rights collide. The precise reason for why legislative resolutions might be *preferred* to judicial ones will be discussed later, when looking at explanations for the test's existence.

Problems with the Scope of *Tuohy v Courtney*

There may be a very good case to be made for a non-interventionist standard of review where legislation tries to reconcile two directly conflicting rights. The major problem is with the scope of the test: the Court did not strictly limit this test to cases of conflicting rights, and thus risked the application of this weaker standard in other circumstances. Finlay CJ said that this test should apply to any statue that balances *constitutional rights and duties*. But he did not see the personal right to be free from unjust and burdensome litigation to be the only such right or interest underlying the law. He seemingly regarded "the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of

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[19] A possible instance of this is *CC v Ireland* [2006] 4 IR 1. In this case, the Supreme Court struck down s. 1(1) of the Criminal Law (Amendment) Act 1935, which criminalised carnal knowledge of a girl under the age of fifteen. CC had had sex with a teenage girl whom he believed to be over fifteen years of age, but who was in fact 13 years and 11 months old at the time. He claimed that the law violated his constitutional rights, as it did not make any provision for a defence of honest mistake. The Supreme Court agreed that having such an offence with no *mens rea* did violate the constitutional rights of the applicant to trial in due course of law, as well as his personal rights under Article 40.3.1, especially the right to good name. In this case, *Tuohy v Courtney* was not actually mentioned. However, it is implicitly rejected when the court notes that there is no balance at all. "The section in question here does not attempt to balance two rights, one against the other. The section contains no balance: it wholly removes the mental element and expressly criminalises the mentally innocent. It need not necessarily have done so." At 77. Considering that the rights of young girls probably were at play, this could be classed as a case where Tuohy was used, but failed rather than *Tuohy* not applying. However, even if this were the case, the Supreme Court's reasoning in this respect is controversial, and may not have fully account for the rights of the young girls defended by the measure. See David Prendergast, "The Constitutionality of Strict Liability in Criminal Law," (2011) 33 DULJ 285.

[20] Justice Jackson famously argued this in the *Korematsu v United States* 323 U.S. 214 (1944), where the US Supreme Court upheld the internment of Japanese-Americans during the Second World War. Justice Jackson said it would have been better, and more honest, for the Court to admit it would not review the decision to intern these people, rather than review it with minimal scrutiny. See Mark Tushnet, "I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases," (Beacon Press, 2008) at 121.

stale or delayed claims"[21] as such a right or duty. This could be thought to mean that in the absence of a personal right being vindicated by the statute, this interest alone could invoke the *Tuohy* standard.

Classifying this general pursuit of an aim in the common good as a constitutional right or duty makes the test extremely broad, because it is difficult to see how one could distinguish this from an ordinary state interest, which would usually be considered in the *Heaney* test. While the conflicting rights approach is cogent when considered narrowly, it was presented so broadly in *Tuohy* that it goes well beyond the category of cases that are justified by this rationale. It could apply to any case where the rationale underlying the statute is the State's desire to protect the rights of citizens, no matter how remote and speculative that protection may be, and potentially may encompass any case involving legislation passed in the interests of the common good.

Considered this way, it can be difficult to see where the *Tuohy* ends and any other standard of review begins. For example, any criminal law measures could be said, ultimately, to be an attempt to defend the rights of citizens from their violation by criminal conduct. The rights of citizens would be very remote, based on speculative assumptions and unknowable levels of deterrence, but it is still possible to phrase the state interest in such a case as a desire to protect the rights of citizens. With no remoteness limitation, and no indication of which categories of cases ought be subject to this standard, it is very difficult to draw a line on the types of case to which it should apply.

This was not the first time that this sort of logic has been brought to bear in Ireland. In *Re Article 26 and the Offences Against the State (Amendment) Bill*,[22] Sullivan CJ discussed the difficulties of courts reviewing statutes where rights are balanced:

> the duty of determining the extent to which the rights of any particular citizen, or class of citizens, can properly be harmonized with the rights of the citizens as a whole seems to us to be a matter which is peculiarly within the province of the Oireachtas and any attempt by this Court to control the Oireachtas in the exercise of this function would, in our opinion, be a usurpation of authority.[23]

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[21] [1994] 3 IR 1 at 47.
[22] [1940] IR 470.
[23] [1940] IR 470 at 481.

As in *Tuohy*, this suggests that reconciling conflicts of rights is a function of the Oireachtas and not of the courts. It also suggests the idea of community right, or a right that belongs to a number of people, rather than just individual rights. If the *Tuohy* test were applied with such a broad conception of rights, it would mean, just as the *Offences Against the State Bill* case had meant,[24] that rights questions were largely non-justiciable. The "rights of the citizens as a whole" would seem broad enough to encompass almost any State interest, leaving no room for a stronger standard of review to vindicate individual rights.

Similarly there was no elaboration of what a constitutional duty might be.[25] An older opinion of Finlay J (as he then was) in *Landers v Attorney General*[26] sheds some light on the matter:

> In Article 40 section 3 sub-section 2 there is imposed upon the State a duty by its laws to protect as best it may from unjust attack the life, person, good name and property rights of every citizen ... I take the view that if as appears to arise in this instance there is an apparent and superficial conflict between two constitutional rights or duties one being the constitutional duty and right of the State to protect the common good and the other being the right of an individual to acquire and own external goods that it is no part of the function of the Court to balance between those rights or choose as having a greater force of priority one right against the other. The Court must as I construe its obligations under the Constitution be as scrupulous in avoiding such a choosing as it must be energetic in preserving a clear and threatened constitutional right. In the same way I do not consider that it is any part of the function of the Court to adjudicate as to what is the best method by which the State can carry out a constitutional duty. If as I am satisfied in this case the State is carrying out a constitutional duty in a way clearly within the right that is a corollary of that duty and clearly being one of the methods to achieve it I do not consider that I would be entitled to declare the act by which that is done unconstitutional merely because I was presented with a better and more efficient method of carrying out the same duty.[27]

Constitutional duties here are corollaries of constitutional rights; there is a duty placed on the State to defend rights, and when the State is attempting to fulfil the duty, the Court's role is reduced. This would put some limit on the scope of *Tuohy* to affect cases where legislation was enacted in defence of constitutional rights; the duty element merely accounts for the fact that the right is indirectly protected by the statute. However, *Tuohy* does not make any such limit clear.

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[24] That is, until it was ultimately undone, as discussed in Chapter 3, note 7.
[25] [1994] 3 IR 1 at 47.
[26] (1975) 109 ILTR 1.
[27] *Ibid* at 5-6.

This unclear scope has led courts to think that the *Tuohy* standard of review is applicable in many if not most rights cases. There are two common problems in the case law: the misconception that the *Tuohy* test is generally applicable to rights cases; and the view that constitutional rights are very broadly defined under this test.

The General Applicability of *Tuohy*

The first of these problems were first seen in *TF v Ireland*[28], a challenge to the validity of the judicial separation regime. The Plaintiff alleged that the judicial separation regime offended his personal rights and the constitutional recognition of marriage. The Supreme Court dismissed his claim. In so doing, Hamilton CJ suggested that the test in *Tuohy* did not apply only to cases of conflicting rights, but to any case. He understood the case as an elucidation of the presumption of constitutionality, that applied to any Act: "Any Act passed by the Oireachtas enjoys the presumption of constitutionality and as stated by Finlay CJ in the course of the judgment of the court in *Tuohy v Courtney*...."[29] The Chief Justice went on to say, in terms almost identical to *Tuohy*, that the Court would be loath to intervene.[30] No specific conflicting rights were identified by the Court,[31] and the judgment indicates that *Tuohy* was a generally applicable principle of constitutional law rather than a test for particular, special cases.

This problem has not abated. More recently, in *BUPA Ireland v Health Insurance Authority*,[32] McKechnie J said the *Tuohy* test was "of general application in dealing with a constitutional challenge."[33] If *Tuohy* was intended to be of limited scope, this intention has been frustrated.

The Scope of Constitutional Rights in the *Tuohy* Test

In the Supreme Court judgment in *Rock v Ireland*,[34] a case very similar to *Heaney*, the risk that the *Tuohy* test would take on an almost unlimited scope was actualised. Ss. 18 and 19 of the Criminal Justice Act 1984 provided that inferences

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[28] [1995] 1 IR 321. See Foley, note 1, at 142.
[29] [1995] 1 IR 321 at 370.
[30] *Ibid* at 371.
[31] In fact, the *TF* case probably did represent a clash of conflicting rights, as the conflicting marital and privacy rights of separated spouses were at play.
[32] *BUPA Ireland Ltd v The Heath Insurance Authority* [2006] IEHC 431.
[33] *Ibid* at [238].
[34] [1997] 3 IR 484. See Foley, note 3, at 81-82; Foley, note 1, at 132.

might be drawn from the silence of a suspect who was found to be in possession of a particular item, or present in a particular place. Rock was arrested after being found in possession of forged hundred-dollar bills, and declined to explain his possession of them. At trial, inferences were drawn from his failure to account for the bills in his possession, and he was convicted under s 8 of the Forgeries Act 1913. Rock contended that this was a violation of his right to silence.

The Court did not frame the State interest here in the way one might expect. There is certainly a state interest in crime prevention generally. There also may be a more specific interest in avoiding the difficultly of disproving beyond reasonable doubt manufactured stories about possession of certain items. However, the Court chose to frame this issue as a balance of rights:

> The protection of citizens from attacks on their person or property is, to some degree, an aim of all criminal legislation. It is a constitutional duty which is imposed on the State and the State is entitled to act on it, as long as due regard is had for the constitutional rights of accused persons. To suggest, therefore, as counsel for the applicant did in this case, that there is no conflict of rights in this instance, is misleading.[35]

The Court concluded that "the legislature was seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all citizens."[36] The *Tuohy* test therefore applied.

However, almost any constitutional rights case could be framed as a clash of rights in this way. This extremely broad conception of right and duties can undermine rights review. The Court said that the interest in crime prevention is present in "all criminal legislation" – thus, that all criminal legislation is deployed in protection of rights, and should attract less stringent review. If the general, nebulous, interest in crime prevention invokes *Tuohy*, then surely so will most other issues;[37] as somewhere down the line, someone's rights are protected by state

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[35] [1997] 3 IR 484 at 499.

[36] *Ibid* at 501.

[37] Another example of the potential breadth of this concept of rights is provided by *Hanrahan v Environmental Protection Agency* [2005] IEHC 482, discussed below at note 77 and accompanying text. Here, Smyth J held that the statute, involving pollution licensing conditions, balanced the property rights of the applicant that were restricted on the one hand, and on the other the property rights and bodily integrity of those potentially affected by pollution from the defendant's premises. The condition attached to the pollution control licence in that case may have had the effect of protecting specific rights of the applicant's neighbours etc, but the power granted by the challenged

action. To borrow a phrase used by Charleton J in a different context, "it has become practically impossible to say when a constitutional right begins and ends."[38]

Costello J had presciently noted the problems with rights being defined so broadly long before *Tuohy* or *Rock*. In *Murray v Ireland*,[39] the Plaintiffs claimed that, as a married couple, imprisoned, they had a right to procreate that the State was obliged to vindicate. The Attorney General submitted that this case was a clash of rights – a balance between the rights of the Plaintiffs and the right of the State to imprison them for crimes committed. Costello J found fault with this:

> It is common enough in every-day discussion on human and political rights to refer to the "right" of the State to punish, or to take life, or to expropriate property etc. However, the indiscriminate ascriptions of "rights" to the State can lead to confusion and is not appropriate when what is in issue is the exercise by one of the organs of government of a power conferred by law.... The issue is, whether the restrictions on the plaintiffs' rights, caused by the exercise of the State's power to imprison the plaintiffs, are constitutionally permissible.[40]

The judge stated a similar concern about recognising rights too readily in the later case of *Donnelly v Ireland*.[41]

This danger is acute in relation to the *Tuohy* test. If many state interests could be held to protect a constitutional right or pursue a constitutional duty, there is nothing to restrain the test. It is difficult to see which, if any, cases would be decided using *Heaney*. If this scope of constitutional rights is defined so broadly, it is no longer an issue of a clash of rights at all. It would be more intellectually honest to describe it, as the Canadian courts do, as a clash of interests, and justify it accordingly.[42]

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statute did not necessarily defend specific rights: some of the conditions imposed under it would do that; others would protect the public interest more generally. If this were held to constitute a clash of rights that could invoke *Tuohy v Courtney*, then any statute that had the *potential* to be used in defence of rights, whether or not it had done so in the case at bar, would attract the lower standard of review.

[38] *DPP (Walsh) v Cash* [2007] IEHC 108.at [29].

[39] [1985] IR 532.

[40] *Ibid* at 540.

[41] [1998] 1 IR 321 at 332: "When the validity of a statute enacted to assist victims of crime is challenged on constitutional grounds, this challenge can be formulated in different ways. For example, it may be suggested that the victims of crime have "rights" and that an accused has "rights" and that the court's task is to balance these rights, and decide whether the rights of the accused have been unduly restricted by laws designed to uphold victims' rights. It seems to me, however, that this is not the way to approach the task with which the Court is now confronted."

[42] See Chapter 4. As will be argued below, such an approach should probably use case-by-case deference rather than a less interventionist standard of review.

Moreover, this broader formulation is not applied consistently. The logical consequence of *Rock* means that *Tuohy* should be used in all rights cases, yet this is clearly not the case. The courts retain the *Heaney* test, and though the test are often conflated, *Heaney* is still applied independently, in some cases where there could be a clash of rights.[43] The result has been widespread confusion over the interaction of *Tuohy* and *Heaney*.

THE ELISION OF THE *HEANEY* AND *TUOHY* TESTS

We can best know a thing by its effects, and explanations of the *Tuohy* test in theory do not necessarily explain the operation of the test in practice. It is frequently elided with the *Heaney* test, eroding whatever strength the *Heaney* test had, rather than standing as an independent standard of review. As Doyle puts it in the equality context, "courts seldom advert to the standards of review which they articulate and standards articulated in other cases."[44]

Examples of Confusion

The *Rock* case, as well as giving *Tuohy* expansive scope, confusingly elided the *Heaney* and *Tuohy* tests. In the High Court,[45] Murphy J did not give any indication that there were two conflicting constitutional rights at issue. He held that the case was analogous to *Heaney*, and applied the *Heaney* test enunciated by Costello J. Murphy J's application of the test, however, leaves a great deal to be desired, insofar as he thought the *Heaney* case, without more, disposed of the issue, as the silence restriction was, in his view, less severe.[46]

The Supreme Court concluded that the *Heaney* case alone was insufficient to dispose of this case. The Court held that this statute was possibly a more significant

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[43] Take, for example, the case of *McNally v Ireland* [2009] IEHC 573, where a law restricting the sale of pre-signed mass cards was held to be constitutional using the *Heaney* test. The religious free practice rights of buyers of pre-signed cards were restricted by the law; the State said it was protecting the free practice rights of purchasers by combatting fraudulent or misleading cards. That is surely a clash of rights. However, the State did not argue that *Tuohy* should apply, and the judge resolved the matter in favour of the State, applying *Heaney*. See also Keane J in the High Court in *Iarnród Éireann v Ireland* [1996] 3 IR 321; *DK v Crowley* [2002] 2 IR 744.

[44] See Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004) at 105.

[45] Unreported, 10th November 1995, Murphy J (HC).

[46] "In my view the *Heaney* case was correctly decided and that being so it follows that Section 18 and 19 are not unconstitutional." 10th November 1995, page 20 of the unreported judgment This judgment was, unusually for a challenge to the constitutionality of legislation, delivered *ex tempore* without time to consider judgment. He thought the restriction less severe as it allowed for the drawing of inferences from silence rather than the direct criminalization of silence.

restriction on silence that the one at issue in *Heaney*.[47] Having decided that this case was, fundamentally, about balancing conflicting rights, the Supreme Court then went on to apply a pick-and-mix of the *Heaney* and *Tuohy* tests.

> The question to be considered by this Court is whether the restrictions which the impugned sections place on the right to silence is any greater than necessary to enable the state to fulfil its constitutional obligations.... The principle of proportionality is now a well-established tenet of Irish constitutional law. It surfaced obliquely in *Cox v Ireland*.[48]

The Supreme Court then cited with approval Costello J's formulation of the test in *Heaney*. However, the Court went on to cite the *Tuohy* test.[49] The Court believed that the tests are interchangeable, or operate harmoniously. This is not the case.

From the Court's reasoning, it is clear that *Tuohy*, not *Heaney*, was eventually applied:

> In this situation, the function of the Court is not to decide whether a perfect balance has been achieved but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible. In this instance, the Court finds that they have done so, and must accordingly uphold the validity of the impugned statutory provisions....
>
> The Court is not satisfied that the provisions of the impugned section are so contrary to reason and fairness as to constitute an unjust attack on the applicant's constitutional rights and the appeal herein must be dismissed.[50]

The fact that the Court used the standard of "so contrary to reason and fairness as to constitute an unjust attack" indicates that the Court invoked the non-interventionist balancing of *Tuohy*. Yet the Court seemed to think that this standard was at least consistent with the *Heaney* test, having cited it with approval. The Court effectively elided the two tests.

Another instance of this dubious conflation of *Tuohy* and *Heaney* is *Meagher v O'Leary*,[51] where Moriarty J in the High Court upheld the "proportionality" of a law

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[47] The law in *Heaney* could punish silence with a short prison sentence; in *Rock*, silence could be used to help convict the accused of a much more serious offence with much more serious consequences. While the restriction on silence is more direct in *Heaney*, it is not as potentially severe in its consequences.

[48] [1997] 3 IR 484 at 500.

[49] *Ibid* at 500-501.

[50] *Ibid* at 501.

[51] [1998] 4 IR 33.

while applying the *Tuohy* test. The plaintiff had been convicted of seventeen counts of illegal possession of animal growth hormones in the District Court. The maximum allowed sentence on summary conviction was 2 years. Following this, the Supreme Court held that the maximum allowable prison time for a summary conviction should be not more than one year. As a result, the sentence was reduced on appeal to eight months imprisonment on each count to run concurrently. However, for two particular counts, he was sentenced to eight months to run consecutively, leading to sixteen months total prison time. The plaintiff claimed that per the Supreme Court's earlier ruling, this was too long a sentence for summary convictions.

Considering this claim, Moriarty J concluded the correct test to apply was the *Tuohy* test, but, applying that test, concluded that the law was *proportionate*:

> Construing the impugned sub-section of the Criminal Justice Act, 1984, in this regard inevitably involves a balancing of conflicting constitutional rights and duties. The manner in which this exercise should be undertaken was set forth in *Tuohy v Courtney* by Finlay CJ....
>
> I am clearly of the view that that the balance set forth in limiting to two years an aggregated maximum of lesser consecutive sentences cannot be said to so contravene reason and fairness as to constitute an unjust attack on the applicant's constitutional rights. In the words of O'Flaherty J in *Heaney v Ireland*, it appears to me that there is "proper proportionality in the provision" between the conflicting rights involved. [52]

There is no elucidation by the judge of a conflicting "right" in this case. Having applied the substance of the *Tuohy* test, he then declared the proportionality of the section, citing *Heaney*. The two tests are amalgamated, with serious confusion about how and when the different standards of review should apply.

Correct Application: *Employment Equality Bill* and *Iarnród Éireann*

It is also important to highlight several instances where, by chance or design, *Heaney* and *Tuohy* have been properly differentiated.

In *Re Article 26 and the Employment Equality Bill*,[53] the Supreme Court did not follow the very broad rights analysis of *Rock* in respect of criminal matters. Hogan and Whyte suggest that this case presents an inconsistency insofar as it states that *Tuohy* was the correct test to apply, but when it came time to consider s. 63.3, it used

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[52] *Ibid* at 42.

[53] *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321.

Heaney instead.[54] I suggest that the Supreme Court's division of its analysis, using a different standard of review for each element, properly applied *Tuohy*. Whether or not this was the intention of the Court, the result is an example of how the two tests can co-exist; *Tuohy* was the correct test to apply where there was a conflict of rights, but then where there is no such conflict, *Heaney* was applied.

In this case, the Supreme Court considered the balancing of rights in the Employment Equality Bill, namely "the guarantee of equality and protection of the citizen's right to work and earn a livelihood and of his or her property rights. That difficult exercise is peculiarly within the province of the Oireachtas...."[55] Hamilton CJ then cited the *Tuohy* test as the principle by which the Court should undertake any assessment of this balance.

However, when the the Court considered s. 63(3), it was the *Heaney* test, not the *Tuohy* test, that was invoked. But section 63(3) did not relate to any of the rights mentioned above; this section related to Article 38.1 rights alone. Section 63 made it an offence to obstruct the work of an equality officer or the Director, or to refuse to comply with a requirement of the Act as told to him by a Court, the Director or an equality officer. Sub-section 3 said that in any proceedings for such an offence, the Director could certify a document stating the circumstances of the alleged offence, and that statement should be *prima facie* evidence of the facts stated therein. According to the Supreme Court, "[i]t concerns the essence of a constitutional criminal trial. It is a fundamental principle in our system that, in general, criminal trials are conducted on *viva voce* evidence."[56] This was a *prima facie* violation of the right to a fair trial, but in assessing the restriction, the Court applied the *Heaney* test. The Court said that "the objective of the legislation is a laudable social policy." However, it was "neither rational nor necessary to so limit the right of due process to achieve the objective of the legislation."[57]

The Court cited *Oakes* and *Chaulk*, and enumerated a test similar to these cases and *Heaney*. Applying that test, the Court concluded:

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[54] Hogan and Whyte, note 3, at 1276. See also See Niall Buckley, "Merging Principles of Public Law: Towards Proportionality in an Irish Context," (2004) 39 Ir. Jur. (ns) 161. Margulies describes the approach of the Supreme Court as "singularly unenlightened." Martin B. Margulies, "Standards of Review and State Action under the Irish Constitution" (2002) 37 Ir. Jur. (ns) 23 at 31. See also Foley, note 3, at 77. Doyle, note 44, at 116, 137-143.

[55] [1997] 2 IR 321 at 343.

[56] *Ibid* at 379.

[57] *Ibid* at 383.

> [I]t is clear that s 63 sub s 3 is not specifically designed to meet the objectives of the Bill. The process is not rationally connected to the objective. The process of certification is an intrusion into the constitutional rights of an accused, yet there is no rational reason why trial by certification process is necessary in this type of case. Thus, there is no proportionality between the process of trial by certification and the objective of the Bill and the limitations of the right to trial in due course of law. The objective of equality in employment does not require that the offence in issue be tried by the method set out in s 63 sub section 3. The intrusion, the interference in the due course of law, is not limited in a rational way. Or to put it a slightly different way, s 63 sub s 3 when read in the context of the Bill is a failure to protect the constitutional rights of the citizen and not warranted by the objectives which it is sought to secure: see *Cox v Ireland*....[58]

Here, the Court saw no balance of competing rights in this criminal measure. There is one right, unreasonably restricted, with no competing right being protected by the legislation. The objective due process violation was enforcing the law, and this did not directly protect rights. If the logic of *Rock* was applied, it could be argued that there was a distant and remote rights interest underlying this legislation, because without these measures the rights of those whom the statute sets out to protect could not be effectively vindicated. The more narrow analysis in this case seems more coherent. Though far from perfect, this case does suggest that the tests can be successfully separated.[59]

Another coherent application can be seen in the Supreme Court in *Iarnród Éireann v Ireland*[60]. This case involved a clash of rights in private law legislation, and the Supreme Court not only invoked the *Tuohy* test, but did so despite the High Court judge having used *Heaney*.[61] This case involved a challenge to s. 12 of the Civil Liability Act 1961 which provided that concurrent wrongdoers in tort were each liable for the whole of the damage done. It then provided a mechanism for recovery from other wrongdoers of any damages paid out by one of the wrongdoers which exceeded the portion of the damage for which he was to blame. In this case, Iarnród Eireann was concurrently liable with an impecunious cattle owner for substantial

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[58] *Ibid.*

[59] The *Employment Equality Bill* case is not free from confusion on the relationship between *Heaney* and *Tuohy*. *Cox* cited to buttress rationality analysis at some points (*Ibid* at 342 and 343) and *Heaney* test analysis elsewhere (at 383). Similarly, the heading 'Proportionality' is given to a section in which the Court seems to discuss the importance of reconciling conflicting rights (at 358-359). No other mention of the term is made in the section. Confusion resulted even though the tests were, on the whole, applied correctly.

[60] [1996] 3 IR 321.

[61] *Ibid* at 361. He had also cited *Tuohy*, at 376, but did not purport to apply it. For an analysis of the High Court judgment, see Foley, note 3, at 81.

damages resulting from a personal injury that occurred when the plaintiff's train collided with cattle owed by the other wrongdoer. The trial court held that Iarnród Eireann were responsible for only 30% of the damages, but because of the rule in s. 12, they were forced to pay the full sum to the victim of the tort, and were only compensated by the ability to take an action against the impecunious cattle owner for the 70% of the cost for which they were not responsible. They claimed that this was an unjust attack against their property rights, and was thus unconstitutional.

Considering this claim, the Supreme Court framed the issue as a balance of rights; the legislation in this case clearly balanced the property rights of victims of tort on the one hand to recover pursuant to a successful claim, with the property rights of those tortfeasors. The conflict of rights here is indissoluble, and every solution to this problem will involve the risk of some rights being infringed: either a victim will not recover the amount to which he is due, or one tortfeasor may be forced to pay more than he is morally and legally culpable for. In certain cases, the balance will favour the victim, in others the tortfeasor, but it is not practicable that the scope of recovery be decided on a case by case basis, so the Oireachtas favoured taking steps to ensure that victims could recover even if that would sometimes lead to harsh consequences for tortfeasors.

Keane J had invoked the *Heaney* test in finding the measure to be justified, though his application of the test in that case was little more mentioning the test and asserting that it was passed.[62] The Supreme Court, however, did not invoke *Heaney*, instead finding that *Tuohy v Courtney* was the correct test to use.[63] The Attorney General had submitted that proportionality was not the correct standard of review and that "the decision of this Court in *Tuohy v Courtney* ... had more relevance to what the Court had to decide."[64] Quoting extensively from the *Tuohy* passages about balancing rights, the Court said that that the legislation was far from irrational; it was in fact "fair and just."[65] Though, not without problems,[66] this case distinguished the standards from one another.

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[62] [1996] 3 IR 321 at 361-2.

[63] The submissions of both the applicant and the State framed the issue as a balance of rights, and Keane J seemed to accept this at one point when denying that this law did not pass minimum impairment (*Ibid* at 369), but *Tuohy* was not mentioned. The Supreme Court noted that the State's case on appeal was somewhat different, and one might conclude that the reliance placed by the State on *Tuohy* only happened at the appeal stage.

[64] *Ibid* at 372.

[65] *Ibid* at 376.

CONTINUING CONFUSION: *KING* AND *HANRAHAN*

While there have been instances of proper application of the tests over the years, problems still persist. Two relatively recent cases illustrate that the confusion surrounding these two tests and the relationship between them has, if anything, become worse with time.

King v Minister for the Environment

In *King v Minister for the Environment*[67] Kearns J completely elided *Tuohy* and *Heaney* to the extent that it would be impossible to differentiate them in his analysis. This case was a challenge to the Electoral Act 1992, which provided that any candidate not affiliated with and endorsed by a political party had to present 30 people from his or her constituency who endorsed the prospective candidate's presence on the ballot. Those individuals had to present themselves, with relevant identification, at the offices of the local county council. The plaintiff in this case objected to this as an unduly oppressive and disproportionate infringement of his constitutional right to stand for election.

In considering this claim, Kearns J set out the following model for analysing the electoral legislation:

> The court therefore should only interfere to strike down legislation as offending the Constitution where there has been clear proof that the proportionality test has not been met. The requirement for deference and restraint was stressed by the Supreme Court in *Tuohy v Courtney*.... When such a test is applied, along with the presumption of constitutionality, the consequence must be that ... the plaintiff must go so far as to show that the impugned legislation is "so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."[68]

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[66] There is some confusing and unclear use of language, as there often is in such cases, making unclear exactly how the Court thought the tests were different. The Court refers to the legislation not being "irrational or disproportionate", without clearly separating the two (*Ibid* at 376.)

[67] [2004] 3 IR 345. See analysis of this case in Foley, note 3, at 84-85.

[68] [2004] 3 IR 345 at 375-376.

The judge went on to cite and apply the test laid down in *Heaney*, seemingly augmented by *Tuohy*, and upheld the legislation as constitutional.

This judgment shows that the lack of clear differentiation between *Heaney* and *Tuohy* has led to confusion and misapplication of the tests. There is no indication of a conflict of rights (or even interests) whatsoever, and the judge makes no attempt to establish one. The justification for non-interventionism here came from the judge's recognition

> that the Oireachtas is entitled to adopt some measures for the purpose of regulating candidature at Dáil elections, such power being expressly conferred on the Oireachtas by Article 16.1.1°... [T]he Constitution has allocated to the Oireachtas the power to determine what the appropriate conditions should be. It is not the function of this court to interfere in that choice simply because it adopts the view that the relevant objective could have been achieved in a manner which is better, or indeed fairer.[69]

This logic suggests that since the Constitution envisages some measures being adopted by the Oireachtas in this area, the Court should not intervene. This has nothing to do with the framework laid out by the Supreme Court in *Tuohy*, unless express constitutional licence to legislate creates a constitutional duty for the purposes of *Tuohy*. If so, the general entitlement of the Oireachtas to legislate under Article 15 of the Constitution could mean that all laws were subject to this lower standard of review.[70] There is no reason for *Tuohy v Courtney* to apply here; the judge simply believed that less interventionism was appropriate in such cases. *Tuohy* was just a watchword for less stringent review, divorced from its origins and justifications.

The Supreme Court, on appeal, overturned the decision of Kearns J and struck down the statute as unconstitutional, as the requirement that a prospective candidate get 30 people to attend the particular place was a disproportionate burden having regard to the objective,[71] making it difficult to submit his or her

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[69] *Ibid* at 375.

[70] Another case that might adopt such an approach is *Re Article 26 and the Illegal Immigrant's Trafficking Bill 1999*, where a strict time limit was set for the taking of an appeal to the Supreme Court. The Supreme Court noted that Article 34.4.3° of the Constitution says that appeal to the Supreme Court shall be subject to "such regulations as may be prescribed by law." Declining to apply the *Heaney* test, the Supreme Court said "Since the legislature has an express power, to be exercised for policy reasons within its own area of discretion, the principle of proportionality has no application." [2000] 2 IR 360 at 400. Hogan and Whyte note 3, at 1275-1276, note in this context that this logic could apply to Article 15.2.1°, and this would eliminate judicial review entirely.

[71] The Court described the objective of the law as follows:

candidacy in a timely fashion, and taking up a disproportionate amount of time during an election campaign.[72] The Supreme Court evidently did not adopt the non-interventionist stance of Kearns J.

That is not to say that the Supreme Court judgment solved the problems evident in the High Court judgment; the Court seems to compare and cite the *Heaney* and *Tuohy* standards without giving any distinction between them. Outlining the burden on the plaintiff to establish the unconstitutionality of the Act, the Court noted:

> In regulating such matters by law the Oireachtas enjoys a measure of discretion and the court should only interfere with the choices made by the legislature if it is satisfied that a threshold of irrationality has been established in connection with that decision or that they were disproportionate. It was submitted that the measures in question serve a legitimate State interest and the interests of the common good in the proper regulation of the electoral process and met the criteria of rationality and proportionality.[73]

Assuming that the rationality standard mentioned by the Court is the *Tuohy* standard and proportionality refers to *Heaney*, this seems to suggest that rationality and proportionality are two complementary standards – that laws must pass both tests to pass constitutional muster.[74]

This displays a misunderstanding of these standards; no law that would fail *Tuohy* could ever pass *Heaney*; the *Tuohy* test is a less stringent way of asking the same questions that the *Heaney* test poses. Testing a law using two standards is both redundant and misleading. The Supreme Court judgment is, therefore, as likely to

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> The court is satisfied, and considers it self evident that the State has a legitimate interest in regulating the conduct of elections by law, subject to the Constitution, in the interests of, *inter alia*, protecting and maintaining the integrity and efficacy of the electoral process for Dáil Éireann as well as ensuring that those elections are conducted free from abuse and in an orderly fashion consistent with democratic values acknowledged by the Constitution...

[2007] 1 IR 296 at 313-314, [33]. One key element of this, supported by *Loftus v Attorney General* [1979] IR 221 and evidence of practices in this and other jurisdictions, was the need to prevent swamping of the ballot paper by frivolous candidates. At [37].

[72] "The marshalling of 30 persons either individually or collectively or in separate groups to commit up to a day travelling to and from the designated office is, in the view of the court, a heavy burden to impose on a person seeking to validate his nomination papers." [2007] 1 IR 296 at 323, [61].

[73] *Ibid* at 309, [25].

[74] *Tuohy v Courtney* is not mentioned at all in the course of the judgment, nor is *Heaney*. I believe it was safe to assume, given Kearns J's use of the test in the High Court, that the *Tuohy* rationality standard is the one under discussion.

add to the confusion about the relationship between *Heaney* and *Tuohy* as to dissipate it.

This case shows the importance of properly distinguishing the two standards. For the plaintiffs, it was the difference between winning and losing – between the court vindicating their constitutional rights and refusing to intervene.[75]

Hanrahan Farms v Environmental Protection Agency

Hanrahan Farms v EPA [76] involved, *inter alia*, a challenge to the constitutionality of the EPA's power to impose what the applicant thought to be onerous and unjust restrictions on property rights. In granting the applicant sheep farm an integrated pollution control licence, the agency imposed a condition that restricted the emission of odours and limited the level of stock the applicant could keep.

Smyth J treated this as a case of balancing competing rights:

> Sections 83 and 84 seek to regulate the carrying out of certain economic activities in the interests of the common good and in order to regulate and protect competing constitutional rights including the rights to property and of bodily integrity of other persons. This is a balancing of rights in the socio-economic area and as such is entitled to a strong presumption of constitutionality.[77]

The judge held, consistent with his finding in a previous judgment on the issue,[78] that the exercise of the power to set conditions was used proportionately:

> I am satisfied ... that the terms of the condition are rationally connected to the objective and are not arbitrary, unfair or based on irrational considerations, and given the option or opportunity afforded to the Applicant to provide a credible tenable alternative impair the rights of the Applicant as little as possible and that the effects of Condition 4 and the rights of the Applicant are proportional to the objective. In short, the means used to achieve the

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[75] It goes beyond the scope of this discussion to examine the Supreme Court's application of the *Heaney* test, and this will be dealt with more fully in Chapter 8, at note 217. However, it should be noted that the application of the test was, to say the very least, extremely unusual, and problematic. The Court held that the law was *prima facie* disproportionate, and so applied very strict tailoring analysis. If the law is disproportionate, there is no other enquiry needed. Even perfect tailoring cannot save a disproportionate law.

[76] [2006] 1 ILRM 275. I would like to thank Rachael Walsh for bringing this case to my attention.

[77] [2006] 1 ILRM 275 at 281.

[78] [2005] IEHC 249.

> objective are proportional, in my judgment, within the terms of the judgment in *Heaney v Ireland*.[79]

Smyth J went on to assess the statute itself, rather than the action taken pursuant to it, using the *Heaney* test. He noted that the applicant had placed "considerable emphasis" on a minimum impairment line of argument. The judge dismissed this argument, relying on *Tuohy v Courtney*:

> In my judgment, the legislature is entitled to balance competing interests and 'it is not for the Courts to impose its view of the correct balance in substitution for the views of the legislature', "but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights." (per Finlay C.J. in *Tuohy v Courtney*.)[80]

Leaving aside the question of whether or not there was a balance of rights in this case, which might justify the application of the *Tuohy* standard, this citation of *Tuohy* to reduce the rigor of minimum impairment analysis in *Heaney* is problematic. If this were such a case, then the *Tuohy* test should supplant *Heaney* as the primary means of analysis. This is not what the judge did; he instead combined the tests. It again shows that courts do not properly consider the limitations of *Tuohy*, instead viewing it as an explanation of, or elaboration on, the *Heaney* test.

Recent Case on Remoteness

In a relatively recent, high profile case, the Supreme Court refused to apply the *Tuohy v Courtney* test because there was no clash of rights or interests, and in so doing, implicitly put some limit on the remoteness of interests that can trigger the test. In *Re Article 26 and the Health Amendment (No. 2) Bill 2004*,[81] the State had attempted to retrospectively validate charges levied against residents of state nursing homes, where there had been no legal basis for the charge.[82]

The Bill was referred to the Supreme Court to examine the constitutionality of this property rights restriction, where it was ultimately held to be an invalid restriction on rights. In the context, the State submitted that additionally the courts

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[79] [2006] 1 ILRM 275 at 282.
[80] *Ibid* at 283. Internal citations omitted.
[81] [2005] 1 IR 105.
[82] See Rachael Walsh, "The Constitution, Property Rights and Proportionality – A Reappraisal" (2009) 31 DULJ 1 at 30-31.

should not intervene, because the State was reconciling competing rights or socio-economic interests. The Court did not agree with this submission:

> There is no balancing of competing constitutional rights, as claimed by the Attorney General. The only justification advanced is the financial interest of the State. This is not a case such as *Tuohy v Courtney*...[83]

This statement could have implied that the *Tuohy v Courtney* test was only relevant to conflicts of rights rather than conflicts of interests.[84] However, a later comment makes it apparent that the court thinks *Tuohy v Courtney* rationality does apply to interests, but only private interests, and not interest exclusive to the State, such as State finances:

> This is not at all the type of balancing legislation which was in contemplation in *Tuohy v Courtney*, *White v Dublin City Council* or *Iarnród Éireann v Ireland*. All of these cases concerned legislation designed to reconcile the interests of different categories of people in society... the invocation of these Articles in circumstances where rights such as arise in this case, rights very largely of persons of modest means, are to be extinguished in the sole interests of the State's finances would require extraordinary circumstances.[85]

The reconciliation of private interests is sufficient to attract *Tuohy v Courtney* review, where as the reconciliation of rights and public interests is not. At the very least, this case puts some level of remoteness on the considerations of interests in *Tuohy* analysis. There surely were individual interests in avoiding a burden on State finances; however, these interests are too remote to invoke the *Tuohy* test. It is also possible that the vulnerability of the group targeted contributed to the reluctance to apply the more lenient standard, given that the modest means of the legislation's targets was specifically mentioned by the Court.[86]

EXPLANATIONS FOR THE *TUOHY TEST*

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[83] [2005] 1 IR 105 at 182

[84] This sort of approach was also implied by a comment of Fennelly J to counsel for the Attorney General during the hearing of the matter: "You introduced the notion of a stronger presumption of constitutionality where the Oireachtas is balancing rights between citizens, as in *Tuohy v Courtney*. However, this case is not really about balancing rights between citizens but is about balancing citizens' rights against the State's interest. *Ibid* at 143.

[85] *Ibid* at 206. Internal citations omitted.

[86] See Eoin O'Dell and Gerry Whyte, "Is this a country for old men and women? – In Re Article 26 and the Health (Amendment) (No 2) Bill 2004," (2005) 27 DULJ 368; Oran Doyle and Gerry Whyte, "The Separation of Powers and Constitutional Egalitarianism after the Health (Amendment) (No 2) Bill Reference," in O'Dell (ed.) Older People in Modern Ireland – Essays on Law and Policy (First Law, 2006) 393,

Whatever its problems, the *Tuohy* test can, in principle, be justified by a number of different arguments for a non-interventionist standard of review. The problem is that it unclear which of these rationales underlies the *Tuohy* test because of the confusion that surrounds it. I wish to canvass some possible explanations for why the test came about, and for how this sort of non-interventionist standard might be justified.

Stalemate

As noted in Chapter 2, when a right is at stake on both sides of a judicial determination, this can lead to a stalemate, when the weight of the objective and the weight of the right restricted are equal.[87] The *Tuohy* court might have been introducing a presumption that this sort of stalemate results whenever rights collide. However, this cannot of itself justify non-interventionism; there must be a reason why legislative settlement is preferred to a court-made resolution. There are two possibilities: either the Irish courts prioritise the legislative judgment in the interests of certainty, or such a decision made by the legislature, elected by the people, might also have a legitimacy or expertise claim to the best decision.

(i) Certainty

Legislative solutions might be preferred because they offer a certainty that court solutions cannot. In terms of the balance of rights in an individual case, the court might be better at coming to a solution that the legislature, particularly given the court's expertise and experience in dealing with constitutional rights. But in terms of settling the matter in the long term, a uniform, consistent, and certain policy might be better than judicial determination on a case-by-case basis. If a court was yet to address an issue, this could leave those affected in fear until such a time when litigation might be brought to resolve it. Moreover, when rights collide, there may be no consistent policy that a court can make; the court may have to hear each case and decide how the balance should operate in that particular circumstance. This involves a great deal of wasteful litigation; it leaves parties uncertain of their rights and obligations; it leaves people generally uncertain of the status of a law that purports to balance competing rights, which could undermine faith in the law more broadly.

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[87] See Chapter 2, note 73 and accompanying text.

A legislative solution can provide this uniformity, consistency, and predictability. Even if it will not strike the "best" balance in all cases, there may be significant merit in its ability to resolve the issue without resorting to adjudication in every instance. The problem of uncertainty was clearly a factor in the *Tuohy* decision; the Court noted that invoking *O'Domhnaill v Merrick*[88] in some cases would offer little comfort to defendants, who would never be sure that they were free from the shadow of burdensome litigation until a judge said so.[89] The certainty of a legislative solution was clearly preferable.

However, the importance of certainty might have been unusually acute in the *Tuohy* case. The right to be free of unjust and burdensome litigation is essentially a right to certainty, because it is uncertainty and anxiety that the right seeks to protect people from. This concern will not always be so acute; it may not always be worth sacrificing a precise protection of rights, done by the courts case-by-case, for the uniformity that legislative intervention will bring. The benefits of uniformity may justify this sacrifice in some cases, but not in others, and may not explain the full extent of the *Tuohy* test.

(ii) Substantively Better Balance

The other possible reason for preferring a legislative settlement of stalemate to a judicial one is that in fact legislative decisions are substantively better for some reason. It could be that experience in dealing with such matters makes the legislature more expert; or it could be that the fact that the legislature is democratically elected makes their determinations more legitimate, because they are ultimately accountable to the people for the balance struck.[90]

It is difficult to know the extent to which these rationales underlie *Tuohy v Courtney*. If they did, we might expect that courts would refuse to resolve cases where rights collide and there has not yet been legislative intervention, waiting for the legislature to offer the preferable solution. However, this has not been the case.[91]

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[88] [1984] IR 151

[89] [1994] 3 IR 1 at 49.

[90] Alexy, when outlining his views on stalemate, believes that the democratic legitimacy of the legislature justifies leaving resolution on stalemate to legislators. Robert Alexy, *A Theory of Constitutional Rights*, (Oxford, 2002) at 416-7. He calls this a procedural principle which states that the democratically elected representatives should make as many decisions as possible.

[91] As we will soon see, there has been some use of a hierarchy of rights to resolve some instances of clash. The argument advanced here relates to matters which fall outside this hierarchy, which has proved to be of limited usefulness.

In *O'T v B*,[92] the Supreme Court accepted in principle that the courts could resolve instances where rights clash. The case concerned individuals who were informally adopted before the framework of the 1952 Adoption Act was in place. The applicant in this case sought discovery of documents from the Rotunda Girls Aid Society and Father Gerard Doyle that would reveal the identity of her mother. They refused, claiming the information to be privileged.

The Court held that the applicant enjoyed an unenumerated personal right of a child to know the identity of his or her natural parent, derived from the natural and special relationship between mother and child. However, the Court also recognised that this right could have to be reconciled with the constitutional rights of privacy and confidentiality of their natural mothers. Neither right was absolute.

The Court recognised two rights which are fundamentally in conflict with one another. Unlike *Tuohy*, there is no legislative intervention purporting to resolve the conflict one way or the other.[93] In the end, the Court did not decide which is the more important, though considered that this could be adequately achieved by the Circuit Court on remission.[94]

There are other examples of courts resolving such conflicts.[95] The fact that the Court is happy to conduct a balance might mean that legislative balancing of conflicting rights is not substantively better, though it might be otherwise preferable for reasons such as avoiding uncertainty. It would be interesting to see what would happen if the courts decided on such a balancing case, and the legislature subsequently enacted legislation that ran contrary to the court's prior decision, as this would test directly what makes legislative resolution preferable.

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[92] [1998] 2 IR 321.

[93] The legislature had provided for a procedure for formally adopted children to seek the identity of their parents under the Status of Children Act 1987, but that could not avail the applicant, as she was not formally adopted, and did not fall under that regime.

[94] Hamilton CJ outlined a list of factors that should form part of a court's consideration of which right is more important: "(i) the circumstances giving rise to the natural mother relinquishing custody of her child; (ii) the present circumstances of the natural mother and the effect thereon (if any) of the disclosure of her identity to her child; (iii) the attitude of the natural mother to the disclosure of her identity to her natural child, and the reasons therefore; (iv) the respective ages of the natural mother and her child; (v) the reasons for the natural child's wish to know the identity of her natural mother and to meet her; (vi) the present circumstances of the natural child; and (vii) the views of the foster parents, if alive. This list is not, nor is it intended to be, exhaustive. The learned Circuit Court Judge will have to consider all the circumstances which may be adduced in evidence." [1998] 2 IR 32 at 355.

[95] In *Roche v Roche* [2009] IESC 81, the Supreme Court was willing to engage in a balancing function between the right to procreate and the right not to procreate, again in the absence of legislative intervention.

Private Law Legislation

A stalemate of this sort may be most likely to be arrived at in assessing private law legislation. *Tuohy* was manifestly concerned with the private law entitlements of both the Plaintiff and the Defendant. The State was, unusually, very much in the background. Both parties who were affected by the legislature's solution to this problem were actually before the Court, because the rights of the both parties were directly affected by the statute; Mr Tuohy's rights were limited by it, Mr Courtney's defended. It highlights the extent to which private law statutes affecting constitutional rights are different from other constitutional rights issues. Grimm put it in the following way:

> A special case is private law legislation. Unlike its public law counter-part, such legislation concerns relationships between individuals as opposed to the relationship between the individual and the state. With respect to fundamental rights, public law relationships are asymmetrical: only individuals have fundamental rights, whereas the state is bound by these rights. Private law relationships, on the other hand, are symmetrical: both individuals have fundamental rights. Private law legislation, therefore, will often require a reconciliation of competing private interests, both of which are protected by fundamental rights. This means that the protection of the endangered right can be ensured only by a limitation of other constitutionally protected rights.[96]

Several jurisdictions, such as Canada and South Africa, have taken different approaches to constitutional issues involving private law rights.[97] Alexy similarly suggests that private law questions are special when outlining his case for legislative discretion in cases of stalemate.[98] It might be that the private nature of the relationship in the *Tuohy* case is part of why the test came about, though this is clearly not what the courts have made of *Tuohy* subsequently.[99]

Any Clash of Interests, or Interests as Rights

The *Tuohy* test could also be a more broad statement that most laws balance interests of other citizens not before the court, and as such the court should be

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[96] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence, (2007) 57 University of Toronto Law Journal," 383 at 392.

[97] See David Beatty, *The Ultimate Rule of Law*, (Oxford, 2004) at 164.

[98] See Alexy, note 90, at 412. The fact that reasons for not protecting a right are as strong as those for protecting "leads to a significant discretion in the area of third party, or horizontal, effect." *Cf* at 415, where Alexy uses a clash of private interests to demonstrate the importance of epistemic discretion.

[99] After *Rock*, it would be impossible to argue that this limited reading is reflective of reality.

hesitant to regard those laws as invalid. This is perhaps the only way that *Rock* and its ilk, seeing rights interests underlying every piece of legislation, could be justified. More interventionist review under the *Heaney* test would exist only in those cases – perhaps few and far between, perhaps non-existent– where the right is violated without any other citizen's interests being affected; that is, where the State is the singular antagonist of liberty.

This is a stalemate argument, but one that is much broader, presuming stalemate between a right and the public interest rather than simply between two rights. Certainly there may be stalemates between rights and public interests, but it is difficult to see why that should ground a separate, less interventionist standard of review; it would seem to be more appropriately dealt with by way of deference to particular determinations if stalemate is apparent. The breadth of *Tuohy* under this theory would also significantly weaken rights review, with few if any cases receiving real scrutiny. This may not sufficiently distinguish rights from other interests.

An Alternative to a Comprehensive Hierarchy of Constitutional Rights

Tuohy v Courtney is not the only way to deal comprehensively with rights clashes in a fairly certain way. The judiciary could use a hierarchy of rights. It has been recognised by the Irish courts that some rights are more important than others, and that in the event that they conflict, the more important right shall prevail. In *People (DPP) v Shaw*, the Supreme Court said: "There is a hierarchy of constitutional rights, when a conflict arises between them, that which ranks higher must prevail."[100] In that case, the life of a victim in peril outweighed the right to liberty of Mr. Shaw during his unlawful detention.

Some other rights have also been elaborated upon; Article 38.1 is a "superior right."[101]Similarly, the right to life of the unborn was held to be a superior right in *SPUC v. Open Door Counselling*.[102] However, the hierachy is a patchwork, and is far from comprehensive. There are certain other rankings in the case law, but they cover only a small portion of the potential overlap of constitutional rights.[103]

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[100] *The People (DPP) v Shaw* [1982] IR 1 at 63.
[101] "It is well established in our constitutional jurisprudence that an accused person's right to a fair trial is one of the most fundamental constitutional rights accorded to persons and that in so far as it is possible or desirable to construct a hierarchy of constitutional rights it is a superior right." *Donnelly v Ireland* [1998] 1 IR 321 at 348.
[102] [1988] IR 593.
[103] See Hogan and White, note 3, at 1283-1289.

The limits of the superiority of the life of the unborn were met when it was considered against the right to life and the right to travel of the foetus' mother in *Attorney General v X.*[104] The Court felt that hierarchical rankings should be avoided unless harmonisation of the rights was impossible. Several members of the Court claimed, in what Hogan and Whyte declared to be "an exercise in sophistry,"[105] that the rights could be reconciled, even though that resulted in the termination of the foetus' life.

The Supreme Court disagreed in *SPUC v Grogan (No. 5)*[106] as to the applicability of the hierarchy. Blayney and Barrington JJ preferred to use the concept of the hierarchy to place the right to life of the foetus ahead of the right to communicate.[107] Denham and Keane JJ disagreed, believing that the question of which right was superior was not the correct one. The job of the Court, Keane J said, was

> not simply to determine whether one constitutional right can properly be regarded as superior to another in the hierarchy of rights. It is rather to decide whether, in the specific circumstances of a particular case, a constitutional right ... can enjoy the protection which would normally be available to it, having regard to the paramount necessity to uphold the Constitution as a whole.[108]

The hierarchy of rights was increasingly an unworkable method of resolving constitutional rights clashes. Even deciding that something is a superior right does not resolve the issue; it does not tell us what happens when it clashes with another superior right. It is also not possible to brand entire rights superior or inferior. There might be times when freedom of speech is greater than the right to a good name, particularly in the context of political expression.[109] However, it is not superior in all cases and in every instance, and therefore courts are loath to rank these rights.

The *Tuohy v Courtney* test manages to circumvent the need for a detailed and comprehensive hierarchy that would be required in order to solve every possible rights clash. The courts have shown neither the desire nor the capacity to create

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[104] [1992] 1 IR 1.
[105] Hogan and White, note 3, at 1286.
[106] [1998] 4 IR 343.
[107] *Ibid* at 372-373.
[108] *Ibid* at 390.
[109] See *Hunter v Duckworth* [2003] IEHC 81 (31 July 2003); see Hogan and White, note 3, at 1289.

such a hierarchy. *Tuohy* essentially allows the legislature to decide which rights are the most important in a particular conflict, and does not compel the court to wade into the issue of which right is superior. However, it allows the court a jurisdiction to intervene and correct any serious errors, such as the relegation of a superior right to protect an inferior one (or, to put it in a manner similar to the language in *Tuohy*, an instance of irrational disregard of one right in favour of another.) The advent of Tuohy avoided the need for the problematic hierarchy of rights doctrine to be expanded.

Too Many Rights?

A realist justification for the existence of *Tuohy* might be the fact that, at the time of its invention, Irish courts recognised a great many rights, some of which conflicted with one another.

In *O'T v B*, Keane J., in dissent, raised an interesting objection that could potentially undercut the need for the *Tuohy* test: should courts even recognise two rights that are fundamentally and irreconcilably in conflict, only to qualify one right out of existence then or at a later date? The conflict of rights in *Tuohy v Courtney* and *O'T v B* arose because the courts recognised two fundamentally conflicting rights. Keane J thought it unwise to recognise two directly conflicting rights in this manner. He noted that for there to be any hope for the applicant in this case, the Court would have to not only find that there was a right to know the identity of one's natural mother, but also find that it is sufficiently important to overcome the rights of the mother. In no case can both rights co-exist. He believed the natural mother has a strong claim to privacy, and so would not recognise the right of the child.[110]

It was of course open to the Court in *O'T v B*, and in *Tuohy* itself, not to recognise both of these rights, and instead to choose one or other right to win out. After *O'T* and the later case of *TD v Minister for Education*,[111] the unenumerated rights doctrine was disfavoured, and the courts will be far more reluctant to recognise new unenumerated rights.[112] It is therefore less likely that this problem of

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[110] "I find it difficult to imagine an aspect of human experience which falls more clearly into the constitutional area of privacy... than the circumstances of the natural mothers in the present case... All must have thought that, if they chose, they could carry their secret with them to the grave." [1998] 4 IR 343 at 373.

[111] [2001] 4 IR 259.

[112] See Gerard Hogan, "Unenumerated Personal Rights: Ryan's Case Re-Evaluated" (1990) 25 Ir. Jur. (ns) 95; Desmond Clark, "Unenumerated Rights in the Irish Constitution," (2012) 34 DULJ 101.

conflicting rights will continue to grow, as judges will have less latitude to characterise novel situations as a clash of rights.[113] If *Tuohy* grew up out of the particular circumstances, it might wane alongside the unenumerated rights doctrine, as the number of cases where the test is needed is fewer with time.

Conclusion

The problems with *Tuohy v Courtney*, and the test that case set out, are several. The first is that it is not entirely clear which of the several possible rationales underlay it. The problems of scope mean that *Tuohy* could be instructing courts with resolution of stalemates involving constitutional rights, or rather instructing courts that a clash between rights will usually be a stalemate. This avoids messy hierarchical ranking, and continual uncertainty over whether a piece of legislation purporting to balance rights might be invalid. On the other hand, it could be far broader, suggesting that almost any clash of interests should mean less judicial scrutiny. This uncertain scope means that *Tuohy* has the potential to make almost all judicial review of rights questions highly non-interventionist.

Secondly, particularly in respect of the broader concerns underlying *Tuohy*, it is unclear why they could not be accommodated within the *Heaney* test, with deference being offered in particular contexts rather than broad and blunt non-interventionism. It might be a coincidence of timing, insofar as the *Tuohy* and *Heaney* test were enunciated almost simultaneously; it might also be because there is a merit to having a separate test.

Thirdly, the vague rationale underlying the *Tuohy* test has resulted in its problematic elision with the *Heaney* test, overtaking the latter test entirely in several cases. This robs the *Heaney* test of strength, and encourages judges to believe the Heaney test is as non-interventionist as the *Tuohy* test, which it is not, or should not be.

Fourthly, this confusion and uncertainty has allowed courts to choose which standard to apply. From the case law discussed above, it would be an unimaginative judge indeed who could not discover a clash of rights in a particular case if he or she were wary to intervene, or assert that the law did not protect rights, but rather

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[113] This is true in theory at least. However, in *Roche v Roche* [2009] IESC 81, the Supreme Court recognised a right not to procreate as a corollary of the previously recognized right to procreate in a case involving a dispute about the implantation of retained frozen embryos. If this issue is subsequently the subject of legislation, it should be subject to the *Tuohy* test.

interests, to apply the more interventionist *Heaney* standard. I do not suggest that this is something that Irish judges have done or would do; I merely suggest that it would be very difficult to criticise a judge for their choice of standard given that the precedents on the issue are, to say the least, erratic.

Fifthly, the *Tuohy* standard is so non-interventionist that it might amount, effectively, to non-review. Worse still, it is non-review under the guise of review, giving the impression of judicial oversight that is in reality absent.

At the same time, *Tuohy* is a rare example of the Irish courts attempting to justify variation in the strength of standards of review. In a great many cases, as we shall see, the *Heaney* test is applied in a weak or deferential manner, with little or no explanation of why this is so. *Tuohy* was different; it explained the reasons for non-interventionism, and thus, in theory, limited it. Of course, the practice of citing *Tuohy* as a general authority for weak review has meant this limitation has been ineffective.

For the same reasons, there might be merit in a separate test. When non-interventionist review is needed, a separate test could limit the risk of a non-interventionist bent seeping into areas where it does not belong, and reducing the strength of review across the board. Again, it cannot be said that this been the reality of the *Tuohy* test, but it is certainly a potential benefit of such an approach.

Perhaps if *Tuohy* had come after the Heaney test was firmly entrenched, it could have established a reflective analysis on that test, and the need for non-interventionist and deferential standards of review. It might have created a judicial culture of justification for the strength of review, resulting in explanations for the variation in the strength of review. The risk of the tests eliding would have been clear to the courts, and steps might have been taken to alleviate this by clarifying the scope of the non-interventionist test. In any event, while we might bemoan what has ultimately come of this test, *Tuohy* was a missed opportunity for the Irish courts to properly grapple with the varying strengths of standards of review, something that they have consistently failed to do.

8 – The Evolution of the *Heaney* Test

Introduction

In the aftermath of *Heaney*, judicial invocations of the test outlined by Costello J proliferated. As we saw in the last chapter, this sometimes led to confusion and elision with the *Tuohy* test. However, the Heaney test had its own problems. Questions were raised about its applicability; it struggled to find coherent application in the Irish courts.

The *Heaney* test became synonymous with the word "proportionality," as the *Oakes* test had in Canada. This led to its own issues, with the test being co-opted into areas of law where no standard of review was needed. For example it was not uncommon to see it cited in cases related to sentencing.[1] However, the Supreme Court recently issued a helpful clarification that use of the *Heaney* test in sentencing cases is "misplaced," and when the word "proportionality" is used in sentencing, it should have its ordinary meaning:

> Broadly speaking the specific doctrine of proportionality referred to by Costello J, in that case is a public law doctrine with specified criteria, according to which decisions or acts of the State, and in particular legislation, which encroach on the exercise of constitutional rights which citizens are otherwise entitled freely to enjoy, are scrutinised with regard to their compatibility with the Constitution or the law. When used in that context the doctrine of proportionality might be said to be a term of art.[2]

There are several other instances where the use of the *Heaney* test is not intended, but proportionality in the general sense is.[3]

The *Heaney* test was soon to be found in many areas of law. It has found a stable home in property rights,[4] but some recent scholarship has queried the extent

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[1] *Montemuino v Minister for Communications* [2008] IEHC 157; *People (DPP) v WC* [1994] 1 ILRM 321.
[2] *Lynch and Whelan v Minister for Justice* [2010] IESC 34.
[3] The *Heaney* test was invoked in *Independent Newspapers v Murphy* [2006] IEHC 566 in relation to the balance of rights in discovery of confidential documents. The test as enunciated in *Heaney* is probably not equipped to apply horizontally in this manner. Similarly, in *Vickers v DPP* [2009] IESC 58, the Supreme Court suggested using "proportionality" to determine whether or not hearsay evidence should be admitted for the purpose of establishing likelihood of offence while on bail for the purpose of refusing bail under s. 2 of the Bail Act 1997. It is probably safe to assume that the *Heaney* test is not what was meant in this case.
[4] *Iarnród Éireann v Ireland* [1995] 3 IR 321; *Daly v Revenue Commissioners* [1995] 3 IR 1; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *Lovett v Minister for Education* [1997] 1 ILRM 89; *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185; *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321; *Gorman v Minister for the Environment* [2001] 2 IR 414; *Clinton v An Bord Pleanala* [2005] IEHC 84; *Bupa Ireland v Health Authority of Ireland* [2006] IEHC 431; *Shirley v AO Gorman* [2006] IEHC 27; *Hanrahan Farms v Environmental Protection Agency* [2006]

of its domination in that arena.[5] It has been used in respect of criminal process rights;[6] voting and election rights;[7] liberty;[8] criminal penalties;[9] freedom of expression and communication;[10] family rights;[11]religious non-discrimination;[12] fair procedures;[13] and bodily integrity.[14]

There are some areas where its application has proven controversial., There was some controversy about its application in the criminal context.[15] It has applied fitfully in equality cases, with some controversy, and it has never taken hold.[16] Similarly, its role in administrative law is controversial. Though it has been applied, often in fair procedures cases, its meaning and scope are still not entirely clear.[17] This is true even after the Supreme Court's adoption of the test in *Meadows v Minister for Justice.*[18]

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1 ILRM 275; *J & J Haire v Minister for Health* [2009] IEHC 562; *Dellway Investments v NAMA* [2010] IEHC 364, *Unite v Minister for Finance* [2010] IEHC 354.

[5] There is some debate on the extent to which the *Heaney* test supplants the text. See Rachael Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31 DULJ 1 and Gerard Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 Ir. Jur. 373. See, in particular, Walsh's suggestion that recent judgments return to textual basis, particularly in *Re Article 26 and the Health Amendment Bill* [2005] IR 1 105.

[6] *Heaney v Ireland* [1994] 3 IR 593; [1996] 1 IR 580; *Rock v Ireland* [1997] 3 IR 484; *Re National Irish Bank (No 1)* [1999] 3 IR 145; *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185; *DPP v Finnerty* [1999] 4 IR 364; *McGonnell v Attorney General* [2007] 1 IR 400; [2006] IESC 64; *Enright v Ireland* [2003] 2 IR 321; *Quinn v O'Leary* [2004] 3 IR 128; *Director of Public Prosecutions v Elliot* [1997] 2 ILRM 156; *Wicklow County Council v O'Reilly* [2006] 3 IR 623; *Meagher v O'Leary* [1998] 4 IR 33; *DPP v Browne and Mullane* [2008] IEHC 391; *Dunnes Stores v Ryan* [2002] 2 IR 60.

[7] *King v Minister for the Environment* [2004] 3 IR 345 (HC); [2007] 1 IR 296 (SC).

[8] *Blehein v Minister for Health* [2009] 1 IR 275; *Gallagher v Central Mental Hospital* [1996] 3 IR 10; *McCann v District Judge Monaghan* [2009] 4 IR 200.

[9] *Enright v Ireland* [2003] 2 IR 321; *PH v Ireland* [2006] 2 IR 540.

[10] *Murphy v IRTC* [1999] 1 IR 12; *Colgan v IRTC* [2000] 2 IR 490; *Mahon v Post Publications* [2007] 3 IR 338; *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573; *Independent Newspapers v Judge Anderson* [2006] 3 IR 341.

[11] *AO and DL v Minister for Justice* [2003] 1 IR 1; *TF v Ireland* [1995] 1 IR 321; *LB v Ireland* [2008] 1 IR 134; *O'Shea v Ireland* [2007] 2 IR 313.

[12] *McNally v Ireland* [2009] IEHC 573.

[13] *DK v Crowley* [2002] 2 IR 744; *Dellway Investments v NAMA* [2010] IEHC 364; *Vehicle Tech v AIB* [2010] IEHC 525.

[14] *McGinley v Judge Reilly* [2009] 3 IR 125; *Devoy v Ireland* [2004] 4 IR 481.

[15] See *Re National Irish Bank (No. 1)* [1999] 3 IR 145

[16] Compare the judgments of Laffoy J in both *Ring v. Attorney General* [2004] 1 IR 185, where she was generally open to it, and *SM v Ireland (No 2)* [2007] 4 IR 369, where she was not. See also *Mhic Mhathúna v Ireland* [1995] 1 IR 484; *An Blascaod Mór Teo v Commissioners of Public Works in Ireland* Unreported, High Court, Budd J, February 27th 1998; *Redmond v Minister for the Environment* [2001] 4 IR 6; *Whelan v Minister for Justice* [2008] 2 IR 142; *Dokie v DPP* [2010] IEHC 110.

[17] *Denis O'Brien v Mr Justice Michael Moriarty (No. 3)* [2006] 2 IR 474, *Law Society v Competition Authority* [2006] 2 IR 262; *AO and DL v Minister for Justice* [2003] 1 IR 1; *Meenan v Commissioner to Inquire into Child Abuse* [2003] 3 IR 283; *Radio One Limerick v IRTC* [1997] 2 IR 291; *BF v Minister for Justice* [2008] IEHC 126.

[18] The strength of the test, and its relationship to administrative law unreasonableness, could not be said to be fully decided. See *Meadows v Minister for Justice*, and the following commentary see Alan Brady "Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*," (2010) 17 DULJ 136 and Paul Daly, "Standards of Review in Irish

In this chapter, I will trace the development of the *Heaney* test in the Irish courts. First, the problem of internal and external limitations on rights will be discussed, as this issue underlies several of the issues surrounding the scope of the test.

Then, the treatment of objectives in the Irish courts will be examined. The tendency of the Irish courts to adopt hypothetical objectives will be discussed, and some of the risks of this noted, including the hypothesis of overly general objectives, and instances of the effect of the measure stated as its objective. Next, the Irish courts' consideration of the validity and importance of objectives will be discussed, canvassing the few instances of objectives coming close to rejection on these grounds. Finally, the issue of facts in relation to the *Heaney* test will be considered, having regard to the courts' consideration of the factual reality underlying objectives asserted or hypothesised.

After this, we will turn our attention to rational connection between means and ends. First, I will canvas some cases where this has proven to be robust - cases of the law being overbroad as regards its stated objective. Then, I will examine how and to what extent the rational test in Ireland is rendered tautologous by the hypothesis of objectives. Finally, I will explore the idea of rational connection as indirect objective scrutiny in the Irish context, laying out some cases that suggest this.

Next, minimum impairment will be examined. The elision of minimum impairment and balancing –in both a rhetorical and substantive sense– will be explored. Then the Irish approach to minimum impairment will be considered, looking at the rise of a weaker test, which ultimately became a rule against excess.

The final balancing test will then be examined. It is rarely applied in Ireland. First, downplaying the importance of rights will be considered, as there is at least one high profile example of this. Then, I wish to look at a very impressive application of balancing where the law failed to pass muster –*Daly v* Revenue *Commissioners*[19]– and contrast it with a profoundly unimpressive instance of a law failing this test – *Blehein v Minister for Health.*[20] Then I wish to examine the use of saving clauses and

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Administrative Law after *Meadows v Minister for Justice, Equality and Law Reform,*" [2010] 17 DULJ 379.

[19] [1995] 3 IR 1.

[20] [2009] 1 IR 275.

interpretation in the balancing test. Finally, I will look to an example of the balancing test being applied in an incorrect manner that raises serious conceptual difficulties.

Finally, I will look briefly at the burden of proof applied in the *Heaney* test. Though the traditional Irish solution –where the burden of proof is placed entirely on the applicant– is still the norm, some cases which diverge from this merit comment.

Looking at this evolution, we will see that the Irish courts have developed a distinct identity for the *Heaney* test, one that is deferential and non-interventionist. However, what has been lacking in this process has been discussion and clear elaboration of these ideas, and the reasoning behind them. There are many cases where the test is passed[21] or, less frequently, failed,[22] without any explanation or elaboration. Since judges do not discuss these ideas, we are left to piece this tapestry together to understand that the courts have done. It should be much more apparent, and far less opaque.

Scope of the *Heaney* Test: External Limitations on Rights

Heaney as an External Limitation Test

The *Heaney* test has been held not to apply to certain rights, such as equality,[23] and the right to trial in due course of law.[24] The reason for this seems to be that certain rights in the Irish legal order are subject only to internal limitations.

The *Heaney* test cannot apply to cases where no right is infringed. This is, of itself, an uncontroversial proposition that the courts have expressly endorsed.[25]

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[21] For example, in *Re Article 26 and the Planning and Development Act 1999* [2000] 2 IR 321 at 354, Keane CJ merely set out the elements of the test seriatim and asserted that the law satisfied them: "Applying the tests proposed by Costello J in *Heaney v Ireland* ... the court in the case of the present Bill is satisfied that the scheme passes those tests. They are rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time, the court is satisfied that they impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained."

[22] The test was discussed with little discussion as to under which limb, or why, in *Blehein v Minister for Health* [2009] 1 IR 275, which will be discussed in the course of this chapter. An even more problematic example is in the case of *Damache v DPP* [2012] IESC 11 at [52], Denham CJ cited *Heaney*, indicated that it should be applied, and invalidated the law, but gave no indication whatsoever about which limb of the test was failed or why.

[23] For a detailed discussion of this, see Chapter 9, text accompanying note 68-72.

[24] *Re National Irish Bank (No. 1)* [1999] 3 IR 145 at 180. See Chapter 9, note 58-67.

[25] In *McCann v Minister for Education* [1997] 1 ILRM 1 Costello P clarified that the test he outlined in *Heaney* could only apply when rights were in issue: "In all the cases in which this test was applied the court was concerned with this infringement of a right." He said the test did not apply to measure which "do not attack legally protected rights." He made this comment in the context of a case where

However, it means that any rights that are only internally limited fall outside the scope of that test, as no right is infringed in such cases unless the right is *unjustifiably* violated. It might have been thought that following Costello J's decision to place external limitations on the Family rights in Article 41, which are phrased in absolute terms, all constitutional rights would be subject to external limitations.[26] However, questions have been raised about the application of *Heaney* to the arena of criminal trial rights under Article 38.1 in a manner that seems to reject external limitations on such rights.[27]

Similarly, in equality case law, only internal limitations are used, and *Heaney* has been rejected. Equality is not infringed by the drawing of any distinction; the discrimination must be problematic in some other sense to violate the right.[28] This might accord with the constitutional text.[29] Irish courts have never paid a great deal of attention to this distinction, and certain rights, such as the right of access to the courts, have sporadically[30] been held to be subject to solely internal limitation without any obvious reason for this.[31]

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no right was even suggested as being infringed, yet it was argued that the Heaney test should be used. Similarly, McKechnie J recently said that "[i]n order for the principle of proportionality to come into play, the Court must first have found that a law in some way, to some extent infringes a right." *McDermott v Governor of Cloverhill* [2010] IEHC 324. *Cf* his judgment in *O'Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562 at 591, [58], where he stated that "proportionality can have little if any role where the provisions in question breach no substantive rights."

[26] Many rights will be subject to both limitations. This is particularly true with a novel rights issue, not previously addressed, where the scope of the right is unclear. Brian Foley, "The *BUPA Ireland* Case and Constitutional Litigation," (2010) 45 Ir. Jur. (ns) 230 gives the example of *Hempenstall v Minister for the Environment* [1994] 2 IR 20, where the question of whether or not taxi licences were constitutional property at all had to be answered before the limitation could be assessed.

[27] "[I]t is doubtful if the principle of proportionality - so important in other branches of constitutional law - can have any useful application here. A criminal trial is conducted *"in due course of law"* or *"with due process of law"* or it is not." *Re National Irish Bank (No. 1)* [1999] 3 IR 145 at 180.

[28] This is true of both the old standard for determining the validity of a discrimination (whether or not it is "invidious") and the more recent standard (whether or not the distinction is "irrational.") See *Brennan v. Attorney General* [1983] ILRM 449.

[29] The text of Article 40.1 envisages unconstitutional discrimination being those that cannot be justified by reference to differences in "capacity, physical and moral, and of social function," and does so in a manner than seems to suggest that such discriminations are not even presumptively unconstitutional, rather than *prima facie* unconstitutional discriminations that are justified.

[30] Strangely, court views have shift on this point, without any comment or explanation. The right of access was broadly defined, and subjected to external limitations, by the Supreme Court in *Murphy v Greene* [1990] 2 IR 566, and more recently in *Blehein v Minister for Justice* [2009] 1 IR 275. The two examples of the external approach related to mental health detention, and the two examples of internal-only limitation related to appeal to the Supreme Court, though this hardly explains this fundamental divergence.

[31] For example, it difficult to see why the right of access to the courts has been internally limited, and why the *Heaney* test has been held to be inapplicable to that right. In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 at 393 upheld a very strictly time limit on appeal to the Supreme Court was held not to impinge upon the right of access to the courts at all, and so was

Some other form of review is necessary where rights are subject to internal limitation only, and to date, review of such limitations in Ireland has often been opaque. This will be further discussed when comparing Ireland and Canada, as Canada has no rights which are not amenable to external limits. For the moment, it suffices to say that *Heaney* is not applied to certain rights, which are subject only to internal limitation.

OBJECTIVES

Given the importance of the objective test for the application of the rest of the *Heaney* test, there has been surprisingly little discussion of it by Irish courts.[32] In *Heaney*, as in *Oakes*, the objective enquiry was given independent force, raising the possibility of objectives that are not sufficiently important to justify a restriction of rights, or that might not be compatible with a free and democratic society. However, no indication was given as to how this might be established, and the enquiry has proven to be weak.[33]

Several points merit discussion: first, the hypothesisation of objectives; secondly, the problem of overly general objectives; thirdly, the validity and importance criteria, and their lack of impact; fourthly, cases where the Irish courts have failed to find an objective other than the effect of the measure, which creates conceptual problems; and, finally, cases where the courts looked at, or failed to look at, the veracity of the factual premises underlying objectives.

Hypothesis of Objectives

Irish courts, even more than others, are vociferous in their opposition to consideration of subjective motivations or objectives in statutory interpretation.[34] The Irish courts have remained staunch in their support of hypothesised or

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not subject to *Heaney* analysis. The same approach was adopted by McKechnie J in *O'Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562 at 594, [66].

[32] Both Rachael Walsh, "The Constitution, Property Rights and Proportionality – A Reappraisal" (2009) 31 DULJ 1 at 10-20, and Ailbhe O'Neill, "Property Rights and the Power of Eminent Domain," in Oran Doyle and Eoin Carolan (eds.) *The Irish Constitution: Governance and Values*, (Thompson Roundhall, 2008) 431 at 439

[33] "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing in a free and democratic society." [1994] 3 IR 593 at 607.

[34] This has always the case; see *Wavin Pipes v Hepworth Iron Co Ltd* (8th May 1981) High Court. It has remained so long after *Heaney*. In *Crilly v Farrington* [2001] 3 IR 267, where the Supreme Court affirmed that parliamentary material was not to be used in construction of statutes. The Interpretation Act 2005 did not alter this rule, and in fact gave statutory footing to the notion that such material was not to be used.

objective motivations in the constitutional context also. Only the objective intention of the legislature, as understood from the language of the statute, is what the court seeks.

This has been confirmed by the Irish courts on many occasions. In *Molyneux v Ireland*, Costello P said it was

> not necessary for the court to search the parliamentary debates to ascertain the arguments used to justify the measure–it will usually be possible for the court to make reasonable inferences from the provisions of the statute itself and the facts of the case. [35]

In *Controller of Patents v Ireland*[36], Keane CJ cited the exclusion of such material in statutory interpretation while finding that it was similarly excluded in constitutional cases:

> What was said or may have been said or may have been written by the Minister to advisers, to Dáil Deputies or senators as to what motives were prompting the initiation of the Bill could not in the slightest degree assist the plaintiff in his claim that the Act was unconstitutional.[37]

More recently, *in PJ Carroll v Minister for Health*, the Supreme Court said: "There can be no question of course in a constitutional challenge, of the State adducing evidence as to what were the intentions as such of the Oireachtas or particular members thereof."[38]

Since subjective purposes are off the table, the courts infer from the measure what the Oireachtas "may well have thought."[39] The Irish courts have not laid out rules or guidelines for how an objective should be hypothesised from a statute. As Doyle has argued, [40] courts almost always have multiple possible objectives to choose from, and there is no instruction on how they should pick between them. We

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[35] [1997] 2 ILRM 241 at 244; approved by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360 at 392.
[36] [2001] 4 IR 229.
[37] *Ibid* at 246.
[38] [2005] 1 IR 295 at 318. This was again affirmed by the Supreme Court in *JP v DPP* [2009] 3 IR 215 at 234-5: "Unfounded speculation as to the alleged unlikelihood of the Oireachtas having intended a different regime in the context of the Act of 1993 from that which originally prevailed under the Act of 1935 cannot avail the plaintiff."
[39] *Murphy v IRTC* [1999] 1 IR 12 at 21.
[40] See Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004) at 119-120.

will examine this in more detail later, as one of the key consequences of this is that it often gives benefit of the doubt to the State in respect of rational connection.

Generality of Objectives

Unlike their Canadian counterparts, the Irish courts have not developed any rules, or issued any guidance, about objectives being framed in an overly general way. As a result, Irish courts have framed very general objectives, with the result that many subsequent parts of the analysis, such as the rational connection test and the overall balancing test, could be distorted.

An example of this is the Supreme Court appeal in *Heaney*. Here, the Supreme Court found an objective that was so vague that it enabled it avoid deciding what the effect of the provisions actually was. The Supreme Court refused to deal with *Heaney* as a case about Article 38.1 criminal trial rights.[41] Since Heaney claimed a right to silence in pre-trial detention that was, according to O'Flaherty J, an entirely different issue. The right in this case derived not from Article 38.1, but from the right of free expression in Article 40.6.1°; a corollary of this right to express oneself is a right to not express oneself. This assumes that since the silence in question here was being invoked before trial, its connection to the course of the trial is too remote to invoke Article 38.1.

The problem is that we cannot know this unless we know whether or not the statements demanded of Mr Heaney, if made, could have been used against him at trial. The Supreme Court decided that this issue did not come into play in this case, since no statements were made, and therefore left it for another day. However, this issue would surely have a vast impact on the minds of those being asked to give a statement, with a significantly greater incentive to speak in the knowledge that the statements could not be admitted.[42] It is remarkable that the Court thought itself able to resolve this dispute without establishing this clearly.

It was the very broad definition of the objective that allowed this. The Court established the State interest in the least specific way possible. The Court quoted a small portion of the Long Title of the Offences Against the State Act 1939: "An Act to

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[41] The Court did not specifically eschew the notion that the right to silence could live in Article 38.1 – they presumably believe that silence at trial is covered by that article. They simply reached no conclusion on the matter. *Heaney v Ireland* [1996] 1 IR 580 at 584.

[42] This logic was accepted by the ECtHR, who noted that it did not matter if the statements would not have been admissible if the suspects were not aware of this at the moment they chose to stay silent. *Quinn v Ireland* [2001] 33 EHRR 264; *Heaney and McGuiness v Ireland* [2001] EHRR 12.

make provision in relation to actions and conduct calculated to undermine the public order and authority of the State...."[43] No other exploration of the objective was undertaken, nor any consideration of how this very broad goal was achieved. This was even less specific than the objective outlined by Costello J in the High Court, which specifically related to the police investigations. By defining the objective so loosely, the court avoided deciding whether the compelled statements are admissible or not (Costello J had assumed that they were.) This circumvents an enquiry into whether or not this objective is accomplished, and means the Court did not even look at the law's full effect.[44] This has obvious effects for other parts of the test, and may not conform to the conceptual requirement to justify the rights restriction with an external objective.

The one exception is *Daly v Revenue Commissioners*. Costello P refused to give the state any more credit than it deserved for the measure in question. He noted that the measure under challenge was part of general tax regime, motivated by a desire "to assist the collection of tax and to prevent avoidance."[45] However, he noted that the entire system was not what was challenged in this instance:

> But the withholding tax regime as enacted by Part III is not challenged in these proceedings - it is only the amendment to s. 18 brought about by s. 26 of the Act of 1990. It seems to me therefore that the court is not concerned with considering the general objectives of Part III of the Act of 1987 but must focus on the specific objective sought to be achieved by the amendment.[46]

Costello P gave the measure no more credit than it deserved, focusing on the objective of the challenged portion of the law, not the law as a whole. There is little, if any, evidence that Costello P's observation has been influential, but it is the approach most consistent with the conceptual nature of the standard of review.

The Effect of the Measure as the Objective

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[43] *Heaney v Ireland* [1996] 1 IR 580 at 589.

[44] If the objective of the law was merely intelligence gathering, then the weight that it would be afforded would presumably be less than if it was to allow the admission of the statements in court, and therefore secure the prosecution of crime. By affording the general objective great weight, and not considering more specifically what the law achieved, the Court's analysis drains the standard of review of any rigor.

[45] [1995] 3 IR 1 at 11.

[46] *Ibid* at 11-12.

An even more extreme example of hypothesising general objectives is hypothesising objectives that are not distinguishable from the effect of the measure. This was noted to have happened before the *Heaney* test came about.[47]

A example in the post-*Heaney* case law, albeit in the equality context,[48] is provided by *JD v Residential Institutions Redress Review Committee.* [49] The respondent had suffered abuse in a residential institution having become pregnant following sexual abuse by her brothers. She entered the home 11 days after her 18th birthday. Consequently, the respondent committee rejected her application for redress, as she was not a child at the time of her admission to the home pursuant to the definition of that term in s. 1 of the Residential Institutions Redress Act, 2002.[50] At the time she entered the home, in November 1968, a child was understood to be anyone under the age of 21. In the High Court, O'Neill J held that this definition was contrary to the Constitution, being an arbitrary discrimination on the basis of age, with no reason being offered for it, other than the need to establish some limits to recovery under the Act. By striking down the definition, the ordinary meaning of the word at the relevant time would have allowed the respondent to recover.

The Supreme Court reversed the decision, upholding the definition. It is very difficult to see, from the Court's judgment, what the purpose of the definition was. The Court said that the definition of childhood was not necessarily understood to be anyone under 21 at the time the respondent entered the home: that was the definition of infancy, but not necessarily childhood. Therefore, the Court concluded:

> In deciding as a matter of policy to establish a special scheme of redress for abused children the Oireachtas necessarily had to define the scope and limits of its application. The court is satisfied that the choice of an age limit of 18 constituted a legitimate legislative designation of the persons who naturally and normally have been described as children. The definition of "child" as a

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[47] In *Doyle v Hearne (No. 2)* [1988] IR 317, discussed in Chapter 6, at note 77, the Supreme Court upheld a law that could not be explained by any objective that could reasonably be imagined. Unable to find an external objective, they accepted the effect of the law as an end in itself. This is contrary to the core principles underlying rights restrictions.

[48] As noted above, and as will be discussed in more detail in Chapter 10, the *Heaney* test has not found general acceptance in the equality case law. However, I feel it is appropriate to use equality case law when looking at how objectives are dealt with, as objectives are also at the heart of the rationality standard now used in equality cases; see *Brennan v. Attorney General* [1983] ILRM 449. That test also provides for some tailoring to the objective analysis. I feel insights derived from this transfer into the context of the *Heaney* test.

[49] [2009] IESC 59.

[50] A child was defined as "a person who has not attained the age of 18 years."

> person under the age of eighteen years represents an objective classification, containing no element of discrimination. It is neither arbitrary nor irrational.

The purpose of this definition of a child was to define the meaning of the word child. Since the Oireachtas was entitled to do this, no further analysis is forthcoming. The purpose of the law is its effect. This is unjustifiable, contrary to the conceptual foundations of standards of review. It also reduced the level of scrutiny in equality cases to something close to non-existent.[51]

Legitimacy and Importance of Objectives

Irish courts do not conduct deep inquiries into whether or not the objective of the measure was important or legitimate, and have never set a very high threshold for importance. Often the objective is ascertained with little mention of its importance, or alternatively an assertion of its importance.[52] The courts have found the importance of objectives to be self-evident.[53]

Given the courts' penchant for hypothesising objectives, it is unsurprising that they rarely find an enactment to be motivated by an illicit, improper, or insufficiently important objective. Courts will almost always be able to hypothesise an objective that is a legitimate one; the presumption of constitutionality ensures that the Court will pick the non-illicit motivation whenever it is possible to do so.[54] Whatever one feels about the non-interventionist presumption of constitutionality, it would be difficult to say that this was not a correct application of the presumption.

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[51] See Oran Doyle, "Judicial Scrutiny of Legislative Classification," (2012) 47 Ir. Jur. (ns) 175. The Supreme Court previously embraced the idea of there being suspect classes that might garner more significant review when they were discriminated against, of which age was one. Here, age is not subjected to any scrutiny at all. *Cf D v Ireland* [2012] IESC 10, which Doyle suggests showed no scrutiny to sex classifications. At 183.

[52] See, for one of many examples, *Re NIB (No 1)* [1999] 3 IR 145 at 179: "The present case deals with the investigation of commercial fraud. No doubt this may often be a much less serious matter than the matter under investigation by the Court in the Heaney case but nevertheless potentially it is a matter of great importance in modern society." Walsh, note 5, gives a full account of the lack of rigour shown by Irish courts in querying whether or not a measure restricting property rights was done in the common good. The courts have accepted very general objectives in that context.

[53] See, for example, the judgment of the Supreme Court in *King v Minister for the Environment* [2007] 1 IR 296 At 313-314, [33]: "The court is satisfied, and considers it self evident that the State has a legitimate interest in regulating the conduct of elections by law, subject to the Constitution, in the interests of, *inter alia*, protecting and maintaining the integrity and efficacy of the electoral process for Dáil Éireann as well as ensuring that those elections are conducted free from abuse and in an orderly fashion consistent with democratic values acknowledged by the Constitution."

[54] *Pigs Marketing Board v Donnelly* [1939] IR 413; Brian Foley, *Deference and the Presumption of Constitutionality*, (IPA, 2008) at 18-19; Donal Barrington, "Some Problems of Constitutional Interpretation," in Deirdre Curtin and David O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law*, (Butterworths, 1992) at 176.

Add to this that the burden of proof in this respect rests on the plaintiff, and it is easy to see why this test is not failed.

This means that the objective enquiry of *Heaney* cannot prevent pursuit of illicit motivations. It also means that there has been little discussion of what might be an improper purpose to pursue in our free and democratic society, outside of the equality context.[55] However, it is possible that, even when objectives are hypothesised, an improper purpose may be found by the Court. This happens when, even from an objective stance, the purpose is improper, or to put it another way, there is no objective that can plausibly be hypothesised other than the improper objective.[56] There have been two instances where serious doubts have been expressed as to validity of the objective, and perhaps one case where no legitimate objective could be found.

In *Lovett v Minister for Education*,[57] Paragraph 8(1) of the pension scheme, established pursuant to the Teachers Superannuation Act 1928, was challenged as unlawful and unconstitutional. It provided that a pensioner convicted of an offence and sentenced to 12 months in prison or any period of hard labour would forfeit their pension. Mr Lovett was principal in a community school, and after investigation of financial irregularities in the school's accounts, he pleaded guilty to three offences of dishonesty, and received a suspended sentence of two years imprisonment.

Kelly J concluded that Paragraph 8(1) was *ultra vires* the parent Act, but went on to say that even were that not the case, the provision would be unconstitutional. This element of the Scheme did not seem to be warranted by anything in the parent Act, the objective of the section was suspect. In this case, Kelly J took a much more scathing view of the objective of the measure than would usually be seen from an Irish court:

> What legitimate interest of the State is being satisfied by this provision? ... Some case might be made to support such a provision concerning serving

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[55] The Supreme Court acknowledged certain presumptively invalid distinctions in the context of Article 40.1 This has not been explored outside that context. See *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321. See generally, Doyle, note 40. However, Doyle sees this as being rolled back recently. See above note 51.

[56] One of the best examples of this is *Gomillion v Lightfoot* 364 US 399 (1960); see Chapter 2, note 20. The example of *SM v Ireland (No 2)* [2007] 4 IR 369, below at note 67.

[57] [1997] 1 ILRM 89.

> teachers who hold a position of trust in our society but none can, in my view, be advanced concerning retired teachers.[58]

It might be that Kelly J could think of no way to justify the measure given its strange scope.[59] Despite thinking the measure unconstitutional on this and other grounds, no declaration of unconstitutionality was issued in this case because, having found the section to be *ultra vires* its parent legislation, Kelly J exercised judicial self-restraint and declined make a declaration. All comments were thus *obiter*. *Lovett* remains one of the few cases where serious doubts were expressed about the objective of a measure.

In *An Blascaod Mór Teo v Commissioners of Public Works in Ireland*,[60] Budd J took a very dim view of the legislative objective. This entry in the long-running legal battle over the Blasket Islands was a challenge to the Blascaod Mór National Historic Park Act, 1989. Under the Act, all land (with certain listed exemptions) on the Great Blasket could be purchased by the state, by agreement or by compulsory purchase. The plaintiffs were the largest land owners on the island, and they were served with compulsory purchase orders. They challenged the constitutionality of the Act, arguing violation of equality before the law and their property rights.[61] They argued that the exemption, in section 4(2) of the Act, impermissibly excluded certain individuals from the scope of the Act based on their pedigree: pre-1953 residents, who have since then owned or occupied the land, and their relatives, were exempted. Furthermore they argued that the Act was in essence a Bill of Attainder, in essentially targeting particular individuals or a very small group, and this was constitutionally impermissible.

Budd J noted that this Act was, in many ways, "abnormal"[62] and that the phraseology used in the Act was "highly unusual."[63] Rather than setting out an acquisition scheme for the entire country, or even a designated part of the country, the Act applied to one island only. The pedigree or lineage exemption was particularly problematic. The justification offered for this provision was that it

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[58] *Ibid* at 101.

[59] Moreover, it was not *legislative* motivation in question, but the motivation of the scheme's drafters, though there would be a presumption that delegated powers were exercised constitutionally just as there would be a presumption that the legislature has acted constitutionally.

[60] Unreported, High Court, Budd J, February 27th 1998. See also Walsh, note 32, at 14.

[61] It should be noted that Budd J is one of the only judges to apply the *Heaney* standard to equality cases, where it has generally been judged to be inapposite. See Chapter 9, at note 68-72.

[62] Unreported, High Court, Budd J, February 27th 1998 at 26.

[63] *Ibid*.

preserved the cultural identity of the island.[64] Though expressing "considerable scepticism,"[65] Budd J said it was

> necessary to overcome initial antipathy to such grounds of discrimination and to examine objectively the reasons why the Oireachtas has chosen to treat two categories of landowners in such contrasting manner with security of tenure for one group and expropriation for another group.[66]

Budd J was clearly very doubtful that this measure was motivated by a legitimate aim. However, he stopped short of finding the aim invalid. We will return to look at the manner in which he ultimately found the law to be unconstitutional.

The one clear[67] example of a law failing to have a legitimate purpose is *SM v Ireland (No 2)*.[68] The Offences Against the Person Act 1861 allowed for different maximum sentences for indecent assault depending on whether the victim the assault was a woman –maximum two years– or a man – maximum ten years. Laffoy J held that since it was sex discrimination, it was *prima facie* invalid unless justified by a "difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary or capricious."[69] In postulating the purpose, she noted the provisions of the Act "manifest a societal repugnance to homosexual activity in the terminology used, for instance, the references to 'unnatural' offences and the 'abominable' crime of buggery."[70] She could find nothing in the Act that pointed to a legitimate purpose.[71] Prejudice against homosexuality was an illegitimate purpose, and no other purpose was forthcoming.

This is one of the only examples in the Irish courts of an objective actually being held to be invalid. It was a rare case when it was not possible to hypothesise a legitimate objective for this measure. There is, to my knowledge, no other case like

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[64] The plaintiffs were displeased with this justification, suggesting that "to classify landowners... as culturally acceptable and unacceptable is objectionable in itself and redolent of apartheid." *Ibid* at 128.
[65] *Ibid* at 75
[66] *Ibid* at 28.
[67] It seems on the face of the judgment that Laffoy J struck down a statute for pursuing no objective in *O'Shea v Ireland* [2007] 2 IR 313. A close reading of this case, however, shows that she felt the objective of safeguarding the integrity of the family were not in fact achieved by the law. It shows that objective scrutiny in Ireland is dealt with by means of rational connection, and will be dealt with in that section.
[68] [2007] 4 IR 369.
[69] *Ibid* at 397, [73].
[70] *Ibid* at 397, [74].
[71] [2007] 4 IR 369 at 398-399, [77]-[78].

it. Moreover, the statute in this case was written in the mid 19th Century; this bias towards homosexuality was surely not an objective that the legislature of 2007 would have supported or defended. It is therefore not a particularly strong judicial stand against legislative objectives, and is unlikely to occur outside of this unusual circumstance of a law motivated by an outmoded moral hangover.

Factual Reality Underlying Objectives

The Irish courts have not tended to look behind the objective being asserted to question whether the reality of the situation backs up that assertion, though it has recently been established that the State can present evidence to establish even greater importance than the courts might presume.[72]

This issue is significant, as the weight of the objective will be vastly different, and the rational connection of the law will be affected, depending on this. It is particularly important where a very grave situation is being depicted, and the law is said to restore or maintain public order. If this is accepted at the objective stage, it will bias the *Heaney* test in favour of the State throughout.

However, it is precisely in such a situation that the courts might wish to defer to the State's particular determination of the gravity of a situation, because of the peculiar competence and expertise of the elected branches in dealing with crisis. There is probably a middle ground –verifying, as far as possible,[73] the facts that found the State's assertion– that does not entirely defer, nor undermine the efforts of the State to deal with crisis.

(i) Offences Against the State Regime

This issue has arisen with the Offences Against the State regime, most particularly the Offences Against the State Act 1939. That Act is designed to combat activity that undermines public order and the authority of the state. [74]

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[72] *PJ Carroll v Minister for Health* [2005] 1 IR 294, discussed below.

[73] In the event that the State's assertion cannot be fully verified, perhaps based on secret intelligence or other sources that are not available to the court, there is a peculiar problem of epistemic and normative deference as well. It is peculiar because, though it relates to facts, it is possible to know truth of the facts alleged, but it is undesirable for the State to reveal this information. Therefore, it is a kind of normative deference to the decision of the State not to reveal the information.

[74] The long title of the Act reads: "An act to make provision in relation to actions and conduct calculated to undermine public order and the authority of the state, and for that purpose to provide for the punishment of persons guilty of offences against the state, to regulate and control in the public interest the formation of associations, to establish special criminal courts in accordance with article 38 of the constitution and provide for the constitution, powers, jurisdiction, and procedure of such

Unsurprisingly, this Act has been subject to frequent constitutional challenge, since it establishes trial without jury, allows extended detention, demands account of one's movements with a penalty for silence, and imposes wide ranging penalties for those who violate it.

Obviously, the fact that this Act pursues a particularly compelling aim has aided the State in its attempts to defeat these challenges. In particular, many of the most radical provisions –such as compelling a statement of whereabouts and the functioning of the special criminal court– were contained in Part V of the Act. Part V is not generally in force; it only comes into force "as and when and for so long" as the Government is satisfied that "the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace...."[75] Such a declaration by the Government can be undone by either the Government or the Dáil when the situation has abated. It is thus a statutory provision that is only to be used in the most exigent circumstances, where the ordinary administration of justice would simply not be possible.

The problem is that this provision has not been used only in the most exigent circumstances. On August 22nd 1939, the government made the required declaration and Part V of the Act was brought into force.[76] This declaration was rescinded in May 1972, but another declaration brought Part V back into force immediately. The circumstances facing the nation in 1939, both with the threat of paramilitaries and the outbreak of the Second World War, could very easily be considered sufficiently exigent to justify these measures. However, it has been in force constantly since 26th of May 1972.[77] Part V is still in force. There have surely been times during this period where the ordinary courts were sufficient to administer justice, yet the State has never acknowledged this.

Despite this, judges not only ignore the fact that this exigency might be a myth, but also give these concerns substantial weight when examining Part V of the 1939 Act. Since it will only be in force in exigent circumstances, any provision of it therefore is in pursuit of a very important objective, and will fare very well in any balancing exercise. The recognition of this objective leads to deferential application

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courts, to repeal certain enactments and to make provision generally in relation to matters connected with the matters aforesaid."

[75] S. 35 (1) and (2), Offences Against the State Act 1940.

[76] *Iris Oifigiúil*, 22 August 1939.

[77] *Cox v Ireland* [1992] 2 IR 503 at 518.

of the *Heaney* test, as the courts will be at great pains to give deference to the State in respect of how the security of the nation will be protected.

In *Cox v Ireland*, the Supreme Court gave significant weight to the objective of the impugned measure, which was activated after conviction in the Special Criminal Court.[78] Without any inquiry into the reality of the situation, or the facts underlying the declaration, Court afforded the objective in question great weight.[79] Similarly, in *Heaney v Ireland*,[80] Costello J noted that the impugned provision "only applies when Part V of the Act of 1939 is in force, that is when a proclamation is in force to the effect that the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of peace and order."[81] The government's belief was not questioned by the judge.

In *DPP v Quilligan*,[82] Walsh J treated Part V of the Act as "emergency provisions"[83], but made no effort to question whether or not such an emergency was existent, and specifically rejected the notion that a judge could question whether a particular instance of the use of those provisions was dealing with subversive crime that would bring on such an emergency.[84] The Supreme Court has since rejected the idea that the courts could question the decision of the Government in these matters, saying the existence of such an emergency is primarily a political question.[85]

While there might be cogent reasons, based on the separation of powers and competence of the various branches of government, to say that the existence of circumstances justifying the continuation of Part V warrants substantial deference, this greatly strengthens the State's objective and gives the impugned law a much better chance of withstanding this review. This is done without regard to whether

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[78] "The Court is satisfied that the State is entitled, for the protection of public peace and order, and for the maintenance and stability of its own authority, by its laws to provide onerous and far-reaching forfeitures imposed as a major deterrent to the commission of crimes threatening such peace and order and State authority." *Ibid* at 522-523.

[79] Of course in Cox, the presumed importance of the measures did not save it, as it was not rationally connected to that high objective.

[80] [1994] 3 IR 593.

[81] *Ibid* at 608.

[82] [1986] IR 495.

[83] *Ibid* at 506.

[84] *Ibid* at 510.

[85] *Kavanagh v Ireland* [1996] 1 IR 321 at 354: "Provided these powers have been exercised in a *bona fide* manner the ordinary courts have no function in relation to them. There is a certain logic in this... The question of the whether the ordinary courts are or are not adequate to secure the administration of justice and the preservation of public peace and order is primarily a political question, and, for that reason, is left to the legislature and the executive."

there such exigent circumstances actually exist; the fact that the State says they do is sufficient.

(ii) Criminal Assets Bureau

McGuinness J adopted a different approach in the High Court in *Gilligan v Criminal Assets Bureau*,[86] which is an unusual example of a court conducting an enquiry as to whether the exigent circumstances the law was claiming to combat truly existed. Mr Gilligan claimed that the Bureau's process for seizure of assets amounted to demanding that the targeted person prove that he was not a criminal, thus assuming, without trial or criminal procedures, that he was a criminal. This raised constitutional concerns as a violation of privilege against self-incrimination, the presumption of innocence, property rights, a shifting of the burden of proof to the accused, and a possibly retrospective effect, insofar as it seized the proceeds of crimes committed before the enactment of the statute.

McGuinness J noted that, unlike many other cases dealing with the right to silence and other restrictions on Article 38.1 rights, this case did not arise in connection with the Offences Against the State Act regime. She observed that the *Heaney* test requires that the measure must be assessed relative to the "situation that gave rise to its enactment", and thus the role of the Court was to "as matter of proportionality, consider whether the situation as regards major crime in this country described in the evidence ... in fact justifies the enactment of measures which are, if not draconian, at least out of the ordinary run of civil legislation."[87]

Unlike the cases involving the Offences Against the State regime, McGuinness J did in fact examine the state interest in great detail, and look at the evidence presented to establish whether the situation was as grave as had been presented to the Court. She then compared the serious circumstances that motivated the Proceeds of Crime Act 1996 to those that motivated the Offences Against State Act regime, and concluded that there was a threat of similar gravity underlying this enactment. Evidence at trial had established there was "an entirely new type of professional criminal who organises, rather than commits, crime and who thereby renders himself virtually immune to the ordinary procedures of criminal

[86] [1998] 3 IR 185.
[87] *Ibid* at 214.

investigation and prosecution."[88] While acknowledging media exaggeration of the extent of the phenomenon, which tended to incite hysteria, she held that the effect of these criminals was serious and worsening, especially in relation to drugs. In the end, she upheld the law.

The objective analysis of McGuinness J is far more robust than the ordinary approach of Irish courts. She adopts an evidence-based approach, relying on evidence actually presented at trial, to ensure that the gravity of the situation was real rather than constructed. She is careful to separate reality from media hyperbole. This is a far cry from accepting assertions of importance and exigency.

(iii) Entitlement of the State to Present Evidence

Since the State does not bear the burden of proof of the justification of the law,[89] it is not necessary that the State introduce factual evidence.[90] However, a recent Supreme Court case highlights the entitlement of the State to introduce factual evidence, in case it becomes necessary to defend the justification of the law after the plaintiff has assailed it. The State can offer proof of the importance of the measure in excess of that importance that the Court will presume.

In *PJ Carroll v Minister for Health*,[91] to defend a ban on tobacco advertising, the State wished to establish not only that smoking is harmful, which was conceded by the tobacco companies, but also the huge extent of that harm and the dangers of advertising, in order to justify very severe restrictions on expression. The plaintiffs said these factual issues were not in dispute, and the evidence was unnecessary, and the High Court judge agreed.

The Supreme Court reversed this decision, and in so doing, made several significant statements about the role of facts in constitutional litigation. First, the Court noted that generally there was no requirement that the State go into expert evidence to justify its laws, as "the Oireachtas is entitled to legislate on the basis of its belief and general experience."[92] The Court also noted the State would not be

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[88] *Ibid* at 240.
[89] See below at note 226 and accompanying text.
[90] For an overview of the role of evidence and facts in constitutional litigation in the time before the *Heaney* test, see Ann Sherlock, "Facts, Evidence and Opinion in Constitutional Litigation: The Experience in Ireland," (1991) 40 ICLQ 425.
[91] [2005] 1 IR 294.
[92] *Ibid* at 317.

entitled to introduce evidence of the intention of particular members of the Oireachtas when passing the law. However,

> that is quite different from suggesting that there cannot be evidence of objective external facts existing at the time that the legislation was enacted. Indeed, this would seem to fit in with the first of the three tests set out by Costello J in relation to proportionality.[93]

The State had to be allowed to introduce evidence, as this might be essential if the law was in danger of failing elements of the *Heaney* test, particular rational connection, and also the final balancing test. The concession of the harm of tobacco was not sufficient to render the evidence irrelevant, because "the proportionality of the impugned legislation in this case is not admitted."[94]

It is unclear what a court does if the State does not or cannot present such evidence. Where facts cannot be presented, such as during an Article 26 reference conducted under pressure of time, the courts would likely take the State's case at its highest, a form of empirical deference.[95] Similarly, due to a very strange procedural history, the Supreme Court recently struck down the Mental Health Act 1945 without a great deal of factual evidence, and saw this as an exception to the usual reliance of the Court on factual circumstances.[96]

The Irish courts approach to objectives had been far from robust. In every respect, the analysis of objectives is weak. The objective stage of the *Heaney* test, at its strongest does not pose any real obstacle for rights-restrictive laws to overcome, and, at its worst, undermines the strength of the *Heaney* test overall.

Rational Connection

The test of rational connection between means and ends has had little impact in Ireland. In many cases, it is not dealt with at all,[97] or brushed aside and treated as

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[93] *Ibid* at 318.

[94] *Ibid*.

[95] In *PJ Carroll*, the Supreme Court noted this possibility, calling it *"sui iuris"* (*ibid* at 319) and noting that the roll of evidence in such cases had not yet been decided.

[96] See *Blehein v Minister for Health* [2009] 1 IR 275 at 280, [13]: "Unfortunately, because of the history of serial proceedings by the plaintiff, this constitutional issue has been separated from findings of fact. Determinations of constitutionality of legislation are best made on a bed of fact. However, special circumstances have given rise to these proceedings, as referred to earlier in the judgment."

[97] See, for example, the Supreme Court in *Heaney v Ireland* [1996] 1 IR 580.

self-evidently established.[98] There are some isolated examples in the pre-*Heaney* case law, such as *Blake* and *Cox*,[99] where rational connection has made an impact, but these are sparse, and no more frequent in the post-*Heaney* case law. In this section, I will look briefly at some successful examples, and then examine some possible explanations for why this is so rarely successful.

Strong Application of the Rational Connection Test

The few cases where rational connection has been applied in a searching manner have been challenges to the breadth of the law – allegations that the law targets people it should not logically target having regard to its objective. In short, rational connection is endangered by laws that cast too wide a net.[100]

An example of this is provided by *McCann v District Judge Monaghan*.[101] Laffoy J in the High Court struck down as unconstitutional s. 6 of the Enforcement of Court Orders Act 1940, which provided for the imprisonment of debtors in default. There were several reasons for this unconstitutionality,[102] one of which was its disproportionate infringement of the right to liberty. Laffoy J said the objective of the law –to enforce agreements and facilitate the payment of debts from those who wilfully refused– was clearly legitimate.[103] However, there was no mechanism to

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[98] See, for example, *Re Article 26 and the Planning and Development Bill* [2000] 2 IR 321, at 349: "It is accepted on behalf of the State that the use of planning legislation, which has traditionally been concerned with the orderly and beneficial planning and development of the physical environment, for a purely social objective of this nature is novel and even radical. The court is satisfied, however, that it is an objective which it was entirely within the competence of the Oireachtas to decide to attain, as best it could, by the use of planning machinery." In *Dellway Investments v NAMA* [2010] IEHC 364 at [10.14], the Court said that it "could hardly be doubted" that there was rational connection between means and ends in this case.

[99] See Chapter 6, text accompanying note 92-97.

[100] There has been less success with arguments that laws are underinclusive – that is, that they do not include all those they should. The courts tend to regard progressive realisation of a goal to be a sufficient excuse for this. See for example *Enright v Ireland* [2003] 2 IR 321 at 345 where Finlay-Geoghegan J said: "It appears to me having regard to Article 40.3.1 that it is permissible for the State, when enacting legislation which seeks to defend or vindicate personal rights of the citizens, to have regard to the practicality or feasibility of imposing the proposed obligations on different classes of persons and to distinguish between persons upon whom the Oireachtas considers it feasible to impose the obligations and those upon whom it considers it would not be so feasible." The Irish courts have recently gone so far as to suggest the failure of a statute to provide something cannot render the statute unconstitutional, as the problem is not with the statute, but with what the statute is not. Statutory omission might create an unconstitutional circumstance, but it does not impugn the statute. *Carmody v Minister for Justice* [2010] ILRM 157.

[101] [2009] 4 IR 200. See Paul Gallagher, "The Irish Constitution—Its Unique Nature And The Relevance Of International Jurisprudence" (2010) 45 Ir. Jur. (ns) 22.

[102] There were arguments on fair procedures as well as the ones on liberty discussed here and the irrationality of not treating those facing imprisonment for non-payment of debt the same way as people facing criminal penalties.

[103] [2009] 4 IR 200 at 257, [158].

exclude such people who were *bona fide* unable to meet their debts from the scope of the procedure. In targeting such people, the law was "arbitrary, unfair and not based on rational considerations. It is an unreasonable and unnecessary interference with the debtor's right to personal liberty."[104] The judge also thought that this caused minimum impairment issues,[105] but the primary reason for this statute's invalidity was its excessive breadth.

A similar situation occurred in *Blehein v Minister for Health*.[106] Though there were several reasons for the invalidity of the law in that case, one was that the statute presumptively barred the civil law claims of all people detained under the Mental Treatment Act, 1945 in an attempt to stop vexatious litigation, and only allowing two potential grounds of claim to proceed. Some of the litigation barred was not vexatious, and should not have been targeted. The law was therefore "arbitrary."[107]

The Seemingly Tautological Nature of Rational Connection

The core problem with the rational connection test is that it appears to be a tautology. As Doyle notes,[108] and as discussed in Chapter 2,[109] if courts hypothesise objectives, there will almost always be rational connection between means and ends; the ends were imagined by looking at the means and wondering what they might have set out to do; it would be unusual indeed if, when compared to the means, those hypothesised ends did not pursue them.

Of course, this of itself does not render the test useless, as if the courts demanded very close tailoring, there could still be problems; the law might not be sufficiently precise to avoid tailoring issues.[110] However, the tailoring requirement is not close: it requires only that the connection be rational, rather than close or narrow, and the courts have hypothesised objectives specific enough to overcome

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[104] *Ibid* at 258, [159].
[105] The judge suggested that fact that the statutory procedure would allow the imprisonment of someone with assets, rather than requiring the creditor to attach those assets, did not minimally impair rights. However, I suggest that this is in fact another instance of failure of rational connection, insofar as it targets individuals improperly with imprisonment rather than excessively limit the right to liberty.
[106] [2009] 1 IR 275.
[107] *Ibid* at 281, [18].
[108] Doyle, note 40, at 118.
[109] Chapter 2, note 27-29 and accompanying text.
[110] Doyle, note 40, at 118.

really any difficulty in tailoring, or multiple objectives to justify different elements of the law

(i) Loose Tailoring and Deference

This is further diluted by deference shown by the Irish courts; instead of insisting that the measure actually advances the objective, the courts often ask whether the legislature could reasonably have considered the measure to be effective at achieving that end. Doyle cites *Re Article 26 and the Employment Equality Bill 1996* as an example of this,[111] when the Supreme Court considered the s. 33(1) exclusion of measures designed to integrate those over 50 into employment from the scope of the Bill's equality provisions. The Court said:

> No doubt in this instance the age limit chosen does not correspond to any recognised threshold. Where, however, as here, the Oireachtas was dealing with a specific problem in ensuring that its legislative goal of equality of employment did not unnecessarily frustrate another objective of eliminating or reducing long-term unemployment, it was entitled, as a matter of social policy, to choose between fixing the relevant age at what was an appropriate level or employing another and more flexible, but it may be a less practicable, yardstick, such as the length of time an individual is registered as being one of the long-term unemployed. While it is possible to argue that the Oireachtas has made the wrong choice, that cannot amount to a finding that the classification for which they have adopted [sic] is irrelevant to the objective intended to be achieved or unfair or irrational.[112]

The Court was not willing to maintain arguments that the State's distinction was incorrectly drawn for the purpose of achieving its ends; it was sufficient that the distinction was not irrational. Oddly, the Court, in a different part of the judgment, adopted a bizarrely strong element of tailoring.[113]

The framing of objectives also leads to the dilution of the rational connection test. The first way this can happen is when several objectives are possible, and the judge chooses that objective which ensures tailoring is unproblematic. Doyle

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[111] *Ibid* at 116.

[112] [1997] 2 IR 321, at 348-9.

[113] The Court objected to the imposition of the burden of accommodating disabled employees being place on the employer rather than society at large, based on a principle similar to the one enunciated by the Court in *Blake v Attorney General* [1981] IR 117. See [1997] 2 IR 321 at 366-8. It is unclear why employers, whose premises might have to be improved in order to accommodate disabled employees, are not a valid and rational target to bear the majority of the cost of this accommodation, especially having regard to the extensive saving measures to prevent hardship. See also the discussion of saving clauses below at note 207 and accompanying text.

suggests that Costello J was free to choose between several possible objectives in *Heaney*, and picked the one that balanced tailoring and legitimacy.[114] There is nothing *per se* wrong with this, but it is suggestive of a non-interventionist stance on the part of the courts.

(ii) General Objectives

A judge can also choose an objective that is so general that it necessitates very little scrutiny of the law in action to determine whether or not there is rational connection. As noted above, the Supreme Court in *Heaney* defined the objective of the measure so generally that it did not even fully establish the effects of the measure.[115] If the Court had concluded that the objective of the measure in that case was to help in the investigation *and* prosecution of violent crime, then the statements would be have to be admissible at trial for that end to be achieved. If the objective were merely related to investigating, but not prosecuting, subversive crime, then there would no need to admit the statements at trial. Without the effect being determined, a rational connection inquiry is impossible.

There may be a more substantive objection to this phenomenon than the previous one. Here, the objective is defined so loosely that it fails to be a justification for the specific rights restriction at all. This presents conceptual problems with the integrity of the standard of review, because it is hard to say the restriction itself is properly examined or explained. It amounts, in essence, to non-review.

(iii) Multiple Objectives

Another way in which objectives can circumvent rational connection is when multiple objectives operate to correct any potential flaw in tailoring.

A good example of this approach is provided by the Supreme Court judgment in *Murphy v IRTC*.[116] Mr Murphy wished to broadcast a radio advertisement for an open meeting in his faith centre where a film about the resurrection of Christ would be shown. He was prevented from doing this by the Irish Radio and Television Commission, which banned the advertisement pursuant to s. 10(3) of the Radio and Television Act 1988. That section provided: "No advertisement shall be broadcast

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[114] See Doyle, note 40, at 119-120.
[115] See above at note 41 and accompanying text.
[116] [1999] 1 IR 12.

which is directed toward any religious or political end or which has any relation to an industrial dispute." Mr Murphy claimed that section was a disproportionate restriction on, *inter alia*, his constitutional right to free speech.

The Supreme Court justified the measure in three ways, going further than Geoghegan J had in the High Court. First, the content of the restricted speech in all three categories relates to divisive issues, so preventing divisive broadcasting was one of the purposes of the measure. However, Mr Murphy had argued that such speech was allowed in various other forms that were no less divisive; he was allowed to post, and had posted, an almost identical message on billboards. He suggested this undermined the tailoring of the law. The second objective found by the Court undercut this argument: to target radio- and television-based speech, because they were the most intrusive type of speech.

The Court then added yet another objective: "the Oireachtas may well have thought that in relation to matters of such sensitivity, rich men should not be able to buy access to the airwaves to the detriment of their poorer rivals."[117] This additional objective is essential to rationalise the law. Mr Murphy had argued that religious and political content could still be broadcast on radio outside the context of advertisements, even if it were as divisive and intrusive as an advertisement. The additional objective –to stop the rich buying support for their opinions– is the only plausible way to justify this otherwise arbitrary distinction. All of these objectives were hypothesized by the Supreme Court; the High Court judge had complained that the State had offered no evidence for what the policy underlying the Statute might be.[118]

By hypothesizing multiple objectives, each for a different element of the law, the Court was able avert serious rational connection problems. If one chose not to recognise so many objectives, then the fact that the law selected a very narrow subset of religious, political and industrial dispute-related speech would be a sign of irrationality. In fact, it changed these potential flaws into benefits. When the objective includes an explanation for this unusual tailoring, then that tailoring is no longer a sign of irrationality but a sign a minimum impairment. The State could have more bluntly targeted all speech on a certain divisive topic, but instead chose only

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[117] *Ibid* at 22.

[118] *Ibid* at 21. The Supreme Court, however, thought it was "possible to gain some assistance on this point by examining the context in which the prohibition appears in the Act of 1988." Ibid.

particular media, and then particular types of speech within those media. Far from being a weakness, the seemingly arbitrary targeting of speech becomes a boon. It is hard to think that any law could be better tailored to these objectives, because in fact the objectives were tailored to the law.

This does not necessarily present a conceptual problem, but, if done consistently, it could result in a profoundly non-interventionist standard of review. Most laws could be justified through the postulation of multiple objectives. When it is not always done, it raises the possibility that the courts can hypothesise multiple objectives if they wish to uphold the law, or decline to do so if they wish to strike it down.

Rational Connection as Indirect Objective Scrutiny

Finally, as argued previously,[119] it is possible that rational connection can serve an additional purpose in indirectly scrutinising objectives when they are hypothesised, and illicit motivations will not be recognised unless there is no other explanation underlying the law. It is possible that bad tailoring reveals that the law is not actually motivated by those concerns which appear to motivate it, but rather by another objective, or no objective at all.[120]

We can potentially see this at work in *An Blascaod Mór Teo v Commissioners of Public Works in Ireland*.[121] As discussed earlier, Budd J thought that the objective of the law in this case was questionable.[122] He must have suspected that the plaintiffs were simply disliked by those that made the law. However, he put aside his reservations, and examined the law based on its most plausible valid objective: attempting to preserve the Great Blasket. He found the reality of the measure dissonant with this goal:

> it involves the likely further deterioration of buildings in the village owned by the exempted classes.... There are obvious difficulties in putting into effect a scheme of conservation of traditional dwellings if some of them are in the Park and others are interspersed among them and still in private hands.[123]

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[119] This point has been developed in Chapters 2 and 5.
[120] This phenomenon was likely seen in *Blake v Attorney General* [1981] IR 117 – there was simply no objective whatsoever behind the choice of properties subject to rent control. See Chapter 6, note 92.
[121] Unreported, High Court, Budd J., February 27th 1998.
[122] See above at note 60 and accompanying text. He thought the law to be "an unusual and dubious classification with ethnic and racial overtones."*Ibid* at 127.
[123] *Ibid* at 75.

He noted the dissonance in lineal descendants of past residents keeping their land, even if they had no other connection with the land, while the plaintiffs, who had taken active steps toward preservation and spent personal resources to rebuild the island, had their land expropriated.[124] The goal would be better accomplished without the discrimination in question. To put it another way, there was no rational connection between means and ends.

The judge had reservations about the objective of the law, but put them aside. However, the possible legitimate objective did not justify the measure. The tailoring requirement illustrated that the valid objective did not underlie the law.

In the more recent case of *O'Shea v Ireland*,[125] Laffoy J struck down s. 3(2) of the Deceased Wife's Sister's Marriage Act, 1907, as amended, which prohibited a man from, *inter alia*, marrying the former wife of his brother, unless his brother were dead rather than divorced. The Plaintiffs wished to enter such a marriage, and sought a declaration that the Act was unconstitutional.

Having extensively canvassed potential rationales for prohibition on such a marriage, including effect on children, and the stability of the marital unit, she could not find that these objectives underlay the measure.

> In my view, the arguments advanced in defense of the current necessity for the specific prohibition based on affinity at issue here, on the basis of reason and common sense, fail to demonstrate that the family or the institution of marriage or the common good would be endangered if the restriction did not exist.[126]

This was clearly a rationality problem, as Laffoy J paid significant attention to the fact that such a marriage would be allowed if the former husband were deceased rather than divorced.[127] Nor could the stability of the family plausibly be advanced from the measure. The objective was not achieved.[128]

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[124] *Ibid* at 76.
[125] [2007] 2 IR 313.
[126] *Ibid* at 333, [58].
[127] *Ibid* at 332, [54].
[128] What makes this particularly relevant is that Laffoy J actually frames this as an issue with the law lacking an objective. She said: "From an objective standpoint, there is no basis for concluding that any benefit is conferred by the existence of the restriction, so that, in my view, the question of proportionality does not arise. Nor is there any basis for concluding that there is any rational justification for the existence of the restriction." *Ibid* at 333, [58] Laffoy J used effects to figure out that the potential objectives of the State in safeguarding marriage and family were not in fact achieved. Though she frames it as a problem with objectives, it was rational connection analysis that showed that the possible hypothetical purposes were not plausible.

I believe these cases are a clear illustration of why rational connection can be useful, and how it stands in as a way to screen for invalid objectives where those objectives are hypothesised.[129]

By and large, we can say that the rational connection part of the *Heaney* test has proven to be very weak. From its few instances of strength, and its usefulness in indirectly scrutinising objectives, it is clear that this does not have to be the case. Its weakness is illustrative of the non-interventionist attitude that permeates the case law on the *Heaney* test. However, the fact that its strength is so sporadic is problematic, as it indicates that judges could vary between different levels of intensity of review in different cases in order to achieve a particular result.

Minimum Impairment

The minimum impairment test is fraught with problems, both in theory and in practice; the Irish courts have struggled with its application. An example of the confusion surrounding the test can be seen in *McNally v Ireland*,[130] where McMenamin J broke down the Heaney test into six principles. Three of these are alternative ways that the minimum impairment test might be described:

> (b) whether the means adopted are necessary for the achievement of the objective; ... (d) whether the objective can be attained by other methods which may be more conveniently applied; (e) whether the method chosen is the least restrictive and the disadvantage caused is least disproportionate to the aim....[131]

In many cases, it is not clear how the test is applied; it is often said to be passed without further comment, or is elided with the balancing test. In other cases, it is discussed and passed, and sometimes it is discussed and failed. Some authors

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[129] It might be possible to construct an argument that much of Ireland's equality jurisprudence is based on the premise that a hypothesised legitimate objective can be validated by rationality analysis. The standard of review for equality seeks out an objective, and conducts rationality analysis. This could be to ensure the objective found is actually the objective underlying the law, rather than a cover for an improper discrimination. This view is bolstered by the fact that certain classifications may be viewed as suspect, such as race, and the closeness of tailoring required to pass the test will be increased, suggesting that the tailoring is used as a way to gauge whether or not the objective is genuine.

[130] [2009] IEHC 573.

[131] *Ibid* at [183].

explained this as the test sometimes being applied and sometimes not.[132] I suggest a different explanation. There are some cases that simply fail to discuss minimum impairment analysis at all, and we cannot be sure what happens in these instances. However, when it is discussed, I suggest that we can generally see a consistent approach:[133] the Irish courts enunciate and apply a very weak but coherent form of minimum impairment analysis.

Elision with Balancing

The elision between balancing and minimum impairment is seen in Ireland, as it is in Canada, but in a somewhat different form. While in Canada, the elision is substantive, with balancing being conducted in the guise of minimum impairment, the elision in Ireland is primarily rhetorical.[134] Irish judges, in the language they use, relate the minimum impairment test to the question of proportionality balancing, and do not keep them separate and distinct. Combined with a general lack of analysis on these points, it makes it very difficult to establish what is at work in any given case.

(i) Rhetorical Elision

This problem was seen in *Heaney* itself,[135] where Costello J applied minimum impairment and balancing together: "What falls for consideration, then, is whether these restrictions impair the suspect's rights as little as possible and are such that their effects are proportional to the objective which the section seeks to achieve."[136] After a brief discussion of the other protections the accused enjoys that would ensure a fair trial, he concluded "that the restriction on the right to silence imposed by the section cannot be regarded as excessive and that it is proportionate to the

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[132] Brian Foley, "The Proportionality Test: Present Problems" [2008] 1 JSIJ 67.

[133] There are some cases, such as *Blehein v Minister for Health* [2009] 1 IR 275, and *McCann v District Judge Monaghan* [2009] 4 IR 200, where the judge suggests a minimum impairment problem that would probably be better understood as a rational connection issue. Rational connection problems arising from overbreadth of legislation can appear to be minimum impairment problems even if they are not.

[134] Substantive elision is seen Canada by the lack of work that balancing does, and the surprising, unexplained strength of minimum impairment in some cases. In Ireland, balancing is rarely used, but there are not many outlying minimum impairment cases that cannot be accounted for by the normal application of that test.

[135] [1994] 3 IR 593.

[136] *Ibid* at 608.

objective which it is designed to achieve."[137] There was no separation of these considerations, and no guidance on how either test should be applied.

There are many other examples. In *Murphy v IRTC*,[138] Geoghegan J in the High Court used opaque minimum impairment analysis that elides with the rest of the test. It was argued by the applicant that the section failed minimum impairment in applying a blanket ban to achieve its objective, which was, according to the trial judge, the avoidance of offence.[139] In response to this allegation, the trial judge concluded: "On the legislation as it stands there are very few limitations on the right to advertise and in that sense proportionality has already been taken into account."[140] Of course, proportionality in this sense has not "already been taken into account;" that implies that since the legislature considered the proportionality of the measure, the courts do not need to get involved. What the trial judge presumably meant –the Supreme Court characterised it in this manner[141]– was that the law was limited in its effects on advertising speech overall, and thus minimally impaired rights. Minimum impairment and balancing are not at all separated in that case.

In the *Planning and Development Bill* case, the Court was "satisfied that [the measures] impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained."[142] In *Re NIB (No 1)*, the sum total of the analysis is that the restrictions "are no greater than the public interest requires. Their meaning is clear and they pass the proportionality test."[143] In *Dellway Investments v NAMA*, the High Court said that the question before the Court was whether it interfered with rights "in a way which is more than that which is necessary to achieve the goal of the legislation and does so in a disproportionate way to the end sought to be achieved."[144]

The problem occurs frequently, with judges even invalidating measures as "disproportionate," which would generally be associated with balancing, while

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[137] *Ibid* at 610.
[138] [1999] 1 IR 12. The facts of this case are outlined above at note 116.
[139] [1997] 2 ILRM 467.
[140] *Ibid* at 478.
[141] [1999] 1 IR 12 at 27.
[142] [2000] 2 IR 321 at 354. It should be noted that the Court did not pay much more attention to the other parts of the *Heaney* test either. It was purely stated to have passed with no analysis of any of the parts of the test.
[143] [1999] 3 IR 145 at 180.
[144] [2010] IEHC 364 at [10.15].

possibly applying minimum impairment analysis.[145] By mentioning the tests side-by-side, and not clearly separating them, the barrier between the tests is eroded.

(ii) Substantive Elision

There are some examples of more substantive elision between the tests, which is similar to the approach seen in Canada.[146]

In the Supreme Court judgment in *Heaney*, minimum impairment analysis, the only limb of the test really addressed by the Court, is passed with regard to the fact that the right to silence is not particularly important in the context of this law.

> As already stated, the innocent person has nothing to fear from giving an account of his or her movements, even though on grounds of principle, or in the assertion of constitutional rights, such a person may want to take a stand. However, the Court holds that the *prima facie* entitlement of citizens to take such a stand must yield to the right of the state to protect itself. *A fortiori*, the entitlement of those with something relevant to disclose concerning the commission of a crime to remain mute must be regarded as of a lesser order.[147]

The correctness of this diminution of the importance of silence aside,[148] this is not minimum impairment analysis. In the Court simply stated that the restriction on rights was not particularly serious, the Court was engaged in balancing.

King v Minister for the Environment,[149] which will be discussed later,[150] applied an extraordinarily strong minimum impairment test,[151] but did so having

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[145] See, for example, *DK v Crowley* [2002] 2 IR 744.

[146] One case also expresses general scepticism of blanket bans: *Holland v Governor of Portlaoise* [2004] 2 IR 573. This stands in contrast to *Murphy v IRTC*, which expressed no general issue with blanket bans. See above. Moreover, in CC v Ireland [2006] 4 IR 1 at 77, the Supreme Court declined to defer to legislative judgment on the basis of *Tuohy v Courtney* because the rights were not "balanced," with one right being essentially ignored: "The section in question here does not attempt to balance two rights, one against the other. The section contains no balance: it wholly removes the mental element and expressly criminalises the mentally innocent. It need not necessarily have done so." This could be regarded as containing some suspicion of blanket bans.

[147] [1996] 1 IR 580 at 590.

[148] See Gerard Hogan, "The Irish Supreme Court: Major Developments, 1995-1996" (1997) 3 European Public Law 180.

[149] [2007] 1 IR 296.

[150] See below at note 221 and accompanying text.

[151] The requirement in question was that prospective election candidates get a certain number of voters to endorse their candidacy by signing a form at a local authority office. This could be onerous, as the office could be some distance from their constituency. The State claimed that only at a local authority office would there be a fully up-to-date electoral register, so for the integrity of the process, it was the obvious choice. The Court disagreed, but did not say why. Perhaps they thought there were sufficient venues for verification that were, or could be made, sufficiently secure. Alternatively, perhaps they thought there were methods of achieving this objective other than presentation of constituents at a designated location. We have no indication of how onerous the Supreme Court

found the measure to be "*prima facie* disproportionate." This seems to be conducting a sort of threshold balancing test, which, when failed, increased the stringency of minimum impairment.

Another case where these tests ran together in substance is *Dunnes Stores v Ryan*.[152] The case concerned s. 19 of the Companies Act 1990, which provided that if the Minister was satisfied that there was a need due to potential fraud or illegality, the books and records of a company could be examined, and statements could be taken from those involved. Failure to produce such record or make such a statement was an offence. S. 19(6) provided: "A statement made by a person in compliance with the requirements imposed by virtue of this section may be used in evidence against him." The courts had previously indicated that such a compelled statement, used in evidence, might be an unconstitutional violation of the right to silence.[153]

Kearns J in the High Court found that the sections requiring disclosure of documents to be constitutional; trial was a remote prospect at the stage the documents were demanded, and the documents were objective evidence. Nor did the threat of criminal penalty, of itself, constitute a constitutional problem. However, the statements that might have to be made alongside these documents were more problematic. There was no scope for saying the statements were voluntary; if they were not offered, an offence had been committed. The judge concluded "I find that s. 19(6), by not immunizing answers given from later use in criminal proceedings, (and to that extent only) infringes the 'minimum invasion' test enunciated by Costello J in *Heaney*." [154]

There is no indication in Kearns J's judgment as to why he thought that this measure failed the minimum impairment test, merely that he thought that it did. When defining the state interest in the impugned measure, he quoted Shanley J in discussing similar measures in *Re NIB*, who noted that as well as prevention of fraud, it was an objective of this part of the Companies Act that prosecutions should ultimately follow these investigations.[155] It is obvious that without the power to use

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conceived this burden on the State to be, but it was clearly significant, as this fairly plausible explanation for the means chosen was rejected, when it would probably have been acceptable under the ordinary levels of scrutiny shown by the Irish courts.

[152] [2002] 2 IR 60. See Foley, note 132, at 88; he does not give an explanation for its differences, deeming it just a strong application of minimum impairment.

[153] *Re NIB* (No 1) [1999] 3 IR 145

[154] [2002] 2 IR 60 at 123. The judge was bolstered in this conclusion by the fact that new amending legislation was to provide for just such an exemption.

[155] [1999] 3 IR 145 at 165, quoted by Kearns J, [2002] 2 IR 60 at 117.

statements like these in subsequent prosecutions, it would be more difficult to convict people. The objective is more fully fulfilled by the more restrictive measure. So why did this fail minimum impairment?

Since the judge did not elaborate at all on what alternative measure he envisaged being more appropriate, the most likely explanation is that this is an exercise in balancing in the guise of minimum impairment.[156] The stated aim of the measure is prosecution of fraud, and use of compelled statements clearly furthers that end. That does not mean the law is valid; the restriction on rights here was very severe, leading to extreme consequences for the individuals subject to the law, perhaps not be justified by the benefit to the objective of prevention and prosecution of fraud. However, that is a balancing problem, not a minimum impairment problem. The judge failed to distinguish between those two concepts in this case.

Rhetorical overlap of the tests tends to result in poorer application of these tests by the courts. The substantive overlap is also problematic, as it jeopardises the function of each test. It also means that the potentially difficult judgments faced in balancing are hidden in the guise of minimum impairment, and, as Julian Rivers notes, "[s]ince it is unnoticed, it is uncontrolled."[157]

Development of a Conservative Approach

The Irish courts have never taken a rigorous approach to minimum impairment. Some of the early, pre-*Heaney* cases involving tailoring foreshadow the approach ultimately taken with the *Heaney* test.[158]

A coherent, if weak, post-*Heaney* approach emerged in *Murphy v IRTC*, the facts of which are discussed above.[159] The core of the case was minimum

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[156] Another explanation is that he may have believed that the Supreme Court judgment in *Re NIB* suggests this result. There, Barrington J examined the less compulsive provisions of s. 10 of the Act, and thought them effective for the combating of fraud: "It appears to me that the powers given to the inspectors under s. 10 ... are no greater than the public interest requires." [1999] 3 IR 145 at 180. Since these powers were greater again, and the objective of them was broadly similar, he may have thought they lacked minimum impairment for this reason. This would have to be elucidated more clearly, as just because a lesser measure sufficed in different circumstances does not mean that a greater measure is excessive.

[157] Julian Rivers, "Proportionality and Variable Intensity of Review," (2006) 65 CLJ 174 at 187.

[158] In *Quinns' Supermarkets v Attorney General* [1972] IR 1 the measure was found to be poorly tailored not by reference to alternatives, but rather the fact that the application of the law was not at all limited, and so it was excessive. In *Attorney General v Paperlink* [1984] ILRM 373, Costello J rejected consideration of alternative measures as a matter for the Oireachtas.

impairment. Counsel for the applicant submitted that a selective administrative system could target only offensive advertisements, and thus reduce the impact on speech. The Court responded:

> No doubt this is true. But the Oireachtas may well have decided that it would be inappropriate to involve agents of the State in deciding which advertisements, in this sensitive area would be likely to cause offence and which not. In any event, once the State is broadly within the area of competence of the Oireachtas and the Oireachtas has respected the principle of proportionality, it is not for this Court to interfere simply because it might have made a different decision.[160]

Though subtle, this statement is revealing. First, the Court is surely right to say that the State had a good reason to reject such an alternative. A content-based ban is certainly heavily restrictive of speech, but a case-by-case ban, administered by the State, would be a viewpoint-based speech restriction, which, as the applicants themselves noted in their submissions, is looked upon with extreme suspicion by the US Supreme Court.[161] Thus, the alternative offered by the applicant might be less restrictive of the rights of some parties, but would impair the rights of other parties in a more problematic way.

Secondly, it is interesting to note that, despite this, the Court chose to go further, and make it clear that even if this were not the case, the State would be entitled to discretion in choosing means. This means that the *Murphy* Court believed that the minimum impairment limb of the *Heaney* test was not concerned with alternatives. The Court said that once the Oireachtas has "respected the principle of proportionality," then the courts have no business calling into question whether other means should be chosen. This means that the proportionality principle, in the court's view, must not look to alternatives, because otherwise testing whether the

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[159] [1999] 1 IR 12. See above note 116 and accompanying text. See Niall Buckley, "Merging Principles of Public Law: Towards Proportionality in an Irish Context," (2004) 39 Ir. Jur. (ns) 161 for some comments on Murphy and Colgan. See also Foley, note 132, at 86-87; Foley, note 54, at 142. Margulies offers some commentary on *Murphy*; Martin B. Margulies, "Standards of Review and State Action under the Irish Constitution" (2002) 37 Ir. Jur. (ns) 23 at 36-37. However, with respect, he profoundly misses the point. Having clearly not heard of the *Heaney* test, he examines the language in *Murphy* by reference to US standards of review, mistakes the strength of test from that comparison, and then criticises the Court for not conforming to his interpretation of the language. However, his interpretation bears no relation whatsoever to Irish standards and values, nor does it regard the accumulated experience of the *Heaney* test.

[160] [1999] 1 IR 12 at 27.

[161] See *ibid* at 19, quoting *Rosenburger v University of Virginia* (1995) 515 US 819. Viewpoint discriminations are considered the focal case of State censorship of ideas, and are perhaps the most grievous ways of restricting speech.

legislature had respected this principle would *per se* require the Court to do what it claims will not be done. This indicates that alternative means will rarely be up for discussion in the Irish courts.

The Court's analysis is not unproblematic; there is some indication that the Court viewed minimum impairment as insisting that the restriction of the rights was minimal – as in negligible, rather than as little as necessary.[162] However, a coherent minimum impairment test started to take shape here.

This weak approach, unconcerned with alternative means, was adopted and clarified in the later case of *Colgan v IRTC*.[163] Like *Murphy*, it was a challenge to s. 10(3) of the Radio and Television Act 1988, this time in the context of a political matter, namely abortion. The applicant was a member of Youth Defence, an organization formed to defend the life of the unborn. The IRTC banned broadcast advertisements made by the organisation directed toward that end.

Sullivan J rejected the challenge in the High Court. He adopted the objective of the statute verbatim from the Supreme Court in *Murphy*, as he was bound to,[164] and quoted at length from that judgment. Addressing the arguments of counsel that the censorship of political material not as sensitive or divisive as religious material, he held that there was "no rational distinction"[165] in *Murphy* between political and religious material. He felt bound to accept this finding of the Supreme Court, along with the finding that the intrusion on rights was "minimalist". Elaborating on this minimum impairment finding, Sullivan J said

> It appears that the correct approach for this court when considering whether the infringement of a constitutionally protected right impairs that right as little as possible is to refrain from condemning a wider infringement such as a blanket ban notwithstanding that a more selective alternative arrangement

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[162] "In the present case the limitation placed on various constitutional rights is minimalist. The applicant has the right to advance his views in speech or by writing or by holding assemblies or by associating with persons of like mind to himself. He has no lesser right than any other citizen to appear on radio and television. The only restriction placed upon his activities is that he cannot advance his views by a paid advertisement on radio or television. The case is totally different from that which existed in *Cox*..." [1999] 1 IR 12 at 26. The Court later said: "As previously stated the restriction on constitutional rights in the present case is very slight." Of course, the fact that the overall impact of a particular measure on rights is slight is not irrelevant; it has a profound impact on the third and final limb of the *Heaney* test. However, it is not determinative of the minimum impairment question.

[163] [2000] 2 IR 490. Foley offers some brief comments on this case; note 132, at 87.

[164] [2000] 2 IR 490 at 508.

[165] *Ibid* at 511.

> is available to the Court.... Some degree of judicial restraint appears appropriate.[166]

Sullivan J read *Murphy* as giving the State a measure of discretion in selecting means, perhaps as an application of the presumption of constitutionality.[167] There are limits to this; for an alternative set of means to invalidate a law, it must be irrational to ignore the alternative means in favour of the means chosen.[168] This seems to be a fair reading of *Murphy*, and probably expresses more clearly what *Murphy* was intimating.

Development of a Rule Against Excess

The approach of the Irish courts, as seen in recent years, is best described as a rule against excess: seeing whether the law was "using a sledgehammer to crack a nut."[169] This will invalidate a law only if an alternative set of means are available which is equally effective in every significant respect. It essentially rejects that a policy choice made by legislature as to the nature of means can ever be overturned by a court in this test, though a decision as to the *extent* of means may be reviewed. If the means used can be limited in the extent of their application, reducing the extent of rights restriction without altering the law's effectiveness, then that measure is invalid.

This is a coherent approach by the courts to minimum impairment, non-interventionist and conservative though it may be. It allows the Irish courts to avoid the problematic review of very different alternatives while not abandoning the test entirely. Two major cases suggest that this is the approach now adopted under the *Heaney* test.

In *DK v Crowley*[170] the applicant was subject to an interim barring order, excluding him from his family home, obtained by his wife *ex parte*, without his participation, after he had allegedly been physically and verbally abusive. He applied for an order of *certiorari* and a declaration that the provisions allowing an *ex parte*

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[166] *Ibid* at 512.
[167] "This judicial restraint may itself be an application of the presumption of constitutionality." *Ibid.*
[168] He indicated the limits of this: "If a rational explanation for the wider infringement is available, the court will not condemn it for failing to impair the right as little as possible."*Ibid.*
[169] *An Blascaod Mór Teo v Commissioner of Public Works in Ireland* Unreported, High Court, Budd J, February 27th 1998 at 50.
[170] [2002] 2 IR 744.

order in the Domestic Violence Act 1996 were unconstitutional. The Supreme Court granted these remedies.

The Court noted the unusual features of this Act: a barring order, even one obtained on an interim basis, could last indefinitely unless it was dismissed after an application by the respondent and the satisfaction of the court the applicant no longer required it. An *ex parte* order had immediate effect upon notification of the respondent, and non-compliance was a criminal offence. Though an *ex parte* order can be granted the court only if "in exceptional cases considers it is necessary or expedient in the interests of justice,"[171] no indication is given of what such circumstances might be. Consequently, a barring order of serious consequence and indefinite duration could be made against an individual without his or her participation, or any significant procedural protections. The Court found that this did not pass the *Heaney* test. Given the exceptional nature of the barring order, it was particularly important that due process be respected, and so "the failure of the legislation to impose any time limit on the operation of an interim barring order, even when granted *ex parte* in the absence of the respondent ... is inexplicable."[172] The Court concluded that the Act,

> in failing to prescribe a fixed period of relatively short duration during which an interim barring order made *ex parte* is to continue in force, deprived the respondents to such application of the protection of the principle of *audi alteram partem* in a manner and to a an extent which is disproportionate, unreasonable and unnecessary.[173]

Other statutes had dealt with similar circumstances, and had limited the duration of orders.[174] Therefore, rights had not been minimally impaired; there was a simple limit that could have been placed on the means chosen that would achieve the objective to the same extent and would have limited the impact on the rights of those parties against whom such orders were made. The Court did not expect the State to make a sacrifice in the efficacy of the means. All that would have to be shown for the means to be upheld was that the imposition of some temporal

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[171] S. 4(3) of the Domestic Violence Act 1996.
[172] [2002] 2 IR 744 at 760.
[173] *Ibid* at 762.
[174] *Ibid* at 760-761. s. 17 of the Childcare Act 1991 allowed a health board to apply for a care order in respect of a child without notice to the parent, if this was needed to protect the child's welfare, or in the interests of justice. Such orders could only be granted for a period of eight days.

limitation on an order would alter the efficacy of the means chosen. Finding there has not been minimum impairment, then, does not undermine the legislature's choice, but rather says that, having chosen those means, the legislature did not sculpt them with rights in mind.

A recent case provides further evidence that this approach is adopted in Ireland; the divisional High Court in *Dellway Investments v National Asset Management Agency*[175] endorsed this view. In that case, Mr McKillen, a property developer, and his companies, challenged the procedures surrounding NAMA's appropriation of loans owed by them to various banks within NAMA's remit on a number of grounds. Amongst other arguments, he contended that neither he nor his companies received due process or any opportunity to be heard. He contended that these defects rendered the law unconstitutional, and suggested it should be interpreted using the double construction rule to prevent this interpretation from winning out.

The Court ultimately concluded that Mr McKillen's rights were not infringed by the law.[176] The Court's *Heaney* test analysis was thus *obiter*. The Court outlined in detail what the proper role of a Court engaged in minimum impairment analysis is:

> In many areas of legislation there will be a policy decision required as to just how far it is necessary to go in order to achieve whatever public good is considered to be advanced by the legislation in question. In such circumstances there may well be a range of measures in contemplation which would have a greater or lesser effect on the rights of those who might be affected by that legislation. It will always, in those circumstances, be possible to argue that any particular policy position chosen goes too far, in that it may be suggested that a less intrusive policy, one which is somewhat more benign from the perspective of those who might be affected by the relevant legislation, would nonetheless achieve the ends desired. However, ultimately the primary policy decision in such circumstances is one for the Oireachtas. It is only where the policy position adopted by the Oireachtas is one which could not reasonably be said to be required to achieve the end in question, that the legislation will be found to be inconsistent with the Constitution.[177]

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[175] [2010] IEHC 364.

[176] *Ibid* at [10.4]-[10.5]. The reasons for this relate the fashion of NAMA's operation; though Mr McKillen's loans were acquired, they were acquired from the bank. The High Court found that the effects on Mr McKillen were too remote to infringe his constitutional rights. On appeal, all seven judges disagreed with this finding.

[177] *Ibid* at [10.16].

I believe this suggests a rule against excesses model outlined above.[178] This view is bolstered by the way in which the Court considered *DK v Crowley*:

> [I]n *DK v Crowley*, Keane J expressly noted that no explanation had been given (because none could) as to why the legislation then in question ... would not have worked every bit as well if the initial *ex parte* order permitted under that Act was expressed to last only for a short period of time, thus requiring the moving party to come back before the court in early course and justify a continuance of the order.... Where there is no reasonable basis for believing that an aspect of a measure is a required policy response needed to achieve the ends of the legislation, then the courts will intervene. However, the Court does not second guess a reasonable policy balancing judgment on the part of the Oireachtas.[179]

The Court interprets the *DK* judgement as a case of a measure that was excessive, that it was struck down because a time limited measure would have worked every bit as well. On appeal, the Supreme Court never reached this stage of the analysis, finding for Mr McKillen on other grounds.[180] Since the Court did not reach the point on which this discussion of minimum impairment took place, I do not think the Supreme Court judgments undercut this element of the High Court decision.

The High Court judgment *Dellway* is a strong indication that the rule against excess approach to minimum impairment is favoured by the Irish courts. It argues for applying the test in a very similar way to this approach, and reads *DK* as an example of this reasoning. It is a step toward bringing conceptual consistency to the Irish approach to minimum impairment, though very few laws will be invalidated by this highly non-interventionist enquiry.[181] Minimum impairment in Ireland has

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[178] It is also possible, from this passage, that this is still a search for alternatives, but with a high level of deference to the legislature's determination to pick one particular alternative, only finding the law invalid it cannot "reasonably said to be required." However, I believe the discussion of *DK v Crowley* in this case point away from this interpretation.

[179] *Ibid* at [10.17]. Internal citations omitted.

[180] The Supreme Court found that Mr McKillen's rights were possibly affected by the measure, and found that any potential effect on rights would demand fair procedures. The Court interpreted the Act using the double construction rule, requiring that NAMA would make such decisions only when fair procedures were offered. See David Kenny, "Fair Procedures and Irish Administrative Law: Toward A Constitutional Duty to Act Fairly in *Dellway Investments v NAMA*," (2011) 34 DULJ 47; Ailbhe O'Neill, "Fair Procedures – An Inviolable Constitutional Requirement?" (2011) 33 DULJ 319.

[181] Another recent case followed *DK v Crowley* in finding a statute unconstitutional. In *Vehicle Tech v AIB* [2010] IEHC 525, Laffoy J found that s 31(8) of the Criminal Justice Act 1994 was unconstitutional. This section allowed the Gardaí to direct a bank in respect of money they suspected to be the proceeds of crime. Laffoy J said this freezing order regime was "vague as to its implementation and lacking in safeguards as regards the owner or person with rights over the property to which it relates to an extraordinary degree." At [11.3]. Citing *DK*, she found the lack of safeguards to render the statute fair failed minimum impairment. At [12.4]. There is little analysis of the meaning or scope of minimum impairment, however.

never been strong, and has always been subject to confusion, and this clarity is therefore welcome.

Balancing

The balancing test is rarely applied in Ireland. It is usually asserted that it has been passed, either alongside minimum impairment, as noted above,[182] or independently.[183] As Doyle puts it, there is "an increasing tendency of the courts to assess not the proportionality between effects and objectives, but rather the proportionality between the means and the objective."[184] That is, the courts are more inclined to focus on tailoring than on balancing. In spite of this, there are some impressive applications of the test, alongside instances of laws failing balancing for unclear reasons.

Downplaying the Importance of Rights

There is some evidence that the courts downplay the importance of the rights at stake in a manner inconsistent with their anti-utilitarian value. The greatest offender in this respect is the Supreme Court judgment in *Heaney*.[185] When defining the importance of the right to silence in that case, the Court highlighted a reason why the rights in this case were not significant. The court decided that it was guilty parties who would wish to invoke a right to silence in the guise of the privilege against self-incrimination:

> There is a dichotomy to be noticed: it is between the absolute entitlement to silence as against the entitlement to remain silent when to answer would give rise to self-incrimination. Where a person is totally innocent, of any wrongdoing as regards his movements, it would require strong attachment to one's apparent constitutional rights not to give such an account when asked pursuant to a statutory requirement. So the court holds that the matter in debate here can be more properly approached as an encroachment against the right not to have to say anything that might afford evidence that is self-incriminating.[186]

This puts the value of the right to silence at almost nothing. One will only be invoking the privilege if one is guilty, and in that case, the Court seemed to imply, the

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[182] See above at note 135 and accompanying text.
[183] See, for example, *BUPA Ireland v Health Authority of Ireland* [2006] IEHC 431 at [290]: "Moreover, it is fair, reasonable and proportionate and the respondents evidence has not undermined this view."
[184] Oran Doyle, *Constitutional Law: Text, Cases and Materials,* (Clarus Press, 2008) at 152.
[185] [1996] 1 IR 580.
[186] *Ibid* at 586.

State's interest in preventing and prosecuting subversive crime is so strong as to override it. The Supreme Court framed the right in a way that makes it very easy to qualify.[187]

As Hogan has argued, this seems to question whether or not the right to silence should exist at all.[188] These arguments are surely best deployed against recognising the right in the first place rather than merely qualifying the right. Moreover, the Court failed to afford any intrinsic value to the right to silence. Its only value is utilitarian.[189] Since the innocent do not need it, it is only a right for the guilty;[190] by not respecting the right to silence, the State can reap the benefit of more readily prosecuting them. But that is precisely what the right attempts to avoid. Some independent justification must be offered for its significance to be recognised. The view of rights taken by the Court is thus at odds with the anti-utilitarian view of rights. In this respect, the case is highly problematic.

Of course, courts must establish whether a right is important or unimportant as part of balancing the impact on the rights of a particular plaintiff. What they cannot do is downplay its importance in a way that undermines its status as a right, as this compromises the protection of rights. This obviously makes any balancing exercise extremely easy to pass, as the rights in question are worthless. In the *Heaney* case, no balancing exercise was even attempted. However, had it been, this would have weighed heavily in the law's favour.

An Impressive Application: *Daly v Revenue Commissioners*

Daly v Revenue Commissioners[191] is one of the very few cases that applies the balancing test successfully, and is also remarkable because the law failed that test.

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[187] This is also a very narrow view of the privilege against self-incrimination. The right to silence could be invoked by the innocent for fear that, in a high pressure situation such as a police interrogation, they might accidentally implicate themselves in a crime they did not in fact commit. Given the number of protections that courts have put in place to avoid the admission into evidence of inaccurate confessions, one can safely assume that the judiciary recognises this as a real risk. An individual may have something to fear other than his guilt; admission of a private, sensitive or embarrassing personal fact, perhaps. The Court's assumption that the right can only apply to the guilty is mistaken.

[188] See Hogan, note 148, at 189.

[189] Costello J's analysis suffered from a less serious but similar flaw, when he decided the weight of the right by reference only to its usefulness in preventing an unfair trial.

[190] Of course, the innocent do have something to lose: their constitutionally protected right to silence. Unless a completely utilitarian view of rights is taken, the right cannot be written off entirely because it seems to the Court not to be important. That is an argument, perhaps, against the recognition of the right, but that is not how it was deployed by the Court. See Hogan, note 148, at 189.

[191] [1995] 3 IR 1.

Hogan describes *Daly* –and others agree[192]– as "the most impressive application to date"[193] of the balancing portion of the *Heaney* test.

The case was a challenge to s. 18 of the Finance Act 1987, as amended. The State, when paying for professional services, deducted tax at standard rate and paid it directly to the Revenue. Initially, the amount could be deducted by the professional as a tax credit from tax paid during the same period. However, the law was amended in 1990, to the effect that the tax credit was postponed until the year after the deduction had taken place. This was done to avoid a windfall benefit to those with the tax credit when the system for the self-employed changed to current year from previous year payment. The results were extremely harsh, as the professional had to pay the tax again, despite its deduction at source, and could not claim the money back until the next year.

This regime had a severe effect on the Applicant; he was a general medical practitioner, who relied on the State for a substantial portion of his income. The tax deduction had been from gross charges, with no allowance for expenses. He had to borrow money just to meet his tax liabilities. He claimed it was an unconstitutional violation of his property rights.

As noted above, Costello P defined the objective narrowly, by reference to the transitional period amendment only, not the objective of the entire regime. In this light, he found the measure problematic in two ways.[194] First, it produced results which were "manifestly unfair to established taxpayers." [195] The withholding of money for tax purposes reduced their ability to discharge that tax liability, and required double payment. The judge focused on the extreme hardship that this could cause for certain individuals, and on the strain this had on the Plaintiff, requiring him to take a lengthy break from practice.[196] Secondly, "the effects on the taxpayer's property rights is not proportional to the objective to be achieved." [197] There were several problems with the law in this instance; it applied to all self-employed taxpayers, even those who began paying tax after the 1990 transition, creating a

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[192] See Walsh, note 5, at 28 and Doyle, note 184, at 150, Buckley, note 159.
[193] Hogan, note 5, at 391.
[194] See above at note 45 and accompanying text.
[195] [1995] 3 IR 1 at 12.
[196] *Ibid* at 10.
[197] *Ibid* at 12.

possible rational connection issue.[198] It had minimum impairment problems in not limiting the measure to cover the transitional period only.[199] But it also had very severe effects for a relatively small public good. However, Costello P was wary of suggesting that the legislature should have adopted another measure, as the Court had "neither the jurisdiction nor the competence to say ... how the objective envisaged by [the law] could best be achieved."[200] However, the court could

> examine the measure actually adopted and decide whether or not the interference with property rights has been brought about by means which are unfair to individual taxpayers or affect property rights in a manner out of proportion to the objective which the measure is designed to achieve. As I have reached a conclusion on these matters unfavorable to the amendment I must declare [the provision] invalid having regard to the provisions of the constitution.[201]

Though other problems were present in the law, it seems clear that the balancing issue was the more serious and the decisive one. This is one of the only examples in Ireland of a law being held invalid by reference to a balancing test that properly considered both the importance of the law and the impact on rights and find the latter to outweigh the former.

A Less Impressive Application: *Blehein v Minister for Health*

In *Blehein v Minister for Health*,[202] the Supreme Court struck down a portion of s 260 of the Mental Treatment Act 1945, which limited the right of access to the courts of those detained in mental health facilities. The section provided that no act done pursuant to the Act could be the subject of civil litigation unless the High Court was satisfied that there were substantial grounds to say that the act in question was done in bad faith or without reasonable care. The Supreme Court struck this down

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[198] "This effect is borne not only by established taxpayers who might have enjoyed the windfall gain if the amendment was not enacted but also by new entrants to the regime who would have obtained no benefits in 1991." *Ibid.*

[199] "The section was designed to deal with a *transitional* situation (namely a windfall gain arising in one year from the change in the basis on which the self-employed were taxed) but in doing so it has imposed a *permanent* measure which involves a permanently unfair method of collecting tax." *Ibid* at 12-13.

[200] [1995] 3 IR 1 at 13, Costello J agreed with the State's submissions that whether or not a different approach to the measure could have been taken was a matter for the legislature and not the courts.

[201] [1995] 3 IR 1 at 13.

[202] [2009] 1 IR 275.

as failing the *Heaney* test, being a disproportionate interference with the right of access to the courts.

Denham J said that although the objective of the measure –giving a limited protection from frivolous claims to those acting under the acts– was legitimate and important, it was "not of sufficient importance to override the constitutional right of liberty and the constitutional right of access to the courts."[203] This seems to be an application of the balancing test. Unfortunately, very little analysis is given as to this, save for the impact on the right of access to the courts, and the consequent, indirect impact on liberty, being mentioned. Denham J also implied that there may have been other problems with the law. She said of the measure:

> while being rationally connected to the objective, it is arbitrary (in referring to only two possible grounds of application) and hence unfair. It therefore does not impair the rights involved as little as possible, and so the effect on rights is not proportionate to the object to be achieved.[204]

From this, we can infer that there was a problem with the law's overbreadth, in barring more litigation than was necessary to achieve its aim, and it was, as such, arbitrary. Arbitrariness suggests a failure in rational connection.[205] There being no rational basis for this, Denham J also thought that the measure did not need to restrict the right of access to the courts as much as it did, though that was really more a symptom of the lack of rational connection. She also held that the effect on rights is disproportionate to the objective, as was indicated by her earlier statement, but her language suggested that this was a consequence of the failure of minimum impairment. Combined with the lack of detail in the analysis, and the fact that a failure of rational connection would dispose of the law even if balancing were not considered, *Blehein* is not a satisfactory application of the balancing test.

Saving Clauses and Double Construction

In *Gilligan v Criminal Assets Bureau*,[206] though McGuinness J did not expressly outline her approach to balancing, she did undertake the type of analysis that would

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[203] Ibid at 281, [18].
[204] *Ibid.*
[205] What we might infer from this is that Denham J meant to say that the measure was on its face rationally connected to the objective, but upon inspection was not so, as arbitrariness would be included in that step of the *Heaney* formula.
[206] [1998] 3 IR 185.

be necessary to decide the issue.[207] As we saw earlier, she engaged in searching objective analysis, ensuring that the exigent circumstances grounding the State's objective in fact existed, and found the objective to be very important. Later, she assessed the impact, or potential impact, on the applicant. In doing this, her judgment illustrates the importance and usefulness of saving clauses, presumptions of validity, and double construction.[208]

The persons whose assets were to be seized under the Proceeds of Crime Act enjoyed several protections, including that a judge must be satisfied that the assets in question are actually the proceeds of crime, even if the assets cannot be accounted for by their owner; and the qualification that the court should not make an order if the judge felt there was a risk of serious injustice being done.

When it came to assessing the impact on the rights of the individual, two features of the Act were of particular concern to McGuinness J. First, she was concerned with the provision of the Act that might force an individual to self incriminate, namely section 9, where a Court could compel a statement of income and property along with an explanation of their origin. She was further concerned with hearsay evidence admitted under s. 8, where an officer of the Revenue Commissioners or a Garda Chief Superintendent could swear to their belief that a particular individual was in control of certain property and that such property was, directly or indirectly, the proceeds of crime.

While warning of a danger, McGuinness J trusted that courts could avoid a vitiation of rights:

> it appears to me that both in the case of the procedures under Section 9 and in dealing with the type of evidence allowed under Section 8 any Court would have to take particular and special care to protect the rights of a Respondent.[209]

In light of this, she concluded:

> [V]iewing the provisions of the Act in the light of their proportionality to the threat posed to the common good, I am satisfied that it has not been

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[207] Walsh, note 5, at 28-29 cites *Gilligan* beside *Daly* as a rare example of the *Heaney* test being well applied.

[208] The importance of such clauses can also be seen when they are absent; see *Vehicle Tech v AIB* [2010] IEHC 525.

[209] [1998] 3 IR 185 at 243.

established that the provisions of the proceeds of Crime Act, 1996 are invalid having regard to the provisions of the Constitution.[210]

This is one of the few cases where the Irish courts have engaged in genuine balancing analysis, with attention devoted to the rights potentially infringed and the extent of their infringement. It furthermore highlights the role that saving clauses and double construction could play in this sort of exercise. To avoid constitutional problems, McGuinness J trusted that the courts would be able to prevent major violations of rights. Courts were well placed to do this, because only a court may demand an order under section 9, and because courts might refuse to make an order under the Act if too much reliance was placed on questionable evidence. The judiciary were a safegaurd; McGuinness J assumed that courts would be able to effectively avoid violations of rights. However, this balancing analysis must have been decided by a narrow margin; McGuinness J advised future courts to take "particular and special care" not to trammel these rights in future.[211] Of course, if judicial safeguards proved ineffective, and the measure did result in a rights violation, the matter could be revisited, and less faith would be put in these protections.

Such an attitude is not always taken. In certain cases, saving clause are insufficient. In *Cox*, the discretion of the government to remit the punishment could not save the measure.[212] In the *Employment Equality Bill* case,[213] a measure was put in place to try and prevent hardship to employers in the accommodation of disabled employees.[214] Though obliged not to discriminate, the employer only had to do what was reasonable in respect of providing facilities etc. to enable the accommodation of disabled employees, and did not have to make accommodations that would cause undue hardship to the employer. These were an insufficient protection against the potential hardship imposed on small businesses by the Bill, for reasons not well elaborated upon; the Court said there was "no provision to exempt small firms, or

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[210] *Ibid.*

[211] The double construction was also a possible remedy. It is often used to save the constitutionality of questionable legislation. If McGuinness J thought the law to be unconstitutional, one remedy would have been to interpret the law as preventing affidavits under s. 9 being used in criminal proceedings, something she clearly thought to be questionable. Instead of formally adopting an interpretation like this, she chose instead to rely on future courts to act in favour of rights when needed.

[212] [1992] 2 IR 503.

[213] [1997] 2 IR 321.

[214] s 34 (4) of the referenced Bill.

firms with a limited number of employees, from the provisions of the bill."[215] Perhaps this was a result of the fact that this case was an Article 26 reference, which meant the law was immune from subsequent review if upheld.[216]

Getting It Backwards: *King v Minister for Environment*

The other example of a law failing balancing shows a profound misconception of the *Heaney* test, and of standards of review more generally. In *King v Minister for the Environment*,[217] the Supreme Court applied a curiously strong variant of the minimum impairment test, rejecting at the very least a plausible reason for rejecting less onerous alternative means.[218] However, more unusually, the Court used the *disproportionality* of the law, presumably established under the third limb of the test, as a reason to ratchet up the scrutiny applied to the choice of means. The Court engaged in balancing first, found that the law failed, and proceeded to consider the other elements. This is a gross misapplication of the test, because if a law fails balancing, it cannot be justified, no matter how narrow its tailoring.

The case involved a challenge to the Electoral Act 1992. Under that Act, if any person wished to stand for election to Dáil Éireann, and was not affiliated with a recognised political party, she was obliged to present 30 constituents at a local authority office to attest to their support for this candidate's presence on the ballot. The plaintiff claimed that this was an oppressive burden on the constitutional rights of prospective candidates, being disproportionate to the objective pursued.[219] The Court identified the purpose of the law as "protecting and maintaining the integrity and efficacy of the electoral process" and "ensuring that those elections are conducted free from abuse and in an orderly fashion consistent with democratic values acknowledged by the Constitution."[220]

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[215] [1997] 2 IR 321 at 368.

[216] References from the President under Article 26 are heard in the abstract, with no specific plaintiff before the Court, so the Court would have to imagine if a circumstance might exist where the law could operate unfairly. If they upheld the law, Article 34.3.3° says the constitutionality of the law can never be questioned, so the Supreme Court may be loath to give any benefit of the doubt to the constitutionality of the law's operations.

[217] [2004] 3 IR 345 (HC); [2007] 1 IR 296 (SC)

[218] See above at note 151 and accopamying text.

[219] The High Court judgment in this case, which purported to apply both *Tuohy v Courtney* rationality and the *Heaney* test, was discussed in Chapter 7.

[220] [2007] 1 IR 296 at 313-314, [33]. The Court noted that a previous case, *Loftus v Attorney General* [1979] IR 221 had previously recognised preventing the swamping of the ballot paper by frivolous candidates as a legitimate reason for electoral bars.

However, the Supreme Court found the law to be a disproportionate restriction on rights, in consuming a great deal of time, at a time when the candidate would be attempting to organise an election campaign. [221]

It was not any individual element of the requirement that caused the disproportionality; the Court considered the number of people required to be modest, and thought it sensible that they must present themselves to signal assent. However, requiring them to go to a local authority office that might be many miles from where they live or work made the otherwise fair restrictions disproportionate. In rural areas, where evidence was presented of a 70 km journey being required, this was simply not a fair requirement.

The Court held that this requirement was "*prima facie* disproportionate to the particular objective to be achieved, namely the due authentication of nomination papers."[222] Since it was *prima facie* disproportionate, the Court said that the State had to proffer reasons why this measure was necessary. The State argued that the requirement of presenting individuals at the local authority office was necessary for the secure authentication, as this was the place where the most up-to-date electoral register would be. The Court rejected this contention:

> Notwithstanding the evidence given on behalf of the State the court is not satisfied by that evidence that there are no other administrative arrangements which are significantly less onerous regarding the verification of a signature on a nomination paper. It is not for the court to designate what other form of administrative arrangements might be provided for in legislation.[223]

Prima facie disproportionality has two significant consequences: first, it places a significant burden on the State to show reasons why no alternatives were available, essentially shifting the burden of proof from where it usually rests. Second, it radically increases the strength of the minimum impairment test.[224]

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[221] "The marshalling of 30 persons either individually or collectively or in separate groups to commit up to a day travelling to and from the designated office is, in the view of the court, a heavy burden to impose on a person seeking to validate his nomination papers." [2007] 1 IR 296 at 323, [61].

[222] Ibid at 323, [62].

[223] *Ibid* at 324, [62].

[224] This is clearly so because the incredibly strong tailoring analysis seen here eclipses by an order of magnitude any other minimum impairment analysis in an Irish case. The State's reasons for preferring these means are at least plausible: an up-to-date electoral register is needed to apply this requirement, and this is kept at the offices of the local authority. Though a copy of the register might be kept elsewhere for this purpose, this is very inconvenient. This sort of administrative convenience argument would usually pass muster in *Heaney* test analysis, but it does not do so here.

We can assume that by *prima facie* disproportionality the Court means that the statute failed the balancing test; the impact on rights was too severe having regard to its objectives. What is unusual is that it is *prima facie* – the Court decides that the law is disproportionate without having regard to the other limbs of the test. This is confirmed by the fact that its disproportionality then feeds back into the other limbs of the test; it makes the other limbs of the test more difficult to pass.

This analysis is fundamentally flawed. It is, of course, possible to put the balancing exercise at the start of a standard of review, as is done in the United States.[225] It is not possible, however, for a well-tailored but disproportionately balanced law to survive. Though this is not what the Supreme Court did, their analysis clearly suggests that this is possible. If the law is disproportionate for failing balancing, tailoring analysis is unnecessary. It is balancing that ultimately decides on the legitimacy of the law, and if the law is not legitimate by this standard, tailoring – no matter how perfect– cannot save it, because it is an illegitimate restriction. This, worryingly, does not seem to be the view of the Supreme Court. The implication of their reasoning is that if a law is disproportionate, having regard to the impact on rights compared to the objective, this could be saved by a finding of necessity. The test has been turned on its head. This makes a nonsense of the conceptual underpinnings of standards of review.

King, moreover, does not suggest any method for applying the balancing test. The use of the term "*prima facie*" suggests that it is simply evident that the law is not proportionate, and no other analysis is required.

Unless it is shown that the Supreme Court has some intention to follow this approach in other cases, it is probably safe to regard *King* as a unique and anomalous application of *Heaney*, that ought not to be repeated.

The balancing test in *Heaney* is very rarely failed because it is rarely applied in any real sense. McGuinness J and Costello P showed that it is possible to apply the test well in *Gilligan* and *Daly*. For every such instance, there are dozens of cases where proportionality between effects and objective is asserted without analysis, or not addressed at all.

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[225] Preliminary balancing was discussed in Chatper 2, at note 46-50 and accompanying text.

The Burden of Proof

Burden Placed Entirely on the Applicant

As noted in previous chapters, the Irish courts have always placed the burden of proving unconstitutionality on the applicant asserting it. This did not change in the aftermath of the *Heaney* test. What was probably an open question was whether the entire burden should fall on the applicant or should shift to the State after an initial infringement of rights is shown, to place the burden of justification on the infringer. This is something that is much easier to do with a standard of review that separates the internal and external limitation stages. The Irish courts have seemingly rejected this burden shifting approach, favouring the burden being entirely on the applicant.

In *Heaney*, Costello J's analysis implied that the burden remained on the applicant, and he later confirmed this in *Daly v Revenue Commissioners*:

> When, as in this case, an applicant claims that his constitutionally protected right to private property ... has been infringed and that the State has failed in the obligation imposed on it by that Article to protect his property rights, he has to show that those rights have been subject to "an unjust attack". He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test - a concept which I considered in *Heaney v. Ireland.*[226]

This burden is placed entirely on the applicant in relation to both the infringement and the lack of justification. In *Hanrahan v The Environmental Protection Agency (No. 2),*[227] Smyth J made the following comments about the applicant's arguments:

> The Applicant's argument was that restrictions on property rights that are irrational, absurd or excessive are unjust... [G]iven the fact that the Applicant was given an opportunity to put forward a tenable alternative proposal to destocking but did not do so, I was not and am not disposed to determine that the destocking provision is excessive or so restrictive as to be unjust.[228]

The burden of proof in this conception is squarely placed on the applicant, even in respect of minimum impairment; if no alternative proposal is put forward,

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[226] [1995] 3 IR 1 at 11.
[227] [2006] 1 ILRM 275.
[228] *Ibid* at 279.

nothing is required for the State to show minimum impairment. Some applicants have put forward detailed proposals.[229]

This distribution of the burden of proof is seen as a natural consequence of the presumption of constitutionality,[230] which "serves a major role in the consideration of legislation. It ensures that the State is not overburdened with ethereal challenges to the constitutionality of Acts of the Oireachtas."[231]

Shifting the Burden of Proof

There are, however, a few cases which might support the proposition that the burden of proof should shift to the State to justify a restriction on rights. It is important to keep these authorities in perspective; they are few, and have not been widely followed.

In *BUPA Ireland v Health Insurance Authority,*[232] the plaintiff insurance company claimed that the risk equalisation scheme violated its constitutional property rights. The scheme purported to divide the risk burden apparently borne by the formerly state-owned insurer, VHI, by demanding other insurers to pay money to the VHI. The judge agreed that its rights were infringed.[233] In this context, McKechnie J said: "[T]here is no dispute but that the onus of proof is on the applicants to prove an infringement of their rights. Once so established however the State must then justify."[234] The State could, in fact, justify the restriction in this case.[235] Foley calls this a "landmark holding."[236] This would certainly have been accurate if it had presaged a new departure in the Irish law. However, with the passage of time, we must admit that this does not seem to have lead to any significant change in judicial practice.

Some other cases intimate such an approach without express discussion.[237] As we have seen, in *King v Minister for the Environment* the burden of proving

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[229] See *Iarnród Éireann v Ireland* [1996] 3 IR 321 at 338, where counsel for the plaintiff suggested three statutory models that could respect a tort victim's right to recover while not burdening them as heavily as the position for concurrent wrongdoers did.
[230] See Foley, note 26.
[231] *O'Sullivan v Prison Service* [2010] 4 IR 562 at 582, [37].
[232] [2006] IEHC 431.
[233] *Ibid* at [241].
[234] *Ibid* at [247].
[235] *Ibid* at [293].
[236] Foley, note 26.
[237] Finnegan P in *Clinton v An Bord Pleanla* [2005] IEHC 84 seemed to place the onus of proof on the State to justify its use of compulsory acquisition measures. I thank Rachael Walsh for highlighting this.

minimum impairment was placed on the State.[238] This was done, however, after a finding of *prima facie* disproportionality. This is not a coherent finding, and therefore is not a good example of burden shifting.[239] Another possible example is *CC v Ireland (No 2)*, where Hardiman J apparently expected the State to present evidence to justify rights restrictions, though he did not openly discuss the burden of proof or its shift.[240]

However, it is not clear that McKechnie J has been consistent on this point. In *O'Sullivan v Irish Prison Service*[241] he said: "the applicant ... must carry the burden of proving that the legislation in question unduly infringes his rights."[242] This suggests the burden on the applicant is prove not merely an infringement of rights, but an *undue* infringement of them. This does not seem to accord with the burden shifting approach in *BUPA*. Moreover, the case has not been followed in subsequent High Court decisions, and has not as yet received Supreme Court approval.[243]

There has been some controversy about the idea of shifting burdens in equality jurisprudence, wherein certain discriminations might require active justification by the State, thus shifting the burden of proof.[244] It is likely, however,

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[238] [2007] 1 IR 296.

[239] Another way of looking at this case would be to think of it as unconstitutionality on its face defeating the presumption of constitutionality, as indicated by the Supreme Court in *Loftus v Attorney General* [1979] IR 221 at 238. The Court said legislation enjoyed the presumption "unless it plainly shows on its face a repugnancy to the Constitution." However, there is no indication that this is what the court meant, and if it did, this is a very low standard for unconstitutionality on its face, considering the constitutionality of the measure was surely debatable. Another example is *Blehien v Minister for Justice* [2009] 1 IR 275, where the High Court held that since the provision the Court had found to be unconstitutional was "apparent on the face of the section therefore the presumption of constitutionality does not apply." [2004] 3 IR 610 at 616. It is unclear how this affected the onus of proof, and neither Carroll J nor the Supreme Court on appeal elaborated on this point.

[240] In that case, Hardiman J cast doubt on the possibility that the strict liability statutory rape law could be justified by its deterrent effect on young man engaging in intercourse with young women. This was suggested by a dissent of McLachlin J in *R v Hess; R v Nguyen* [1990] 2 SCR 906 1990 CanLII 89 (SCC), which dealt with a nearly identical law. He refused to entertain "the complete objectification of a whole group of a community –young men– and a disregard for their human and constitutional rights, on the basis of an unevidenced speculation about the contents of the "substratum" of their consciousness." At [60]

[241] [2010] 4 IR 562.

[242] *Ibid* at 582, [38].

[243] Laffoy J in *O'Shea* thought that the plaintiff bore the burden of rights infringement and the non-justification of that infringement: "In my view, in order to discharge the burden of proof they have assumed the plaintiffs must show that s. 3(2) infringes one or more of the rights which the Constitution confers on them. Insofar as any such right is not an absolute right and the question which arises is whether the impugned provision is within the constitutionally permitted bounds of the limitation of such right, it is for the plaintiffs to establish that it is not. For example, as regards any issue as to the rationality or proportionality of s. 3(2) in the context of the recognition of a constitutionally protected right, the onus is on the plaintiffs to establish irrationality or disproportionality." [2007] 2 IR 313 at 323, [29].

[244] Laffoy J regarded this matter as open in *SM (No 2)* [2007] 4 IR 369.

that this is limited to proscribed categories of discrimination, once established, will shift the burden.[245] Despite Foley's enthusiasm, this remains a fringe idea in Irish law.[246] Because Irish courts so rarely discuss these issues, confusion such as this arises.

Conclusion

From its proliferation into all areas of Irish law, one might expect the *Heaney* test to have had a significant impact on Irish constitutional adjudication. In fact, its effects have been more subdued. It has shown some strength in certain areas, such as the scepticism of overbreadth in rational connection, and the use of rational connection as a tool for indirect scrutiny of hypothesised motivations. However, these were not new phenomena. Looking at the standards of review in Ireland before *Heaney*, we saw that many of these elements were present. The *Heaney* test gave them labels, but in fact, as we saw in minimum impairment, it is not clear that these labels have clarified more than they have confused. Nor have the Irish courts given detailed analysis of the nature of the limbs of the *Heaney* test; their meaning can only be extracted with detailed analysis of case law.

The *Heaney* test did not bring significant changes. The approach to ascertainment and objectives and the burden of proof –two of the biggest distinctions between the *Oakes* test and the pre-*Heaney* law in Ireland– have not been significantly altered.

The single biggest promise of the *Heaney* test was express balancing –making courts express and justify the conflicting interests that they previously had balanced opaquely behind the scenes. This was essentially unknown in the pre-*Heaney* case law. The revolution that *Heaney* promised has not occurred; this limb of the test has been properly applied on only a few occasions. It is generally just used a form of words in which to frame the justification of laws.

The *Heaney* test can take two roads. It can be a genuine standard of review, making courts justify their rights analysis by reference to a test that is more transparent than the opaque standards of review in use before its advent, and bringing into the light the controversial and difficult process of balancing conflicting values. It has not gone down this path, save in a handful of cases. The majority of the

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[245] See Doyle, note 40, at 242, and the *Employment Equality Bill* case [1997] 2 IR 321.
[246] See Foley, note 26.

case law on the *Heaney* test sees it moving down another road: its use as a linguistic flourish, to give seeming uniformity to what is probably results-oriented, deferential, and non-interventionist rights jurisprudence. As Margulies puts it: "It is as if judges do what they want and then cover their trails with conflicting scents."[247] For all the bluster about the *Heaney* test, the changes it has wrought are few indeed.

[247] Margulies, note 159, at 42.

9 – Something for Everyone: the *Oakes* Test as a Standard of Review

The preceding two parts of this thesis have examined the application of standards of review in Ireland and Canada. From this examination, some obvious similarities and differences are apparent in their application of the identically worded *Oakes* and *Heaney* tests. The purpose of this chapter is to highlight the most significant of these differences, and to posit some possible explanations for the diverging approaches, with reference to differences in the domestic legal system of each jurisdiction, and the values that those systems embody.

This analysis shows us that the *Oakes/Heaney* test –incorporated in similar forms around the world as the "proportionality principle" and hailed by one leading commentator as "the ultimate rule of law"[1]– is not a complete standard of review; it is rather a form of words that encompasses all the essential conceptual elements of a standard of review, but leaves significant room for normative choices made by each jurisdiction. Moreover, it invites departure from the choices it does make with language that is too strong to be realisable, as can be seen in the language of minimum impairment. Perhaps the original formulation of the test by Dickson CJ did take normative stances on some, or even most, of these normative issues. The reason his test has endured and proliferated, however, is not the wisdom of his normative decisions, but rather the ability of the test he outlined to break free of those choices.

Although adopting a Canadian standard of review word for word, the Irish courts did not import Canadian values alongside it. Instead, the Irish courts did not alter their pre-existing framework for constitutional rights cases when they incorporated the *Oakes* standard; they altered the *Oakes* test to conform to the constitutional values they had long espoused and applied. The *Heaney* test provided new language and a new structure for analysis, but there is no evidence of a change in the analysis that the courts undertook, even when those values diverged from those suggested by the *Oakes* test. Elements of the courts' previous practice worked their way into the *Heaney* test, which minimised the change that was wrought by the introduction of that test. This was not done clearly, and the problems of the opacity of this approach will be discussed in the next chapter.

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[1] See David Beatty, *The Ultimate Rule of Law*, (OUP, 2004).

If the language of a standard of review does not reflect the reality of its application, it is misleading. Academic commentary welcomed the arrival of this test, both in Ireland and internationally, as a red-letter day for rights protection.[2] The promise of this new test was not fulfilled. Though it appeared to be a substantive change, it was not.

Similarities and Differences in the Irish and Canadian Approaches to the *Oakes/Heaney* Test

The Irish and Canadian courts adopt a facially identical standard of review, and so it is natural that the tests display similarities. However, also notable is the extent to which they diverge. Focusing on the application of the standard of review, I wish to examine each element in turn, and highlight the ways in which the tests differ across the two jurisdictions.

Objectives

Given that both jurisdictions under consideration adopt a facially identical standard of review, they both nominally incorporate a preliminary test of the importance of objectives. They are also similarly lax in respect of its application. In neither jurisdiction is this part of the standard of review applied with any rigour; laws almost never fail to pass this test in either Ireland[3] or Canada.[4] Relatedly, both jurisdictions are largely willing to accept the importance of the objectives as self-evident without substantial analysis.

One of the most significant differences between the articulated approaches of the courts in Ireland and Canada is how they ascertain the objectives underlying legislation. In Canada, it has long been asserted that the correct approach to ascertaining objectives is to look to the real, subjective motives underlying the law.[5] Similarly, the idea of shifting, changing objectives being examined did not sit well

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[2] See Beatty, *ibid*; Gerard Hogan, "The Constitution, Property Rights And Proportionality" (1997) 32 Ir. Jur. (ns) 373; Gerard Hogan, "Judicial Review – the Law of the Irish Republic" in Brigid Hadfield (ed.) *Judicial Review: A Thematic Approach* (Gill & McMillan, 1995) at 340. Hogan's praise for the doctrine is more restrained and circumspect than Beatty's, acknowledging some of the risks: "even though the proportionality doctrine has the undoubted merit of providing an objective structure, it does not eliminate the substantial element of subjective judicial appraisal which still remains." (1997) 32 Ir. Jur. (ns) 373 at 393.

[3] See Chapter 8, at note 52-71 and accompanying text.

[4] See Chapter 5, at note 1-14. The Canadian court has only ever invalidated two laws by reason of insufficiently pressing motive, and both of these cases pre-date the *Oakes* case.

[5] Chapter 5, at note 15-25.

with the Canadian courts.[6] On the other hand, the Irish courts have never been willing to look to subjective motivations, and, without much sustained analysis in the constitutional context, have chosen to hypothesise the motivations of law.[7]

This difference, however, may only be skin deep. As argued earlier, in certain cases[8] Canadian courts clearly seem to choose better motives rather weaker ones. In other cases, there is no evidence that the motive found by the court was the true, subjective motivation of the legislature.[9] Moreover, there is evidence of tailoring to the objective being used to indirectly scrutinise objectives; this also suggests that motivations are in fact hypothesised.[10] This indirect analysis would be unnecessary if the genuine motive were being ascertained.[11]This suggests the approach is in fact similar to Ireland's.

However, differences exist as to how these objectives are treated. In Canada, the courts have developed rules about the objectives of the law being too general, and though it has never been discussed, one might imagine a similar objection being made to multiple objectives.[12] On the other hand, Irish courts have proven willing to embrace multiple objectives,[13] and some that are so general they are no more than a statement of effect,[14] and little protest has ever been raised to this phenomenon.[15]

Though nominally differing in respect of ascertainment, the reality of how objectives are treated in Ireland and Canada is quite similar, in respect of both importance and ascertainment. The way in which Ireland treats objectives does not appear to have changed after the incorporation of the *Heaney* test.

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[6] Chapter 5, at note 26-34.
[7] Chapter 8, at note 34-40.
[8] *Chaulk v R* [1990] 3 S.C.R. 1303; 1990 CanLII 34 (SCC)
[9] For example, R v *Oakes* [1986] 1 S.C.R. 103; 1986 CanLII 46 (SCC), amongst others.
[10] Chapter 5, at note 85-97.
[11] As discussed in Chapter 2, there would be not need for indirect scrutiny if the true motive were found.
[12] See *R v Zundel* [1992] SCR 731; 1992 Canlii 75 (SCC).
[13] Chapter 8, at note 116-118.
[14] These features, though originating in the objective stage, might be more prone to manifest themselves in respect of rational connection. It is unlikely that a Canadian court will identify multiple objectives, or very general objectives, to justify a law that is otherwise not well-tailored; this is more likely to occur in Ireland. Therefore, though both jurisdictions adopt a generally weak approach to rational connection, the Canadian courts might be somewhat more likely to invalidate laws on this basis.
[15] Costello P in *Daly v Revenue Commissioners* [1995] 3 IR 1 is the only exception of which I am aware. See Chapter 8, note 45-46.

Rational Connection Between Means and Ends

Both Ireland and Canada have ultimately adopted relatively weak approaches to rational connection between means and ends. Initially, Canadian courts seemed to adopt a more stringent assessment of rational connection, with over-inclusive laws seemingly impermissible, and a burden on the state to justify the tailoring of the law. This ultimately gave way to a more lenient approach, with both of those elements diminishing over time.[16] Similarly, save for some isolated instances of strength, the Irish courts have adopted a weak rational connection test.[17] This accords with the language of the test, as a "rational" connection is one that does not offend against common sense, rather than one which is very precise.

However, in both jurisdictions, a strong rational connection requirement, when it is seen, is deployed in similar circumstances. One instance where it is deployed is toward statutes that are overbroad. This is observable in Canada, not only from Oakes itself, and in its well-developed doctrine of abstract overbreadth challenges, which will be discussed later.[18] In Ireland, very rare cases like *McCann v District Judge Monaghan*[19] and *Blehein v Minister for Health*,[20] discussed in chapter 8, and *Cox v Ireland*,[21] discussed in chapter 6, have invalidated statutes due to close scrutiny of connection between means and ends. All of these statutes cast too wide a net.[22] In contrast, Irish and Canadian courts have both been wary of claims of underinclusiveness.[23]

Interestingly, both jurisdictions have also seen some instances of the test having strength that can be linked to indirect scrutiny of objectives. Though this

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[16] Chapter 5, at note 47-61.
[17] Chapter 8, at note 108-118.
[18] See below at note 123.
[19] [2009] 4 IR 200.
[20] [2009] 1 IR 275.
[21] [1992] 2 IR 503.
[22] The legislation in *Cox* enacted severe penalties and forfeitures in order to deter subversive crime by those who worked for the State, but applied this to a vast array of offences, some of which had no necessary subversive element. In *McCann,* debtors could be imprisoned who had made all good faith efforts to pay back their debts, targeting people who were not refusing to repay loans in bad faith. In *Blehein*, there was a restriction on those in mental health detention taking civil actions against their detainers, targeting far more people than those who were taking vexatious claims.
[23] *McKinney v University of Guelph* [1990] 3 SCR 229; 1990 CanLII 60 (SCC) introduced an incremental approach which frustrates most claims of underinclusiveness. *Enright v Ireland* [2003] 2 IR 321 makes similar points in the Irish context. The Irish courts have recently gone so far as to suggest that the failure of a statute to provide something cannot render the statute unconstitutional, as the problem is not with the statute, but with what the statute is not. Statutory omission might create an unconstitutional circumstance, but it does not impugn the statute. See *Carmody v Minister for Justice* [2010] 1 ILRM 157.

approach is more apparent in some Canadian cases,[24] the evidence for its use in Ireland is still strong.[25] This would suggest two similarities. Both sets of courts do not scrutinise the motivations of their respective legislatures directly, perhaps because this would be disrespectful, or difficult to do. It might also serve as evidence that, despite facial differences in the way objectives are ascertained, both Canadian and Irish courts might hypothesise objectives, because indirect review of objectives makes sense only if the court is not looking to the true subjective motive of the legislature. This also conforms to pre-existing Irish practice on this form of tailoring.[26]

Minimum Impairment

The minimum impairment tests in Ireland and Canada share a core similarity: neither test bears any close resemblance to the language that was used to set it out. Beyond that, however, the approaches adopted are different; both courts ultimately opted for a weak and deferential form of minimum impairment review, but Ireland's chosen variant is weaker than Canada's.

In Canada, the strong language of the *Oakes* test quickly faded in *Edwards Books*, as concerns such as empirical deference and concerns about the separation of powers caused the courts to worry about the stringency of the *Oakes* approach.[27] The test shifted from demanding that rights be infringed as little as possible to demanding that they be infringed "as little as is reasonably possible,"[28] insisting that the legislature had a "reasonable basis"[29] for eschewing an alternative.

Ireland went further. Some of the Irish case law resembles its Canadian counterparts in asking if there was a "rational explanation"[30] for the means chosen to be preferred. The *Tuohy v Courtney* test, which grew up alongside the *Heaney* test, offers significant deference in this and other respects, motivated by factors similar to those found in Canada.[31] Later cases suggest that the Irish courts go further, reviewing only whether or not there was a mechanism by which the means actually

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[24] Chapter 5, at note 85-97.
[25] *An Blascaod Mór Teo v Commissioners of Public Works in Ireland*, Unreported, High Court, Budd J, February 27th 1998; *O'Shea v Ireland* [2007] 2 IR 313.
[26] See *Blake v Attorney General* [1982] IR 117, discussed in Chapter 6.
[27] See Chapter 4 and Chapter 5.
[28] *R v Edwards Books* 1986 CanLII 12 (SCC) at [131].
[29] *Irwin Toy v Quebec* [1989] Canlii 87 at 71.
[30] *Colgan v IRTC* [2000] 2 IR 490 at 512; cf *Murphy v IRTC* [1999] 1 IR 12.
[31] *Tuohy v Courtney* [1994] 3 IR 1. A fuller discussion of this case and the test associated with it will be carried out in the next chapter.

chosen could be rendered less excessive by some limit or cap on their effects.[32] This suggests that Irish courts have gone beyond deference in consideration of alternatives, and have chosen the less interventionist approach of not considering independent alternatives at all. The few examples of this sort of tailoring that are identifiable from the previous jurisprudence of the Irish courts suggest a similar approach.[33]

The consequence is that, although the Canadian test retains significant strength, even if this was only seen intermittently, the Irish variant, by contrast, does not. In Canada, blanket bans were the major trigger for more severe minimum impairment review, with very few such bans passing muster, even when relatively plausible reasons for the scope of the restriction were forthcoming.[34] The form of review to which these bans were subject to is so strong as to lose any resemblance to the usual standard of minimum impairment. By contrast, there is no similar strength to be found in the Irish version of the test. The handful of cases where the test has invalidated legislation involve failures of the narrower excessiveness test,[35] or an unusual and unexplained departure from general practice.[36]

The final point of comparison is the extent to which the minimum impairment test has incorporated balancing. In Canada, the fact that the court is willing to look to alternatives means that the incorporation of some balancing is probably unavoidable. There is also evidence that the link between these tests is significant, with failure of minimum impairment and failure of balancing often coinciding.[37] In Ireland, the elision is primarily rhetorical, with balancing and minimum impairment often being run together in the course of the application of the standard of review.[38] However, there are some instances of a more substantive elision in the modes of analysis, albeit less significant and less common than those

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[32] *DK v Crowley* [2002] 2 IR 744; *Dellway Investments v NAMA* [2010] IEHC 364. See Chapter 8, at note 169-181.

[33] *Quinn's Supermarkets v Attorney General* [1972] IR 1 and *Attorney General v Paperlink* [1984] ILRM 373 both indicate an approach concerned with excessive scope of the type of means chosen or an unwillingness to look to alternatives. See Chapter 6, at note 99.

[34] See chapter 5, at note 118-137; in particular, *R v Seaboyer* [1991] 2 S.C.R. 577; 1991 CanLII 76 (SCC); *Edmonton Journal v Alberta* [1989] 2 SCR 232; 1989 CanLII 20 (SCC).

[35] *DK v Crowley* [2002] 2 IR 744.

[36] *Dunnes Stores v Ryan* [2002] 2 IR 60; *King v Minister for the Environment* [2007] 1 IR 296 (SC); see Chapter 8.

[37] See the disucssion in Chapter 5 of *R v Seaboyer* 1991 CanLII 76 (SCC); *Edmonton Journal v Alberta* 1989 CanLII 20 (SCC) and *Thompson Newspapers v Canada* 1998 CanLII 829 (SCC), where balancing was said to be failed after a failure of minimum impairment.

[38] Chapter 8, at note 135-145.

seen in Canada, and often in cases that display confusion over what the precise purpose of each element of the test should be.[39] This is unsurprising considering the Irish courts' limited approach to minimum impairment and their general disinclination to engage in balancing at all.

Generally, we can say that neither the Irish nor the Canadian courts have settled upon a method of dealing with minimum impairment that bears any resemblance to the words initially used to describe it. However, the Canadian test has not departed to such a great extent; though it has incorporated significant deference, it retains potency, and allows judicial intervention in a significant minority of cases. The Irish approach is much more conservative, and reflects the non-interventionist attitudes of the courts in this area. It has also lacked a clear and consistent meaning; though there may be a coherent theory to be extrapolated from some Irish cases, other cases clearly misunderstand what the test is to do, or do not offer any analysis whatsoever.

Balancing

Both Irish and Canadian courts show extreme reluctance to engage in balancing. Canada does have some judicial pronouncements on the subject,[40] though these do not seem to have inspired courts to apply the test or to do so clearly. In Ireland, it is probably fair to say there has been no discussion of balancing, or its meaning or importance. It is largely forgotten. This means that, to whatever extent the balancing analysis is conducted, the courts do not explain or elaborate any metric that might be used to weigh particular concerns, or any other normative stances that affect the balancing exercise.

However, the balancing test is rarely applied in either jurisdiction. In very few cases is a law struck down because of a problem with balancing alone.[41] A law that fails the balancing test always has an additional flaw in tailoring that would render the law invalid in any event. Both jurisdictions display a suspicion of the balancing process, or at least a reluctance to conduct the balancing process visibly.

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[39] Chapter 8, at note 146-157.

[40] Dickson CJ in *Oakes* (1986 CanLII 46 at [70]) and *Edwards Books* (1986 CanLII 12 (SCC) at [122]); MacLachlin CJ in In *Canada v JTI-MacDonald* at [46]; McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567; 2009 SCC 37 Canlii at [75].

[41] There is little evidence of this ever having happened in Canada. One could make an argument that *Daly v Revenue Commissioners* [1995] 3 IR 1 could be an example of this in Ireland, but the law probably would have failed the one or both tailoring tests as well, given Costello J's analysis.

Since, as discussed in the last section, Ireland seems less willing than Canada to incorporate balancing into minimum impairment, this might mean that very little balancing at all is done in Ireland, or perhaps that whatever balancing is done in the background almost always favours the State.

Comparing the jurisdictions, we can see that balancing is not undertaken clearly by either Irish or Canadian courts, and therefore both fall down on the essential, legitimising component of the standard of review. This criticism can be levelled even more forcefully at Ireland, because of a lack of evidence of balancing elsewhere within the standard, and the failure to highlight the importance of this step in judicial pronouncements. Canada's failure might be limited to hiding balancing considerations elsewhere and not being clear on the metrics used. These are normative condemnations. Ireland's failure might be fundamental and conceptual: a failure to apply the core legitimising part of the standard of review. The single biggest difference between the inchoate standards of review that existed before, and the *Heaney* test that replaced them, was the addition of articulate balancing. However, this difference has proven illusory because, though the language of balancing is used, in reality, balancing is either hidden or absent, just as it was before.

The Burden of Proof

One of the most profound differences between the Irish and Canadian standards is the placement of the burden of proof. This is a hugely important element of the standard of review, as it decides results in many cases, and reflects the default constitutional balance between protecting rights and favouring the interests of the state.

In Canada, ever since *Oakes*, the burden of proof has been clearly apportioned between the State and the individual.[42] The individual will at all times bear the burden of establishing an infringement of the right. This might be simple or self-evident, or it might not be; very complex issues about the scope of rights can exist, and the plaintiff asserting the infringement has to establish it.[43]

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[42] *Oakes* 1986 CanLII 46 (SCC) at [67]. *Oakes* also made clear that the standard for each is the usual civil standard, the balance of probabilities.

[43] Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-7. It is also possible that some element of the rights infringement will be justificatory in nature – for example where the right cannot be unreasonably or arbitrarily infringed. This is a substantive internal limitation on the scope

However, that burden discharged, the State takes on the burden of proving that the rights restriction was justified.[44] Therefore, from the point where the standard of review kicks in, all relevant tests presumptively side with the plaintiff; the State bears the burden of all aspects of justification. This is an extremely strong measure in defence of rights, as the burden is significant, and establishing the law's lack of justification might be difficult for plaintiffs. However, it must be noted that the reality of the burden of proof is not always so strict, as deference can be shown. This is seen where self-evidence is accepted in several contexts *in lieu* of evidential justification.[45]

The burden of justification on the state stems, as we shall discuss shortly, from the provision in s 1 of the Charter that a restriction on rights shall be "demonstrably justified." Demonstration of justification is an essential, textually ingrained part of the Charter and the limitations clause.

In Ireland, by contrast, the State bears no burden.[46] Before and after *Heaney*, that burden rested with the plaintiff. That clearly includes establishing the initial restriction of rights, and the subsequent proof that no justification for the limitation exists. This leaves the plaintiff in the invidious position of having to prove one of several negatives: that the law does not have an important objective; that the law is not rationally tailored; that the law is not minimal in its impairment of rights; that the law does not fairly balance rights and interests. This creates the curious situation where the test is framed in a positive light, but the proof required of the court is negative.

The presumption of constitutionality is probably the underlying reason for this practice.[47] It is one of the key reasons that the *Heaney* test is so weak, even by comparison to its counterpart in Canada, and leads to far less judicial intervention.

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of the right, and the plaintiff in that case will bear the burden of proving this also. This will be discussed later in context of a discussion of internal/external limitations on rights.

[44] See ibid at 38-8. Hogg suggests that one element of justification under s 1 does not carry any burden of proof at all: the requirement that the restriction be prescribed by law. This is seemingly a neutral enquiry conducted by the court.

[45] This was suggested in *Oakes* 1986 CanLII 46 (SCC), and seen in *Edwards Books* 1986 CanLII 12 (SCC). Hogg, note 43, at 38-9 and Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 S.C.L.R. (2d) 501, amongst others, commend reducing reliance on evidence in Charter litigation, because of concerns of costs, complexity, and the lack of availability of evidence.

[46] Exceptions to this are very rare, and show no sign of development into a wide change in the way that courts deal with the burden of proof, despite *Foley* hinting in that direction. Brian Foley, "The *BUPA Ireland* Case and Constitutional Litigation," (2010) 45 Ir. Jur. (ns) 230.

[47] See *Buckley v Attorney General* [1950] IR 67 at 83; ch 4 p29-31. See Foley, note 46.

However, it is important to highlight the causative attribute: the Irish standard of review is not non-interventionist because of the burden of proof; the burden of proof in Ireland favours the state because of choices made by the courts about interventionism.

Deference and Non-Interventionism

There is also some similarity in the kinds of concerns that have led to deference and non-interventionist choices in Ireland and Canada, accompanied by very great differences between how these considerations are dealt with. The rationales underlying deference and non-interventionist choices are largely similar in each jurisdiction; the extent of the deference shown, and the scale of the non-interventionism, are different, as is the manner in which they manifest and are discussed. This will be dealt with in detail in the next chapter.

THE UNIVERSALITY OF THE *OAKES* AND *HEANEY* TESTS

The scope of the test differs between the jurisdictions in some respects. First, the *Oakes* test retained a universal application by offering significant variability in application in different circumstances. Ireland, in theory, opted for a different approach, in creating two standards of review. One of these – the *Tuohy v Courtney*[48] test – was reserved for cases where significantly more deference should be offered to certain determinations, and where non-interventionist choices required a fundamentally different standard to apply. Again, this will receive more attention in the next chapter.

In Canada, Hogg notes that *Oakes* was offered as "a universal rule, applicable to all Charter infringements."[49] This has led to a more rigid adherence to external limitation on rights in Canada. Canada does have some rights that are subject to substantive definitional or internal limitation, such as the right to be "secure against unreasonable search or seizure"[50] and the right "not to be arbitrarily detained or

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[48] [1994] 3 IR 1.

[49] Hogg, note 43, at 38-44. It should be noted, however, that the test laid down in *R v Sparrow* [1990] 1 SCR 1075; 1990 CanLII 104 (SCC), is used for the limitation of aboriginal rights under s 35 of the Constitution Act, 1982, as these fall outside the scope of the Charter of Rights and Freedoms. See Dwight Newman, *"The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests,"* (1999) 62 Sask. L . Rev. 543.

[50] s 8, Canadian Charter of Rights and Freedoms. Some s 11 criminal rights are also subject to reasonableness restrictions, such as a right to reasonable bail, a right to information on charge and trial in reasonable time.

imprisoned."[51] These rights are restricted unless the restriction is unreasonable or arbitrary. There would seem to be little need for an external limitation in addition to that, as the definition of the right includes a judgment as the quality of the infringement. However, in practice, the courts have chosen to apply an external limitation as well.[52] This ensures the almost universal application of the *Oakes* test.[53]

External limitations are universal in Canada. They even seem to apply to the s. 12 prohibition against cruel and unusual treatment and punishment,[54] despite criticism of this approach.[55] There is no right in the Charter that is subject to internal limitations alone. This has recently attracted criticism, with some academics criticising the *Oakes* test's application in some areas, and advocating a single-stage approach,[56] while others defended the *status quo*.[57]

In Ireland, there is no agreement on universal application of the *Heaney* test, and some rights may not be subject to external restrictions at all. The right to a trial in due course of law may be subject to internal limitations only. In *Re National Irish Bank (No. 1)*,[58] the Supreme Court suggested that trial in due course of law is a binary concept, which was not subject to proportionality analysis:

> [I]t is doubtful if the principle of proportionality - so important in other branches of constitutional law - can have any useful application here. A criminal trial is conducted *"in due course of law"* or *"with due process of law"* or it is not.[59]

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[51] s 9, Canadian Charter of Rights and Freedoms.

[52] Hogg, note 43, at 38-45.

[53] It is possible this may involve some duplication of work, with similar considerations deployed to the analysis of the breach of the right as to its limitation, but Hogg notes that the considerations of reasonableness in the context of s 8 search and seizure do differentiate themselves from Oakes analysis. *Ibid* at 38-47. The same might be true of reasonableness for s 11 criminal rights. See *ibid* at 38-48. In any event, the internal limitations simply add to *Oakes* test protection, which will be available regardless.

[54] In *R v Smith* [1987] 1 SCR 1045; 1987 CanLII 64 (SCC) found that a mandatory minimum sentence for drug importation was cruel and unusual, and then considered whether it was justified under s 1, ultimately finding that it was not. However, it implies that in principle one can justify such a punishment using the *Oakes* test.

[55] Hogg cannot imagine that there would ever be such a reasonable limit, and says it is perhaps the only absolute right in the Charter. Hogg, note 43, at 48-49. However, he acknowledges the dissonance between his view and the analysis in *Smith*.

[56] Chanakya Sethi, "Beyond Irwin Toy: A New Approach TO Freedom OF Expression Under The Charter," (2012) 17 Appeal 21; Christopher D Bredt, "Revisiting the s. 1 Oakes Test: Time for a Change?" (2010) 27 NJCL 59 at 66; Grégoire Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship," (2010) 23 Can. J. L. & Jur. 179.

[57] Charles-Maxime Panaccio "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication," 2011 24(1) CJLJ 109.

[58] [1999] 3 IR 145.

[59] *Ibid* at 180.

The court would not balance any interest against this right, as an unfair trial cannot be justified. This is an assertion that the Article 38.1 right is not subject to external limitations.

There is something credible in this stance, in that it seems to afford criminal rights great weight, and given that the wording of the provision seems absolute; a trial is either conducted in due course of law, or it is not. However, other rights that are phrased in similarly absolute language have been subject to external qualification, and it is not clear why these rights should be treated differently.[60] Moreover, in the *NIB* case, the Supreme Court was dealing with the right to silence as an element of trial in due course of law, which in Costello J in *Heaney* subjected to external limitation analysis.[61] In a later case, Costello J chose to address the question of trial in due course of law by asking whether or not a right to confront one's accuser was included in the protections of Article 38.1, and found that it was not. Had he found that it was part of those protections, it seems he would have used *Heaney* analysis to test the limitation in that case.[62] This issue has not been precisely resolved, but it should be noted that many cases involving Article 38.1 do not invoke the *Heaney* test.[63]

Similarly, though for reasons that are less apparent, the right of access to the courts is not subject to external limitation. In the case of *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*,[64] the Supreme Court found that limiting the right of appeal to the Supreme Court, in this case with a 14 day time limit, did not of itself constitute a limitation of the right of access to the courts. Only when the limitation was "so restrictive as to render access to the courts impossible or excessively difficult it may be considered unreasonable ... and therefore unconstitutional."[65] The

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[60] See *Murray v Ireland* [1985] IR 532, discussed in Chapter 6.

[61] [1994] 3 IR 593. The Supreme Court, by contrast, recognised the right to silence as a corollary of the right to free speech. [1996] 1 IR 580.

[62] *Donnelly v Ireland* [1998] 1 IR 321 at 335-336: "I am satisfied therefore that the section does not infringe the plaintiff's constitutional right to fair procedures. As a corollary to this it follows that the right to a physical confrontation by an accused of his or her accusers is not a constitutionally protected right. It also follows that the Court is not required to consider whether the section has impermissibly restricted the exercise of a protected right."

[63] For example, the test is conspicuously absent from the abundant case law on the duty to seek out and preserve evidence; see for example *Braddish v DPP* [2001] 3 IR 127; *Dunne v DPP* [2002] 2 IR 305; *Bowes and McGrath v DPP* [2003] 2 IR 25; *McFarlane v DPP* [2007] 1 IR 134; *Savage v DPP* [2009] 1 IR 185; *Byrne v DPP* [2010] IESC 54. Rather than any Heaney test analysis, the courts asks if the failure of the Gardaí to seek out and preserve evidence has created a real risk of unfairness in the trial.

[64] [2000] 2 IR 360

[65] *Ibid* at 393.

right is clearly subject to internal limitation only. This has not always been the approach of the courts,[66] though it was adopted in a recent High Court judgment,[67] leading to an incoherent position. It is not clear why this right has been singled out for internal-only limitation.

Moreover, the Irish courts have been reluctant to apply the *Heaney* test to equality cases. Some early discrimination cases seemed willing to apply principles that were similar principles to *Heaney*.[68] However, later cases departed from this, holding that the extent of a discrimination was not be considered to form a part of its review, only its purpose.[69] The *Heaney* test, which is obviously concerned with extent, has thus not found a place as a part of Irish equality law.[70] This seems to be another example of internal limitations excluding external limitation analysis. Only

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[66] In *Murphy v Greene* [1990] 2 IR 566 at 572, Finlay CJ held that requiring the leave of the High Court to take an action against someone who had held one in psychiatric detention, as provided for by s 260 of the Mental Treatment Act of 1945 was a *"prima facie* a curtailment of the constitutional right of every individual of access to the courts to the extent that it requires a precondition of leave of the court for the bringing by him of a claim for damages for an asserted wrong." Recently, in *Blehein v Minister for Health* [2009] 1 IR 275, Denham J in the Supreme Court applied the *Heaney* test to hold the restriction in the Mental Treatment Act to be an unconstitutional interference with the right of access to the courts. This clearly envisages the right of access to the courts as being external, as it brands a restriction on access a *prima facie* restriction on the right, implying that this can be justified.

[67] In *O'Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562 McKechnie J followed its approach in declining to review a statute restricting access to the courts using the *Heaney* test. He said, as he has on previous occasions, "proportionality can have little if any role where the provisions in question breach no substantive rights," and found no such breach here. *Ibid* at 591, [58]. Looking at s. 16(12) of the European Arrest Warrant Act, 2003, requiring a certificate to be granted by a High Court judge for an appeal to the Supreme Court to be taken in a case involving a European warrant, he took an internal limitation approach, requiring an infringement of a certain severity to restrict the right; it must "not unduly infringe the applicant's constitutional right of access to the court" to present a problem. *Ibid* at 594, [66].

[68] See *Quinn's Supermarkets v Attorney General* [1972] IR 1. See Chapter 6, at note 81.

[69] In *Mhic Mhathúna v Ireland* [1995] 1 IR 484, the Supreme Court said that if a basis for the distinction exists, the courts would not look to the extent of the discrimination. The plaintiffs challenged the provision of social welfare allowance and more favourable tax rates to unmarried mothers and single parent families as a discrimination against married couples. The Supreme Court accepted that there was a legitimate distinction to be drawn between a married family and single parent family in the area of tax and social welfare, due to the difficulties that would face a single parent, both financially and in terms of lack of support and assistance from a spouse. Finlay CJ said: "[T]here are abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living together and rearing a family. Once such justification for disparity arises, the Court is satisfied that it cannot interfere by seeking to assess what the extent of the disparity should be." At 499. It might be that in light of recent developments, the equality standard is in the process is once again being gradually eroded. See Oran Doyle, "Judicial Scrutiny of Legislative Classification," (2012) 47 Ir. Jur. (ns) 175.

[70] There is an isolated instance of the test being invoked in a High Court case. In *An Blascaod Mór Teo v Commissioners of Public Works in Ireland* Unreported, High Court, Budd J., February 27th 1998, Budd J deployed *Heaney* test analysis in the context of equality. However, he used the test to judge the "invidiousness" of the discrimination, a test that had been disfavoured in Ireland, in favour of a rationality test. It is therefore an unpersuasive authority. More recently, this has not found favour with High Court judges. See *SM v Ireland (No 2)* [2007] 4 IR 369.

in the event that the purpose and rationality test[71] is failed is the right violated; short of that, no equality problem is raised. This avoids all distinctions being regarded as potentially unconstitutional, and fits the text of Article 40.1,[72] although the presumption of constitutionality and the burden of proof placed on the plaintiff would also mitigate against too many laws being presumed invalid.

Canadian courts have expressed some reservation about applying the *Oakes* standard of review in the area of equality. In *Andrews v Law Society of British Columbia*,[73] where it was questioned if *Oakes* might be "too stringent for application in all cases."[74] McIntyre J argued that the legislature "must make innumerable legislative distinctions and categorizations."[75] He argued against the *Oakes* test for review of these distinctions in cases concerning Article 15;[76] such distinctions "must not be held to the standard of perfection, for in such matters perfection is unattainable."[77] However, the Supreme Court was divided in that case, and Hogg suggests that this viewpoint has not been followed in later cases, though none of them have expressly overruled it.[78]

It might be that the reservation expressed in *Andrews* stems from the unwillingness of the Canadian courts to adopt solely internal limitation of rights. The concerns expressed by McIntyre J illustrate this; he was unnerved by the idea of almost all legislature discriminations being presumptively invalid, and subject to potentially stringent justification. Hogg shares this concern about the floodgates of equality being opened if *Oakes* applied in that context.[79] It is interesting that this was the point where the universality to the *Oakes* test comes close to waning, and the Irish courts refused to apply the *Heaney* test for similar reasons.

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[71] The old "invidiousness" standard of early cases was ultimately abandoned in favour of a rationality test. See *Brennan v Attorney General* [1983] ILRM 449 at 483; *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 IR 321. This test looked for the purpose of the law, and whether or not the law rationally pursued that objective.

[72] Article 40.1 allows the state to have "due regard to differences of capacity, physical and moral, and of social function."

[73] [1989] 1 SCR 143. 1989 CanLII 2 (SCC).

[74] *Ibid* at 43.

[75] *Ibid* at 44.

[76] Article 15 (1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[77] 1989 CanLII 2 (SCC) at 45.

[78] Hogg, note 43, at 38-45.

[79] He backs up this concern with a fascinating statistic: before the scope of the s. 15 equality clause was narrowed by the courts in *Andrews*, there were 599 s. 15 challenges in three years, the overwhelming majority unsuccessful. Most of these challenges could not be taken post *Andrews*, and so there were far fewer in its wake. Hogg note 43, at 38-7.

THE IMPACT OF DOMESTIC CONSTITUTIONAL NORMS

Comparative constitutional lawyers frequently warn of the dangers of relying on the law of foreign jurisdictions, because of the danger of overlooking some social or constitutional factors that would render the comparison futile.[80] Uniform constitutional norms, such as proportionality principle, take attention away from the fact that, in any given case, it is a particular constitution that the courts are examining. The differences between the *Oakes* and *Heaney* test put these back into focus. It is clear that the Irish courts did not, when adopting the *Heaney* test, wish to incorporate by reference the constitutional law of Canada. However, even in relation to more the technical issues of standards of review, the Irish courts have refused to follow Canadian case law, because of the role of domestic norms in those cases.[81] It is important to highlight the most significant differences between these constitutional systems as potential explanations for the divergence in the standards of review.

The Limitations Clause

First, the Canadian Charter has a general limitations clause in s 1, which can help to explain several key observations.[82] The limitation clause seems to suggest that it applies to all the rights set out therein. This means that Charter comes close to dictating external limitations on all rights. In Ireland, there is no such general limitation clause; some rights have express limitations,[83] whereas some do not.[84]

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[80] Mark Tushnet, "The Possibilities of Comparative Constitutional Law," 108 Yale LJ 1225 (1999); Mark Tushnet, "Some Reflections on Method in Comparative Constitutional Law," in Sujit Choudhry (ed.) The Migration of Constitutional Ideas 67 (Cambridge University Press, 2006); Ahron Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012) at 66-67.

[81] In *PJ Carroll v Minister for Health* case, on whether or not the State was entitled to adduce evidence of harms to illustrate justification of the *Heaney* test, even in the event that harm was conceded, the Supreme Court declined to follow Canadian authority on the point, though they ultimately reached the same conclusion: "I do not think it necessary to rely on the Canadian caselaw for this purpose. It is fair to say that the Canadian cases cited were partly determined on foot of the Canadian Charter of Rights." [2005] 1 IR 295 at 318.

[82] It reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[83] For example, freedom of speech, association, assembly and religious practice are guaranteed subject to public order and morality. See Articles 40.6.1° and 44.2.1°. Private property rights, according to Article 43, may be delimited to "reconcile their exercise with the exigencies of the common good."

[84] Article 38.1 guarantees trial in due course of law without any obvious limitation. Article 41's guarantees on Family rights similarly have no express limits.

This leaves it open to the courts to decide to adopt wholly internal limitations for some rights, and external limitations for others.[85]

Moreover, the burden of proof in respect of *Oakes* is largely dictated by the wording of the limitation clause. In requiring that limitations be "demonstrably justified," it clearly suggests that justification be affirmatively established. The burden of demonstration therefore logically seems to fall on the State, seeking to justify the limitation. In Ireland, there was no such express constitutional guidance, and therefore the courts were at liberty to choose where the burden of proof was to fall. It had, before the *Heaney* test, previously fallen on the plaintiff to establish unconstitutionality in all respects. This was retained, without discussion, and with very little subsequent disagreement.

Override

Secondly, the Canadian constitution has a caveat to judicial supremacy in rights matters: the s 33 notwithstanding clause.[86] This provision in essence allows Parliament or State legislatures to operate notwithstanding certain provisions of the Charter, thus allowing the legislature to override court judgments. There is no equivalent provision in Ireland; if the legislature is unhappy with a judgment of the courts, the only way to circumvent it is to amend the Constitution by referendum put to the people. Though this has been done on several occasions for the purpose of overruling or amending court judgments, it is in theory a substantially more cumbersome process.[87] It could be that this facility allows the Canadian courts to be

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[85] Article 38.1 is not, it seems, subject to external limits, though its internal limits may be defined by external limitations on ancillary rights. On the other hand, Article 42's seemingly unqualified rights are subject to external limitation of some sort. See Costello J in *Murray v Ireland* [1985] IR 532.

[86] Section 33 reads: "(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
(5) Subsection (3) applies in respect of a re-enactment made under subsection (4)."

[87] Gerry Whyte makes this argument in his article "Discerning the Philosophical Foundations of the Report of the Constitutional Review Group: An Analysis of the Recommendations on Fundamental Rights," *(1998) Contemporary Issues in Irish Law and Politics* 216 at 232-233. Hardiman J, writing extrajudicially, notes that it is very difficult, in practice, to organise such a referendum, precluding its use as a meaningful check on the power of courts. See Adrian Hardiman, "The Role of the Supreme Court in our Democracy," in Joe Mulholland (ed.), *Political Choice and Democratic Freedom in Ireland*, (MacGill Summer School, 2004). Conor O'Mahony has recently revisited this issue. See "Constitutional

more interventionist in spite of concerns about the separation of powers or the legitimacy of the legislature, as the legislature can ultimately have the last word.[88]

However, this difference is probably less significant than it seems, because of the reality of s 33's operation. Though it has been used extensively by Quebec,[89] it has been used very rarely outside of that province, and never successfully used by the Federal Parliament.[90] The main attempt to use this mechanism was to override the *Morgantaler*[91] decision on abortion, but support for this proposition was not forthcoming, with a great deal of controversy resulting. There have been few serious efforts to invoke the *notwithstanding* clause since.[92] At the same time, Ireland has successfully overturned court decisions on constitutional matters on several occasions via the referendum process.[93] Therefore, it is important not to exaggerate the impact of this somewhat atrophied provision of the Canadian Charter.

Remedies

Thirdly, the approach adopted to remedies in Canada is quite radically different from the approach in Ireland. While remedies seem as though they should be a separate and unrelated consideration, in fact the remedies available to the court can be intimately bound up with how courts deal with rights questions. The consequences of a law being found unjustified are obviously relevant to the court making that determination; courts will not be blind to it, even if they ought to be.[94]

Amendment and Judicial Restraint: How Restrained Should An Irish Court Be?" delivered at "The Irish Constitution: Past, Present, and Future" King's Inns, Dublin, 29th June 2012.

[88] See Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52 U Toronto LJ 221; Tsvi Kahana, "The Notwithstanding Clause Mechchanism and Public Discussion: Lessons from the Ignored Practice of Section 33" (2001) 43 J Can Public Admin. 225.

[89] Hogg, note 43, at 39-3–39-4.

[90] *Ibid* at 39-4.

[91] Peter Hogg and Alison Bushell, "The Charter Dialogue Between the Courts and Legislature: (Or Perhaps the Charter of Rights Isn't Sucha A Bad Thing After All)" 35 Osgoode Hall LJ 75 (1997) at 95-96.

[92] See JL Hiebert, "Is it too late to rehabilitate Canada's Notwithstanding Clause?" (2004) 23 Supreme Court LR (2d) 169.

[93] See Whyte, note 87, and O'Mahony, note 87, for discussion of such amendments. There is arguably ten such instances, and several more attempts which failed at referendum, though only a few of these related to rights matters.

[94] Walsh J said that the consequences of unconstitutionality should not affect judges deciding upon the constitutionality of laws in *De Burca v Attorney General* [1976] IR 38. However, the risk of this happening was acknowledged by Geoghegan J in *A v Governor of Arbour Hill Prison*, where he very honestly noted that had the Supreme Court in that case not limited the consequences of a declaration of unconstitutionality, "there would be a grave danger that judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences." [2006] 4 IR 88 at 203.

When a statute is unconstitutional in Ireland, the standard remedy is that it is struck down outright. The declaration of unconstitutionality is a strong remedy, but is considered an essential part of the judicial function in reviewing the constitutionality of legislation. Outside of this, the Irish courts are highly conservative, and the other remedial options available are very narrow. There are two other primary[95] remedies: the law can be interpreted harmoniously to avoid unconstitutionality;[96] or it can have its unconstitutional language severed.[97] Both of these remedies are strictly limited, however.[98] The reason that Ireland's alternative remedies are so limited is due to concern about the separation of powers.[99] To adopt a radical construction of a statute, or sever language that would change the meaning of a statute in a significant way, would, the courts say, usurp the legislative power, which the constitution vests solely and exclusively in the Oireachtas in Article 15.2.1°.

Canada also strikes down statutes as its key remedy, but adopts a much broader array of remedial options. The Canadian courts will occasionally strike down only particular applications of a law, rather than the law entirely.[100] Canada similarly has a double construction rule, know as *reading down*. It has a broader linguistic severance rule, even severing language that would quite radically change the scope of statutes.[101] Canadian courts are willing to read in statutory language to solve constitutional problems,[102] which cannot be done in Ireland.[103] Canadian

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[95] By primary, I mean remedies that actually address the invalidity of the statute, rather than trying to compensate for the statute's effects.

[96] The double construction rule interprets out constitutional invalidity, saving the statute from a declaration of unconstitutionality, but only when two plausible interpretations of the statute are open to the court. *McDonald v Bord na gCon* [1965] IR 217.

[97] Similarly, linguistic severance allows the unconstitutional legislation to be saved if the unconstitutionality arises from a specific and discrete potion of the legislative language. The court will strike out that language, saving the statute from invalidity. *Deaton v Attorney General* [1963] IR 170; *King v Attorney General* [1981] IR 233.

[98] Double construction is only available if both meanings are reasonably open. It does not allow the courts to interpret statutes in any radical way, or in any way that departs from the clear meaning of the text; to "do violence to the plain meaning of words." *Re Haughey* [1971] IR 217 at 254. See also *Hegarty v O'Loughran* [1990] 1 IR 148. Linguistic severance can only be done when the law would be sensible and operable after severance has taken place, and the severance cannot undermine the intention of the legislature *Maher v Attorney General* [1973] IR 140.

[99] *East Donegal Co-operative Livestock Mart v Attorney General* [1970] IR 317 at 341.

[100] This is known as "exemption." See Hogg, note 43, at 40-19. This closely resembles as-applied challenges to legislation that are common in the United States.

[101] See *Tétreault-Gadoury v Canada* [1991] 2 SCR 22; 1991 CanLII 12 (SCC) and *Benner v Canada* [1997] 1 SCR 358; 1997 CanLII 376 (SCC) where the Supreme Court severed language in order to expand an insurance entitlement scheme and an entitlement to citizenship respectively.

[102] The most famous instance of this is *Schacter v Canada* [1992] 2 SCR 679; 1992 CanLII 74 (SCC) where the Supreme Court read in language to an Act in order to extend equality of entitlements to

courts will strike down laws that create constitutional problems because of *lacunae*; that is, unconstitutionality resulting from what the law does not provide.[104] Irish courts do not find that these lacunae create any constitutional difficulty in the statute (though it may create an unconstitutional state of affairs) and therefore are unwilling to strike down the law in that case.[105] Canadian courts are also willing to invalidate laws, but suspend the effect of that action to allow the legislature time to adapt to this development.[106] Irish courts have never expressly endorsed such suspended declarations of invalidity, though similar action has been taken in several cases, and there has been some judicial support for the prospect.[107] Canadian courts do draw a line where alternative remedial options cannot be invoked by reason of the separation of powers,[108] but the courts have far more options before they reach this point than are available to their Irish counterparts.

The effect of this distinction is that when a law is found to be unconstitutional in Canada, there is a far greater likelihood of the law being retained in some form. In Ireland, in the vast majority of cases, the only available remedy will be total invalidation. It is easy to see that this could lead to hesitancy on the part of the Irish courts to intervene, because the consequences of intervention are so great. We of course cannot know if this is the case, but it is a huge divergence in practice between

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adoptive and natural parents, where natural parents had been discriminated against. See also *Miron v Trudel* [1995] 2 SCR 418; 1995 CanLII 97 (SCC) and *Vriend v Alberta* [1998]1 SCR 493; 1998 CanLII 816 (SCC).

[103] *Somjee v Minister for Justice* [1981] ILRM 324; *Carmody v Minister for Justice* [2010] ILRM 157.

[104] See *Nova Scotia v Philips* [1986] 34 DLR 633.This is obviously only necessary when language cannot be read in to solve the difficulty.

[105] *Somjee v Minister for Justice* [1981] ILRM 324; *Carmody v Minister for Justice* [2010] ILRM 157. The Supreme Court in *Carmody* managed to fashion a remedy for the unconstitutional circumstances of the prosecution of the applicant, by refusing to let the prosecution proceed unless he was granted legal aid.

[106] See, for example, *Schacter v Canada* 1992 CanLII 74 (SCC).

[107] In *Blake* [1982] IR 117 at 141-2, the Supreme Court advised lower courts to be slow to grant decrees of possession that would be allowed in the statutory vacuum left by the legislation, and advised the legislature to fill the vacuum. . In *Carmody*, the Supreme Court prohibited the prosecution of the applicant until some mechanism for legal aid was provided, encouraging swift executive or legislative action. See Paul Gallagher, "The Irish Constitution—Its Unique Nature and The Relevance Of International Jurisprudence" (2010) 45 Ir. Jur. (ns) 22; Gerard Hogan and Gerry Whyte, *J.M. Kelly: The Irish Constitution*, (4th ed, Tottel, 2004) at 893-4. Eoin Carolan, in a recent article, makes several additional suggestions, including the recent case of *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, and notes some endorsement of the possibility by Denham J in *A v Governor of Arbour Hill*.. [2006] IESC 45 at [162]. Eoin Carolan, "The relationship between judicial remedies and the separation of powers: collaborative constitutionalism and the suspended declaration of invalidity," (2011) 46 Ir. Jur. (ns) 180.

[108] This is when the remedy would be in essence "reconstruction" of the legislation. This is discussed in Hogg, note 43, at 40-21.

the jurisdictions, and it would be naïve to think that the consequences of invalidity do not play on the minds of judges.

Presumption of Constitutionality

Another key distinction, which will become central in the next chapter, is the presumption of constitutionality. In Ireland, the presumption that the legislature acts constitutionally is extremely strong, and very old. It plays a significant part in defining the scope and meaning of Irish constitutional law, and applies to constitutional rights matters.[109] In Canada, on the other hand, this is not the case. There is a presumption of constitutionality that applies to constitutional issues, but it does not apply to issues of charter rights.[110] This is because of the "innovative and evolutive character of the Charter," the courts said; it was not appropriate to give a general advantage to the state in respect of rights infringement.[111]

This has a profound effect on how rights cases are dealt with. The Canadian courts do not presumptively lean towards the legislature in rights issues; the legislature does not win in default. As we have seen,[112] and will discuss again shortly, the Canadian courts do defer the to actions of the legislature and choose not to intervene in rights questions where they feel it would be inappropriate. However, that is not the default position; it is decided based on the circumstances whether the State should be favoured. In Ireland, the default position is that the State is favoured, that its actions are presumed valid. Invariably, that will lead to a less interventionist and more deferential approach to rights questions.

Pre-existing *Acquis Constitutionnel*

The foregoing factors highlight perhaps the greatest difference between the jurisdictions at the time they adopted their similar standards of review. Ireland had a significant body of constitutional law relating to rights, and decades of court practice in the field of constitutional rights adjudication. Canada did not have a body of rights jurisprudence; the Charter was in its infancy, and only a handful of significant rights cases had been decided before the *Oakes* test was set down. The *Oakes* test was drawn up from scratch; most of those normative choices left to courts

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[109] See generally, Brian Foley, *Deference and the Presumption of Constitutionality* (IPA, 2008).
[110] Hogg, note 43 ,at 38-10.
[111] *Manitoba v Mertropolitan Stores* [1987] 1 SCR 110; 1987 CanLII 79 (SCC) at [16].
[112] See Chapter 4.

about how rights questions should be handled had never been made or considered before. The Canadian courts had great freedom in how to make those choices when they were making the test, and freedom to change those choices as the test developed.

The *Heaney* test was a new addition to a well-established *acquis constitutionnel*. The test either had to conform to that pre-existing body of law, or change it. This creates two important differences. First, the Irish courts were hugely influenced by this body of law; it had no counterpart in Canada. Many fundamental normative questions had been addressed by these older cases, either expressly or, more often, implicitly. The Irish courts were thus not as much at liberty as the Canadian courts in making normative decisions.

Secondly, this means that elements of the *Heaney* test could clash with pre-existing norms in a way that was simply not possible in Canada. The test, being incorporated from elsewhere, could conflict with long established ideas and values. If this happened, the courts could take one of the following approaches: they could ignore this conflict, and incorporate the test without change; incorporate the test without change, while explaining the reason for changing the pre-existing value; decline to incorporate the test for that reason; incorporate the test absent that element, explain this, and reflect the change in the language of the test; or change the test to avoid any conflict, without discussion or explanation, and without clear evidence of change taking place.

Where Irish courts faced such a conflict, it seems they chose the last of these options. Of course, it is also possible that the courts failed to appreciate the existence or significance of these differences, and prioritised domestic norms without even realising it.

It is obviously important that domestic values are incorporated into a standard of review. To fail to do this would refuse to acknowledge the unique nature of each legal system, and the values that matter to any given country and any given people.[113] Jackson reminds us that "constitutional law is, in part, an expression of

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[113] Jackson says that the proportionality principle "cannot serve as the exclusive tool of national constitutional interpretation without ignoring the role of national constitutions as instruments of national self-expression." Vicki Jackson, "Being Proportionate About Proportionality" 21 Const. Comment 803 (2004) at 810. Jackson, in her analysis, focuses mainly on constitutional text. However, there are lots of other factors – the *acquis constitutionnel* – that also make up domestic constitutionalism.

national particularity."[114] Margulies says that "[s]uccessful constitutions, whether written or unwritten, function on two levels: as working instruments of government, and, on a more mystical plane, as national symbols that unify the society through their emotive power."[115] Barak notes that constitutions are an implicit or explicit "expression of the national ethos, the cultural heritage, the social tradition and the entire historical experience of that nation."[116] But it is also important to note that these values are not compatible with a uniform standard of review. Barak favours what he terms "inspiration" from the constitutional laws other countries, but is mindful of the need to recognise legitimate differences between jurisdictions in the process. [117] To accommodate these concerns, a standard of review being incorporated from abroad has to be changed, sometimes in a significant way, which fundamentally alters the standard.

CHANGES BETWEEN *OAKES* AND *HEANEY* BASED ON PRE-EXISTING VALUES

Any of the differences noted above could potentially be explained by divergence between the domestic values of the legal systems in which the respective tests were developed. However, in the Irish context, these changes were not discussed or considered. The domestic values being upheld were never tested or questioned. I wish to take two examples that require particular scrutiny: first, the use of abstract review of rights questions; and secondly, the burden of proof.

First, in *Heaney*, Costello J rejected an abstract challenge to the law on the basis of a domestic rule of constitutional adjudication called the *jus tertii* rule.[118] This rule limits the arguments one can make in the context of a constitutional challenge to arguments based on one's own rights.[119] One cannot argue that the law would be unconstitutional as applied to another person; one must prove the law is unconstitutional as applied to oneself. This is primarily[120] in place because courts claim that a real plaintiff is needed in a particular case in order to decide a

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[114] Ibid at 858.
[115] Martin B. Margulies, "Standards of Review and State Action under the Irish Constitution" (2002) 37 Ir. Jur. (ns) 23 at 30 at 54.
[116] Barak, note 80, at 73.
[117] *Ibid* at 66-67.
[118] [1994] 3 IR 593 at 607.
[119] *Cahill v Sutton* [1980] IR 269.
[120] It might have a secondary function in preventing vexatious claims, but in fact there is another rule of litigation – the *locus standi* rule – that makes sure that plaintiffs have sufficient interest in the law's application to take a case. This gatekeeper rule keeps vexatious litigants at bay; the *jus tertii* rule limits the arguments made by non-vexatious litigants who pass that initial hurdle.

constitutional issue. A plaintiff gives the issue the "force and urgency of reality" that is lacking with an abstract claim.[121]

This court-made rule was incorporated into *Heaney* despite some prior indications that rationality questions similar to those involved in the *Heaney* test might not apply.[122]

In Canada, the courts have not imposed such a rule. The doctrine of overbreadth allows plaintiffs to take challenges to legislation based on third party rights in certain cases.[123]

The Irish courts never considered whether it would be better to relax the *jus tertii* rule upon incorporation of the *Heaney* test. Instead, they strictly adhered to the pre-existing rule, perhaps never considering whether this was appropriate in the context of the test that was being adopted.[124] This major inconsistency between the two jurisdictions has never been noted or discussed by an Irish court.

Secondly, as discussed here at length, the Irish and Canadian courts adopt fundamentally divergent approaches to the burden of proof. Again, Irish courts might conclude that the burden of proof being placed on the plaintiff is an essential element of the domestic legal order. The question is whether or not the *Heaney* test should be adopted if that is that case.

The *Heaney* and *Oakes* tests frame questions in a positive way: for example, are rights impaired as little as possible? This suggests an enquiry into that question

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[121] *Cahill v Sutton* [1980] IR 269.

[122] In the earlier case of *Cox v Ireland* [1992] 2 IR 503, the Supreme Court had struck down sections of the Offences Against the State Act because it was too broad; it was supposed to target subversive offenders for particular punishment, but in fact covered a wide variety of offences with no necessary subversive element. This was invalidated despite the fact that Mr Cox, the Plaintiff in that case, was probably accused of a subversive crime; he was convicted of possession of two firearms and a quantity of ammunition. Contemporary reports also suggest that Mr Cox harboured two escapees of the Maze prison, who were apprehended near his home at the same time the weapons were found. See "Teacher jailed for possession of two pistols", *The Irish Times*, February 18th 1988. The argument must have therefore been considered in the abstract rather than by reference to Mr Cox's own circumstances. However, in *Heaney*, an essentially identical argument about the same enactment was rejected by Costello J: "It is true that suspect may be arrested under s. 30 for an ordinary non-subversive type of offence if it is a scheduled offence and has not been committed for any political motive. It is unnecessary, however, for me to decide whether the powers under s. 52 could be operated validly and constitutionally in such circumstances as in this case the plaintiffs had been arrested because of suspicion of their involvement in serious subversive crimes and the section was operated for the purposes for which parliament intended it to be used." [1994] 3 IR 593 at 608.

[123] *R v Heywood* [1994] 3 SCR 761; 1994 CanLII 34 (SCC) first set out the overbreadth doctrine, and it has seen intermittent application by the Canadian courts. See Hogg, note 43, at 47-55–47-56.

[124] I have outlined a more developed version of this article elsewhere. See David Kenny, "A Dormant Doctrine of Overbreath: Abstract Review and Ius Tertii in Irish Proportionality Analaysis" (2010) 32 DULJ 25. It was surely worth consideration in light of the fact that the Court in *Cox* had rejected, implicitly at least, *jus tertii* objections to Mr Cox's claim. See above at note 122.

– that the court is searching for an answer. This is the case in Canada, where the courts will probe that issue, even if no evidence is presented by the plaintiff to raise this suggestion.

The same is not true in Ireland. These questions are dealt with only if the plaintiff overcomes the burden of proof placed upon him to show a failure to minimally impair rights. The court is in fact asking negative questions: it enquires whether or not the statute fails to impair rights as little as possible, and will be moved to act only if such failure is established. Passing this test in Ireland does not mean that there has been any affirmative case made to show minimum impairment; it merely means that no evidence has been shown to indicate the contrary. The language of the test suggests that the Court makes affirmative enquiries, and affirmative findings, but courts do not do so in reality.

Once again, a pre-existing domestic norm –in this case the belief that the plaintiff should bear the burden of proof entirely– was folded into the *Heaney* test without any discussion or debate. This norm originates from the presumption of constitutionality.[125] There was no debate as to whether that norm should be reconsidered, and there was little regard to whether or not the test articulated in *Heaney* actually fitted with that norm. The *Oakes* test was designed for a legal system that demanded demonstrable justification of rights limitations, which was almost certain to place the burden of proving justification on the State. It is unclear why it was thought that incorporation of that standard, unchanged, would fit with a legal system which embraced precisely the contrary value.

It would have been a better reflection of that norm, perhaps, to phrase the test in a negative way, as the courts did with the *Tuohy v Courntey* test. There, the central question is whether the law's balance between rights is so contrary to reason and fairness that it constitutes an unjust attack on rights. The Court is not purporting to look to fairness or justice; it rather looks for evidence of severe unfairness or injustice. This negative language indicates the stance of the Irish courts far more effectively than the positive language of the *Heaney* test. For

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[125] Foley says that the presumption is far more than a burden of proof, though Hogan and Whyte, note 107, at 846-7, find it hard to distinguish the presumption and the burden of proof. The double construction rule, which requires courts to adopt constitutional readings of statutes where this is reasonably open to the Court, traces its origins to this presumption. *McDonald v Bord na gCon (No 2)* [1965] I.R. 217. O'Mahony concurs with Hogan and Whyte's analysis, and suggests that the double construction rule does not need the presumption to stand as a rule of adjudication. See Conor O'Mahony, "Societal Change and Constitutional Interpretation," [2010] Vol 1(2) IJLS 71 at 85.

example, instead of asking was the law motivated by a pressing and substantial objective, it could ask: "is the law motivated by an illegitimate or unimportant objective?" That would be a more honest reflection of the reality of the *Heaney* test's application.

Conclusion

These are but two examples of many. There are, as noted above, many substantial divergences from the language of the test in both Ireland and Canada, from the use of minimum impairment, to the near total absence of balancing analysis.

The conclusion that can be drawn is that the language used in the *Oakes* and *Heaney* tests is misleading.

The *Oakes* test does carry with it, in its language, some normative choices. However, it is clear that these have bound neither the Canadian courts or the Irish courts in their subsequent application of the test. Moreover, the test is not complete: it does not make some fundamental normative choices about deference and interventionism that will invariably have a significant impact on how the test is applied.[126]

In Canada's case, the test adapted to ever-changing norms about how to structure the Canadian constitutional order, with the values expressed in *Oakes* changing over time, and additional normative choices being made. In Ireland, the test was moulded around long-standing and pre-existing constitutional norms, the values in the original language were abandoned, and normative choices were made

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[126] In the context of various jurisdictions, this observation has been made. Hickman says the proportionality principle "must be accompanied by a well-thought-out, clear, consistent and principled approach to its content and structure. This has not occurred. There is a real danger that proportionality will become no more than a label attached to outcome of a judge's consideration of the facts of case." Tom Hickman, "The Substance and Structure of Proportionality" [2008] PL 694 at 714. Jackson calls the principle a "necessary, but not sufficient, tool" of adjudication, saying "It may need to adopt a more complex interpretive approach that retains anchors in the particular decisions and institutions of its particular polity." Jackson, note 113, at 859. Helen Fenwick and Gavin Phillipson (in *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), quoted in Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) at 238) say there might be many proportionality tests. Aileen Kavanagh suggest variation comes from deference alone; as I have argued in Chapter 2, I think that is perhaps too narrow a view. Julian Rivers had also highlighted the incompleteness of the proportionality principle as a standard of review. "[T]he doctrine of proportionality is not already specifically designed for implementation by courts, but forms a general rationality test for the limitation of rights. Only when coupled with a theory of institutional competence and legitimacy can it adequately be implemented by courts." Julian Rivers, "Proportionality and Variable Intensity of Review," (2006) 65 CLJ 174 at 182

by reference to past cases without any discussion. In neither case does the test's application resemble the language used to describe it.

It is of course important that a standard of review accommodate matters of domestic concern. Domestic constitutional norms are part of the identity of a country and a political system; they should not be lightly given up. The problem arises when those concerns require such a substantial reworking of the substance of the test that it is no longer the same standard of review at all.

The departure from the articulated standards *Oakes* and *Heaney* means that it is misleading to say that these tests as articulated truly reflect the standard of review applied in either jurisdiction. The criticism in Ireland is more biting. Just as the proportionality principle has received international acclaim,[127] several academic commentators welcomed the arrival of the *Heaney* test in Ireland as potentially a more objective way of reviewing rights restrictions,[128] and as a potentially significant departure from the approach adopted by the Irish courts in the past.[129] It probably appeared to these authors that the Irish courts had abandoned the "habit of deference,"[130] cast aside the "deferential baggage"[131] of the past. However, while the proportionality principle might have done this in Britain, the *Heaney* test did not bring substantive change to the way the Irish courts look at rights questions.[132] The

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[127] Beatty, note 1, is its most vocal proponent in this regard; see, amongst many other parts of the book, his comments on the neutrality of the proportionality principle at 159. Tsakyris critiques the test on the grounds that it appears to be objective: "Thus it pretends to be objective, neutral, and totally extraneous to any moral reasoning." Stavros Tsakyrakis, "Proportionality: an assault on human rights?" (2009) 7 IJCL 468. Reaume similarly says that people could be taken by the test's "technical flavour," giving it "the illusion of method." Denise Reaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009 at 3. Jackson suggests that balancing "obscures the inevitability of judicial judgment about constitutional values." Jackson, note 113, at 833.

[128] Hogan in the Irish Jurist, while acknowledging that it could be used to reach different results, described the Heaney test as an "objectively structured principle" the adoption of which was "significant" because it would "reduce otherwise subjective judicial appraisals in important areas of constitutional law." Of course, as we have seen, the structure of the test is not nearly as fixed as it might appear. Gerard Hogan, "The Constitution, Property Rights And Proportionality" (1997) 32(1) Ir. Jur. 373.

[129] Hogan suggested that the reliance on Heaney meant a departure from the text of the Constitution in the area of property rights. However, Walsh would suggest that this has not, in fact, been the case, and that both within and without the context of the *Heaney* text, the constitutional text still plays a significant role. See Rachael Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31 DULJ 1.

[130] David Feldman, "Proportionality and the Human Rights Act 1998" in Ellis (ed.) *The Principle of Proportionality in the laws of Europe*, (Oxford University Press, 1999) at 139.

[131] Kavanagh, note 126, at 254.

[132] In the next chapter, it will be discussed whether or not the *Oakes/Heaney* test might have had procedural benefits in terms of the structure of the analysis, etc. These benefits might be real and substantial, but I will argue that, in Ireland at least, the courts have not acted with sufficient transparency to avail of these.

Heaney case did not portend a new departure in rights limitation analysis. The same normative values that underlay the old methods were co-opted into *Heaney*, without discussion or debate, making the new standard nearly identical in substance to the old.[133] The test was passed off as something new, something with international credentials. But the courts took their deferential baggage with them. What was ultimately adopted was neither what was seen on the face of the test, nor what was done in the country whose test was one of the primary inspirations of *Heaney*. It was just the old approach in new packaging.

As the proportionality principle grows in prominence, and its adoption is advocated in more jurisdictions,[134] the lessons to be drawn from this are not unique to Ireland or Canada. The experiences of these jurisdictions rather support a more general observation: that there can be no such thing as a uniform standard of review for rights questions. Such a standard will, unless a country is to abandon domestic values entirely, have to adapt itself to the domestic legal system of each different country, and this will cause it to depart from its language. The idea of the proportionality principle as a common vocabulary for human rights holds immense appeal, but its allure is dangerous. Behind the veil of uniform language, normative choices will be made. The uniform language of a single test succeeds only in hiding these choices, and the role they play. It might justify and buttress contestable normative decisions of courts, giving them the authority of an internally renowned and respected standard of review, circumventing proper debate on a country's constitutional values.

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[133] Ireland serves as an interesting rebuttal to the contention that the proportionality principle leads to more judicial intervention; See Alex Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" [2008] 47 Columbia Journal of Transnational Law 73 at 78. They argue: "Adopting proportionality replaces all of these standards with something akin to strict scrutiny, positioning courts to exercise dominance over both policy and constitutional development." At 79. *Cf* Part V of the paper, at 160. This can hardly be said of the Irish example. It would be difficult indeed to argue that the advent of proportionality in Ireland has increased judicial interventionism to anything even resembling strict scrutiny.

[134] Most recently, Schlink argues for the adoption of the principle in the United States, viewing it as a rule at which all courts ultimately arrive. Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere But Here?" 2012 22 Duke Journal of International and Comparative Law 291 at 302. Sullivan and Frase argue that proportionality underlies US standards of review as it stands, but their analysis rests on what I think is a confusion of the conceptual elements of standards of review with the standards themselves. See E Thomas Sullivan and Richard Frase, *Proportionality Principles in American Law*, (Oxford University Press, 2009).

10 – Deference and Interventionism, and Standards of Review: Discourse of Values in Irish and Canadian Courts

In the last chapter, we examined the divergence seen between the linguistically identical standards of review in Ireland and Canada, the *Oakes/Heaney* test. Divergence in practice is obviously influenced by differences in constitutional design and the values of these different legal systems. It would be impossible to have uniform application of a standard of review without a set of uniform values across jurisdictions, and such a set of values would ignore the role of constitutions as expressions of national identity.[1] Therefore, criticising the divergence of these standards, of itself, would be otiose.

The criticism must be more nuanced, and comes in two forms. The first criticism was aired in the last chapter: that these values may warp the test in a manner that causes it to depart from its language, and behave in a manner not consistent with its appearance. The second criticism will be explored here: that these normative values, which have a huge influence on the standard of review, may not be apparent. They might be aired and discussed, and their influence clear; or hidden away, with no clear indication of the role they play, and no opportunity to debate or discuss them.

The two jurisdictions under discussion here have had very different experiences in this respect. First, it seems that some similar rationales underlie the attitude taken to matters of deference and the choices made about interventionism. Secondly, there seems to be a difference in respect of degree, with the Irish courts making more non-interventionist choices than their Canadian counterparts, who focus on deference. Finally, and most importantly, the way in which these issues have been dealt with are very different, with Canada undergoing more than a decade of judicial discourse on the subject, while Ireland's only attempt at articulation of the principles underlying their choices in this respect ending in failure. I will argue that discussion and discourse, between academics and the judiciary, and within the judiciary itself, is crucial to the development of a standard of review, and that Ireland has failed in this respect, whereas Canada has succeeded.

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[1] Vicki Jackson, "Being Proportionate About Proportionality" 21 Const. Comment 803 (2004) at at 858.

Rationales for Deference and Non-Interventionist Choices in Ireland and Canada

As discussed in the first part of this thesis, there is no conceptual requirement that a standard of review should incorporate any element of deference or take any particular stance on interventionist choices – only that a stance of some sort must be taken, since neutrality on those issues is not possible. However, in practice, it is probable the most courts will adopt a deferential stance in at least some instances, for one of the many possible rationales outlined in Chapter 2.[2] In Ireland and Canada, the courts have been moved by similar considerations in adopting deferential stances and making non-interventionist choices, though Canadian courts have enumerated more of these rationales than Irish courts.

Expertise, Democracy and Legitimacy

The comparative advantage of legislative decision-making is a common rationale for deference and non-interventionism. As was seen in Chapter 2, this comes in several different forms. The expertise rationale holds that the legislature is qualitatively better at making decisions than the courts in some areas. The legitimacy/democracy rationale suggests that legislative decisions are superior because of the democratic accountability possessed of the elected branches of government that the courts lack. The decision is not *better* than the one made by a court, but it would be more legitimate thanks to democratic oversight. These rationales can also co-exist in particular cases. It is also important to note that the rationales are not interchangeable, and sometimes only one is appropriate. When dealing with a clash of rights/stalemate rationale, which suggests that there is no clear answer on how to reconcile competing factors, the expertise rationale cannot justify preferring the legislature's resolution, because this suggests that the legislature can create a better solution, and therefore that a solution is knowable. Therefore, in such cases, the democratic legitimacy rationale alone can apply.

Such rationales are seen frequently in Canadian case law justifying choices to defer or not intervene. It was cited by Dickson CJ in *Irwin Toy* as a key rationale for the relaxation of the *Oakes* test in certain matter, involving the allocation of scarce resources.[3] Such distributions are one of the legislature's most important functions

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[2] Chapter 2, at note 64-81.
[3] *R v Irwin Toy* [1989] Canlii 87 at 70.

as popular representatives, and the area in which they have peculiar expertise. Most areas of civil law and social policy receive deference from the courts.[4] David Wiseman argues that both expertise and democratic legitimacy underlie this deference,[5] though as noted above, this is problematic if the conflicting rights rationale justifies less scrutiny in civil cases. The expertise argument leans towards interventionism in the context of criminal rights, where the courts have generally declined to offer any deference to legislative determinations, given the courts' "accumulated experience in dealing with such questions."[6]

Limits have been placed on the deference that can be offered in this respect, because Canadian courts will not allow deference to result in the abdication of their constitutional duty to protect rights, or give the dominion over a particular area.[7]

In Ireland, socio-economic matters have long been thought to receive special accommodation. In the landmark case of *Ryan v Attorney General*, Kenny J argued that these contested matters should not be readily interfered with by the Courts:

> When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of its citizens.[8]

Foley notes that this rationale has become prevalent in recent years.[9] Later cases specifically highlighted the need to defer to the legislature, in socio-economic and other matters, because of the particular expertise the legislature had in that area,[10]

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[4] "When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function." [1989] Canlii 87 at 70.

[5] David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument," 2006 51 McGill LJ 503 at 505.

[6] *Irwin Toy,* [1989] Canlii 87 at 70-71.

[7] *RJR MacDonald* 1995 Canlii 64 (SCC) at [134]-[136].

[8] [1965] IR 294 at 312.

[9] Brian Foley, *Deference and the Presumption of Constitutionality* (IPA, 2008) at 142. He cites *TF v Ireland* [1995] 1 IR 321; *Lowth v Minister for Social Welfare* [1998] 4 IR 321; *Murhpy v IRTC* [1999] 1 IR 12, amongst others. In *Re Planning and Development Bill, 1999* [2000] 2 IR 321 at 357, Keane CJ noted that "the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to legislation dealing with controversial social and economic matters."

[10] Kenny J in *MacDonald v Bord na gCon* [1965] IR 217 at 235 said that the courts should defer in light of the "now accepted extensive role of the State in economic and social matters."

and the democratic legitimacy of that body.[11] Such rationales were also apparent in the extra-judicial writings of Costello J.[12]

The most recent articulation of this notion comes from the High Court judgment in the case of *Dellway Investments v NAMA*.[13] Kearns J, writing for a divisional court of three judges, stated that where issues of major national import were at stake, or there was controversial social and economic matters under consideration, then "a significant degree of deference needs to be afforded by the Court to the judgment of the Oireachtas as to just how far it is necessary to go in providing an adequate solution to the undoubted problems which exist."[14]

The *Tuohy v Courtney* rationality test and the Canadian jurisprudence on conflicting rights and interests, may, in reality, turn on democratic legitimacy arguments; when conflicting rights or interests are not resolved by courts, it implies that the legislature's decisions are considered to be more legitimate.

Conflicting Rights/Interests

In both Ireland and Canada, a clash of rights and values has been a core rationale for deference, and non-interventionist choices to adopt weaker standards of review.

In Canada, the criminal/civil law distinction that developed in the early Canadian case law was motivated in large part by this concern. In *Irwin Toy*, Dickson CJ framed the State as the singular antagonist of liberty in the criminal sphere. On the other hand, when the legislature acted in the civil context, it was more often than not "striking a balance between the claims of competing groups."[15] The legislature acted to defend and protect liberties as well as restricting them; it was a zero-sum game, and the intervention of the courts to protect one set of liberties would

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[11] See Keane J in *Kavanagh v Government of Ireland*, [1996] 1 IR 321. This rationale also finds indirect expression. In *JD v Residential Institution Redress Board* [2009] IESC 59, the State argued for a heightened level of deference because the issue in that case – the eligibility for redress for those subject to abuse in residential institutions – was "an exceptionally sensitive social issue." Presumably, the reason that decisions of such senstivity should be left to the legislature is one of legitimacy.

[12] Balancing rights and the common good depended on "knowledge and study and assessment of complex social and economic condition the courts will exercise a deference to the organ of the government best suited to make such a judgement and will not interfere with it unless for clear and compelling reasons." Declan Costello, "Natural Law, the Constitution, and the Courts" in Patrick Lynch and James Meehan (eds.) *Essays in Memory of Alexis Fitzgerald*, (Incorporated Law Society of Ireland, 1987) at 117.

[13] [2010] IEHC 364.

[14] *Ibid* at [10.18].

[15] 1989 CanLII 87 (SCC) at 70.

invariably mean that another set of liberties was not protected. The balance to be struck was one that warranted deference from the courts that they would not give when the State was restricting liberty without the protection of another, similar interest as the goal of the law. As noted above, the underlying justification for this must be democratic legitimacy, or certainty, to explain why the legislature, not the court, should resolve the stalemate.

The criminal/civil laws category collapsed, in no small part because of its focus on the conflict of liberties that underlay civil laws. It became apparent that criminal laws, too, could defend the liberty of others, even in a direct way. Casting the State as the singular antagonist of liberty is not accurate.[16] Moreover, all criminal laws protect the liberties of others in an indirect sense, by preventing, deterring and prosecuting crime. Therefore, the clash of liberties category could eventually extend leeway to the State in all law-making; at this point, it would stop being a question of deference, as it would fundamentally change the way that review of laws was conducted. It would be a choice not to intervene when conducting rights review. The categorisation therefore collapsed and was replaced by a consideration of contextual factors, where issues such as this considered in particular cases, without any rigid categories.

It is difficult to tell to what extent this consideration survived the collapse of categorisation, and lives on in the modern, contextual approach. It might be that the rigid and much maligned[17] notion of liberty adopted by the Supreme Court in the early years of the *Oakes* test proved unworkable, and no longer plays any meaningful role in Charter adjudication.

In Ireland, on the other hand, this rationale is still in the ascendancy thanks to the continued prevalence of the *Tuohy v Courtney* rationality test. In the *Tuohy* case, the Supreme Court held that deference was due to the State whenever a law represented a clash of rights or constitutional duties. Where the legislature was balancing such rights and duties – restricting some rights in order to vindicate others – the Court found that:

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[16] Indeed, the incoherence of the category, which caused its collapse, was caused in significant part by the fact that the conflicting liberties did apply to criminal cases, in spite of the initial assertion to the contrary. See *R v Chaulk* 1990 CanLII 34 (SCC) and *R v Downey* 1992 Canlii 109 discussed in Chapter 4.

[17] See, amongst others, Andrew Petter and Patrick Monahan, "Developments in Constitutional Law: The 1986-1987 Term", 1987 10 SCLR 61; Robin Elliot, "The Supreme Court of Canada and Section 1 — the Erosion of the Common Front" (1987) 12 Queen's L.J. 277; Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limitations" 2002 40 Osgoode Hall LJ 377.

> the role of the courts is not to impose their own view of the correct balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.[18]

The statute in question –the statute of limitations– attempted to balance two pre-existing constitutional rights: the right to succeed in litigation, and the right to be free of unjust an burdensome litigation.

In this form, the *Tuohy* test was motivated by precisely the same concerns as the Canadian courts' jurisprudence on conflicting rights and liberties. It was also clearly motivated by a belief in either the expertise or the legitimacy of the legislature; either the legislature was better at solving these clashes, or, in the case of a stalemate of interests, the decision of the democratic branch of government should prevail.

This was the clear starting point of *Tuohy v Courtney* rationality. However, as discussed in Chapter 7 and again below, later cases invoke the test with little mention of this conflicting rights rationale, and it is unclear how influential it is in the test in its present application.

Additionally, the socio-economic deference suggested by Kenny J in *Ryan* was based in part on the need for balancing concerns in this area.[19] This aspect of the dictum was stressed in certain later cases.[20]

There is one possible Irish example of a vulnerable groups rationale, similar to the Canadian case law on that subject.[21] As noted in Chapter 7, the Supreme Court in *Re Health Amendment Bill* did note the vulnerability of the individuals targeted by the law in finding it to be invalid.[22] This could have been a denial of deference because of the vulnerability of the rights holders, though it is not entirely clear if

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[18] [1994] 3 IR 1 at 47.

[19] Kenny J spoke of "reconciling" different concerns in this area. [1965] IR 294 at 312-313.

[20] Foley, note 9, at 142, notes this in *Salafia v Minister for Environment* [2006] IEHC 61.

[21] Chapter 4, at note 55-68.

[22] O'Dell and Whyte suggest that the case stands for the proposition that there is "heightened judicial scrutiny of legislation that primarily effects vulnerable persons of modest means." Eoin O'Dell and Gerry Whyte, "Is this a country for old men and women? – In Re Article 26 and the Health (Amendment) (No 2) Bill 2004," (2005) 27 DULJ 368 at 390. See also Oran Doyle and Gerry Whyte, "The Separation of Powers and Constitutional Egalitarianism after the Health (Amendment) (No 2) Bill Reference," in Eoin O'Dell (ed.), *Older People in Modern Ireland – Essays on Law and Policy* (First Law, 2006) 393 at 415.

that affected the deference owed to the State, or was rather a factor that exacerbated the harm done by the property rights restriction.

Differences in Rationales Adopted

Though there are certain similarities in the rationales for deferential or non-interventionist choices given by the Irish and Canadian courts, there are also significant differences which must be highlighted.

Canadian courts have cited numerous rationales that have never taken hold in Ireland. There is no direct equivalent of the Canadian courts' refusal to defer to legislative judgments restricting rights that were particularly strong,[23] though a recent Supreme Court judgment shows very strict scrutiny of denial of fair procedures.[24] Canada's fairly well developed deference on the basis of conflicting or contested empirical evidence has not been matched in Ireland.

On the other hand, the burden of proof in Ireland seems clearly to be based on the presumption of constitutionality,[25] under which laws are presumed to conform to the Constitution unless and until the contrary is established. I believe the presumption is directly related to the separation of powers. Quite aside from the expertise of the legislature, or its democratic legitimacy,[26] it is owed deference in the eyes of the Irish courts because of its institutional role, specifically and exclusively vested in it by the Constitution. That rationale seems to have no equivalent in Canada, where there is little discussion of this aspect of the separation of powers as an independent value that could motivate deference and non-interventionism. The fact that no presumption of constitutionality vests in statutes that restrict Charter

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[23] Chapter 4, at note 119.

[24] In *Dellway Investments v NAMA* [2011] IESC 14, the Supreme Court took a dim view on limitations on the constitutional right to basic fair procedures, in particular *audi alteram partem*. Though restrictions on the rights were acknowledged, they had to be specific and limited. Per Hardiman J at 74-78. Even if notice and participation might have to be denied at initially, where notice would frustrate the purpose of the action (see for example *O'Callaghan v Commissioners of Public Works* [1985] ILRM 364) but even then, fair procedures should be offered as soon as practicable after the fact. (See *DK v Crowley* [2002] IR 744.) It is not clear if the Court thought outright denial for an indefinite period was ever acceptable. However, if this was an indication of particular privilege for this right over others, this was not said in the judgment, nor had it been discussed in other cases, so this is purely an inference from the way the right was treated in the *Dellway* case. For more on the *Dellway* case, see David Kenny, "Fair Procedures and Irish Administrative Law: Toward A Constitutional Duty to Act Fairly in *Dellway Investments v NAMA*," (2011) 34 DULJ 47; Ailbhe O'Neill, "Fair Procedures – An Inviolable Constitutional Requirement?" (2011) 33 DULJ 319.

[25] See discussion in Brian Foley, "The *BUPA Ireland* Case and Constitutional Litigation," (2010) 45 Ir. Jur. (ns) 230. Hogan and Whyte suggest that it would be hard to characterise the presumption of constitutionality as doing much more than placing the burden of proof. Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th ed, Butterworths, 2003) at 846-847.

[26] On this point, Foley and I disagree, and I will take this up further in the final chapter.

rights[27] illustrates that Canada, unlike Ireland, values the judicial function in the protection of rights as more important than this particular aspect of the separation of powers.

As will be discussed, the single greatest difference between the jurisdictions is the level of discussion and analysis devoted to this topic by the courts. In Canada, the courts deal with the rationales for deference directly and frequently. By contrast, Ireland lacks detailed judicial discussion about what the Irish courts do in this respect or why they do it. Therefore, we cannot with as much certainty say what factors do or do not motivate the Irish courts. It is possible that concern for certain groups or certain rights might prompt the courts to be less deferential than they might otherwise be. If that were the case, it would be very difficult to tell.

The Extent of Deferential and Non-Interventionist Tendencies

The reliance on certain similar rationales for deference and non-interventionism in Ireland and Canada has not led to similar results. Indeed, though Canadian courts have far more to say about these issues, it would be wrong to conclude from this that they are more likely to offer deference to the state's assessment of an issue or make non-interventionist choices. The Irish courts, despite their relative silence on the issue, are more prone to these tendencies.

Moreover, the Canadian courts primarily deal with deference; they tend to afford additional weight to particular choices, while retaining residual discretion to intervene in a strong way when this is appropriate, and countervailing factors are at work. Irish courts, on the other hand, have tended toward non-interventionism, with standards of review declining to ask certain questions rather than changing how the answers are to be treated.

Tracking the use of deference in Canada, it is clear that it has not eroded entirely the potency of the *Oakes* test. Laws still frequently fail the test, in particular the minimum impairment limb.[28] Looking at the how the test is applied, we might say that the test is less stringent than it seemed to be in the *Oakes* case, or even that it is less stringent than the language of the test might suggest.[29] However, it would

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[27] *Manitoba v Mertropolitan Stores* [1987] 1 SCR 110; 1987 CanLII 79 (SCC). See Chapter 9, at note 111..

[28] Chapter 5, note 118-147.

[29] See Chapter 5, "Conclusion."

be hard to say that it is without force, or that it has been entirely eroded, given the significant and numerous ways which it renders law invalid.

By contrast, the two standards of review in Ireland leave very little scope for the invalidation of laws, and render the invalidation of laws unlikely. Certainly, laws still fail the test, but they are few in number. Having regard to the minimum impairment test, for example, the number of successful invocations of the test in Ireland is few indeed.[30] The standards of review used by the Irish courts regard laws less suspiciously than their Canadian counterparts. This can be seen by examining the way in which considerations of deference, and choices about interventionism, have influenced the developments of the standards of review in each jurisdiction.

In Canada, there have been several significant changes in the way the *Oakes* test has applied that can be directly related to concerns about deference and interventionism: the change to the rational connection test, and the change to the minimum impairment test.

The rational connection test under *Oakes* was probing indeed, demanding very close tailoring, and seemingly tolerating very little over-inclusiveness from laws.[31] This changed almost immediately. In *Edwards Books*, it was all but abandoned when Dickson CJ said laws "need not be tuned with great precision in order to withstand judicial scrutiny."[32] Though that was said specifically in relation to business regulation, it led to a wide relaxation in the standards of rational connection required by the courts. Courts now looked to whether the ends were furthered by the means;[33] inclusiveness was not cut out entirely, but these issues no longer played a significant role in this examination.[34] The courts could still assess if laws were over-inclusive, but would treat the answers and explanations of the state

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[30] These cases were dealt with in Chapter 8. I believe there are three clear cases: *DK v Crowley* [2002] 2 IR 744, *King v Minister for Environment* [2007] 1 IR 296 and *Ryan v Dunnes Stores* [2002] 2 IR 60. There may be others which I have not noticed. There is then a category of cases where the law might have failed due to minimum impairment, but this is not entirely apparent, such as *Blehein v Minister for Health* [2009] 1 IR 275, where the law, it seems failed all the limbs of the test. Other cases, such as *McCann v District Judge Monaghan* [2009] 4 IR 200 and *Re Article 26 and the Employment Equality Bill* [1996] could be regarded as minimum impairment cases, but I see them as relating to breadth and rational connection. Whichever way one wishes to count, there are still far fewer than the dozen or so Canadian examples listed in Chapter 5, which is not at all an exhaustive list of the Canadian cases that have failed the test. Even having regard to the size of the jurisdictions, the number in Ireland is very small indeed.

[31] Chapter 3, at note 76.

[32] *R v Edwards Books and Art* 1986 CanLII 12 (SCC) at [130].

[33] *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232; 1990 CanLII 121 (SCC).

[34] See Chapter 5, note 47-61.

far more deferentially in that regard. The nature of the proof required to establish rational connection was also weakened, with self-evidence becoming an acceptable mode of proof in this context.[35]

The most significant of these changes was the way in which the minimum impairment test was altered. It was acknowledged almost immediately that the form of language used in the *Oakes* test was too strong, and in *Edwards Books* the standard shifted to impairing rights "as little as is reasonably possible."[36] Rather than being concerned with where to draw the "precise line,"[37] the courts became concerned with whether or not the legislature had a "reasonable basis"[38] preferring the more intrusive means chosen. While the test did become weaker, moving to a rationality- rather than a correctness-based approach, it did not lose its strength entirely. In particular, the Supreme Court's extreme distrust of blanket bans meant that many laws failed to pass minimum impairment because of their sweep.[39] Even when some reason was forthcoming to explain the choice, it was possible that the reason would simply not be good enough.[40]

This was very clearly the application of deference. It did not fundamentally alter the question asked; alternatives were still to be considered, but there was a change as to how the answer to the question was dealt with. Rather than demand the government adopt the least restrictive means, they would instead only demand that the government acted reasonably, or rationally, in choosing its means. However, this meant that in the appropriate case, laws would still fail, where alternatives should be adopted. It did not take the idea of alternatives off the table entirely.[41]

This is true of most of the significant changes to the *Oakes* test;[42] the usual result was deference in particular cases rather than non-interventionist changes in the standard of review.

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[35] Chapter 5, note 62-70.
[36] 1986 CanLII 12 (SCC) at [131].
[37] *Ibid* at [147].
[38] *Irwin Toy* [1989] Canlii 87 at 71.
[39] Chapter 5, at note 118-137.
[40] See, for example, *Edmonton Journal v Alberta* [1989] 2 SCR 232; 1989 CanLII 20 (SCC).
[41] Some cases did suggest that there should be no change in efficacy; *R v Downey* 1992 CanLII 109 (SCC), for example. These cases clearly did not prevail, as many or most of the blanket ban cases cut against this. It might be that the explanation for this variation is the incorporation of balancing into this exercise, with the strongest cases seemingly going farther than deference alone can coherently explain.
[42] For example, the proof required for objectives changed the standard expected of answers, but did not change the fact that the question was asked. Despite the *Oakes* test's strict standards, demanding that the state provide evidence and proof of the matter it had to establish to justify a rights limitation,

On the other hand, Irish courts make non-interventionist choices, changing fundamentally the way in which questions were asked, or making an entirely new standard of review.

In relation to the *Heaney* test, whilst some of the divergences from the language of the test might result from deferential rather than non-interventionist choices,[43] two of the most significant choices clearly go beyond deference. First, the manner in which Ireland dealt with minimum impairment seems to result in non-interventionism in a way that the Canadian jurisprudence does not. Rather than simply changing the way that alternatives were considered, and looking at whether alternatives were reasonably or unreasonably disregarded, the Irish approach seems to have moved further.[44] The more recent Irish approach seems to eschew any consideration of different means, and instead only looks to whether or not the means chosen were excessive.[45] That is not a matter of deference, as it does not alter merely the way that the reasons for eschewing alternatives are treated. Instead, it changes the question entirely, by declining to look to different means at all, and exclusively focusing on excessiveness. It was a choice which reduced the likelihood of intervention generally, rather than deferring to any choices made by the State in a given instance.

Similarly, and even more significantly, the choices made about the burden of proof are non-interventionist choices. As noted in the previous chapter, placing the burden of proof entirely on the individual changes the nature of the enquiries that form part of the *Heaney* test from positive enquiries to negative ones. What are said to be genuine enquiries as to justification are in fact enquiries into lack of justification. In setting the default position in favour of the State and upholding the law in all cases, and assuming justification, the test is fundamentally changed in a non-interventionist way, so that far fewer laws will be jeopardised. Unlike deference, which operates in particular cases where appropriate, this operates in

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the self-evident of the importance of a measure was accepted by the Canadian courts as mode of proof; this began with Dickson CJ in Oa*kes* itself: 1986 CanLII 12 (SCC) at [76]. Similarly, the self-evident importance of communal rest days was accepted in *Edwards Books* 1986 CanLII 12 (SCC) at [126].

[43] The self-evidence of objectives, which is also a feature of Irish law, would be an example of a deferential approach. See Chapter 8, note 53, citing *King v Minister for the Environment* [2007] 1 IR 296 at 313-314, [33].

[44] The approach in *Murphy v IRTC* [1999] 1 IR 12 could be seen as a deferential approach; see Chapter 8 at note 158-162.

[45] The *Murphy* approach seems to have been superseded later cases. See Chapter 8, the rule against excess section. Chapter 8 at note 169.

every case, and on every point of justification. The burden of proof is evidence of the Irish courts' non-interventionist approach; it is not the cause. The cause is the courts' choice to focus on the presumption of constitutionality, and the values that underlie that constitutional tenet.

Even more obvious is the fact that the one clear articulation of a reason for a deferential or non-interventionist approach by the courts led to its own, independent standard of review, the *Touhy v Courtney* test.[46] Whereas concerns about conflicting rights led to deference in Canada, especially having regard to minimum impairment, in Ireland a dedicated standard of review for such cases was created. It was a standard that would look to intervene only where the rights of one side were unreasonably ignored, reflecting the fact that a negative rather than a positive enquiry was taking place.[47] The choices of the Irish courts again lead to non-interventionism rather than merely deference.

Deferential and non-interventionist choices can have similar underlying rationales. It is fair to say that, for the most part, Canadian courts have invoked these rationales to justify deference, whereas the Irish courts have used similar rationales to make non-interventionist choices. The significance of these differences comes into play when considering the likelihood of laws being invalidated. Contextual considerations of deference, as seen in Canada, can be more readily displaced than the ever-present non-interventionist tendencies of the Irish courts. These are ubiquitous, and are design choices that other courts cannot displace in future; they change the standards of review in a fundamental way. The attitudes of the Irish and Canadian courts diverge in certain respects that might seem minor, but are, in fact, most significant. These differences have profound consequences for the way in which laws are reviewed, and the strength of the courts' protection of rights; rights are not as well-protected in Ireland as in Canada as a result.

Discourse and Values: what Canada has that Ireland lacks

The most important distinction between Canada and Ireland is perhaps not the specific choices they have made about deference and interventionism, but the

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[46] [1994] 3 IR 1.

[47] The courts would not care about whether or not the measure was justified; they would case only about patent lack of justification. In so doing, the courts adopted some weak standards of tailoring, and seem to eschew balancing altogether, presumably premised on the idea that when such a clash exists, the goal of balancing the rights in question is justification enough for the legislative action.

manner in which they make them. Canada dealt with them through rigorous discussion and debate, with academic commentary and judicial opinion engaging in a discourse on the values of the Canadian Charter, their importance, and the best way to reconcile them with the protection of rights. Ireland did not deal with these issues at all. At the time of incorporation of the *Heaney* test, there was no real discussion or debate about the values that underlay the test. The values pre-dated the test, and were folded in without any comment, or any acknowledgment of the role they play. The one attempt to define the importance of certain values and discuss how to deal with them was the *Touhy v Courtney* test, where the Supreme Court at least attempted to discuss and enumerate values of the Irish legal system that lay behind their choice, albeit not as extensively or as precisely as one might like. While a positive attempt, it did not lead to any sustained analysis of these issues, with subsequent courts applying the test with little if any regard for the values that were expressed at the time of the test's creation. Canada shows the value of transparency; Ireland shows the poverty of the *Oakes/Heaney* test when transparency is absent.

Discourse and Values in Canada

As discussed in detail in Chapter 4, Canada's attempt to grapple with the problem of deference and non-interventionism led to a system of *a priori* categorisation of certain cases as either meriting strong review or not. This was typified by the criminal/civil distinction, with criminal laws prompting ready interventionism, but civil laws prompting far less.[48] This system of categories collapsed when it became apparent that the lines drawn between them were stilted and artificial, and when it became apparent that certain laws in each category did not deserve the treatment they should the category suggested.[49] These categories have been replaced with a more fluid system of contextual considerations which may sway the court towards or away from deference if they are present in a particular case.[50] This avoids the stilted formalism of categorisation, allows for deference to be present when appropriate in individual cases without blanket non-interventionism.

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[48] Chapter 4, at note 24-30.
[49] Chapter 4, at note 31-54.
[50] Chapter 4, at note 71-84.

This process of the courts grappling very openly with these considerations was of considerable benefit. In the first place, it gives a clear sense of the Canadian courts think are relevant considerations in this regard. Even when particular categories could not survive -such as the criminal/civil distinction- the considerations that gave rise to that distinction could survive as contextual factors.[51] The importance of these factors became apparent when the courts had to debate and discuss the process they used, and its strengths and weaknesses. When the courts were forced to abandon categorisation as a failed effort, they admitted their approach was too blunt, requiring nuance. In dismantling the categories, they could see what concerns underlay them, and which of those concerns should be considered seriously. In fact, the transformation of the *Oakes* test in the wake of *Edwards Books* is a consequence of gradual realisations about deference and the difficulties faced by legislatures that would justify deference in rights cases.[52] The failure of categorisation was of immense value for the courts to develop their understanding of these issues, as it crystallised which factors were important in the consideration of deference.

Moreover, this process came about thanks to a fruitful dialogue, not merely between legislatures and courts,[53] but between different judges, and between courts and academic commentators. Three points are noteworthy. First, the openness of the judicial approach allowed academic commentators to engage with the court's choices directly, which they did in detail and at length. At the time of *Oakes* and *Edwards Books*, commentators such as Eliot[54] and Petter and Monaghan[55] were prescient in predicting on what basis the jurisprudence would develop. Eliot pointed out the rule against over-inclusiveness that *Oakes* seemed to endorse was highly

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[51] For example, the clash of liberties factor, the expertise and legitimacy of lawmakers in respect of social policy decisions, and the strength of rights considerations are all contextual factors. See Chapter 4.

[52] This is clealry acknoweldged by Choudhry; his postulated "real legacy" of Oakes is the realisation on the part of the courts of the difficulties of legislative uncertainty, and the need to accommodate this into consideration of rights. Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 S.C.L.R. (2d) 501 at 505 at 516

[53] Dialogue in the Canadian constitutional context usually has this meaning, thanks to Hogg and Bushell. See Peter Hogg and Alison Bushell, "The Charter Dialogue Between the Courts and Legislature: (Or Perhaps the Charter of Rights Isn't Sucha A Bad Thing After All)" 35 Osgoode Hall LJ 75 (1997).

[54] Robin Elliot, "The Supreme Court of Canada and Section 1 — the Erosion of the Common Front" (1987) 12 Queen's L.J. 277.

[55] Andrew Petter and Patrick Monahan, "Developments in Constitutional Law: The 1986-1987 Term", 1987 10 SCLR 61.

problematic, and would bring government to a halt if not relaxed, and suggested a way to distinguish *Oakes* by reference to the severe consequences of criminal sanction.[56] He suggested that the court viewed the State as the antagonist of liberty in criminal cases, but not in civil cases.[57] Petter and Monaghan also noted the idea of distinguishing criminal cases from the "wary pragmatism"[58] of *Edwards Books*. However, they warned that the Supreme Court's view was skewed, and that it risked ignoring the role of civil laws in protecting liberty.[59]

This sort of engagement was rendered possible because of the openness of the courts' reasoning. Some of these flaws in that reasoning were even suggested in inchoate form in Supreme Court judgments that took a different view.[60] Early commentators could see from the *Oakes* and *Edwards Books* decisions what the Supreme Court's views were, and thus how they were likely to develop. This enabled flaws to be highlighted, and certain choices praised or criticised for the values that they reflected. This openness continued as the Supreme Court's considerations became more precise and nuanced, and new developments were similarly open to critique and comment because it was done with relative clarity.

Secondly, the academic discourse seemed to feed into judicial practice, or at least predicted it. These academic commentators predicted both the rise of the *Irwin Toy* categorisation and its downfall. They foresaw that the Supreme Court would adopt this categorisation approach, and critiqued it long before these flaws would become apparent in the case law.[61] Other categories were also the subject of detailed academic discussion and criticism.[62] These problems were acknowledged by the courts as these categories were gradually set aside and abandoned in favour of contextual considerations. Similarly, these further developments were subject to

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[56] Robin Elliot, note 54, at 318.
[57] *Ibid* at 318 and 335.
[58] *Petter and Monahan*, note 55, at 64.
[59] *Ibid at 67.*
[60] See La Forest J's concurrence in *Edwards Books*: "attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected." 1986 CanLII 12 (SCC) at [183].
[61] Though apparent in *RJR MacDonald v Canada* 1995 Canlii 64 (SCC), they were not fully enunciated until *Thompson Newspapers v Canada* 1998 CanLII 829 (SCC).
[62] Ruth Colker, "Section 1, Contextuality and the Anti-Disadvantage Principle", 42 U Toronto LJ 77 at 84; Choudhry, note 52; Lise Gotell, "Shaping *Butler*: The New Politics of Anti-Pornography" in Brenda Cossman, Sharon Bell and Lise Gotell (eds.) *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (University of Toronto Press, 1997); Lara Karaian, "Troubling the Definition of Pornography: Little Sisters, a New Defining Moment in Feminists' Engagement with the Law?" 2005 17 Canadian Journal of Women and the Law 117. Leon Trakman, William Cole-Hamilton, Sean Gatien, "*R v Oakes* 1986-1997: Back to the Drawing Board," 36 Osgoode Hall LJ 83 at 107.

detailed commentary.[63] Conflicting viewpoints and other approaches were espoused in dissenting judgments.[64] Courts regularly engaged with academic commentators on the nature and meaning of the *Oakes* test, and continue to do so.[65] Academic and judicial criticism enabled more nuanced judicial decisions on these choices and values.

Thirdly, this dialogue meant that the values espoused by the Supreme Court were subject to debate. These choices were not made opaquely, behind the closed doors of judges' chambers. Instead, they are clear from the judgments of the Court. They can be thus be discussed and critiqued, by both academics and judges –as we have seen– and by politicians, who had the choice to engage with the court and disagree with it on these matters.[66] Moreover, the gradual evolution of the Supreme Court's attitude on these matters shows that it was not a closed book, and the decisions in this respect have been open to revision.

This is not to say that Canada does not have failings in this respect; some areas could benefit from more clarity and discussion. For all the care and detail that has gone into the discussion of deference, there has never been a clear articulation of what considerations go into the balancing process.[67] It is not entirely clear to what extent balancing has in fact worked its way into the minimum impairment analysis, which makes the nature of the balancing process even less clear.[68]

In spite of these imperfections, the judicial approach to the *Oakes* test shows transparency in respect of the values surrounding deference and interventionism. These decisions must be made by courts to have applicable standards of review, and are rarely, if ever, governed entirely by constitutional design. In Canada, the courts have dealt with this reality openly. These choices are not hidden away, disguised as

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[63] Choudhry, note 52; Alyn Johnson, "Abdicating Responsibility: the Unprincipled Use of Deference in Lavoie," 42 Alta. L. Rev. 561 2004-2005.

[64] See, for one of many examples, the dissenting judgments of La Forest and McLachlin JJ in *Downey* [1992] 2 S.C.R. 10; 1992 Canlii 109.

[65] For example, in the recent case of *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567; 2009 SCC 37 Canlii at [75], McLachlin CJ takes on a suggestion by Peter Hogg (at 38-12) that balancing is rendered essentially redundant by the existence of the important objective requirement, and gives a strong defence of the balancing test. In the same context, she invokes points made by Ahron Barak in his article "Proportional Effect: The Israeli Experience" (2007) 57 *UTLJ* 369.

[66] See Hogg and Bushell, note 53, on what they term "legislative sequels", and their sequel to that article; Peter Hogg, Alison Thornton and Wade K. Wright, "Charter Dialogue Revisited– Or 'Much Ado About Metaphors'"[2007] 45 Osgoode Hall LJ 1. See also Choudhry, note 52, at 520, discussing the legislative response to *R v Seaboyer* [1991] 2 S.C.R. 577 invalidating a law preventing rape victims being cross-examined as to their sexual history.

[67] Chapter 5, at note 149-157.

[68] Chapter 5, at note 148.

background realities that needed no discourse and could not be altered. The courts were willing to admit that these were choices about values; that just as they were made, they could be unmade; and this admission allowed for a dialogue on Charter values that was not exclusive to the judiciary. This is no small thing.

The Failure of Discourse in Ireland

In Ireland, by contrast, the approach to standards of review is entirely incoherent; as Margulies put is, "all over the ballpark."[69] The language of the test is so incongruous with its application, and these divergences have never been explained.

Doyle has noted that, in the equality context, "the courts seldom advert to differences between the standard of review which they articulate and standards articulated in the other cases."[70] This could just as easily be said of the changes taking place in the *Heaney* test. In fact, the problem runs deeper, Irish courts do not even explain the reasons for the standards chosen in any individual case, let alone explaining its relation to others. The values at play in any given case are often opaque, and in the event that the standard changes, it is difficult to figure out why. Deference and non-interventionism are obviously significant, but their role is rarely clear; Foley notes that choices made about deference are "implicit or latent rather than express or articulate."[71]

This means that the *Heaney* case law lacks the praiseworthy elements of the *Oakes* test dialogue. The courts have not admitted the varying concerns that play into deference and non-interventionism, except for the infrequently mentioned criteria discussed above. Moreover, given that the decisions tend to result in non-interventionism as opposed to merely deference, this may result in Irish courts not

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[69] "Standards of Review and State Action under the Irish Constitution" (2002) 38 *Ir Jur* 23 at 30. Margulies insists on comparing Irish standard of review to those used in the United States, which is an entirely unhelpful and unenlightening comparison, as he seems not even to account for the most basic distinctions between them. However, in so doing, he offers a succinct summary of the how the language of the test is incongruous with its application, and the lack of guidance on the meaning of balancing, taking the *Murphy v IRTC* case as an example: "This confuses the standards utterly. The requirement of rationality and non-arbitrariness, of course suggests rational basis review. The minimum impairment requirement – what Americans would call the least-restrictive means test – suggest strict scrutiny. And the proportionality language is circular, for when one speaks of proportionality one is really asking how much over-inclusiveness a court will tolerate, and the answer depends upon the standard of review." At 37

[70] Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004) at 130.

[71] Foley, note 9, at 136.

analysing these factors, considering them to be static, background realities, rather than contested choices.[72]

In light of this, it is unsurprising that academic commentary has not been able to keep pace with and predict the approach of the Irish courts. Aside from Hogan's landmark article,[73] little attention was given to fleshing out the *Heaney* test and its precise meaning in its early years. The lack of openness in the Irish courts made such commentary difficult, if not impossible, to produce. Given the complex and possibly indecipherable web of decisions, it is not surprising that analysis has had to come from detailed, *ex post facto* examination of long periods of practice for any meaningful conclusions to be drawn. It was far more difficult for Irish academia to see what the courts were doing and critique it. Strides have been made in recent years. Doyle's work went a long way toward unravelling the tangled standard at work in the field of equality rights.[74] Walsh's re-examination of property rights reassessed the work of the *Heaney* test in that area in a more critical light.[75] Foley's extensive work on deference has shed light on that topic in several different areas, and made inroads into the *Heaney* test's problems.[76] But this is still a very recent development, and further work is needed before the breadth and scope of the Canadian literature could be rivalled. Moreover, there has been no indication of judicial cognisance of this scholarship in Ireland.

It is impossible to know if this is the case, but it might be that these problems are exacerbated by the lack of judicial dissent on constitutional points in Ireland. This is thanks, in large part, to the "one judgment rule" of Article 34.4.5°, whereby when ruling on the constitutionality of a law, the Supreme Court may only issue a single ruling, and no dissent may be published or even acknowledged.[77] This means

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[72] As was discussed in the previous chapter, this is exacerbated by the fact that these choices have probably been carried over from older cases without consideration or analysis, or assessment of whether or not those values fit with new standards of review.

[73] Gerard Hogan, "The Constitution, Property Rights And Proportionality" (1997) 32 Ir. Jur. (ns) 373.

[74] Doyle, note 70.

[75] Rachael Walsh, "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31 DULJ 1.

[76] Foley, note 9; "Diceyan Ghosts: Deference, Rights, Policy and Spatial Distinctions" (2006) 28 *DULJ* 77; "The Proportionality Test: Present Problems", (2008) 1 *Judicial Studies Institute Journal* 67.

[77] This was introduced by the Second Amendment to the Constitution, an omnibus amendment passed just before the expiration of the power to amend the Constitution by ordinary legislation. These provisions were apparently provoked by the case of *Re Article 26 and the Offences Against the State Amendment Bill, 1940* [1940] IR 470. Though no dissenting opinion ever in fact came to light, John Dillon TD apparently found out that two of the five member Supreme Court had thought the Bill unconstitutional. Adding this to Gavan Duffy J, who had thought essentially identical measures unconstitutional in *State (Burke) v Lennon* [1940] IR 136, Deputy Dillon implied that the

that scope for public discourse amongst the upper ranks the judiciary is greatly reduced, as also is the likelihood that flawed reasoning or false assumptions would be acknowledged. Moreover, the one judgment rule also distorts the opinions actually issued, as these are presumably the compromise views of the court, incorporating various judge's views.[78] This could mean that opinions the author of the judgment wished to stress might have to be removed or altered in light of the other judges' views, leaving little scope for Supreme Court judges to engage in detailed analysis of the test in *obiter dicta*.

Again, we cannot know if public discourse amongst judges, through the medium of published dissent, would have improved this area of constitutional law, but given the many incisive dissents in Canada, it is at least possible that this has had an impact.

It is also necessary to acknowledge the recent positive development in this area: the acknowledgment, in a Supreme Court judgment, of the lack of transparency in *Heaney* test, and its incompleteness as a standard of review. In the case of *Nottinghamshire County Council v B*,[79] O'Donnell J said the following:

> [P]roportionality in itself is not an entirely transparent concept. It can be applied strictly to strike down legislation or generously to sustain it. It is important to remember that proportionality is a tool for analysis, rather than an end in itself. The mere statement that something is *proportionate* is almost as delphic as the statement that it is *reasonable*. The analysis of whether any particular restriction or limitation is consistent to the Constitution may be assisted by the structure proportionality analysis provides, but only if it is explained *why* any particular provision is permitted by the Constitution, and is proportionate. In my view it is an error to approach the constitutional issue by simply asking, almost in the abstract, whether any particular provision is proportionate as an almost self standing test of constitutionality and detached from careful consideration of the text and the values necessarily implied by it.[80]

O'Donnell J succinctly recognises the problems inherent in *Heaney* test analysis, and the fact that values are implicit within the standard. It is remarkable that it has

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constitutionality of the measure was still dubious. 78 Dáil Debates col. 1723-1724. *See Gerard Hogan,* "The Supreme Court And The Reference Of The Offences Against The State (Amendment) Bill 1940" (2000) 35 Ir. Jur. 238, and James Casey, "Changing the Constitution: Amendment and Judicial Review," in Brian Farrell (ed.) *De Valera's Constitution and Ours*, (Gill and MacMillan, 1988) at 154. The committee stage Dáil debates on the Second Amendment show that this was a concern for the Taoiseach in proposing these amendments. 82 Debates col. 1859.

[78] See Gerry Whyte, "The One Judgment Rule in Action" (1983) 5 DULJ 273.

[79] [2011] IESC 48.

[80] *Nottinghamshire County Council v B* [2011] IESC 48 at [87].

taken nearly 18 years to have these issues acknowledged. Perhaps this could serve as a call to arms, rallying the Irish judiciary to reassess their use of the *Heaney* test.

However, it is not yet clear if this will be the start of something bigger, or merely a highly lucid insight that will not be heeded by others, and a recent, high-profile Supreme Court case suggests that little has changed. In *Damache v DPP*,[81] Denham CJ invalidated s 29(1) of the Offences Against the State Act, which authorised a Superintendent of the Garda Síochána to issue search warrants that could include the search of a dwelling. This violated the protection of the dwelling, which is inviolable pursuant to Article 40.5,[82] as the Garda superintendent was not an independent person, unconnected with the investigation. In finding this, she cited the *Heaney* test as the method to determine if rights were justifiably limited, and presumably purported to apply it in this case.[83] However, having outlined the test, she never mentioned it again, and the Chief Justice gave no indication of which part of the *Heaney* test was failed or why.[84] This was a statement that a law was disproportionate that could only be described, in O'Donnell J's terms, as "delphic."

The Failure of *Tuohy v Courtney*

The one exception to this trend of opacity was *Tuohy v Courtney*.[85] In that case, the Supreme Court made it clear what it was doing: creating a standard of review that would specifically deal with cases where the legislature deserved wide latitude. In so doing, the Court posed negative questions to reflect the limited nature of the enquiry, and indicated the types of cases where it was appropriate: the clash of constitutional rights and duties. It made plain the concerns that justified its approach, and, at least in principle, limited the non-interventionist approach it advocated to such cases. In terms of how to deal with these concerns, it is an excellent example of transparency. In creating a specific standard of review for use in such cases, it also had the potential to segregate cases where significant leeway

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[81] [2012] IESC 11.

[82] Article 40.5 reads: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with the law."

[83] [2012] IESC 11 at [52].

[84] Perhaps the judge wished to endorse the reasoning of the Morris Tribunal Report, at [53], which she said "considered the proportionality" of the section. The quote from the report seems to suggest that there was little reason that a judge could not be contacted in most cases. This might suggest minimum impairment of rights. However, this would be a very strong application of minimum impairment, and this reasoning was not in any way replicated in the portion of the judgment labeled "Decision;" *ibid* at [54]-[59].

[85] [1994] 3 IR 1.

was required, reducing the risk of this seeping into other cases where it was not appropriate, and diluting rights review generally.

Unfortunately, despite its potential, this effort ended in failure. The values discussed in *Tuohy v Courtney* were soon forgotten, its limitations cast aside, and it became a watchword for deference and non-interventionism, an all-purpose excuse for escaping from the more searching elements of the *Heaney* test. There was no adequate discussion of this process, or of the rationale behind it. This failure can be attributed to both the *Tuohy* Court and the many subsequent courts applying this decision.

As was illustrated by the detailed analysis undertaken in Chapter 7, the *Tuohy* Court, on one reading, drew its category in a way that was wide enough to encompass most if not all cases. The primary focus of *Tuohy v Courtney* was cases, such as the one at bar in that instance, where two constitutional rights were in conflict, one limited by the legislature's action, and another one defended by it. In such a case, striking down the law does not simply mean that rights are vindicated, because other rights holders have their rights jeopardised thanks to the loss of legislative protection. This is a case where particular circumspection is required.

However, the *Tuohy* Court did not clearly limit the test's applicability to cases of that nature. When Finlay CJ described the circumstances where this non-interventionist standard was appropriate, he spoke not just of a clash of constitutional rights with other constitutional rights, but a clash of rights with "constitutional duties" and "the interest of the public."[86] The concept of a constitutional duty was unclear and ill-defined. Almost every piece of legislation involves the interest of the public at some level, and there was no clarity as to what precisely he was referring. It does not seem likely that it was the Court's intention to have the *Tuohy* standard apply in all cases; the tenor of the judgment seems to wish to set particular cases aside for special consideration. If that was the intention, however, it was frustrated by this lack of clarity and precision.

However, more problematic again is the process outlined in Chapter 7 whereby *Tuohy v Courtney* was more commonly deployed as a modifier to the *Heaney* test rather than a stand-alone standard of review.[87] Without rhyme or reason, without pattern or plan, the courts invoked the *Tuohy* test to neuter the

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[86] *Ibid* at 47.
[87] Chapter 7, at note 44.

more potent aspects of the *Heaney* standard. As Foley says "the Tuohy decision became the standard by which later courts 'watered down' the potential for non-deferential application of the [*Heaney*] test."[88]

There is no coherent explanation of the use of the *Tuohy* case in this context. It is often entirely unclear why it is appropriate for use in any one instance –which of the rationales outlined in *Tuohy* are being relied on– and it often seems that there is no such rationale present. Similarly, there are cases where *Tuohy v Courtney* might apply, but does not.[89] It is almost never explained why *Tuohy v Courtney* is not used, where it could be apposite.[90]

Moreover, this process has eroded the tests' separate identites. Folding elements of the *Tuohy* test into the *Heaney* test framework reduced the likelihood of the *Heaney* test having a separate, more potent identity. Any benefit that might have come from the co-existence of two distinct standards was swiftly thrown away.

The intentions behind the *Tuohy* test may have been to explain and articulate the rationales adopted by the Irish courts for non-interventionist review. It could have had the effect of helping the Irish to courts to sort and categorise these rationales, which would have been of use for courts considering both the *Tuohy* and *Heaney* standard. However, it did not achieve any of these potential benefits; *Tuohy v Courtney* has instead become a watchword for judicial passivity, the context of its creation long forgotten, invoked whenever an Irish court wishes to justify less invasive review of rights limitations.

The Canadian approach, though far from perfect, shows how variations the *Oakes/Heaney* test can be dealt with openly and transparently, and shows us how the test can be positive: it can become the focal point for a debate between courts, legislatures and academics as the meaning and strength of rights, the values of the

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[88] Foley, note 9, at 129. He further notes that the courts shift between *Heaney* and *Tuohy* "without any real judicial explanation as to why these choices (which, of course, reflect choices about deference) are justified, or in the worst cases, without even recognising that different cases have made difference choices." *Ibid* at 130.

[89] There are cases where rights clashed and no application of the *Tuohy* test was even considered. See Chapter 7, at note 43, discussing anomalies in *McNally v Ireland* [2009] IEHC 573 and the High Court in *Iarnród Éireann v Ireland* [1996] 3 IR 321, where there was a specific constitutional right on both sides of the law, but Tuhoy did not apply. Those focal cases –where two constitutional rights directly clash– are the most significant in this context, but given the possible breadth of the *Tuohy* test, any case where the interests of the public are at stake could potentially activate this test. It is almost never explained why *Tuohy v Courtney* does not apply.

[90] The notable exception is *Re Health Amendment Bill* [2005] 1 IR 105. See Chapter 7, at note 81. Walsh, note 73, convincingly argues that the Court eschewed *Heaney* test analysis as well, preferring a bespoke standard of review based in part on the text of property rights protections in Article 43.

constitutional order, and the best answer to the normative questions that rights limitation issues pose. In Canada, it started a debate about how to best to form a standard of review that reflected that which was most important in Canadian constitutionalism. In Ireland, no such debate has taken place, with opaque, a-la-carte judicial use being the test's legacy.

The Bitter Technical Flavour

In the last chapter, I argued that without a common set of norms with which the *Oakes/Heaney* test could be imbued, the usefulness of this common or universal standard of review is substantively limited. However, many advocates of the test do not argue the test's substantive benefits, but rather its procedural advantages, its "technical flavour."[91] It gives clarity to the judicial process, and a transparency that might not otherwise be present.[92] Hogan called it a "badly needed analytical framework"[93] and an "objectively structured principle", while acknowledging that different judges could of course use the principle to reach different results in individual cases.[94]

The advantage of courts displaying the processes they use in a uniform way is not insubstantial. However, whatever advantages this approach would afford are squandered if courts obscure the normative choices that underpin the standard of review. The huge effect of these choices is such that if one does not understand the influence they have, one does not really understand the standard of review; it is intimately bound up with these values. This was alluded to in O'Donnell J's sceptical appraisal of the *Heaney* test in *Nottinghamshire County Council v B*,[95] where he noted the potential structural advantages, but said they could only be realized with proper

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[91] Denise Reaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009 at 3.

[92] Jackson, note 1, at 831. She further notes: "While proportionality analysis may not always fulfil the promise its most ardent advocates envisage, its doctrinal aspects offer some hope for more careful, open reasoning about constitutional values." *Ibid* at 834. *Cf* Alex Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" [2008] 47 Columbia Journal of Transnational Law 73 at 78.

[93] "[T]he courts have sought to employ a workable judicial methodology and this is why the adoption of the proportionality doctrine is so significant. While we have seen that it would to be wrong to regard this principle as a solution to every such difficulty, the advantage of this new doctrine is that it will to help to provide a badly needed analytical framework and, hence, reduce otherwise subjective judicial appraisals in important areas of constitutional law." Gerard Hogan, "The Constitution, Property Rights And Proportionality" (1997) 32(1) Ir. Jur. 373.

[94] "[D]iffering judges can reach differing conclusions on the same problem even when applying an objectively structured principle." Ibid.

[95] [2011] IESC 48 at [87].

discussion of the factors at play. Moreover, many argue that the technical nature of the test is more hindrance than help.[96]

The procedural benefits of the test, such as transparency in judicial decisions, are illusory if the values underlying it are hidden. In Ireland, it would be difficult to argue that the structure of the test has produced any transparency. Stone Sweet and Matthews argue that "[p]roperly employed, [the *Oakes/Heaney* test] requires courts to acknowledge and defend honestly and openly the policy choices that they make when they make constitutional choices."[97] This may be true; but if so, we must accept that it has not been properly employed in Ireland.

Conclusion

Standards of review such as the *Oakes/Heaney* test can be useful. If incorporated in the right way, with full discussion and clarity, it could potentially make judicial review more transparent and help countries come to terms with the realities and norms of the legal system that will invariably influence how standards of review operate.

However, the language of the test is so malleable, that –as we saw in the last chapter– it can be used to describe a wide variety of different approaches. It is thus not *a* standard of review; it is *every* standard of review, and which it is to be in any given jurisdiction is open to debate. If incorporated with no discussion or debate about the value judgments that go alongside it, it exacerbates problems in the judicial approach to rights limitations, obscuring those issues and making it less likely that they will be addressed. Unless and until the reality of these standards of review is widely acknowledged, this problematic obfuscation is the more likely outcome.

Nowhere is this better illustrated than in the diverging approaches to deference and non-interventionism in Ireland and Canada, and the lessons here stretch beyond the bounds of those jurisdictions. Normative views about these issues aside, and cognisant that the approach is far from perfect, Canada did it right: it engaged in an open, on-going debate about the values that should influence the Court in taking on the important issues of deference and non-interventionism.

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[96] Reaume, when she referred to the technical flavor of the test, warned of the "illusion of method" that it can create. Note 91, at 3. Jackson warns of this, quoting Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," 96 Yale L.J.943 (1987), that balancing "obscures the inevitability of judicial judgment about constitutional values." Jackson, note 1, at 833.

[97] Note 92, at 78.

Ireland, in short, did it wrong. Concealing and obfuscating these views and values, we are left with a labyrinthine jurisprudence with no clear focus and no coherence. Hopefully recent developments could point the way to a more frank acknowledgment of the role of values in the standards of review.[98] However, it is hard be even cautiously optimistic that more than twenty years of obscurity can be so easily undone.[99]

[98] *Nottinghamshire County Council v B* [2011] IESC 48.

[99] *Damache v DPP*, discussed above at note 81-84, might confirm a cynical suspicion that this change will be slow.

11 – A Standard of Review for Ireland: the Normative Case

In the foregoing analysis, I have tried to keep separate the conceptually essential elements of standard of review for rights limitations from those normative decisions and choices that are needed to choose one from a number of conceptually possible standards. This has allowed us to see how these standards are formed, the significant role that such choices play in forming standards of review, and to note that the differences between jurisdictions mean that there can be no such thing as a common international standard of review, unless one was to set at naught the domestic values of each individual jurisdiction.

In this final chapter, I wish to make a normative case for a particular standard of review, an argument for what the best way to conduct review of rights limitations actually is. Of course, the foregoing analysis illustrates that it is only sensible to do this in the context of a particular jurisdiction. Therefore, I will make a case for what I believe the most appropriate approach is for Ireland. I wish to make a case for which values should be prioritised and why, and what sort of standard of review that would result in. In doing so, I will be re-evaluating and challenging some central values of the Irish constitutional order. These values will not be disregarded; rather, they will be subject to the same critical reflection to which any normative argument that will change a standard of review should be subject. Some will be discarded, whereas others, which are seen as central to the constitutional order, will be retained.

Part of my proposal is to roll back to some extent on the non-interventionism seen in the *Heaney* test, both in the substantive limbs of the test, and the burden of proof and presumption of constitutionality. While doing this, I hope to respect the set of values and practices drawn up by the Irish courts, and this will be seen in the approach to objectives, and to both tailoring tests. While altered, some of their character would be preserved. In respect of deference, and the difficult task of balancing, I do not propose any precise ways to approach these most difficult of tasks. An excess of deference and a lack of balancing have endangered rights review in Ireland. In addressing these, the most important change is an approach that is transparent, and acknowledges the importance and the dangers of these elements, and therefore lays out clearly what factors weigh upon the court's determination.

Transparency in this respect allows the normative choices made, and their consequences, to be scrutinised and questioned.

It is hoped that a standard of review could be proposed that would better protect constitutional rights while still upholding domestic constitutional values, reconciling those two goals. While some of these pre-existing values must be reconsidered in order to uphold the value of rights protection, few have to be abandoned entirely.

What I propose is similar to the *Heaney* test, but different in certain respects in both operation and language. Two points must be made at this juncture. First, since my proposal is not radically different from linguistic formulations of *Heaney*, it could be done in the form of a review and clarification of the *Heaney* principles. However, it is more desirable to approach this as the creation of an entirely new standard of review. The problematic practices that have grown up alongside the *Heaney* test might be difficult to sever from the name and language of the test, just as pre-existing constitutional practices continued under the guise of the *Heaney* test. Other names that are used, like proportionality, similarly carry misconceptions that are difficult to shift. Therefore, in terms of judicial practice, starting from scratch seems desirable.

Secondly, if the test proposed here is not radically different, then some might ask: what is the point of the complex severance of normative and conceptual elements undertaken in this thesis? In response, I would say that the standard of review proposed here is trying to allow for transparent, open adjudication with a clear accommodation of core constitutional values, rather than hiding those values and obscuring the process. It allows review to take place with a standard that is consistent, which is applied in a manner consistent with its language. This is something that the *Heaney* test never managed to achieve, as we have seen from examining the case law. But even aside from this, the arguments in this chapter are designed to have a meaningful discussion about what a standard of review in Ireland should be. Choices about standards of review have been made by Irish courts without proper analysis and discussion; normative choices were made without any justification or debate. These normative choices have to be made, and it is crucial that we understand their character when we make them. Thus, the true value of this discussion lies not in the breadth of the changes wrought, but in setting out the

reasons underlying these choices, and laying them open to discussion, criticism, and reflection. This is what Ireland has not done, and now needs to do.

Conception of Rights

Utilitarian or Anti-Utilitarian Rights

Since the advent of the Constitution, it is clear that Irish courts have rejected the values of utilitarianism. Though there is not a great deal of discussion on this point in the judgments of the courts, it is clear that the courts view the judicial task as very different from the legislature's.[1] There is some vocal judicial scepticism of utilitarianism. [2] Extra-judicial commentary suggests such a rejection of utilitarianism. [3] Moreover, the *Oakes/Heaney* test contains elaborate tailoring requirements that would be unnecessary if a utilitarian stance were being adopted. This was probably, at least in part, a consequence of the natural law language of the Irish constitution, which, now looked upon with scepticism, might live on in this rejection of utilitarianism.[4]

I believe that the Irish courts are correct to choose this approach, and eschew a wholly utilitarian view of rights limitations. Though theoretically possible, the utilitarian account of rights does not seem to reflect the reality of constitutionally entrenched rights. Dworkin's argument, that at least some considerations must be

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[1] Many different facets of the separation of powers jurisprudence are relevant here. See *TD v Minister for Education* [2001] 4 IR 259. See Conor O'Mahony, "Education, Remedies, and the Separation of Powers" (2002) 24 DULJ at 57; Paul Anthony McDermott, "The Separation of Powers and the Doctrine of Non-Justiciability" 2000 35 Ir. Jur. (n.s.) 280. See also Eoin Carolan, *The New Separation of Powers*, (Oxford University Press, 2009). See also the jurisprudence on remedies, where the courts refuse to anything seen as resembling law-making; *Re Haughey* [1971] IR 217; *Maher v Attorney General* [1973] IR 140. The *Tuohy v Courtney* test requires that there being is some key difference in the processes of the legislature and judiciary that makes the legislature a better or more legitimate decision-maker in some instances. All this shows that the process of legislatures and courts vastly differ in the mind of the Irish judiciary. If judicial review was no more than a utilitarian balance, the same as the legislature's, courts would surely disclaim any power of review on this basis, or at least express reservations on this ground.

[2] In *CC v Ireland*, Hardiman J, in declining to follow a dissent from McLachlin J in the Canadian Supreme Court, calls her argument "crudely utilitarian,"At [58], 84, and "wholly utilitarian" At [55], 82.

[3] See Costello in "Natural Law, the Constitution, and the Courts" in Patrick Lynch and James Meehan (eds.) *Essays in Memory of Alexis Fitzgerald*, (Incorporated Law Society of Ireland, 1987);Declan Costello, "The Irish Judge as Law-Maker", in Deirdre Curtin and David O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law*, (Butterworths, 1992); Declan Costello, "Limiting Rights Constitutionally," in James O'Reilly (ed.) *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh (*Dublin , 1992).

[4] See Oran Doyle, "Legal Positivism, Natural Law, and the Constitution," (2009) 31 DULJ 206; Oran Doyle, "Legal Validity: Reflections on the Irish Constitution," (2003) 25 DULJ 56; Declan Costello, "Natural Law, the Constitution, and the Courts," in Lynch and Meenan (eds.) *Essays in Memory of Alexis Fitzgerald* (Incorporated Law Society of Ireland, 1987) 105; Desmond Clarke, "The Role of the Natural Law in Irish Constitutional Law," (1982) 17 Ir. Jur. (ns) 187.

subservient to rights, gives a far more compelling account of what rights are.[5] The utilitarian conception does not account for why courts can give final adjudications on rights questions in Ireland, not subject to legislative reconsideration. It does not account for the strength of the constitutional rhetoric on the subject of rights contained in the Irish Constitution; a right solely concerned with the distribution of utility could surely not be described as "inalienable and imprescriptible rights, antecedent and superior to all positive law."[6] Nor could such an approach account for the declaration in Article 43 "that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods." The rejection of utilitarianism, implied by the Constitution and upheld by the Irish courts, is the correct choice.

Teleological or Deontological Conception of Rights Limitations

The Irish Constitution's language, with its references to inalienable and imprescriptible rights, antecedent and superior to positive law, could be said to favour a deontological approach to rights limitations. This very strong language implies a duty to protect rights that is higher than law-making, and therefore higher than the consequentialist decisions that law-making entails. However, in practice, it would be difficult to suggest that Irish courts have cut out consideration of consequences from their adjudication of rights questions. The courts are right to avoid the deontological approach, as that approach is ultimately impractical.

It is not clear how the right and its limitation can be considered abstractly, severed from the utility or disutility it creates. In particular, how the abstract notions of right and objective can be compared *in their real-world context* without a lapse into utilitarian balancing is unclear. There is no obvious mechanism that would allow the abstract weighing of norms to take place while still having proper regard for the reality of the circumstances. When such attempts are made, they usually reveal that some notion of utility is incorporated.

Robert Alexy is a proponent of a deontological conception of rights limitations. However, in spite of Alexy's insistence to the contrary, his theory of rights limitations is not deontological, at least not in the sense used in this thesis. His

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[5] Ronald Dworkin, *Taking Rights Seriously*, Chapter 4: "Hard Cases," (1977, Harvard University Press) at 92.

[6] The rights of the Family are described in this way in Article 41.

model cannot, despite his claims, be said to excise utility entirely. This becomes increasingly apparent in his attempt to flesh out the process of balancing. To avoid an entirely abstract balance, Alexy gives each norm or principle a "concrete weight."[7] This concrete weight is established by reference to the extent to which the norm or principle is realised in any given factual circumstances. In giving examples of this, Alexy reveals himself to be taking utility into account, making his theory not deontological in nature.

For example, Alexy cites a German Constitutional Court case about human dignity to illustrate this.[8] Titanic, a satirical magazine, had referred to a paraplegic man who had carried out military service as "né Murderer" and a "cripple"[9] and were order to pay damages to this man. Titanic claimed this to a violation of its freedom of expression rights. The German Constitutional Court held that the "né Murderer" comment was, in the context of a satirical publication, humourous and not an interference with the man's personality rights. The magazine should be allowed to express itself in this way without damages being awarded against them. Alexy describes this as an interference with the right to personality having "a moderate, perhaps only a minor, intensity."[10] However, the comment about him being a cripple was seen by the Court as humiliating and a violation of his personality right. Alexy describes this as a "very serious or an extraordinarily serious violation."[11]

It seems to me that one cannot weigh these norms without regard to the consequences of each being restricted. Surely the intensity of the violation does depend on its consequences. The fact that one statement is seen as humorous and the other not has regard to the consequences of the material being read; it is not intrinsic to the statement, but depends on the consequences of their publication and feelings that the publication caused. If the man in question never read the offensive remark, it might not be thought as serious as if he had. If the readership of the remark were a handful of people rather than many, it might not be thought as serious as if it were nationally circulated. Similarly, the consequences for the magazine, such as the scale of the award of damages, must be relevant in

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[7] See Robert Alexy, *A Theory of Constitutional Rights*, (Oxford, 2002) at 403-404.
[8] BVerfGE 86, 1.
[9] Alexy, note 45, at 403.
[10] *Ibid.*
[11] *Ibid* at 404.

determining how great the freedom of expression restriction actually is. These are clearly assessments of the utility and disutility that is suffered by each side if their rights were vindicated or restricted. There seems to be no way of determining this without regard to utility. Therefore, Alexy's theory is ultimately not deontological, but a strong teleological approach, limiting –but not removing– considerations of utility. This does not suggest that Alexy's theory has no value. It rather illustrates two points: first, that taking a strictly and absolutely anti-utilitarian view is perhaps not practical, and secondly, that the teleological conception of rights limitations is flexible enough to accommodate even very strong anti-utilitarian conceptions of rights. Others have put forward methods of deontological balancing, but I do not find them convincing.[12]

It might be that few, if any, courts would actually adopt or conform to the deontological approach. They might reject the notion as impracticable for the reasons stated, or, even if accepted, they might fail to apply it in a manner that truly excludes all considerations of utility.

Moreover, in attempting to excise utility, it is likely that courts would engage in an opaque reasoning that would be very difficult to understand and critique. In light of this, I think the Irish courts are wise to reject this notion, and adopt a teleological approach. Though this approach might not fit the very strong language of the Constitution as well as the deontological approach, it does not preclude rights being strongly protected, and is more practical than the deontological approach.

Internal or External Limitations

In the Irish Constitution, some rights are expressed as being amenable to external limitation.[13] Others not subject to textual qualification have been subject to internal limitations only, such as equality, trial in due course of law, and, for some reason, the right of access to the courts, or to appeal to the Supreme Court.[14]

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[12] Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, 2007). Jurgen Habermas, *Between Facts and Norms* (Polity Press, 1996). This is not the appropriate place an extensive critique of these authors. However, I do not believe that Zucca's proposal of *a priori* weighing of values excises utility, or gives enough regard to the factual context of the dispute. Nor do I think Habermas sufficiently explains how adjudication can move between facts and norms without consideration of utility. Even if these authors are right in principle, I further do not think that their methods are practically applicable.

[13] For example, property rights under Article 43, and the right to free expression and association in Article 40.6.1 are subject to express qualificaiton by reference to listed values. See Chapter 6.

[14] See Chapter 9, at note 58-72.

However, other rights, which were expressed without textual reservation, have proven amenable to external limitation.[15]

The combination of internal and external limitations is desirable. All rights are subject to definitional limitation in the process of courts grappling with their meaning, and the penumbral instances of those rights.

Sometimes, it desirable for that to be the primary or the only limitation; the idea that the State could seek to justify an unfair trial, torture, or degrading treatment by reference to external considerations, is unsettling. Similarly, an internal system avoids having a great many laws presumptively violate rights. Especially in the area of equality, where many if not most laws draw distinctions, it seems senseless to regard them as presumptively invalid, when the overwhelming majority of such classifications are not only acceptable, but necessary. The internal approach does limit the number of *prima facie* rights restrictions, though this can be done in tandem with an external approach.

However, it is not clear that the considerations that go into internal limitations are always, mostly, or even often different from those involved in external limitations, so the difference may well be one of perception. The process of definition almost certainly involves balancing.[16] Ultimately, the processes seem similar in Ireland.[17]

The real difference between solely internal limitations and external limitations is therefore rhetorical: within the scope of the right, there is nothing that can interfere with its protection.[18] No balancing can be carried out in the internal-only system where it is a core instance of the right, and there is no question of scope

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[15] Costello J held this to be true of Family rights in *Murray v Ireland* [1985] IR 532; see Chapter 6.

[16] Ahron Barak, *Proportionality: Constitutional Rights and Their Limitations*, (Cambridge, 2012) at 74-5. See also Richard Fallon, "Individual Rights and the Powers of Government," 27 Ga. L. Rev. 343 (1993).

[17] The recent Irish case of *O'Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562 illustrates this. Though adopting an internal-only limitation of the right of access to the courts, the factors considered by the judge in making his determination that the right was not infringed clearly focused on the extent of the restriction, just as an external approach would. He took account of the following considerations in reaching this conclusion: "i) the hearing is in the High Court; ii) the parties are or may be represented; iii) it is in part a supervisory or facilitating judicial hearing; iv) despite this, there are express safeguards to ensure that an applicant's rights will not be infringed when surrendered; and furthermore; v) some appeal or further judicial scrutiny is possible." *Ibid* at 594, [66]. The distinction between the internal and external approaches is, therefore, scant, since largely identical considerations are involved.

[18] This is what Barak would regard as a class of genuinely absolute rights. Note 16, at 32. I disagree with this terminology, as the right (and any other right similarly thought absolute) is patently limited by definition of its scope, so not absolute in the sense in which I would use the term. However, I embrace his argument that it is a powerful rejection of certain conduct to regard it as totally unjustifiable.

or interpretation whatsoever. In a system of balancing, the right might be so strong that it can never in practice be justly restricted, but the notion can still be entertained; it is still possible in principle. For certain rights, such as torture, this possibility existing even in principle is problematic.

However, an internal-only system of limitations has several negative side-effects. Internal-only limitations are less amenable to a shift in the burden of proof, and I will later argue that such a burden shift is something that Ireland should adopt. This is not to say that such a burden shift is impossible, merely more difficult.[19]

Similarly, the internal-only limitations have been the source of a great deal of confusion in Ireland. In respect to trial in due course of law, there has been uncertainty as to whether trial in due course of law, or the elements of that protection, are subject to external limitation. It has similarly led to confusion in respect of the right of access to the courts. In the equality context, the demise of consideration of the extent of a distinction –which causes the right to be subject to internal limitations only– seems to severely limit the scope of the equality guarantee. Initially, it seemed as if this might lead to certain suspect categories receiving higher scrutiny, but even this has recently seemed to be absent, rendering the equality protection of Article 40.1 almost non-existent.[20]

A wholly internal approach leads to considerations of balancing and tailoring in the context of definition and interpretation of rights. However, it is generally more difficult to see these at work in the context of definitional limitation. It is for this reason that merging substantive questions into the definitional stage is staunchly criticised by Barak[21] and others.[22] It causes confusion.

The optimum approach for Ireland is not to abandon wholly internal limitations, but to use them sparingly. There may be a rhetorical benefit in regarding

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[19] Since the right is not restricted until the point at which it is violated, there is no obvious point at which the burden can shift. However, this can be circumvented. For example, the way in which the Irish courts deal with trial in due course of law is to create a set of ancillary or related rights, which ensure that trials will be fair. See *Donnelly v Ireland* [1998] 1 IR 321. These rights can be subject to external limitations, and so a burden shift could take place in those instances. In relation to equality, there are certain categories that have in recent years been presumptively suspect. See *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; See Oran Doyle, *Constitutional Equality Law*, (Thomson Round Hall, 2004). That might allow a shift in burden once that discrimination is established.

[20] Scrutiny in even these limited categories outlined in *Employment Equality Bill* may be on the wane. See Oran Doyle, "Judicial Scrutiny of Legislative Classification," (2012) 47 Ir. Jur. (ns) 175.

[21] See Barak, note 16, at 76-77.

[22] Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (Kluwer, 1996) at 53.

the right to a trial in due course of law as absolute within the bounds of its definition. However, in the vast majority of cases, external limitations do play a role. The most unqualified expressions of rights in the Irish Constitution have already been held to be capable of external limitation.[23] Internal-only limitations have created confusion in the equality context, and perhaps contributed to the declining strength of review of that right. The key benefit of internal limitations is the ability to reduce the number of cases that are *prima facie* violations of the right to a reasonable number, and stop the right being implausibly wide on its face. This can be retained while still subjecting rights to external limitations, and this would seem to be a more open approach, that better accounts for reality of judicial review of rights, and avoids the confusion seen in Ireland to date. Therefore, internal-only limitation should be reserved for those few rights that are so important that when they are limited in core way, there should be absolutely no question of justification.[24]

Objectives

Preliminary Threshold Requirement and Importance

I believe Ireland should retain the preliminary threshold requirement that objectives must be important, or pressing in a democratic society, as I believe such a requirement can be useful in spite of the fact that it has not been so to date.

A preliminary examination does have some rhetorical benefit, insofar as it eliminates, at the very earliest stage, objectives that are insufficiently weighty to justify the restriction of rights. I also believe that the importance required of objectives at this stage should be high; not just any legitimate objective, but a genuinely important one.[25] This shows a high degree of respect for rights, commensurate with the high status they are given in the Irish Constitution. The standard articulated in *Heaney* seems sufficiently high to do this, but it requires it to be applied. Application need not involve laws failing this test frequently; the

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[23] *Murray v Ireland* [1985] IR 532.

[24] Examples might be trial in due course of law and torture.

[25] The preliminary requirement seems to be duplicative of the balancing exercise, as the importance of the objective is a key consideration there. As a result, I am not highly concerned with the manner in which this is carried out at the preliminary stage, or with the precise level of importance that should be required. Importance is something that will invariably have to be decided based on domestic values, with some deference to legislative belief of importance based on democratic grounds. A high rather than a low level of importance does enable the ancillary advantages related to rational connection discussed herein.

overwhelming majority of rights-restrictive laws are motivated by important objectives. Application involves discussion of this fact, and proper analysis of why the objective is important.

A strong objective requirement would have two ancillary benefits.[26] First, as Doyle has previously argued, strong objective requirements limit the number of objectives that can be hypothesised and therefore increase the potency of the rational connection test.[27] Secondly, a stronger importance requirement allows rational connection to be used as a means of indirect scrutiny of objectives.[28]

As I will later argue, the burden of proof of this should be on the State, and it should be for the State to argue that the measure is justified, and put forward a sufficiently important objective. I would advocate courts looking to the factual background of the law to establish whether or not the alleged factual circumstances behind the law in fact exist, as was done by McGuinness J in *Gilligan v Criminal Assets Bureau*.[29] Some empirical deference could be offered when the factual situation was uncertain, when an objective is founded on plausible suppositions rather than certainties. Recognition of objectives as self-evidently important should be avoided. That is not to say that empirical evidence of the importance every objective need be provided; more precisely, a discussion of why the objective is important should be undertaken, rather than it simply being asserted, or deemed too obvious to be worthy of discussion.

Actual or Hypothetical Objectives

Ireland has long opted to examine hypothetical objectives of the legislature, rather than probing the actual, subjective purposes of that body. I believe that this is a sensible approach.

First, the arguments against looking toward subjective purposes are cogent. It is difficult to explain how the objective of a large body can be established. It requires searching analysis of the actions and words of many individuals. Invariably, the objectives of particular individuals will be given preference, as different

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[26] I believe that Ireland should retain its approach to hypothetical objectives, and, along with rational connection, a preliminary importance requirement can rein in the problems of hypothetical objectives.

[27] Doyle, note 19, at 119.

[28] This will be discussed further below. As seen in Chapter 8, at note 119-129, this is already done in Ireland to some extent.

[29] [1998] 3 IR 185.

individuals will have different goals, and one must ultimately be settled upon if they diverge. The idea of a true intention of a group of people is therefore problematic.

There is something to be said for the conception of the rule of law that suggests that a government of laws and not of men should be judged by the laws it passes rather than the intention of those who passed them. Irish courts have long believed this to be true,[30] and I do not believe that this longstanding value should be displaced unless there were compelling reasons to do so.

Secondly, I can see no reason why the value should have to be displaced, as I do not think that rights protection is weakened by hypothetical objectives *per se*. When combined with very little need for the objective to be important, and when there are no rules about overly general objectives, the hypothetical approach can be problematic. However, I would counsel the alteration of these other elements, rather than the rejection of the hypothetical approach.

Invalid objectives may still be weeded out in the hypothetical objectives approach, once there is a test of importance that limits the number of objectives that may be hypothesised. There may be cases where only illegitimate objectives can explain the law, in which case it will be held to be invalid.[31]

Outside of the deontological conception, I cannot see why invalidation of a law because of its subjective motivation increases the protection of rights; the law could be re-enacted, on identical terms, once the legislature has a different motivation. In the absence of any benefit, and finding the rule of law objection to the subjective purpose approach persuasive, I would advocate affirming the approach currently adopted, with certain modifications made to the importance requirement discussed above. If the objectives being hypothesised must be of a sufficient level of importance, this limits the number of objectives that it is open to the courts to dream up.

It should be stressed that the goal of this process is to find the objective motivation of the law, not the objective that is of most benefit to the State, or the objective most likely to uphold that law. The most plausible objective on the face of the law should be adopted. It should not be a strained or artificially attenuated objective.

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[30] Most recently, this was affirmed by the Supreme Court in *Crilly v Farrington* [2001] 3 IR 351. For the Supreme Court's endorsement of the rule of law as the cornerstone of the Irish legal system, see *Maguire v Ardagh* [2002] 1 IR 385.

[31] See Chapter 8, at note 56.

Multiple Objectives and the Generality of Objectives

Unlike Canada, Ireland has no rule in respect of how general an objective recognised by Irish Courts can be. There seems to be little, if any, awareness of the problems of overly general objectives. A general objective often does not accurately reflect the reason why the right is restricted, but rather describes the goal of the measure more broadly. The former is the reason that rights must be restricted in the process of achieving the latter. Choosing the more general objective gives too much importance to it, since the objective of the measure generally is taken to be the objective of the rights restriction. It also essentially circumvents tailoring to the objective as a mode of analysis, as the more general the objective, the easier it is to identify a connection to the means. That does not ensure that the objective of the *rights restriction* is so connected. Focus on this would also stop the highly problematic instances where the effect of the measure is taken as its objective.[32]

It is difficult to formulate a way to express a rule against general objectives. Moreover, the general objective of a measure may occasionally require and explain the restriction of rights, when that objective cannot be achieved at all without rights being infringed.[33] Such zero-sum measures are rare, but this means that the most one can say is that Irish courts should ensure that the objective recognised is truly the one behind the restriction of rights, and not some more general goal. The courts should ensure that the state establishes this, and highlight it in their judgments.

Similarly, the Irish courts should exercise care when hypothesising multiple objectives. Since some laws surely are motivated by multiple objectives, and this will be apparent, there is no reason why they should not be recognised in appropriate cases. However, if multiple objectives are hypothesised, this can circumvent the tailoring process almost entirely, with otherwise irrational or excessive means rendered rational and necessary by reference to another objective. The example of *Murphy v IRTC*, discussed in detail in Chapter 8,[34] shows how this can go too far. In that case, several different objectives were hypothesised to explain multiple different facets of a law restricting religious broadcast advertising, that otherwise

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[32] Chapter 8, at note 47-51.

[33] For example, the imposition of a planning code, which significantly restricts the use and enjoyment of land and therefore property rights, cannot be done without rights restrictions. The general goal – the public good that flows from ordered planning and development of land– is also the goal of the rights restriction that is necessarily involved in its pursuit.

[34] Chapter 8, at note 116-118.

seemed inexplicable. If this approach were regularly adopted, the tailoring tests could never play a meaningful role, as any issue that might cause a tailoring problem would be resolved by additional objectives that the court dreams up. Again, it is difficult to draw a line that would separate out legitimate and illegitimate instances of multiple objectives, but the dangers of multiple objectives should be borne in mind. Courts should take care to recognise more than one purpose only where the objective motivations of the law are clearly comprised of multiple purposes. As noted above, objectives should be recognised only when they are the most plausible explanation of what the legislature did, not because recognising these objectives would help to uphold the law. This is true *a fortiori* of multiple objectives.

Tailoring to the Objective/Rational Connection

The apparently tautological nature of the rational connection enquiry might serve to explain why it is infrequently discussed or dwelt upon in the judgments of Irish courts. However, it is an important element of the standard of review, and it deserves more sustained attention, and more intensive application, than it has received in Ireland to date. It serves a very important role in indirectly scrutinising hypothetical objectives.

Closeness of Connection and Indirect Scrutiny of Motives

The tailoring test in Ireland has rarely had bite, and this should change. The test has proven to be useful in cases such as *Cox v Ireland*,[35] *Blake v Attorney General*,[36] *McCann v District Judge Monaghan*,[37] and possibly *Blehein v Minister for Health*.[38] More often, it has been ignored, or whittled away by invocation of deference[39] or of multiple or general objectives. I believe that closeness should be required, as this is the only way in which Irish courts can make sure that the objectives they hypothesise for laws are actually achieved to some degree by those laws. This is not to say that it should adopt a very stringent approach, like the one seen in the early days of *Oakes*.[40] It should acknowledge the important role that deference to particular determinations plays in giving the legislature room to

[35] [1992] 2 IR 503.
[36] [1982] IR 117.
[37] [2009] 4 IR 200.
[38] [2009] 1 IR 275.
[39] Chapter 8, at note 111-114.
[40] Chapter 3, at note 74-76.

manoeuvre.[41] But it should not tolerate irrational over-inclusiveness, and so the test should be applied with some rigour.

When combined with changes in the way the Irish courts deal with objectives, rational connection can take on a potent and important role in the standard of review. Limits on recognition of general and multiple objectives would help stop the circumvention of this test, and give it more scope for intervention in appropriate cases. It is here also that the higher importance requirement for objectives becomes significant. Often, when hypothesising objectives, several different plausible objectives might be open to the court. Since not any objective will suffice to pass the first stage, courts must hypothesise one that is sufficiently important, thus limiting the number of potential objectives available. Doyle notes that in hypothesising objective, a court might have to choose between an objective that had more explanatory force for the law and one that was more important.[42] A less important objective might more effectively rationalise the means employed. However, by reason of being less important, it might have a difficult time passing the initial importance criterion.[43]

As argued in Part I of this thesis, tailoring to the objective can act as powerful form of indirect objective scrutiny when objectives are hypothesised.[44] An objective that might on its face seem to explain the law might not do so once a detailed examination of the means employed is undertaken. Bad tailoring undermines the notion that the objective actually underlies the law at all. We have seen some of this in Ireland[45] as well as in Canada.[46] Tailoring to the objective is a very useful tool, ensuring that laws pursuing illicit objectives that are not discoverable on the face of the law, or laws that do not pursue any clear external objective, do not slip through the net. I believe that adopting a strong rational connection test, that demands actual efficacy from the objective of the law, and demands real connection between the objective and the means, is what a standard of review for Ireland should do. This is not necessarily a radical departure; certain Irish cases display strong invocation of

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[41] Tailoring, as the Canadian courts remind us, "seldom admits of perfection."*RJR MacDonald* 1995 CanLII 64 (SCC) at [160]. Simliar sentiments were expressed by the Irish courts in *Murphy v IRTC* [1999] 1 IR 12.

[42] Doyle, note 19, at 119-120.

[43] Or, if it did pass, it might fare less well in balancing than the other possible objective might have.

[44] Chapter 2, at note 34-35.

[45] Chapter 8, at note 119-129. See *An Blascaod Mór Teo v Commissioners of Public Works in Ireland,* Unreported, High Court, Budd J, February 27th 1998; *O'Shea v Ireland* [2007] 2 IR 313.

[46] Chapter 5, at note 85-97.

these principles. What should change is that this application of the test should be consistent; these factors should always be discussed, rather than dusted off only occasionally in egregious cases.

Minimum Impairment of Rights/Tailoring to the Right

Ireland has always taken a very conservative approach to minimum impairment, one that eschews consideration of alternatives, and focuses instead on excessiveness. Though this is obviously substantially less interventionist than a test that would consider alternatives, it has the advantage of being consistent and transparent. It is far easier to apply this test with consistency than an approach that purports to consider alternatives, but does not provide a means of determining which alternatives ought to be within the pale and which beyond it. This is a problem that has plagued Canada's minimum impairment test. Therefore, I would advocate maintaining the conservative, but compelling, approach adopted by the Irish courts, with some alterations.

First, I would advocate the abandonment the current linguistic formulation, or any formulation that indicated that rights should be impaired "as little as possible." It should instead acknowledge what seems to have become the norm in the *Heaney* test analysis: that the tailoring to the right test is failed only in the event that a cap or limit could have place on the measure that would cause rights to be less significantly infringed without reducing the efficacy of the measure. Only when essentially no efficacy is sacrificed should the means be invalidated. Importing a notion that has taken hold in the Canadian case law, blanket bans should be looked at with great care; these are the most likely choice of means to be excessive, as they could scarcely be more extensive in scope. While offering some empirical deference in cases of genuine uncertainty, courts should insist that such measures be justified by clear reasons for their not being excessive, and why lesser means would not be as effective. Such reasons will frequently exist, and so the test will be failed on rare occasions.

Secondly, elision between tailoring to the right and balancing should be avoided. A standard of review is cumulative; each element is necessary to ensure justification. When these tests combine, each is adversely affected, and the transparency of the court's process significantly reduced. It is very difficult –perhaps impossible– to avoid this elision if broader alternatives are considered. If any

efficacy is to be sacrificed when an alternative set of means is preferred, the court is making an implicit or explicit judgment that that sacrifice should be made, because it is insufficiently important to justify the extra restriction of rights. This is, of course, an exercise in balancing. The excessiveness approach, therefore, can avoid this problematic elision more effectively than others, and that is a substantial argument in its favour.

It is of paramount important that balancing actually take place independent of this analysis, and so the rhetorical elision of the test –where they are dealt with together as if related– should be eliminated.[47] This can be achieved by spelling out precisely what each test actually does, and would be aided by the adoption of clear language to express the tailoring the to right test.

Finally, the tailoring test should be used as a means to refine objectives, with the existence of alternatives potentially narrowing the objective that goes on to be considered in balancing. The existence of alternative means that would be made apparent in a tailoring to the right test can affect a law's validity even if the existence these alternatives does not of itself make the law invalid. Considering the available alternatives, and the sacrifice in efficacy that would have to be suffered if they were chosen, renders far clearer what is at stake when considering the overall balancing test. The reason for violating right to this extent is not the achievement of the objective generally, but the increased efficacy that comes from choosing more rights-intrusive means.[48] The balancing test should then factor in whether the objective could be achieved in these other ways, and ask if the legislature was right in choosing that increased efficacy over reduced harm to rights holders. This would create a more accurate and honest balancing exercise, and would account for the reality that alternative means do exist, even if that fact alone does not violate the tailoring to the right test.

This process of objective refinement also argues for keeping the tests in the order in which they are set out here, with tailoring preceding balancing, rather than

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[47] Chapter 8, at note 135-145. There is the additional problem of the elision of the whole test, with no clear unpacking of the elements. See *Re Article 26 and the Planning and Development Bill 1999* [2000] 2 IR 321; *Damache v DPP* [2012] IESC 11.

[48] One example of where this might have taken place is *Daly v Revenue Commissioners* [1995] 3 IR 1. Costello J refused to say state should have adopted an alternative. However, he was clearly unnerved that a temporary problem had been fixed with permanent solution, and this seemed to lessen the weight of the objective, as did fact that people who were not ever subject to the old regime suffered due to the transition. At 13. It seems as if the objective was downplayed because of the existence of alternatives despite the fact that he refused to say the state should have adopted another set of means.

frontloading balancing as was seen in *King v Minister for the Environment.*[49] This will be discussed further below.

The disadvantage of the conservative approach adopted by the Irish courts is that it offers far less scope for laws to be invalidated, and therefore seems to protect rights less effectively. However, these difficulties can be offset by ensuring a clear role for balancing, and using the test to refine the consideration of objectives in that context. Moreover, the clarity and consistency that this approach brings is significant. Approaches which consider alternatives invariably oscillate between strong and weak review of choice of means without coherent reasons, whereas the excessiveness approach can be applied with transparency. The Irish courts have not reaped those benefits, because of the dissonance between the test's broad language and its narrow application; the rhetorical elision between minimum impairment and balancing; and the failure to articulate clearly the nature of the tailoring to the right test being performed. If the test's language were recast, it could achieve this potential.

BALANCING

Balancing in Ireland has been clearly and expressly preformed on perhaps two occasions. In almost all cases, it is ignored, or the courts assert that it is passed with no analysis as to why this is so. The failure to come to grips with balancing in Ireland has been so complete that it hard to define where the problem lies. Whereas in Canada the balancing test has been subsumed into minimum impairment analysis,[50] there is little evidence that balancing considerations have been so incorporated in Ireland. Instead, there is no balancing exercise to speak of in Ireland in the overwhelming majority of cases.

Preliminary Balancing

I do not believe that Ireland should employ a preliminary balancing test, such as the one that might exist in the United States, or advocated by Hogg.[51] Kumm[52]

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[49] [2007] 1 IR 296.

[50] Chapter 5, at note 148.

[51] Hogg argues that the objectives analysis does all the work that really needs doing; see Peter Hogg, *Constitutional Law of Canada*, (5th ed, Carswell, 2007) at 38-43.

[52] See Mathias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos, (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007).

Alexy,[53] Reaume,[54] and Barak[55] all present compelling cases against this approach, as does the Supreme Court of Canada.[56] Feedback into objectives from minimum impairment requires that tailoring analysis come before balancing. Moreover, placing the balancing test at the beginning of the analysis is likely to mislead or confuse the courts. This is illustrated by the conceptually problematic preliminary balancing conducted in *King v Minister for the Environment*,[57] where the Court seemed to consider that a failure of balancing –the measure was found *prima facie* disproportionate– did not end the enquiry. The Court presumably thought that if the tailoring limbs were passed the measure could be upheld, though it did not do so in that instance, due to the exacting tailoring requirement imposed by the Court. This ignores the crucial role of balancing in the determination of the legitimacy of any measure; a law cannot fail balancing and ultimately be held to be legitimate. Consequently, conducting balancing at the first stage is ill-advised.

Reasonableness or Correctness Approach

Since balancing is so rarely conducted, it is impossible to say whether a reasonableness or correctness approach is in fact used by the Irish courts. As to which is the more appropriate, this is ultimately a question of deference and non-interventionism. I will later argue that Ireland's two-tier approach to standards of review may be appropriate in this instance: certain situations might call for a lesser, reasonableness standard, where as others may call for correctness review. A more coherent distinction between the *Tuohy v Courtney* test and the *Heaney* test might be able to achieve this.

Metrics and the Conduct of Balancing

Many criticisms and allegations of incommensurability of values are levelled at the notion of balancing. At the most extreme, these become arguments against justiciable rights.[58] It is possible that this concern about radical subjectivism in

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[53] Alexy, note 45.
[54] Denise Réaume, "Limitations of Constitutional Rights: The Logic of Proportionality," Oxford Legal Research Paper Series, No 26/2009 at 8-9.
[55] Barak, note 16, at 247-249.
[56] *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567; 2009 SCC 37 Canlii at [75].
[57] [2007] 1 IR 296.
[58] This might be said of these writings, taken to exteremes: Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7 IJCL 468; Grégoire C.N. Webber, "Proportionality, Balancing, and

balancing explains the Irish courts' unwillingness to engage in it. While courts should be careful about balancing, and should attempt to conduct it in as neutral a manner as possible, they should not render this test defunct. To do so would be to turn one's back on the constitutional instruction to the judiciary to defend personal rights, an abdication of their constitutional function. The Constitution tasks the courts with reconciling rights and the interests of the common good;[59] that constitutional edict surely envisaged courts engaged in a balancing function. If it is believed that the exercise of this power is problematic or wrong, it is always open for the government and the people to take this power from the courts by way of constitutional amendment. In the absence of such a move, it is wrong for the courts to resile from their constitutional function.

When balancing, courts should endeavour to weigh the competing rights and interests in light of constitutional values and priorities. Such values will not enable a court to decide every issue, or provide a single correct answer or interpretation of a dispute. Judges may need to have recourse to contested values and judgments, but if they do so clearly, allowing discussion and debate on the issue, this is an acceptable way to conduct balancing.[60]

A model for application of the balancing test is found in the one Irish case to fully engage with it. In *Daly v Revenue Commissioners*,[61] Costello J carefully considered the benefit achieved by the means chosen by the State. He narrowed down the objective to its core, noting that the measure was trying to address a temporary loophole in the taxation of the self-employed. While worthwhile, this was not a matter of the greatest importance, and was treated as such. He was detailed in his spelling out of the harm to the plaintiff and those like him, burdened with a significant overpayment of taxes, with a delayed refund, for an indefinite period of time. He rejected that the Oireachtas should *per se* have pursued their objective a different way.[62] However, the effects were severe; the benefit was small, and the measure thus failed to strike the right balance.

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the Cult of Constitutional Rights Scholarship" (2010) 23 CJLJ 179; Grégoire Webber, *The Negotiable Constitution*, (Cambridge University Press, 2009).

[59] This is most expressly required by Article 43.2.2° in respect of property rights being delimited by reference to the exigencies of the common good.

[60] I agree with Waldron's view that balancing does not have to be a precise weighing of values but rather "*any* form of reasoning or argumentation about the values in question." Jeremy Waldron, "*Fake Incommensurability: A Response to Professor Schauer*," 45 Hastings L.J. 813, (1994) at 819.

[61] [1995] 3 IR 1

[62] *Ibid* at 13.

This is all that is required for successful invocation of the balancing exercise: a clear and transparent laying out of the benefits and costs of restricting rights, and the reasons that the judge ultimately finds one to exceed the other. The judge does not outline any precise metric for this weighing, but rather explains why he thinks one interest to be weightier in this instance. It might be that *Daly* was a very clear instance of harsh response to a small problem, and that other applications of balancing would not be so straightforward. However, even in more complex scenarios, or where the balancing of the two factors is closer, all a judge has to do is outline the reasons why she sees one interest superseding the other.

The greatest benefit of this approach is that it is clear. Looking at Costello J's judgment, one can readily see his opinion of both the harm and the benefit. One could readily take issue with his assessment of either of these, and argue that he failed properly to account for, or underestimated the importance of, some particular consideration. It allows for disagreement and criticism of the values and weightings that judges use, and could lead to discourse about this where appropriate.

The *Daly* judgment shows that courts should not be afraid to put forward arguments for why some values are more important than others; why some state objectives are not sufficiently central to justify particular rights restrictions; why some rights must give way to the achievement of state interests. This is what the constitutional function of rights protection requires. Not conducting balancing at all, or hiding balancing conducted below the surface, is far more problematic than the lucid analysis of the *Daly* case.

Abstract Arguments: Resurrecting a Doctrine of Overbreadth

As noted in Chapter 9, Irish courts have chosen not to pursue a doctrine of abstract review of overbreadth that first came into focus in the *Cox* case, instead choosing the prioritise the *jus tertii* rule, and its limitation of constitutional argument.[63] The concern behind the *jus tertii* rule –the need for a real plaintiff to ground complaints– does not apply to most of the analysis of the *Oakes/Heaney* test. The tailoring limbs of the test –rational connection and minimum impairment– do not require a real plaintiff in order to be conducted. They are abstract questions about whether the law is designed in an appropriate way to retain connection to the objective behind it, and to avoid needless violation of rights. The facts of any one

[63] Chapter 9, at note 118-122.

case do not illuminate that abstract enquiry. The final balancing test, however, might require a real plaintiff, to allow the court to assess the extent of the detriment to rights, and concretise those harms. However, instead of creating a more nuanced version of the *jus tertii* rule, that would apply in the right cases, but allow overbreadth challenges in others, the Irish courts simply prioritised the *jus tertii* rule.

If the Irish courts wished to continue to reject any abstract argument, they could do this; but in that case, the standard of review should reflect this. However, it would better to embrace this sort of doctrine. I have made a detailed argument elsewhere for the adoption of a doctrine such as this.[64] The benefits include the likelihood that invalid laws would be weeded out at an earlier stage, since their review would not have to wait for a particularly situated plaintiff. Therefore, I believe that the Irish courts should entertain abstract arguments in respect of the tailoring test, though not the final balancing analysis.

Burden and Standard of Proof

One of the most significant changes to the way that Ireland approaches standards of review relates to changing how the burden of proof is allocated. This goes to the heart of the standard of review, and to the heart of the issue of interventionism. It is the epitome and the greatest manifestation of the presumption of constitutionality. Part of the rationale for this change, therefore, derives from the arguments below about the relaxation of this presumption.

I advocate a shifting burden of proof, that shifts between two stages in the adjudicative process – that is, the burden of proof of the limitation of rights falls on the individual alleging such limitations, and if that burden is met, the burden shifts to the State to prove that the limitation is justified.

There are very strong normative arguments for a shifting burden of proof. The "demonstrably justified" language in the Canadian charter demands a burden shift of this sort, but many other jurisdictions have settled on this model by judicial choice rather than textual fiat.[65] Barak also argued forcefully that this approach

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[64] David Kenny, "A Dormant Doctrine of Overbreath: Abstract Review and *Ius Tertii* in Irish Proportionality Analysis" (2010) 32 DULJ 25.

[65] See Barak, note 16, at 438-441, noting this is the case in New Zealand, South Africa. Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) at 254 notes that this is the case in the UK as well.

should be adopted, perhaps going so far as to assert (incorrectly, I think) that a shifting burden of proof is a conceptual requirement. He regards the protection of human rights as the paramount consideration, and argues persuasively that those justifying limitations must prove justification, or the protection of rights would be greatly weakened.[66] He thus concludes that the presumption of constitutionality has no role in presuming the justification of a proven limitation.

I agree with Barak's analysis, save insofar as he suggests that this is conceptually required rather than a normative choice. The presumption of constitutionality can live on, and can still place the burden of proof on the applicant: it presumes that laws are constitutional, and thus that they do not limit rights.[67] It can also continue its non-litigious functions, encouraging respect and obedience of the law unless and until a court has deemed the law unconstitutional. However, when it has been established to the satisfaction of a court that the law actually does infringe upon constitutionally protected rights, the presumption of constitutionality loses its force. The presumption is based on the separation of powers: the presumption of good faith and competence in each branch of government performing its role. However, the role of the legislature in limiting rights is a heavily circumscribed one. Once it has ventured into this twilight zone of its powers, it must speak in defence of its own actions. It cannot rely on the separation of powers or any constitutional presumption to justify rights-limiting acts.

The burden of proof in Ireland has always rested completely on the individual, long before the advent of the *Heaney* test. The failure to adopt the shifting burden from *Oakes* was a choice to follow that long-held judicial practice, based on the presumption of constitutionality. It might be that the idea of a two stage process that enables a shift in the burden of proof never occurred to those judges who adopted the simple rule that "he who asserts must prove" in the constitutional context.[68] However, this could have been changed at any point, or afforded detailed consideration. It was not, most likely because there has been no desire on the part of the judiciary to take this step. The conservative nature of the Irish judiciary in constitutional matters is the cause, not the consequence, of this presumption.

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[66] Barak, note 16, at 442-446.
[67] This seems to be the case in Canada, and Barak says the same of Israel and South Africa.
[68] See Chapter 6, at note 110-122.

The results of this conservative attitude have been devastating for rights review in Ireland. The Irish courts, making highly non-interventionist choices, have forced rights-holders to face a difficult, uphill battle to disprove any state justification for the infringement of their rights. It behoves us to take rights seriously, and as long as we see justification of rights restrictions as something to be *disproven* by a rights-holder, with scepticism that the State ever acts unjustifiably in this regard, we will never fulfil that duty. First, the attitude of the Irish judiciary must change, with a realisation that the current regime is simply too narrow and too conservative to adequately protect rights. With this realisation, the burden of proof can be reconsidered, and can be reapportioned fairly between the rights-holder and the State.

Despite Foley's initial sanguinity in the wake of *BUPA Ireland*,[69] I see little sign that this issue is, in fact, undergoing any real change. It is more likely that its opacity –since it is so rarely considered or discussed– leads some judges to apply the burden of proof without regard to precedent and longstanding practice. Changing this would require change in the way courts conceive of the presumption of constitutionality as well. These are sacred cows of the Irish legal order, and may be hard to overcome. However, only by changing these values can standards of review in Ireland ever shake off the highly non-interventionist practices of the past.

Deference and Interventionism

In critiquing the current Irish approach, and advocating a different one, I have been advocating for a radical change in the stance of the Irish courts towards interventionism. This section seeks to outline what that would entail –a significant erosion of the presumption of constitutionality, as well as the other specific changes I have advocated in this chapter– and why that should be done. I also wish to advocate a clear explanation of factors that influence deference being set out, and explained in any case in which they are invoked. This would guard against the presence or absence of deference being a disguise for agreement or disagreement with the choice actually made in that case. Finally, I wish to suggest that a separate standard of review should exist for cases where the courts have made *a priori* decisions that judicial intervention is less appropriate, but that there should be very clear lines drawn as to when it should be used.

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[69] Brian Foley, "The *Bupa Ireland Case* And Constitutional Litigation," (2010) 45 Ir. Jur. (ns) 230.

Reviewing Non-Interventionism

As has been discussed at length, Irish courts have been hugely non-interventionist in drawing up standards of review. In adopting the weakest forms of scrutiny, eschewing balancing almost entirely, and expanding the particularly lax *Tuohy* test into many areas, the courts have chosen not to exercise their role in rights review in an interventionist way. This non-interventionism goes so far as to give the impression that the Irish courts would rather not be involved in this field at all, or at least not as heavily involved as the constitutional order seems to demand. The Irish courts seem to feel burdened by the fact that the Constitution forces upon them an unwanted duty to review the legislature in matters of constitutional rights.

Doyle has recently offered a new way of looking at this issue. He has suggested that a sort of "living law"[70] of a legal system permeates its institutions that can influence the rights jurisprudence. Doyle suggests that, "largely independent of the posited law of the human rights instrument, there is a living law peculiar to the legal or judicial culture in question."[71] This set of norms and values, widely accepted and approved, underlies judicial and legal culture, and generate an "expected way of doing things"[72] which all those inculcated into the legal culture will understand.[73] This living law in Ireland is seen in a deeply ingrained judicial outlook of deference to the State and non-interventionism in rights questions, as we have seen in this examination of standards of review. It is this living law that must change, but this is change that will be hard to effect.

The reluctance to engage in review in this area is understandable, but it cannot co-exist with judicial protections of rights. The courts may think that they can eat their cake and still have it; show vast restraint and respect for the separation of powers and the institutional role of the legislature, and still review the laws of the legislature for constitutional rights violations. However, they cannot; in making non-

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[70] The concept is drawn from Garrett Barden and Tim Murphy's *Law and Justice in the Community* (Oxford, 2010).

[71] Oran Doyle, "The Judicial Protection of Human Rights in Ireland: The Interaction of the Constitution and the European Convention on Human Rights," Four Jurisdictions Conference, Middle Temple, London, May 12th 2012, at 20.

[72] *Ibid* at 20

[73] Doyle suggests degrees of inculcation into these unwritten norms and practices: "Lawyers are more part of this culture than non-lawyers; practitioners are more part of the culture than academics. They are better placed to predict what judges will do with the human rights instruments, because they are more part of the culture and have internalized the same unwritten norms that govern the behaviour of judges." *Ibid* at 20.

interventionist choices in so many areas, the courts come close to abdicating their constitutional duties. I would advocate a more interventionist approach, which would centre on the diminution of the presumption of constitutionality.

Due to its primacy in the constitutional order, it is easy to forget that the presumption of constitutionality is a judge-made rule; it means what the courts say that it means. In expanding that presumption to be all-encompassing, it is clear that the courts' attitude has been severe hesitancy to intervene in rights matters. This attitude should be moderated.

The motivation for the presumption of constitutionality seems to me to be the separation of powers. The courts are not presuming that the legislature acts constitutionally because of any sort of presumed process that the legislature is imagined to go through. It is that the Oireachtas is a constitutionally established institution, worthy of respect. Due to this, the courts presume that the legislature acts within the scope of the Constitution, and does not overstep its bounds. It is the respect mandated by the separation of powers that dictates that the presumption should exist. Even if the legislature went through no open or clear deliberation, and did not consider constitutional issues, it would be entitled to this respect, and entitled to the presumption.

This is why I believe Foley is incorrect in his conclusion that the concerns underlying the presumption of constitutionality can be served by the model which he proposes. In his conclusions, Foley advocates abolition of the presumption of constitutionality and its replacement with a due deference model. Whether or not deference is offered turns on the nature of the legislature's consideration of the constitutional rights issues, and the extent of those considerations.[74]

There are several problems with this suggestion for the replacement of the presumption with due deference. First, this does not avert to the distinction between deference and non-interventionism. The sweeping presumption of constitutionality is not a matter of deference – it does not apply to particular determinations. It is clearly a matter of interventionism, determining how the court deals with all legislation. Therefore, a case-by case model of due deference is profoundly different from dealing with the presumption, which lies at the heart of non-interventionism. Secondly, a case-by-case assessment does not serve the rationale that lies behind the presumption: the respect accorded to the legislature

[74] See Brian Foley, *Deference and the Presumption of Constitutionality*, (IPA, 2008), Chapter 10.

by its privileged status as a constitutionally established organ of government.[75] Deferring when such deference is "earned" does not afford any special status or respect to the legislature, but rather affords special status to particular deliberative processes. Foley's argument may have significant merit, and his case against the extent of the presumption is a strong one, but his alternative cannot claim to be serving the same end as the current presumption.

Cognisant of the importance in which the Irish courts hold this practical manifestation of the separation of powers, and of the merit of this approach, my suggestion would be more modest. I wish to redefine the scope of the presumption, recognising it, without letting it dominate other matters of constitutional importance. The argument that won out in Canada is persuasive – that the nature of Charter rights was such as to stop the presumption operating in a way that would undercut the protection of rights.[76] Similarly, Barak's argument that presumption simply loses its force when it comes to the question of rights limitations stands to reason.[77]

A presumption of constitutionality could persist to presume that the legislature did not restrict rights, and require clear illustration that this was the case. This respects and recognises the legislature's constitutional position. However, at that point, the constitutional status of rights also becomes relevant. To presume that the legislature acted justly in limiting rights might respect the legislature to an even greater degree, but it pays insufficient respect to the facts that rights, too, have special constitutional status. A balance can be struck that would temper the courts' non-interventionism without completely disregarding the purpose of the presumption, and the message it sends.

Of course, this is about far more than the presumption of constitutionality and the burden of proof that it creates; it is about a changing attitude to the idea behind the presumption. Irish courts have privileged respect for the legislature, at the expense of respect of rights.[78] Change in this attitude is needed, because it has

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[75] See Doyle, "Review: Deference and the Presumption of Constitutionality," Law Society Gazette, April 2009 at 47. Doyle disagrees with Foley's view that deference is in Ireland has been based on the process of legislative consideration of issues: "Rather, judicial deference seems to me – for better or worse – to be a substantive choice designed to uphold democratically approved measures."

[76] See Chapter 9, at note 111; *Manitoba v Metropolitan Stores* 1987 CanLII 79 (SCC).

[77] Barak, note 16, at 444-446.

[78] Arguably, courts have done this in the context of remedies for positive entitlements under the Constitution as well, as seen in case of *TD v Minister for Education* [2001] 4 IR 259, where the Supreme Court chose to prioritise respect for the executive power and the separation of powers as a

led to a variety of non-interventionist choices, not merely the continued pre-eminence of the presumption of constitutionality; that is a symptom of the larger problem. The normative choices outlined in this chapter, which aim to move Ireland away from this highly non-interventionist approach, would only be possible in the event that this pervasive judicial passivity were to change. It is so entrenched in legal and judicial culture that it might be very difficult to undo. In the name of realising more extensive protection of rights, however, it behoves us to try.

Tuohy v Courtney as a Non-Interventionist Standard of Review

Not all of the instances of non-interventionism by the Irish courts are misplaced, nor are all non-interventionist choices to be avoided. Several non-interventionist choices have been made in the proposed standard of review above, such as the approach to tailoring to the right. In addition, the underlying rationale of *Tuohy v Courtney* holds significant weight. The core rationale was soon forgotten, and the test proliferated into all areas of constitutional jurisprudence. This was where the courts' non-interventionism became excessive, because it was motivated by little other than an overdeveloped desire to show respect to the legislature. I would advocate the maintenance of the *Tuohy v Courtney* standard –or something substantially similar to it[79]– as an avowedly non-interventionist standard of review. However, I would limit its use to certain enumerated categories of cases. This would limit non-interventionist choices to the areas where they were appropriate.

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concept over the granting of a mandatory order to vindicate the rights of children in State care to secure accommodation. For some of the extensive academic commentary on this point, see Gerard Hogan, "Judicial Review and Socio-Economic Rights" in Sarkin and Binchy (eds.), *Human Rights, the Citizen and the State: South African and Irish Perspectives* (Roundhall, 2001) David Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press, 2001); Gerry Whyte, "Rights and Judicial Activisim" in Keily (ed.) *Theorising Irish Social Policy* (2004), at 165; Adrian Hardiman, "The Role of the Supreme Court in Our Democracy" in Mulholland (ed.), *Political Choice and Democratic Freedom in Ireland* (2004); Gerry Whyte, "The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman" (2005) 27 DULJ 368; Conor O'Mahony, "Education, Remedies, and the Separation of Powers" (2002) 24 DULJ at 57; Paul Anthony McDermott, "The Separation of Powers and the Doctrine of Non-Justiciability" 2000 35 Ir. Jur. (n.s.) 280; Rory O'Connell, "From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution," in Doyle and Carolan (eds.), *The Irish Constitution: Governance and Values,* (Thompson Round Hall, 2008).

[79] It might be worth abandoning the *Tuohy* test, given how it has been misused since its inception. A similar test without the baggage of *Tuohy v Courtney*'s misapplication would perhaps be less likely to exceed the strict boundaries that I wish to impose. Similarly, *Tuohy v Courtney*'s language is too loose, and is not necessarily limited to cases of direct rights clash. A new and more carefully worded elaboration of the rationale might be again avoid the test creeping over its boundaries. However, for the sake of simplicity, I will refer to maintenance of the *Tuohy* test as a short hand.

The risk of stalemate with directly conflicting constitutional rights is great. A law that protects certain rights will sometimes clash with other rights that cannot be protected simultaneously. It might be possible for a court to determine an individual case of a direct rights clash; when two rights cannot co-exist, the courts may be able to determine which right should win out in a particular circumstance. However, this is not a practical way to resolve the problems of rights clashes generally. It requires a case-by-case determination, meaning that each and every rights holder must bear the inconvenience and expense of litigation to vindicate his rights. There is no certainty and no consistency; the extent to which either right is protected is dependent on judicial determination. Therefore, when the legislature weighs in, resolving the clash in favour of one right or the other, this provides significant benefit. It provides certainty where there was none. It means that rights can be exercised and enforced without judicial intervention. But such a measure, by its nature, requires a resolution that is more sweeping and less nuanced than one would get in a case-by-case determination. Showing that a court, making a *de novo* determination in balancing, would reach a different result would undoubtedly be possible in some cases. Therefore, it makes sense to remove courts from the usual exercises in standards of review to some degree.

Unlike most rights questions, when rights directly clash, and a law acts directly to protect rights, the rights holders protected by the law will have their rights infringed to a greater degree if the law is invalidated. Therefore, as a class, such cases are different from usual rights limitations, where it is an ordinary political objective or public purpose that is being pursued, and ordinary standards of review no longer function in the same way in those cases. The rights protected by the law deserve the same protection that an ordinary standard of review would give to the rights of the challenger. The *Touhy v Courtney* standard does this, in giving the legislature more leeway to make such laws, thus giving more strength to the rights protected by such laws. It does not abandon the courts' duty of oversight in rights cases, because it retains its discretion to intervene where one right is given no regard, or is ignored for a reason unrelated to the need to protect the other right. The reason for its "failure" to review the rights restriction strictly is that to do so would endanger the rights protected by the law.

The *Tuohy* test should only be used where the law in question directly protects rights. To be clear about what this means, this occurs when two specifically

protected constitutional rights conflict, and the rights of one group of specific individuals will be directly affected by the vindication of the other right. The *Tuohy v Courtney* example is clear enough: the right to take and win litigation, and the right not to be burden by litigation (and threat of litigation) that is long delayed. The clash seen in *Roche v Roche*,[80] between a one person's right to procreate and his or her partner's right not to procreate, is also clear. Those rights cannot be enjoyed simultaneously. And whenever a person seeks to vindicate one right, it means that the other person involved cannot enjoy the other right. It is in those circumstances that the legislature is entitled to resolve the clash with an expectation of minimal judicial intervention.

A clash of an individual right with a general right –say, the right of society, or members of society, to be free from crime[81]– are not enough to trigger non-interventionist review, as these are not entitled to the same privilege as individual constitutional rights, so this clash does not present the same issues. Nor should any other clash outside of two individual rights –such a clash of a constitutional right with a "constitutional duty"[82] or non-rights "interests"– be sufficient to trigger this review. The stalemate problem is particular to a direct clash of rights. Finally, new individual rights should not be recognised too readily, which is not a problem in Ireland, but perhaps once was.[83] If courts are very willing to recognise new rights, it would be possible to do this to uphold a law that was well-liked by finding that the interest that it pursues is a constitutionally protected right. It would make use of the test too unpredictable, and would be too difficult to judge if it was being used honestly or disingenuously.

The State should have to establish that a direct clash is present in a given case, bearing the burden of showing that the *Tuohy* test should be used. It should never be used without express demonstration that individual rights are directly protected by the law. Only through this can the gradual creep of this non-interventionist test into other areas be avoided.

It is my view that no other rationale justifies the kind of non-interventionism that is apparent in the *Tuohy* test. However, if some other rationale was considered to justify similar non-interventionism, it would be essential that this be clearly

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[80] [2009] IESC 81.
[81] *Rock v Ireland* [1997] 3 IR 484.
[82] *Tuohy v Courtney* [1994] 3 IR 1.
[83] See Chapter 7, at note 110-113.

articulated, and again, essential that a burden be placed on the State to show that the law in question fell into this category and so deserved the less interventionist standard of review. Otherwise, there is a serious risk of creeping non-interventionism smothering rights review, as has happened in Ireland to date.

Deference

So much can be said about deference that it is difficult to make a succinct a contribution to the normative debate about its appropriateness. However, I feel that separating genuine cases of deference –where particular determinations are deferred to– from non-interventionism –where the courts simply withdraw from the question of review– goes some way to ensuring that the deference is properly considered, and will not turn into non-review. Once this is done, deference can be a more case-specific decision, which does not endanger the strength of rights review generally. If "deference" were spread so broadly that this became a decision not to intervene, then the same criticisms as above would apply.

First, deference must be case-by-case, insofar as it relates only to particular determinations. It does lead to a general change in the enquiry, or else it is a non-interventionist choice.

Secondly, deference cannot be a synonym for agreement.[84] The *sine qua non* of deference is that one defers to the decision in spite of disagreement. Every determination of whether or not to offer deference will turn on specific factors being present or absent. However, care must be taken to avoid the determining deference based on an examination of the decision that might turn on its correctness.

This is a reservation I have about Foley's proposition of due deference.[85] In letting deference turn on how well the legislature has conducted itself, and how well it has considered particular factors, this comes dangerously close to review based on the merits of the decision. This is not similar to looking for particular factors –such as empirical uncertainty, or competing private interests that stop short of a clash of rights– before deciding if deference is appropriate. Rather, it requires a consideration of whether or not the legislature did its job properly in respect of the consideration of constitutional issues. Foley admits that the standard by which

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[84] See Chapter 2, at note 82-84.
[85] Foley, note 74, Chapter 10.

legislative consideration should be judged is difficult to pin down.[86] It therefore difficult to sever a conception of whether or not the legislature has deliberated correctly from whether or not the legislature has reached a result with which one agrees. If one disagrees with the decision ultimately reached, it is more likely perhaps that one would consider that further deliberation should have taken place. If one agrees with the ultimate decision, then it might seem that further deliberations would have achieved little.

Considering deference using contextual factors that may apply in certain cases, but not in others, is the best way to sever deference from choices related to interventionism. However, care must be taken to ensure that these choices are not proxies for agreement, or the concept of deference risks being lost

Finally, without getting involved in a detailed normative argument about what contextual factors are appropriate, I wish to advocate the clear setting out of such factors, and their express invocation any time deference is to be offered. The benefit of categorisation in Canada was that an understanding developed of what factors might be relevant to deference. The importance of particular factors, and why they justify deference, was teased out in the courts. The Irish courts should similarly discuss and debate these different rationales. Many different considerations, such as democratic legitimacy, empirical uncertainty, and competing private interests, may justify deference in some cases. Each case should be examined to see if the elements that would justify deference on these grounds are present. This process should be clear: the rationale relied on and the reasons for it being operative in that instance should be apparent on the face of court judgments. To date in Ireland, deference has operated without a great deal of scrutiny. It was ever-present, but poorly explained; one would find it very difficult to say which precise motivations underlay any particular instance of deference. Non-interventionist choices, which simply declined to exercise the power of judicial review, were made to look like deference when they were not. Deference became a watchword for less judicial scrutiny, rather than a margin of leeway that was afforded by courts in particular cases, and Foley's detailed critique, drawing out themes and explaining tangled case law on the topic, illustrates this.[87]

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[86] *Ibid* at 365.
[87] Foley, note 74.

Courts must be cognisant of the need to explain any deference offered, and explain why particular rationales are operative in specific cases. In the end, this matters as much or more than which particular rationales are relied on. The ability for judges and academics to critique the way that deference is invoked in particular cases should improve the invocation of deference in the long-run, and stop it undermining the judicial protection of rights.

Conclusion

The central insight of this thesis is that most of the elements of standards of review are not conceptual requirements, but normative choices, which change between jurisdictions. In suggesting a standard of review for Ireland, I have put forward my own view on the best normative choices that could be made, and my interpretation of the Irish constitutional order. These are, of course, contested and contestable, and I make no claim for the objective correctness of the approach suggested here; it is merely my own preference.

Whatever approach is ultimately taken in Ireland, the one change proposed here which is essential is transparency. Ireland's greatest problem with standards of review was the adoption of a standard from abroad –the *Oakes/Heaney* test– and moulding it to fit the pre-existing values of the Irish constitutional order. The language of the test does not resemble its application, and it hides the long-held values of Irish courts on review of legislation. Even if no change was made to the way in which standards of review are applied in substance, courts should at least be clear and open about what they do. To do this, the language used in rights adjudication must shift towards something that resembles that which actually takes place. The *Heaney* test has been a cloak that hides the reality of rights review in Ireland. Only with highly detailed analysis is it even possible to see that reality. Surely the very least the we deserve is the ability to see what actually happens in the course of rights adjudication, and not be misled with a standard of review whose appearance is so radically different from its application.

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