# Limiting Rights to Protect Morality: Upholding *Charter* Values as a Pressing and Substantial Objective

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*The Supreme Court of Canada has held that the enforcement of morality is a valid purpose of the criminal law and a pressing and substantial objective capable of justifying limits on* Charter *rights under the* Oakes *test. In this article, we argue that the Court's jurisprudence establishes that it is permissible for the state to limit* Charter *rights to protect morality if doing so advances* Charter *values. We show that this approach is consistent with the need for the state to remain neutral between moral values, a fundamental tenet of liberalism, and we respond to other potential objections. We also apply our argument to various laws governing morality. We claim that laws that prohibit the commodification of the human body and preserve the value of human life have a pressing and substantial objective. Conversely, laws criminalizing consensual sexual practices that rely exclusively on majoritarian moral judgments do not.*

*La Cour suprême du Canada a déterminé que l'application d'une certaine moralité est un objectif valide du droit criminel et un objectif urgent et substantiel capable de justifier des limites aux droits garantis par la* Charte, *selon le test de l'arrêt* Oakes. *Dans cet article, nous soutenons que la jurisprudence de la Cour établit qu'il est possible pour l'État de limiter les droits garantis par la* Charte *afin de protéger la moralité, si cela fait avancer les valeurs de la* Charte. *Nous montrons que cette approche est compatible avec la nécessité pour l'État de rester neutre entre les valeurs morales, un principe fondamental du libéralisme, et de répondre à d'autres critiques potentielles. Nous appliquons ce raisonnement à diverses lois régissant la moralité, en affirmant que celles qui interdisent la marchandisation du corps humain et préservent la valeur de la vie humaine ont un objectif urgent et substantiel. À l'inverse, les lois criminalisant les pratiques sexuelles consensuelles, lesquelles s'appuient exclusivement sur des jugements moraux majoritaires, n'ont pas de tel objectif.*

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## Introduction

According to the *Oakes*[1] test for applying section 1 of the *Charter*,[2] a limit on a *Charter* right that is prescribed by law is justified only if it: (i) has a pressing and substantial objective, (ii) is rationally connected to the law's objective, (iii) impairs the right as minimally as possible, and (iv) is proportionate overall in that its beneficial effects outweigh its harmful effects. The minimal impairment stage has traditionally dominated section 1 analysis, but the Supreme Court has increasingly placed greater emphasis on the final overall proportionality step.[3] This raises the question whether other elements of the *Oakes* test should also be recalibrated.

The first step in determining whether a law advances a pressing and substantial objective ("PSO") has recently attracted attention. In *Frank v Canada (Attorney General)*,[4] the Court concluded that the goal of preserving the "social contract," whereby citizens participate in the creation of laws and are in turn expected to obey them, was too vague to serve as a PSO for limiting the section 3 *Charter* right to vote. *Frank* follows *Sauvé v Canada (Chief Electoral Officer)*,[5] which decided that enhancing civic responsibility and respect for the rule of law was also too vague to be a PSO for limiting prisoners' right to vote. Earlier still, in *R v Big M Drug Mart Ltd*, the Court held that compelling observance of the Christian Sabbath could not be a PSO for limiting section 2(*a*) of the *Charter* because it amounted to enforcing majoritarian religious beliefs in a way that was inimical to the purpose of religious freedom.[6] However, apart from intolerance for vagueness or overt disregard for *Charter* rights, there are few parameters for identifying permissible or impermissible reasons to limit *Charter* rights under *Oakes*.

In the spirit of the contemporary trend of refining the *Oakes* test, we re-examine the issue of whether "morals laws"[7]— laws that aim to uphold society's fundamental moral values— can be understood as advancing a PSO.

1 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].
2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].
3 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 78 [*Hutterian Brethren*]; *R v KRJ*, 2016 SCC 31 at paras 77-79. See also Sara Weinrib, "The Emergence of the Third Step of the Oakes Test in *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 68:2 UT Fac L Rev 77; Mark Zion, "Effecting Balance: *Oakes* Analysis Restaged" (2012) 43:3 Ottawa L Rev 431.
4 2019 SCC 1 at para 53 [*Frank*].
5 2002 SCC 68 at paras 22-26 [*Sauvé*]. Cf *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202 [*Zundel*].
6 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 8 DLR (4th) 321 [*Big M*].
7 *Cf* Bradley W Miller, "Morals Laws in an Age of Rights: Hart and Devlin at the Supreme Court of Canada" (2010) 55:1 Am J Juris 79.

The Court has not addressed this issue since *R v Butler*.[8] There, it held that the criminalization of extreme pornographic material under the aegis of obscenity limited freedom of expression. But the limit was justified by a PSO of preventing the harm of sexual exploitation and oppression of women. In his reasons, Justice Sopinka nonetheless remarked in *obiter* that Parliament has "the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."[9]

Scholars have extensively explored how harm justifies prohibitions on obscenity.[10] And, ever since H.L.A. Hart critiqued Lord Devlin's argument for criminalizing homosexuality in the United Kingdom, there has been a rich philosophical literature on the legitimacy of legally enforcing moral norms.[11] But no theoretical defence has yet been given of the doctrinal principle alluded to in *Butler* that the enforcement of morality, as a goal independent of harm prevention, could be a PSO under section 1 of the *Charter*. Our contribution in this article seeks to fill this lacuna.

We argue that a morals law advances a PSO if the moral value it aims to safeguard is a *Charter* value. To be clear, we claim that promoting *Charter* values is only a sufficient condition for a morals law to have a PSO, not a necessary one. For example, it may be possible for such a law to have a PSO if it does not promote *Charter* values but instead promotes unwritten principles underlying the Constitution of Canada as a whole.[12] Either way, the challenge for any account of how morals laws could advance a PSO is what Justice Sopinka referred to in *Butler* as "legal moralism."[13] The law cannot undermine the ideals of plu-

8 [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler*].

9 *Ibid* at 493.

10 See e.g. David Dyzenhaus, "John Stuart Mill and the Harm of Pornography" (1992) 102:3 Ethics 534; LW Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004), ch 5; Andrew Koppelman, "Does Obscenity Cause Moral Harm?" (2005) 105:5 Colum L Rev 1635; Nick Cowen, "Millian Liberalism and Extreme Pornography" (2016) American J Political Science 509.

11 HLA Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963). See also Joel Feinberg, T*he Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford: Oxford University Press 1987); Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press 1997); RA Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018).

12 For recent discussion of unwritten constitutional principles, see *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 49. See also *M v H*, [1999] 2 SCR 3 at para 107, 171 DLR (4th) 577 ("While I agree that an objective must be consistent with the principles underlying the *Charter* in order to pass the first stage of the s. 1 analysis . . . [i]t may be that a violation of s. 15(1) can be justified because, although not designed to promote equality, it is designed to promote other values and principles of a free and democratic society. This possibility must be left open . . ." [emphasis omitted])

13 *Butler*, *supra* note 8 at 492.

ralism and neutrality between citizens' conception of the good life by aiming simply to enforce conventional moral standards that are held by a majority of Canadian society. We contend that a *Charter* values approach to morals laws meets this challenge.

We describe the challenge of legal moralism in Part I. We defend the *Charter* values approach in Part II by showing how it garners support from the Court's judgment in *Butler*, its interpretation of criminal prohibitions of obscenity, and Parliament's jurisdiction to enact criminal laws under the constitutional division of powers.[14] In Part III, we argue that the approach avoids legal moralism, and we reply to other objections. In Part IV, we apply the approach to particular examples of morals laws and consider whether they advance a PSO because they protect a *Charter* value. We argue that laws that prohibit the commodification of the human body and that encourage respect for human life safeguard *Charter* values and have a PSO. Conversely, laws prohibiting certain sexual practices among consenting adults are unlikely to pass the first stage of *Oakes* because their justifications have been rooted in majoritarian moral preferences and not *Charter* values.

## I. The challenge of legal moralism

In *Butler*, the government submitted that besides preventing harm to women, the purpose of criminalizing obscenity was to "maintai[n] a 'decent society.'"[15] Justice Sopinka explained that whether the protection of moral values could be a PSO depends on whether we construe the objective as enforcing "a certain standard of public and sexual morality, solely because it reflects the conventions of a given community."[16] Justice Sopinka stated that this type of aim, known as "legal moralism", [17] could not be a PSO under *Oakes*. This is because "a majority deciding what values should inform individual lives and then coercively imposing those values on minorities" is "inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract."[18] In a liberal society, the state must remain neutral between plural conceptions of the good and must not impose the views held by some citizens on others.

14 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27), reprinted in RSC 1985, Appendix II, No 5.
15 *Butler*, *supra* note 8 at 491.
16 *Ibid* at 492.
17 *Ibid*, citing David Dyzenhaus, "Obscenity and the *Charter*: Autonomy and Equality" (1991) 1 CR (4th) 367 at 370 [Dyzenhaus, "Obscenity and the *Charter*"].
18 *Butler*, *supra* note 8 at 492.

On the other hand, as we saw, Justice Sopinka held that the state may enact laws "on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."[19] In order for this claim to be viable, it must be possible for the state to enact morals laws that have a PSO in a manner that avoids legal moralism and instead upholds morality without undermining liberal neutrality.

In concurring reasons, Justice Gonthier agreed that upholding moral values could constitute a PSO if two conditions are met. First, those values must be genuinely moral by addressing concrete problems such as "life, harm," or "well-being," and not mere "differences of opinion or of taste" or "dislike." Second, "a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people." This is because "if the holders of these different conceptions agree that some conduct is not good, then [respect for pluralism] becomes less insurmountable an objection to State action."[20] Justice Gonthier's suggestion, then, is that morals laws can avoid legal moralism and advance a PSO if, in addition to rising above prohibiting merely offensive conduct that is not immoral,[21] they remain neutral by only safeguarding moral values that are the object of agreement between citizens holding plural and diverse conceptions of the good rather than values held merely by a majority of society.

Justice Gonthier applied this proposition later in a dissenting judgment in *Sauvé* to hold that enhancing civic responsibility and respect for the rule of law was a PSO under *Oakes*. He accepted that it is legitimate for the state to curtail the right to vote to achieve this objective because there is a consensus in Canadian society on the fundamental moral value of the social contract, according to which the ability to participate in political processes carries a reciprocal obligation to obey the law.[22] However, the approach to *Oakes* sketched in *Butler* by Justices Sopinka and Gonthier has not received more detailed elaboration outside of this opinion.[23] This is our task in what follows.

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19 *Ibid* at 493.

20 *Ibid* at 523-24, citing Stephen Gardbaum, "Why the Liberal State Can Promote Moral Ideals After All" (1991) 104:6 Harv L Rev 1350.

21 See Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (Oxford: Oxford University Press, 1985).

22 *Sauvé*, *supra* note 5 at paras 109-121. Hence, the view that the social contract can constitute a PSO for limiting the right to vote that was ultimately rejected in *Frank* seems to have had its genesis in the analysis of obscenity in *Butler*. Recall that Justice Sopinka also stated that the imposition of majoritarian moral values on a minority is inimical to freedoms that "form the basis of our social contract."

23 For other recent discussion of *Butler*, see Janine Benedet, "The Paper Tigress: Canadian Obscenity Law 20 Years After *R v Butler*" (2015) 93:1 Can Bar Rev 1.

## II. The *Charter* values approach to the enforcement of morality

In our view, a law enforcing moral values advances a PSO if those values are *Charter* values. This view was recognized in *Butler*. In writing that safeguarding fundamental morality could constitute a PSO, Justice Sopinka cited David Dyzenhaus's comment that "[m]oral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values."[24]

In the article referred to, Dyzenhaus discussed how Justice Twaddle, in a dissent for the Manitoba Court of Appeal in *Butler*, and Justice Wright, in the *Butler* trial decision, each invoked *Charter* values as an interpretative aid in applying *Oakes*. They were particularly concerned with how the *Charter* value of equality informed the objective of criminalizing obscenity as it applied to pornographic material that demeans women. Dyzenhaus writes that, based on these lower court decisions, when "freedom of expression is exercised to perpetuate a regime of inequality such as patriarchy, that freedom cannot be privileged by resort to the right to autonomy."[25] Thus, the *Charter* value of equality was a basis for limiting an individual's moral decision to create or observe degrading material.

Although few courts in Canada have since developed this approach, it has received subsequent support from the Supreme Court on related legal issues. In particular, in *R v Labaye*,[26] the Court interpreted the meaning of indecent acts under section 293 of the *Criminal Code*. While the constitutionality of the provision itself was not challenged, defining whether an act is indecent is interwoven with concerns about enforcing moral values touched on in *Butler*.

Chief Justice McLachlin stated that "indecency" could not be defined by reference to a "community standard of tolerance." Such a test is imprecise and invites judges and jurors to impose their own personal, subjective views of moral impropriety.[27] Furthermore, exclusive reliance on prevailing community standards is objectionable in a liberal pluralist society that mandates tolerance for practices that differ from majoritarian conceptions of the good. Rather, an indecent act in a liberal society is one that produces some harm that society "*formally recognizes*" as incompatible with its proper functioning.[28]

24 *Butler, supra* note 8 at 493, citing Dyzenhaus, "Obscenity and the *Charter*", *supra* note 17 at 376.
25 Dyzenhaus, "Obscenity and the *Charter*", *supra* note 17.
26 *R v Labaye,* 2005 SCC 80 [*Labaye*].
27 *Ibid* at para 18.
28 *Ibid* at para 32 [emphasis in original].

By grounding indecency in harm, and rejecting a definition rooted in prevailing moral beliefs, *Labaye* might be read as denying that the enforcement of moral values — independent of the need to prevent harm — can justifiably restrict individual liberty.[29] On the contrary, *Labaye* must be read as adopting a wider sense of "harm" that encompasses not only setbacks to persons' interests or wellbeing, but to threats to a society's fundamental moral values.[30] Richard Jochelson and James Gacek observe that the "harm as articulated in *Labaye* can clearly invoke harms to political values. Sustaining and guarding society's "proper functioning" presumes a moral order based on consensus which embraces law as a means of imposing and delineating limits on actions."[31]

But if it is insulting to liberal neutrality to locate the moral values in prevailing community standards, how are we to identify those values? In *Labaye*, Chief Justice McLachlin made clear that they must be grounded in norms that our society has recognized in its Constitution or similar fundamental laws.[32] She wrote:

> The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential . . . [T]o ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society's Constitution or similar fundamental laws, like bills of rights, which constitutes society's formal recognition that harm of the sort envisaged may be incompatible with its proper functioning. Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.[33]

In holding that the legitimate purpose of criminalizing indecent acts is to protect Canadian society's fundamental values as they are formally recognized in constitutional laws, *Labaye* supports the view that the enforcement of morality can be a PSO under *Oakes* if a morals law aims to enforce *Charter* values. Thus, if we were to re-litigate *Labaye* and challenge the prohibition of indecent acts as violating section 2(*b*) of the *Charter*, we would expect the provision to have a

29 *Ibid* at para 37. See also *R v Katigbak*, 2011 SCC 48 at paras 66-67.

30 *Labaye*, *supra* note 26 at para 62. See also *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 1060 [*Polygamy Reference*].

31 Richard Jochelson & James Gacek, "Reconstitutions of Harm: Novel Applications of the *Labaye* Test Since 2005" (2019) 56:4 Alta L Rev 991 at 1004. See also Benjamin L Berger, "Moral Judgment, Criminal Law, and the Constitutional Protection of Religion" (2008) 40 SCLR (2d) 513 at 536.

32 *Labaye*, *supra* note 26 at para 30.

33 *Ibid* at para 33.

PSO under *Oakes* if it prevented harm to formally recognized values or values that, in other words, are *Charter* values.

Debates over the legitimacy of morals laws also arise in the Supreme Court caselaw on the constitutional division of powers. It has long been held that Parliament acts with a valid criminal law purpose when legislating to uphold morality.[34] For example, in *Reference re Assisted Human Reproduction Act* ("*AHRA Reference*"), Chief Justice McLachlin wrote, "criminal law may target conduct that Parliament reasonably apprehends as a threat to our central moral precepts. Moral disapprobation is itself sufficient to ground criminal law when it addresses issues that are integral to society."[35]

Justices Binnie and Gonthier summarized the division of powers caselaw in *R v Malmo-Levine; R v Caine* while deciding that criminalizing the possession of marijuana was a valid criminal objective. In framing the proper scope of morals laws, they wrote that the criminal law's legitimate concern with morality "does not include mere 'conventional standards of propriety' but must be understood as referring to societal values beyond the simply prurient or prudish."[36] Despite referencing *Butler*, *Charter* values do not figure in the majority's analysis in *Malmo-Levine*. The account of valid morals laws is negative and informs us only of what is not a valid objective, namely, the imposition of conventional standards of propriety that are not prurient or prudish. Nor does the majority offer any guidance on how courts can make that negative determination. As such, on its own, *Malmo-Levine* does not take us very far in being able to distinguish between morals laws that advance a PSO under *Oakes* and those that do not.[37]

Nevertheless, if we interpret cases like the *AHRA Reference* and *Malmo-Levine* in harmony with *Butler* and *Labaye*, we can infer that in a pluralistic

34 *Reference re Validity of Section 5 (a) Dairy Industry Act* (1948), [1949] SCR 1 at 50, 1 DLR 433; *Labatt Breweries of Canada Ltd v Attorney General of Canada* (1979), [1980] 1 SCR 914 at 932-33, 110 DLR (3d) 594. See also Carolyn Strange & Tina Loo, *Making Good: Law and Moral Regulation in Canada, 1867-1939* (Toronto: University of Toronto Press, 1997).

35 *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 50 [*AHRA Reference*], cited in *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 90 [*GNDA Reference*]. See also John D Whyte, "Federalism and Moral Regulation: A Comment on *Reference Re Assisted Human Reproduction Act*" (2011) 74:1 Sask L Rev 45; Shannon Hale & Dwight Newman, "Constitutionalism and the *Genetic Non-Discrimination Act Reference*" (2020) 29:3 Const Forum Const 31 at 41-43.

36 *R v Malmo-Levine; R v Caine*, 2003 SCC 743 at para 77 [*Malmo-Levine*].

37 It should also be kept in mind that the caselaw on Parliament's criminal law power is only meant to determine whether a morals law is constitutionally *intra vires* and not whether any limit on rights it causes is demonstrably justified in a free and democratic society under the *Charter*. Accordingly, it might be possible for such a law to be a valid exercise of the criminal law power even if it does not advance a PSO capable of justifying a limit on *Charter* rights.

liberal society, Parliament can legislate to protect fundamental moral values if those values are formally recognized in constitutional laws. A nexus to *Charter* values ensures that legislation does not merely impose prudish taste and majoritarian preferences but instead upholds a neutral moral standard consistent with individual liberty.

## III. Responses to objections

This returns us to the legal moralism challenge. A skeptic might object that protecting *Charter* values does not constitute a PSO capable of justifying limits on *Charter* rights because it does not remain neutral between plural conceptions of the good life and risks imposing moral values conventionally held by a majority to those outside the majority.

In reply, we argue that it is legitimate to limit *Charter* rights to protect *Charter* values in a liberal society for two reasons. First, *Charter* values can be accepted by all members of the community no matter what moral view they hold. Second, the very objective of preserving liberal neutrality between moral views requires the state to limit *Charter* rights when their exercise is inconsistent with *Charter* values. We will set out these two replies in turn.

In *Butler*, Justice Gonthier suggested that limits on *Charter* rights imposed by morals laws avoid legal moralism where a societal consensus exists on the moral iniquity of certain conduct and the need to legally restrain it. In our view, we should expect such agreement to coalesce where conduct threatens *Charter* values. This is because values such as liberty, fundamental justice, equality, human dignity, privacy, and autonomy — the "aspects of human flourishing"[38] that *Charter* rights protect — are expressed in sufficiently general language that enables them to secure the allegiance of various people holding various moral views for various reasons while still enabling these people to disagree over how these values should be applied to resolve disputes in concrete cases. For example, even people who disagree about the moral propriety of criminalizing medical assistance in dying could agree that to flourish people should not be deprived of liberty or security of the person except in accordance with principles of fundamental justice.[39]

These claims are implicit in the Supreme Court's constitutional jurisprudence. For example, in *Re Manitoba Language Rights*, the Court stated that the

38 *McKitty v Hayani*, 2019 ONCA 805 at para 96 [*McKitty*]; *Ontario Nurses' Association v Participating Nursing Home*s, 2021 ONCA 148 at paras 152-53 [*ONA*].

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

"Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental."[40] In *Canada (Attorney General) v Hislop*, the Court expanded on this by describing constitutional law as protecting shared values: "The inviolability of the Constitution ensures that our nation's most cherished values are preserved."[41] We take the Court to say that the principles and values in question are, or are expected to be, "held as fundamental" and "most cherished" not just by some subset of Canadians but by all Canadians in consensus. Indeed, the Court subsequently confirmed this view by stating that a liberal society can cohere only if "all its participants accept that certain basic norms and standards are binding."[42] These basic norms must include *Charter* values. After all, it would be inconsistent for the Court to claim that the protection of *Charter* values merely amounts to enforcing majoritarian values if, as it also has claimed, the protection of minority rights is an underlying principle of the Constitution as a whole.[43]

The fact that *Charter* values provide a common point of agreement on moral values across different conceptions of the good while still allowing for the reasonable disagreement that characterizes pluralistic liberal societies is also what makes the "living tree" method of constitutional interpretation possible.[44] *Charter* values are sites for intergenerational agreement about what moral values will govern our polity, but they are capable of being applied by different generations in different ways depending on how moral values evolve over time.[45] It follows that they are not identical to any particular moral values held by any particular intergenerational or intragenerational groups of citizens; they are "freestanding" from any particular worldviews.[46]

It is helpful to note how our argument relates to the distinction between "positive" and "critical" morality that often arises in discussions of legal moralism. Hart defined "positive morality" as "the morality actually accepted and

40 *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 745, 19 DLR (4th) 1.

41 *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 114. See also *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at para 46 [*Loyola*]; "Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada" (13 February 2014), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/spe-dis/bm-2014-02-13-eng.aspx> [perma.cc/B4KV-972E].

42 *Christian Education South Africa v Minister of Education* (2000), 10 B Const LR 1051 at para 35 (S Afr Const Ct), cited in *Bruker v Marcovitz*, 2007 SCC 54 at para 74.

43 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 61 DLR (4th) 385 at paras 79-82.

44 For discussion of living tree interpretation, see *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 21-30. See also Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can JL & Jur 55.

45 For an argument along similar lines as the argument presented here, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) at 7-12.

46 John Rawls, *Political Liberalism*, expanded ed (New York: Columbia University Press, 2005) at 10.

shared by a given social group" and "critical morality" as the "general moral principles used in the criticism of actual social institutions including positive morality."[47] In other words, positive morality is conventional — it can vary from place to place and time to time — while critical morality is the true, universal, objective morality that can be used as an independent standard for critiquing the moral views people actually hold in a given time and place. In claiming that *Charter* values are values that can be the object of an overlapping consensus among citizens in a liberal society, we do not go so far as to claim that the potential for such a consensus means that *Charter* values must be objectively true moral values according to critical morality.[48] Rather than straightforwardly availing ourselves of the positive/critical morality distinction, our concern is with a distinction *within* positive morality between one version of it that consists of majoritarian values alone and another version that consists of values that could be agreed upon by all Canadians, regardless of whether they are conventionally held by a majority.

We can refer to the latter version of positive morality as a community's "constitutional morality,"[49] a concept that enjoys recognition in Commonwealth jurisdictions outside Canada. For example, in a case where the Delhi High Court in India read down a statute criminalizing intercourse between gay men, Chief Justice Ajit Prakash Shah held that the statute could not be justified by how most citizens disapproved of same-sex relationships. He wrote as follows:

> Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights . . . . Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality.[50]

47 Hart, *supra* note 11 at 20.

48 Some moral philosophers maintain that for a moral principle to be objectively true and correct is just for it to be amenable to a kind of hypothetical agreement or consensus. See e.g. David Gauthier, *Morals By Agreement* (Oxford: Clarendon Press, 1987). We make no commitment to this kind of view here.

49 See e.g. WJ Waluchow, "Constitutional Morality and Bills of Rights" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 65.

50 *Naz Foundation v Government of NCT of Delhi* (2009), [111] DRJ 1, [2009] INDLHC 2450 (Delhi HC). While the decision was overturned on appeal, its central holding was later affirmed by the Supreme Court of India. See *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321, [2018] INSC 746 (India).

Similarly, when interpreting the purpose of criminal prohibitions of prostitution, Justices O'Regan and Sachs of the Constitutional Court of South Africa referred to the Canadian *Butler* decision and expanded on its holding as follows:

> To posit a pluralist constitutional democracy that is tolerant of different forms of conduct is not, however, to presuppose one without morality or without a point of view. A pluralist constitutional democracy does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but it is not neutral in its value system. Our Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality . . . . [W]hat is central to the character and functioning of the state is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself. The state has accordingly not only the right but the duty to promote the foundational values of the interim Constitution.[51]

These judgments reveal that, in a pluralistic and tolerant society, limits on constitutional rights cannot be justified by "popular morality," that is, the prevailing moral opinions of the day or conventional majoritarian beliefs. They can, however, be justified by the need to foster "constitutional morality" or a society's "deep civic morality." This system of moral values is also positive and conventional. However, it is made up of a society's fundamental and stable moral commitments, which all citizens can rally around regardless of their divergent moral views or transient political convictions.[52]

While it is unnecessary to hold that constitutional morality thus understood rises to the level of critical morality, it is also not identical to majoritarian positive morality either. Rather, it sits in the middle of these two extremes. Ryan Thoreson uses the term "suprapositive" to designate this intermediate position. As he explains, "[t]he doctrine of constitutional morality shifts discussions of morality toward these suprapositive values. Rather than allowing a representative of the government or the preferences of a popular majority to decide what is or is not moral, a constitutional morality analysis considers these claims in light of the broader values and commitments of the polity."[53]

Let us move on to our second reply to legal moralism. Consider the perspective of someone like Donald Butler, or perhaps James Keegstra,[54] Ernst

51 *S v Jordan and Others*, [2002] ZACC 22, 2002 (6) SA 642 at paras 104-05 (S Afr Const Ct).

52 Mary Wollstonecraft, *An Historical and Moral View of the Origin and Progress of the French Revolution and the Effect it has Produced in Europe* (London: J Johnson, in St Paul's Church-Yard, 1794) at 404.

53 Ryan Thoreson, "The Limits of Moral Limitations: Reconceptualizing Morals in Human Rights Law" (2018) 59:1 Harv Intl LJ 197 at 230.

54 *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1 [*Keegstra*].

Zundel,[55] or William Whatcott.[56] Your speech is said to be inegalitarian, and you have had a *Charter* right to free expression denied by a law that is said to promote the *Charter* value of equality. Suppose you complain that the law restricts your liberty because it imposes a particular conception of the good that you reject. Your complaint, in other words, is that the law abjures liberal neutrality.

Your complaint is unlikely to be compelling. Your entitlement to exercise your *Charter* rights free from intrusion by the morality of others, and your demand that the state not take a stand on whether your view is correct or not, lose their force if your moral beliefs deny that others similarly have the right to be free to pursue their conception of the good. If you deny the need for neutrality with respect to others' conception of the good, you cannot carve yourself out as exceptional and, at the same time, avail yourself of neutrality with respect to your own conception of the good. This is why the Court has held, for example, that violent expression is not protected under section 2(*b*) of the *Charter*. Threats of violence "undermine the very values and social conditions that are necessary for the continued existence of freedom of expression."[57]

Hence, if the state enacts a morals law that promotes *Charter* values by prohibiting behaviour that impedes others' pursuits of their worldviews, it has not abandoned neutrality. It has rather guaranteed the conditions under which neutrality can flourish by preventing the societal dissemination of views that reject the need for neutrality. As Dyzenhaus writes, the individual's right to "moral independence,"[58] that is, the right to autonomously pursue one's own moral vision of a valuable life, is only valuable to the extent that it is consistent with equality:

> [L]iberalism is an egalitarian doctrine which requires the state to be neutral between conceptions of the good life only insofar as particular conceptions do not aim to support existing inequalities or to create new ones. The state is thus not only permitted but is even required to act to create a public culture of social and political equality, because it is only with such a culture as the backdrop that individuals will be able to lead autonomous lives.[59]

55 *Zundel*, *supra* note 5.

56 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*].

57 *R v Khawaja*, 2012 SCC 69 at para 70, cited in *Whatcott*, *supra* note 56 at para 112.

58 Dyzenhaus, "Obscenity and the *Charter*", *supra* note 17.

59 David Dyzenhaus, "Regulating Free Speech" (1991) 23:2 Ottawa L Rev 289 at 315. For similar arguments, see Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) at 359-65; Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), ch 11.

Dyzenhaus holds that this theoretical account of liberal neutrality supports Justice Wright's invocation of *Charter* values to identify a PSO for limiting section 2(*b*) of the *Charter* in *Butler*.[60]

A useful illustration of this reply to legal moralism comes from how the Supreme Court used the *Charter* value of equality to limit the availability of the provocation defense for those accused of murder. At the time of *R v Tran*,[61] the defense was available under the *Criminal Code* only where the accused killed the victim in response to a "wrongful act" or "insult" that is sufficient to deprive the "ordinary person" of the power of self-control.[62] The rationale for an objective standard of sufficiency was to encourage citizens to behave in a manner that eschewed violence in response to perceived slights and not give an accused access to the defense whenever he or she subjectively regarded an insult as sufficient to warrant losing control.

But in *Tran,* the Court went further and stated that "the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*."[63] This meant that, for example, the defense would not be available to an accused who exhibited homophobic behaviour by losing control in response to a homosexual advance. It would also not be available to an accused who harbours the sexist belief that his wife is his property and kills his wife to preserve his "honour" upon seeing her with a paramour. In her reasons, Justice Abella emphasized "the cardinal principle that criminal law is concerned with setting standards of human behaviour."[64] *Tran* thus encourages people to accept the *Charter* value of equality by eschewing discriminatory reactions and limits the liberty of accused persons who fail to do so in order to promote egalitarianism. This should not attract charges of illiberalism, departure from state neutrality, or the imposition of majoritarian moral values. Nor should the *Charter* values approach to the PSO step of *Oakes*.[65]

60 Dyzenhaus, "Obscenity and the *Charter*", *supra* note 17.

61 2010 SCC 58 [*Tran*].

62 The statutory provision has since been amended to remove this language. See *Criminal Code*, RSC, 1985, c C-46, s 232 [*Criminal Code*]. For discussion of the amendments, see Isabel Grant & Debra Parkes, "Equality and the Defence of Provocation" (2017) 40:2 Dal LJ 455 at 479-84.

63 *Tran*, *supra* note 61 at para 34.

64 *Ibid*.

65 For discussion of other cases where the Court has held that a limit on a *Charter* right that protects a *Charter* value is a PSO, see Vanessa MacDonnell & Jula Hughes, "The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law" (2013) 50:4 Osgoode Hall LJ 999 at 1022-37.

Having presented our replies to the challenge of legal moralism, we now turn to defending the approach from separate objections. To begin, Bradley Miller (now a judge of the Ontario Court of Appeal) has critiqued the approach, writing that "[i]f the enumerated rights and freedoms are to be limited by the principles of a free and democratic society, it seems circular to then define the principles of a free and democratic society exclusively by reference to the enumerated rights and freedoms."[66]

But this objection is flawed. A law is never challenged on the basis that it limits *Charter* rights *tout court* and never defended on the basis that it protects *Charter* values *tout court*. Rather, *Charter* claimants typically allege that a morals law limits a specific right(s) and governmental respondents submit that the law protects a specific *Charter* value(s). It is therefore not circular to hold that one *Charter* right, like the right to free expression at issue in *Butler* or the right to liberty at issue in *Tran*, can be limited by an entirely distinct *Charter* value, like the value of equality for women. The interplay between the enumerated *Charter* rights and section 1 is symbiotic. Section 1 provides that rights are subject to limits that "can be demonstrably justified in a free and democratic society." But the values of a free and democratic society cannot be separated from those underlying the enumerated rights. In *Oakes*, Chief Justice Dickson observed:

> Inclusion of [the words "free and democratic society"] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. . . . 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.[67]

Thus, far from being circular, the limitation of *Charter* rights by morals laws to protect *Charter* values brings into full view the "ultimate standard" of justification for limits on rights.[68]

Another objection to the *Charter* values approach might be that the very vagueness that permits their broad acceptability across worldviews makes them overly indeterminate. Lacking a clear framework for identifying whether a

66 Miller, *supra* note 7 at 90. See also Berger, *supra* note 31 at 537.

67 *Oakes*, *supra* note 1 at 136. See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056, 59 DLR (4th) 416; *Keegstra*, *supra* note 54 at 735-36.

68 For discussion, see Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 436-37.

*Charter* value exists and when such a value is endangered, their application to resolve legal disputes is malleable and held hostage to judges' subjective personal inclinations, which is contrary to the rule of law.[69] This concern prompted the concurring and dissenting judges in *Law Society of British Columbia v Trinity Western University*[70] to recalibrate, or outright reject, the *Charter* values approach set out in *Doré v Barreau du Québec*[71] in the administrative law context. We also saw at the outset of this article that the Court in *Sauvé* and *Frank* was intolerant of indeterminate concepts when identifying a law's PSO.

We accept that the sources and scope of *Charter* values are more ambiguous than *Charter* rights themselves.[72] But, as we shall argue presently, this, in itself, does not render them so ethereal as to invite excessive judicial subjectivity or so elusive as to preclude a court from employing them to establish a PSO.

For starters, it must be borne in mind that our *Charter* values approach is distinct from the *Charter* values approach outlined in *Doré*. Therefore, criticisms leveled against the latter do not necessarily impugn the former. In particular, we do not recommend the use of *Charter* values as a standalone basis for adjudicating *Charter* challenges that replaces *Oakes* wholesale. On the contrary, ensuring that a morals law has a nexus with a *Charter* value provides the means by which a court can assess whether the law advances a PSO in the first step of *Oakes*. Rather than displacing the *Oakes* test, the inquiry is incorporated within it.

The significance of this nuance becomes clear if we remember that judges are constrained in the way they must formulate a PSO under *Oakes*. These constraints derive from the rules for interpreting a law's purpose when determining whether the law limits section 7 of the *Charter*. For example, a court's statement of a law's objective must not remain simply at the general level of the law's "animating social value."[73] Accordingly, if a morals law is said to pursue a *Charter* value, the analytical strictures of the *Oakes* test require judges to articulate the law's PSO in a way that maximizes precision and succinctness while minimizing vagueness and indeterminacy. In addition to these strictures, it should be

69 See e.g. David A Crerar, "The Darker Corners: The Incoherence of 2(*b*) Obscenity Jurisprudence After *Butler*" (1997) 28:2 Ottawa L Rev 377 at 400; Berger, *supra* note 31 at 536; *Gehl v Canada (Attorney General)*, 2017 ONCA 319, Lauwers and Miller JJA, concurring; *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893, Lauwers and Miller JJA, concurring.

70 2018 SCC 32 at paras 111, 171-172, 307-11 [*Trinity Western*].

71 2012 SCC 12.

72 Anthony Sangiuliano, "The Dawn of *Vavilov*, the Twilight of *Doré*: Remedial Paths in Judicial Review of Rights-Affecting Administrative Decisions and the Unification of Canadian Public Law" (2022) 59:3 Alta L Rev 725.

73 *Frank*, *supra* note 4 at para 46, citing *R v Moriarity*, 2015 SCC 55 at para 28.

borne in mind that when a judge identifies the protection of a *Charter* value as a law's PSO, the judge's reasoning is thereby oriented towards the community's constitutional morality as opposed to majoritarian views. This, as we saw above, is a form of positive morality that nonetheless preserves the neutrality of judicial reasoning and avoids the hazard that judges will mould *Charter* values with reference to their own moral views.[74]

Furthermore, even if the Court were to hypothetically reverse course and disavow *Doré*, the well-founded role of *Charter* values in several other aspects of constitutional adjudication shows that they are not overly indeterminate when identifying a statute's purpose and are sufficiently precise to provide a legitimate model for assessing the justification of morals laws. Although the Court in *Trinity Western* disagreed over the propriety of *Doré*, it was unanimous that *Charter* values play a role in constitutional adjudication.[75] For example, *Charter* values inform the purposive interpretation to *Charter* rights.[76] This was recently illustrated in *Quebec v 9147-03721 Quebec inc,* where the Court decided the section 12 *Charter* guarantee prohibiting cruel and unusual treatment protects human beings exclusively because, read purposively, the right is "inextricably anchored in human dignity."[77] Similarly, in *Mounted Police Association of Ontario v Canada (Attorney General)*, the Court referenced the *Charter* value of equality to interpret the purpose of the section 2(*d*) *Charter* right to freedom of association.[78] *Charter* values are also invoked when assessing the detrimental effects of an impugned law in the final balancing stage of the *Oakes* test.[79] For instance, in *Alberta v Hutterian Brethren of Wilson Colony*, the Court assessed the negative effects of a law limiting the section 2(*b*) *Charter* right to religious freedom on the *Charter* values of "liberty, human dignity, equality, autonomy, and the enhancement of democracy."[80]

74 *Cf* Wil Waluchow, "On the Neutrality of *Charter* Reasoning" in Jordi Ferrer Beltrán, José Juan Moreso & Diego M Papayannis, eds, *Neutrality and Theory of Law* (Dordecht, ND: Springer, 2013) 203.

75 *Trinity Western, supra* note 70 at paras 115, 170, 270. See also *R v Comeau,* 2018 SCC 15 at para 52.

76 *Big M*, *supra* note 6 at 344; *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at paras 5-13 [*Quebec (Attorney General)*]; *McKitty, supra* note 38 at para 96; Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation under the *Canadian Charter of Rights and Freedoms*" (2015) 65:3 UTLJ 239.

77 *Quebec (Attorney General), supra* note 76 at para 17 (per Brown and Rowe JJ). See also *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para 48.

78 *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 58. See also *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 81-86.

79 *Loyola*, *supra* note 41 at para 36; Richard Stacey, "A Unified Model of Public Law: *Charter* Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338 at 357-65.

80 *Hutterian Brethren*, *supra* note 3 at para 88.

Moreover, courts have consistently relied on *Charter* values in the development of common law principles[81] and the interpretation of statutes.[82] Their uses in these circumstances, according to Justice Peter Lauwers of the Ontario Court of Appeal, "have not yet proven to be exceptionally problematic."[83] Indeed, although the Court has never formalized a set or canonical list of *Charter* values, certain concepts are so well established that their status as a "*Charter* value" is incontrovertible.[84] For example, we saw that the majority in *Labaye* identified autonomy, liberty, equality and human dignity as examples of values that underlie the Constitution and similar texts.[85] The identification of these values was not revolutionary, and it reflected a rich body of jurisprudence that previously formulated and applied them.[86]

Justice L'Heureux-Dubé's concurring opinion in *Corbiere v Canada (Minister of Indian and Northern Affairs)*[87] offers an instructive example of the *Charter* values approach to recognizing a PSO that we defend. In *Corbiere*, all the judges agreed that provisions of the *Indian Act* restricting the rights of off-reserve band members to vote in band elections limited section 15 of the *Charter* in a manner that could not be justified under section 1. The majority stated that the limit had a PSO under the *Oakes* test, which was "to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council."[88] However, Justice L'Heureux-Dubé provided further detail, stating:

> Parliament's objective is properly classified as ensuring that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective, in my opinion, is pressing and substantial. It accords with *Charter* values, by recognizing the important dignity and autonomy interest in one's home and livelihood.[89]

81 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 603, 33 DLR (4th) 174; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 83-99, 126 DLR (4th) 129.

82 *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 59; *R v Rodgers*, 2006 SCC 15 at paras 18-19; *R v Mabior,* 2012 SCC 47 at para 43.

83 The Honourable Justice Peter Lauwers. "What Could Go Wrong with *Charter* Values?" (2019) 91 SCLR (2d) 1 at para 169.

84 *Trinity Western, supra* note 70 at para 41; *McKitty, supra* note 38 at para 100; *ONA, supra* note 38 at paras 152-54.

85 *Labaye*, *supra* note 26 at para 33.

86 See e.g. *Oakes, supra* note 1; *M(A) v Ryan,* [1997] 1 SCR 157 at para 30, 143 DLR (4th) 1; *Blencoe v British Columbia (Human Rights Commission*), 2000 SCC 44 at paras 76-78.

87 [1999] 2 SCR 203, 173 DLR (4th) 1.

88 *Ibid* at para 21.

89 *Ibid* at para 100.

While the PSO of the challenged law in *Corbiere* was similar to the objectives advanced by the government in *Sauvé* and *Frank* for limiting the section 3 *Charter* right to vote, it was not deemed overly abstract, vague, or indeterminate. One possible explanation for why it was seen as sufficiently precise was that it was framed with specific reference to familiar *Charter* values instead of comparatively ambiguous concepts in "social contract" political philosophy that are extraneous to Canadian constitutional law.[90]

*Charter* values are in fact more precise than other frameworks proposed in the literature for justifying morals laws. For instance, Miller proposes that the state can enforce morals laws as long as doing so achieves justice or peace.[91] But if justice or peace are not too indeterminate to constitute a PSO for a morals law, *Charter* values like equality must not be either. *Charter* values are arguably more determinate than these concepts, as it is hard to see how to explicate the nature of justice or peace without referring to something like equality. In this respect, the use of *Charter* values helps tether the identification of a morals law's PSO to a familiar legal framework that is not merely the product of judicial imagination.[92]

## IV. Applying the *Charter* values approach

We now turn to analyzing how the *Charter* values approach would apply when adjudicating challenges to specific morals laws. We will consider three categories of such laws: those prohibiting the commodification of the human body, those safeguarding the value and integrity of human life, and those concerned with consensual sexual behaviour. Our question will be whether these laws' objectives are to safeguard a *Charter* value and whether they would therefore have a PSO under the first step of the *Oakes* test.

In many of the cases we discuss below, courts interpret the objective of a morals law as a prerequisite for determining whether they violate principles of fundamental justice under section 7 of the *Charter*. We assume these cases are nonetheless suitable to reference when analyzing a law's purpose under the first step of *Oakes*.

By way of preview, we argue that laws restricting the commodification of the human body and laws that emphasize the value of human life protect the *Charter* values of human dignity, life, and equality and would thus satisfy

90 *Cf Frank, supra* note 4 at paras 153-154 (per Côté and Brown JJ.).
91 Miller, *supra* note 7 at 94.
92 Thoreson, *supra* note 53 at 229-231.

the first step of *Oakes*. Note that this contention does not automatically imply that these laws are constitutionally valid; the government would still have to show that they satisfy the rest of the *Oakes* test. By contrast, laws prohibiting consensual sexual activity have historically been justified with reference to conventional morality alone and not *Charter* values. Therefore, whether they advance a PSO under *Oakes* depends on what other objectives they are said to achieve.

## A. Laws concerning the commodification of the human body

The first group of laws we examine are those that criminalize or regulate the commodification of the human body. These include prohibitions of commercial surrogacy,[93] the sale of human organs, tissues, or embryos,[94] and prostitution.[95] Each of these laws are premised, at least in part, on the notion that treating human beings as subjects of commercial transactions is an affront to human dignity. For instance, the post-*Bedford* sex work legislation invokes moral considerations in its preamble, asserting that prostitution is inherently exploitative, offends human dignity and equality, and causes social harm by objectifying the human body and commodifying sexual activity.[96] Arguments for legally prohibiting commercial surrogacy — "renting a womb" or "baby-selling"[97] — and the sale of body parts[98] invoke similar considerations. In short, human bodies are viewed as beyond the purview of the market. They are not mere objects up for sale.

Each of these laws could limit *Charter* rights. For example, the right to liberty under section 7 guarantees "an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[99] The prohibition of commercial surrogacy may reduce the pool of potential surrogates,[100] and thus may interfere with an infertile couple's

93 *Assisted Human Reproduction Act*, SC 2004, c 2, s 6 [*AHRA*].

94 See e.g. *ibid*, s 7; *Human Tissue Gift Act*, RSBC 1996, c 211, ss 10-11; *Human Tissue and Organ Donation Act*, SA 2006, c H-14.5, s 3(2).

95 *Criminal Code*, *supra* note 62, ss 286.1-286.4.

96 *Protection of Communities and Exploited Persons Act*, SC 2014, c 25.

97 Margaret Jane Radin, "From Baby-Selling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market" (2017) 54:2 Osgoode Hall LJ 339.

98 Nicola Lacetera, "Incentives and Ethics in the Economics of Body Parts" (2007) 54:2 Osgoode Hall LJ 397 at 400-07.

99 *Godbout v Longueuil (City),* [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577.

100 Canadian Fertility and Andrology Society, "Position Statement on Compensation for Third Party Reproduction in Canada" (2017), online (pdf): <cfas.ca/_Library/2020positionstatements/CFAS-Position-Statement-Compensation-Third-Party-Reproduction-May_2017-EN.pdf> [perma.cc/2UGG-8FMZ].

family planning.[101] Similarly, the prohibition of organ, tissue, and blood sales may limit the physical and psychological integrity (and potentially the right to life) of a person with kidney failure who, faced with a long wait list, finds an informed and consensual donor willing to sell their kidney.[102] Prohibitions on prostitution may engage the liberty and security of the person interests of vulnerable people who, although immune from criminal prosecution,[103] are nevertheless restricted in the practices they can employ.[104]

However, we believe that any limit on *Charter* rights would be justified by a PSO according to the *Charter* values approach we propose. Specifically, prohibitions on commodifying the human body uphold the *Charter* values of human dignity and equality.

We can extract this conclusion from *Labaye*. In his dissent, Justice LeBel noted explicitly that "Canadians are not inclined to tolerate the commercial exploitation of sexual activities, which is contrary to a number of values of the Canadian community, such as equality, liberty and human dignity."[105] In her majority opinion, Chief Justice McLachlin was similarly careful to point out that the sex clubs at issue could be distinguished from antisocial activity such as paid sex work or the treatment of another as a mere object of gratification.[106] To the majority, it was critical that the participants in the sex clubs did not engage in financial transactions. Their activity did not treat others as mere objects.[107] If non-objectifying activity is not indecent because it does not undermine fundamental constitutional values, it follows that objectifying activity may do so. Laws limiting such activity have a valid purpose because they protect those values.

Hamish Stewart builds on this conclusion when analyzing the post-*Bedford* sex work regime. In noting that the new law seeks to promote equality and human dignity, the objective of deterring and denouncing sex work becomes merely a means to this more significant end.[108] As such, Stewart argues that

101 Nisha Menon, *Regulating Reproduction— Evaluating Canadian Law on Surrogacy and Surrogate Motherhood* (LLM Thesis, University of Toronto, 2009) [unpublished] at 40-43.

102 *Cf Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 118.

103 *Criminal Code*, *supra* note 62, s 286.5(2).

104 *R v NS,* 2022 ONCA 160 at paras 80, 92-94, 124-125, 150, finding that ss 286.2 and 286.4 do not engage s 7 of the *Charter* whereas s 286.3 may engage s 7 of the *Charter*, but is neither overbroad nor grossly disproportionate; Hamish Stewart, "The Constitutionality of the New Sex-Work Law" (2016) 54:1 Alta L Rev 69 at 72, 87.

105 *Labaye*, *supra* note 26 at para 149.

106 *Ibid*, at para 67.

107 Michael Plaxton, "What *Butler* Did" (2012) 57 SCLR (2d) 317 at 330-31.

108 Stewart, *supra* note 104 at 84. See also *R v Joseph*, 2020 ONCA 733 at para 95. We recognize a claimant could argue that the prohibition imperils her dignity by denying her agency in making personal

it is permissible for Parliament to pursue this objective when regulating sex work.[109] The Ontario Court of Appeal similarly recognized the legitimacy of these objectives in *R v NS*.[110]

The anti-objectification principle extricable from *Labaye* applies to commercial surrogacy and organ selling. In the *AHRA Reference*, Chief Justice McLachlin held that the provisions of the *Assisted Human Reproduction Act*[111] ("*AHRA*") that regulated the reimbursement of surrogates and donors of reproductive material had a valid criminal law purpose as they demarcated altruistic from commercial reproductive activities. Moreover, Parliament could prohibit what it saw as the inappropriate commodification of women because commercial exchanges of this nature would undermine respect for human life and dignity.[112] Thus, prohibiting the commercialization and objectification of the human body is a PSO under *Oakes* according to our *Charter* value approach.

## B. Laws concerning the preservation of the integrity and value of human life

The second group of morals laws we consider are those that seek to preserve the integrity and worth of human life. In our view, these laws protect the *Charter* values of life and human dignity and would have a PSO under the first stage of the *Oakes* test.

The *AHRA* contains several provisions that pursue these objectives, such as prohibitions of mixing human and non-human genetic material and altering the genes of *in vitro* embryos, or human cells, in a way that transmits the alterations to descendants.[113] The same can be said of *Criminal Code* provisions, including section 241, which deals with medical assistance in dying. Upholding

choices. We do not see the competing conceptions of human dignity as invalidating the judicially-sanctioned objective of prohibiting the objectification of others; rather, the debate must be had in the subsequent proportionality analysis (i.e. in light of the different conceptions of human dignity, is the prohibition rationally connected to the aim, minimally impairing, and otherwise proportionate?) For a discussion of the facets of human dignity and their nexus to morals laws, see Roberto Perrone, "Public Morals and the European Convention on Human Rights" (2014) 47:3 Israel LR 361 at 376-77.

109 Stewart, *supra* note 104 at 82.

110 *R v NS*, *supra* note 104 at paras 59, 121, 126, 130-131, 151-153.

111 *AHRA*, *supra* note 93.

112 *AHRA Reference*, *supra* note 35 at para 111.

113 *AHRA*, *supra* note 93 at ss 5(1)(f), 11. Other provisions of the Act could also be substantiated on the basis that they engage equality values, such as the ban on determining an embryo's sex for non-medical reasons (*ibid*, s 5(1)(e)).

the sanctity of life continues to be a legislative objective for regulating medical assistance in dying after *Carter v Canada (Attorney General)*.[114] The 2021 law amending the relevant *Code* sections recognizes that "Canada is a State Party to the United Nations Convention on the Rights of Persons with Disabilities and recognizes its obligations under it, including in respect of the right to life,"[115] and further, "Parliament affirms the inherent and equal value of every person's life."[116] These purposes accord with Chief Justice McLachlin's holding in *Sauvé* that "the respect for the dignity of every person . . . lies at the heart of Canadian democracy and the *Charter*."[117]

There are perhaps no other laws that so profoundly engage society's moral attitudes as those that implicate life and death. As Chief Justice McLachlin said in the *AHRA Reference:*

> The creation of human life and the processes by which it is altered and extinguished, as well as the impact this may have on affected parties, lie at the heart of morality. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. Taken as a whole, the [*AHRA*] seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants. This is a valid criminal law purpose, grounded in issues that our society considers to be of fundamental importance.[118]

The Chief Justice's words have taken on a new meaning in light of the advances in science since the *AHRA Reference* was decided over a decade ago. While the restrictions placed on altering genetic materials, for instance, may have once seemed fanciful or obscure, they have become increasingly relevant with the advent of genetic-editing technologies such as CRISPR.

A case could be made that the *AHRA* limits *Charter* rights to the extent that it prohibits people from modifying genetic material to prevent inheritable diseases, such as sickle-cell anemia, HIV, or possibly even mental health

114 *Carter, supra* note 39 at para 63.

115 Notwithstanding this acknowledgement, the Special Rapporteur on the Rights of Persons with Disability advises that Medical Assistance in Dying violates Article 10 of the *UN Convention on the Rights of Persons with Disabilities* if it permits assisted dying because of a disability or disabling conditions: Office of the High Commissioner for Human Rights, "Disability is not a reason to sanction medically assisted dying - UN experts" (25 January 2021), online: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26687&LangID=E> [perma.cc/K2GG-M4XM].

116 Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2020-2021, Preamble (as assented to 17 March 2021).

117 *Sauvé, supra* note 5 at para 44

118 *AHRA Reference, supra* note 35 at paras 61, 97-98.

disorders such as depression[119] from being transmitted to their offspring.[120] The *AHRA Reference* establishes that even though "the ethical acceptability of these techniques is, of course, debatable, it cannot be seriously questioned that Parliament is able to prohibit or regulate them."[121] This jurisdictional conclusion raises difficult questions of whether any limits on *Charter* rights caused by the *AHRA* can constitute a PSO under *Oakes* in virtue of upholding *Charter* values of life and human dignity. The answer to these questions will depend on whether, for example, preserving the sanctity and dignity of human life requires preventing genetic modifications. Similar observations apply to similar laws, such as those dealing with sex-selective abortions, "saviour siblings," and discrimination based on disability, ethnicity, or genetic status.

In *Carter*, the Court acknowledged that the "sanctity of life is one of our most fundamental societal values."[122] But it subsequently determined that "the preservation of life" was not the object of the impugned prohibition of medical assistance in dying.[123] This observation should not be read as preventing Parliament from limiting the right to die in order to protect *Charter* values as a PSO. It should not be forgotten that in *Rodriguez v British Columbia (Attorney General)*, Justice Sopinka, also the leading author in *Butler*, held that the limit was pressing and substantial insofar as it was "grounded in the respect for and the desire to protect human life, a fundamental *Charter* value."[124] It is possible that the Court in *Carter* followed the decisive reasoning in *Butler* by focusing on the harm to vulnerable people the impugned provisions were said to prevent rather than the *Charter* values they sought to safeguard. But it is precisely this

119 Walter Isaacson, *The Code Breaker: Jennifer Doudna, Gene Editing, and the Future of the Human Race* (New York: Simon & Schuster, 2021) at 335-65. Isaacson also explores the moral hazards of a permissive legislative regime, observing that people may be able to one day sequence genes to "enhance" superficial traits, such as body height. In this respect, Jamiroquai's 1997 single "Virtual Insanity" is prophetic: "And now every mother, can choose the colour; Of her child; That's not nature's way; Well that's what they said yesterday …"

120 For another example of the nexus between the *AHRA* and section 7 rights see Jennifer Chandler, "Does a Patient have a Constitutional Right to the Freedom of Medical Research? Regenerative Medicine and Therapeutic Cloning Research in Canada" (2012) 6:2 McGill JL & Health 1 at 1-53. Chandler concludes that the instrumental use of human beings for medical purposes would be contrary to *Charter* values, which include respect for the inherent dignity of the human person, but queries whether human embryos necessitate the same protection.

121 *AHRA Reference*, *supra* note 35 at para 100 [citation omitted]. See also *GNDA Reference*, *supra* note 35.

122 *Carter, supra* note 39, at para 63.

123 *Ibid* at paras 75-77; *Cf* John Keown, "Carter: A Stain on Canadian Jurisprudence?" (2018) 85 SCLR (2d); *Fleming v Ireland*, [2013] IESC 19 at para 74.

124 *Rodriguez v Canada (Attorney General)*, [1993] 3 SCR 519 at 613, 107 DLR (4th) 342.

type of neglect of *Butler*'s *obiter* reasoning, which was decisive in *Rodriguez*, that we attempt to remedy in this article.[125]

## C. Laws concerning sexual morality

Finally, we turn to laws that criminalize consensual sexual conduct. Indeed, it is worth recalling that it was the British law prohibiting homosexual acts that spawned the Hart-Devlin debate and the discourse surrounding legal moralism ever since. These days, the question posed in the Hart-Devlin debate has been turned on its head. Instead of debating whether homosexuality should be legal, there is a credible argument that the criminalization of homosexuality itself constitutes a crime against humanity.[126]

Even though Parliament has long repealed the prohibition on homosexuality,[127] the *Criminal Code* still contains provisions forbidding certain consensual sexual acts among adults, notably, incest under section 155 and polygamy under section 293, both of which stand separate and apart from offences criminalizing non-consensual and exploitative conduct, such as sexual assault[128] and sexual interference.[129] The criminalization of prostitution can also be understood as the regulation of sexual morality. Do these provisions advance a *Charter* value as a PSO?

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125 We acknowledge the application judge surveyed the ethical debate and the nexus between assisted dying and the value of human life. But she did so without framing the discussion in light of *Butler* and the validity of morals laws: see *Carter v Canada (Attorney General)*, 2012 BCSC 886 at paras 31, 348-358, 1190. Among the judge's holdings, she relied on expert evidence to decide there was no ethical distinction between actively assisting in someone's death and other end-of-life practices that may hasten it, a finding cited by the Supreme Court on appeal. It may not have been open to the application judge to draw this conclusion. As Thomas McMorrow suggests, "[t]hat a certain number of ethicists agree is a factual finding. That the thing ethicists agree about is correct is not a factual finding: it is a normative claim." Thomas McMorrow, "MAID in Canada? Debating the Constitutionality of Canada's New Medical Assistance in Dying Law" (2018) 44:1 Queen's LJ 69 at 111-12. See also Robert E Charney & S Zachary Greene, "Prophets of Doom, Seers of Fortune: 20 Years of Expert Evidence under the *Oakes* Test" (2006) 34 SCLR 479 at 481-82. Recasting normative claims as factual findings risks encroaching into Parliament's affairs. As the majority held in the *AHRA Reference* (*supra* note 35 at para 71), courts should not substitute "a judicial view of what is good and what is bad for the wisdom of Parliament." The puzzle of morals laws is that their objectives are often incapable of being proven by evidence. In the case of medical assistance in dying, the thing about death is you cannot consult anyone who has done it: Peter Schjeldahl, "The Art of Dying", *The New Yorker* (16 December 2019), online: <www.newyorker.com/magazine/2019/12/23/the-art-of-dying> [perma.cc/9Y9A-HYAL].

126 Josh Scheinert, "Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution" (2015) 24 Tulane JL & Sexuality 99.

127 *Criminal Law Amendment Act, 1968-69,* RSC 1968-69, c 38.

128 *Criminal Code, supra* note 62 ss 150.1, 271.

129 *Ibid*, s 151. See also: ss 152 (invitation to sexual touching); 153 (sexual exploitation); and 172.1 (child luring).

Two provincial appellate courts have held that the criminalization of incest does not deprive an offender of liberty in a manner that is contrary to the principles of fundamental justice under section 7 of the *Charter*, predicating the decision partly on moral considerations. In *R v RPF*, the Nova Scotia Court of Appeal determined that the "significant number" of the community's strong opposition towards incest was a valid purpose for the prohibition. It described incest as "unacceptable, incomprehensible and repugnant to the vast majority of people, and has been for centuries in many cultures and countries."[130]

In *R v MS*,[131] the British Columbia Court of Appeal accepted that the law can legitimately enforce moral values. It held that the criminal law fundamentally deals with right and wrong and gives expression to our society's moral principles.[132] As such, "[f]or the good and order of our community, obedience to laws such as s. 155 cannot be a matter of choice governed only by private conscience."[133] In a concurring opinion, Justice Southin found the outcome so obvious she regretted the matter ever had to be litigated. Indeed, she found it "ludicrous" that any other conclusion could be reached.[134] She noted:

> It may be that the question will become a matter of debate [in Canada] and the crime of incest will suffer the same fate as the crime of the "detestable and abominable vice of buggery." But it is no more the proper business of the judiciary, which has no collective claim to moral wisdom, to bring about that fate than it is the proper business of Parliament to try a man for murder.[135]

*RPF* and *MS* each seem to countenance the objective of imposing non-neutral, majoritarian conceptions of sexual morality. They ostensibly conclude that societal offense or disgust is sufficient to deprive an individual of liberty. Had this line of reasoning been applied under the *Oakes* test, its failure to draw an explicit connection between the objective of the incest offence and a *Charter* value indicates that, if the offense has a PSO capable of justifying a limit on a *Charter* right under section 1, it must be an objective other than protecting moral values.

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130 *R v RPF,* 1996 NSCA 72, 105 CCC (3d) 435 at 455. For a widely read discussion of the reaction to incest with moral disgust, see Jonathan Haidt, "The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment" (2001) 108:4 Psychological Rev 814.

131 *R v MS*, 111 CCC (3d) 467, 4 CR (5th) 113 (BC CA) [cited to CCC].

132 *Ibid,* at para 54.

133 *Ibid,* at para 56.

134 *Ibid* at para 70.

135 *Ibid* at para 84. See also *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906 at 930-31, 59 CCC (3d) 161.

Both *RPF* and *MS* were cited approvingly in *Malmo-Levine*.[136] But it is difficult to reconcile their reasoning with the caution against legal moralism in *Butler* and *Labaye.* Miller makes the same point, writing that *Labaye* "suggests that the Court may not be willing to allow s. 1 justifications for legislation that prima facie limits Charter rights when the legislation limiting the right rests on a judgment of sexual morality."[137]

Miller's view coheres with the Ontario Court of Appeal's decision in *Canada (Attorney General) v Bedford,* where the majority, citing *Butler,* held that "a legislative purpose grounded in imposing certain standards of public and sexual morality is no longer a legitimate objective for purposes of Charter analysis."[138] The court decided that the prostitution offenses at issue had to achieve a compelling purpose in order to be fundamentally just under section 7, and to do that they had to be distinguishable from "the objectives of the current bawdy-house provisions, which are rooted in English common law and relate to nuisance and affront to public decency, not modern objectives of dignity and equality."[139] While the Supreme Court did not address this assertion on appeal, the claim supports our view that a law fulfilling a "modern" objective by promoting *Charter* values, such as dignity and equality, is a permissible state objective in constitutional adjudication. By contrast, laws that rest on conventional majoritarian moral values do not have a permissible objective.

The Supreme Court of British Columbia considered the constitutionality of the criminalization of polygamy in the *Polygamy Reference*. Chief Justice Bauman held that the law limited section 2(*a*) and engaged section 7 of the *Charter*, but, except for its application to youth, the limit was justified under section 1.[140] He accepted that preventing the harms to society that polygamy posed, especially to women and children, was a valid PSO even where polygamous relationships are consensual.[141] But his analysis partly relied on traditional customs and moral attitudes. For example, he noted that "the law seeks to advance the institution of monogamous marriage, a fundamental value in Western society from the earliest of times."[142]

136 *Malmo-Levine*, *supra* note 36 at para 118. See also *R v GR*, 2005 SCC 45 at paras 17-21.

137 Miller, *supra* note 7 at 101, n 87. See also Marie-Pierre Robert & Stéphane Bernatchez, "La criminalisation de la polygamie soumise à l'épreuve de la *Charte*" (2010) 40:2 RGD 541.

138 *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 189.

139 *Ibid* at para 190.

140 *Polygamy Reference*, *supra* note 30 at paras 1098, 1178, 1359.

141 *Ibid* at 1331, 1159-1161, 1219-1220.

142 *Ibid* at 1330, 1352.

There is no gainsaying the many actual harms that Chief Justice Bauman articulates. But on its own, the mere fact that a widespread social value has always been a widespread social value — detached from any link to *Charter* values such as equality for women and children — is not a PSO that can be sustained under the approach to justifying morals laws that we defend. Like incest, the criminalization of polygamy presumably reflects the overwhelming societal view that such arrangements are repugnant and abhorrent, but moral rectitude and decency, however worthy and important, are not *Charter* values. In this respect, to the extent that these laws are premised on traditional majoritarian values alone, they are unlikely to constitute a section 1 PSO. Of course, this observation does not preclude other justifications for the laws.

## V. Conclusion

Proportionality analysis under section 1 of the *Charter* has been evolving in recent years. At the same time, significant constitutional questions concerning the justification for limiting *Charter* rights to enforce moral values continue to arise. A crucial next phase in the evolution of *Oakes* will be to address whether morals laws have a pressing and substantial objective. In *Butler,* the Supreme Court ruled that morals laws do when they have a basis in *Charter* values. We have sought to defend the continued validity of this ruling in light of intervening jurisprudence. We have shown how a *Charter* values approach avoids the problem of legal moralism. And we have illustrated how it might be applied to help resolve challenges both to current morals laws and novel *Charter* disputes on the horizon.